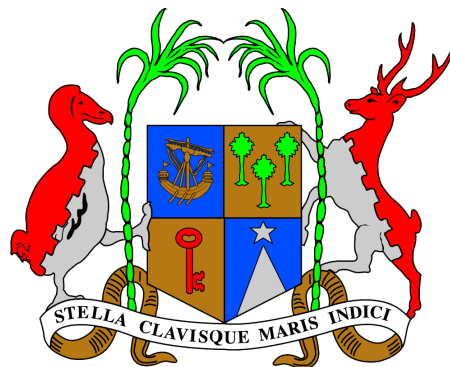


ARBITRATION UNDER ANNEX VII OF THE 1982 UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

REPUBLIC OF MAURITIUS

v.

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



MEMORIAL OF THE REPUBLIC OF MAURITIUS

VOLUME I

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CHAPTER 1: INTRODUCTION

1.1 This claim arises out of the United Kingdom’s decision, in April 2010, to declare a “Marine Protected Area” (hereinafter “MPA”) around the Chagos Archipelago. The Republic of Mauritius challenges the right of the UK to establish the “MPA” and other maritime zones around the Chagos Archipelago, and the compatibility of the “MPA” and such zones with the 1982 United Nations Convention on the Law of the Sea (hereinafter “the Convention”).

1.2 At the outset, Mauritius wishes to make clear that it places a very high value on the protection of the marine environment. It is conscious of the extraordinary diversity of the waters of the Chagos Archipelago, and the need to safeguard the region against the environmental challenges it faces today. Mauritius is fully prepared to exercise its responsibilities under the Convention in that regard. In this case, Mauritius raises the question of whether the “MPA” that the UK has unilaterally purported to impose is compatible with the Convention. Mauritius considers that it is not.

1.3 Mauritius’ case is that the “MPA” is unlawful under the Convention, because it is a regime which has been imposed by a State which has no authority to act as it has done. There are two parts to the argument:

- (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.

1.4 These two fundamental points are elaborated in this Memorial, which is submitted in accordance with the Rules of Procedure adopted by the Tribunal on 29 March 2012. By way of introduction, in addressing these matters it is appropriate to place the case in its broader context, to make clear what the case is – and is not – about.

1.5 First, this is a dispute about the interpretation and application of the Convention. It requires the Tribunal to interpret and apply various provisions of the Convention, from the meaning of the words “coastal State” to individual provisions governing the rights of a “coastal State” in the territorial sea, exclusive economic zone (“EEZ”) and continental shelf. The case also invites the Tribunal to take note of the fact that in purporting to establish the “MPA”, the UK acted in great haste, on the basis of a manifestly inadequate process of consultation and without prior information to Mauritius, despite the UK’s longstanding recognition of Mauritius’ rights in relation to

the Chagos Archipelago. The Tribunal will also note that the UK has not notified or made public any detailed regulations in respect of the purported “MPA”, including the ban on fishing and other activities, or devoted any significant financial resources to give effect to its purported environmental objectives. Nor has the UK seen fit to dedicate the human resources which would typically be needed to oversee the protection of an area that extends over 640,000 square kilometres. Finally, the Tribunal will note that the UK has excluded the area around the island of Diego Garcia from the “MPA”, and in 2010 allowed more than 28 tons of tuna to be caught by recreational fishing in those waters. With manifest and multiple violations of the Convention, the UK has abused such rights as it might, on its own case, be entitled to claim under the Convention.

1.6 The UK considers that the establishment of the “MPA” achieves other objectives which it regards as beneficial, namely continued control of the Chagos Archipelago and the permanent banishment of the Mauritian citizens who were former residents of the Archipelago. These objectives are in plain violation of the UK’s obligations under the Convention and the rules of general international law that are applicable under the Convention, including *ius cogens* principles concerning decolonisation and the right to self-determination. These fundamental rules of international law are applicable here, given that the Convention requires the Tribunal to “apply [...] other rules of international law not incompatible with this Convention”.

1.7 Second, it is apparent that this dispute is *sui generis*. It arises against the background of the specific events that occurred between 1965 and 1967 in relation to decolonisation. This was when the UK decided to offer Mauritius independence while dismembering its territory by excising the Chagos Archipelago, and acted to remove all the Mauritian citizens who were residing at the time in the Archipelago (hereinafter “Chagossians”). The dispute about the “MPA” thus concerns the interpretation and application of the Convention against the background of the UK’s international obligations relating to decolonisation and self-determination. This includes the right of Chagossians not to be forcibly removed from that part of the Mauritian territory where they always lived, and their right to return thereto.

1.8 Third, there is a general recognition that Mauritius has sovereign rights in relation to the area that is covered by the purported “MPA”. The great majority of States recognise the sovereignty and sovereign rights of Mauritius over the Chagos Archipelago: this is reflected in resolutions adopted by the African Union,¹ the Non-Aligned Movement,² the Africa-South America Summit,³ and the Group of 77 and China.⁴ Even those States, led by the UK, that do not appear to share this position, nevertheless accept that Mauritius has clear rights relating to its sovereign interests. The United States has expressed its understanding that Mauritius retains fishing and mineral rights over the Chagos Archipelago.⁵ The UK recognises that Mauritius has certain attributes of a coastal State: for example, it has made no objection to the submission by

¹ See paras 3.109, fn 303-304, and 3.111.

² See para. 3.109, fn 301, and 3.112.

³ See para. 3.109, fn 302.

⁴ See para. 3.109, fn 305.

⁵ See para. 3.85, fn 257.

Mauritius to the United Nations Commission on the Limits of the Continental Shelf (“CLCS”) in May 2009 of Preliminary Information concerning the Extended Continental Shelf in the Chagos Archipelago Region.⁶ Moreover, having submitted no preliminary information of its own, and having regard to the time limits for submitting such information, the UK is bound to accept that Mauritius is the only “coastal State” entitled to make a submission to the CLCS. The UK has also recognised the prior right of sovereignty of Mauritius by undertaking that the Chagos Archipelago will “revert” to Mauritius when the Archipelago is no longer required for defence purposes.

1.9 Against this background, Mauritius has rights in the area that has been purportedly designated an “MPA” by the UK. Those rights must be respected under the Convention. Whether Mauritius is a “coastal State”, as it considers, or simply has fishing, mineral and continental shelf rights, and beneficial interests including a right of reversion, as the UK accepts, the purported unilateral declaration of an “MPA” is inconsistent with the provisions of the Convention. It violates the rights of Mauritius that the Convention is intended to safeguard.

I. The Factual Chapters of the Memorial

1.10 All elements of Mauritius’ case begin with the history of the Chagos Archipelago. The case is deeply embedded in colonialism, its decline in the 1960s, and political deals made between powerful nations to protect their interests as the former colonies became independent nations in their own right. For these reasons, this *sui generis* case cannot be considered in the same light as other disputes that raise issues of sovereignty and the exercise of rights over maritime spaces. It concerns the entitlement of a former colony to all of its maritime zones around its rightful territory, in accordance with the Convention and the rules of international law applicable thereunder. This entitlement is a consequence of the full implementation of Mauritius’ right to self-determination. The dispute arises against the background of the excision of a group of islands from a former colonial territory, in circumstances where a section of the Mauritian population has been removed from those islands by the colonial power. This situation is recognised as manifestly unlawful by the great majority of States, and by the United Nations General Assembly in its resolutions 2066 (XX), 2232 (XXI) and 2357 (XXII).

1.11 Chapters 2 to 4 of the Memorial set out the relevant facts. Chapter 2 begins with a short survey of the geography and early history of the Chagos Archipelago: the first recording of Mauritius and the Chagos Archipelago (including the cartography of the 1820s); the geography of the region; the administration of Mauritius by France and then the UK; the administration of the Chagos Archipelago as part of Mauritius; and the domestic political structure prior to independence.

1.12 Chapter 3 then sets out the more recent historical background, in a number of key stages:

⁶ See para. 4.33.

- (i) The plan devised in the early 1960s by the UK and US to detach the Chagos Archipelago, in response to US military aspirations in the Indian Ocean;
- (ii) The September 1965 Constitutional Conference in London, at which negotiations on independence were held between the UK and the leaders-in-waiting of Mauritius;
- (iii) The UK's excision of the Chagos Archipelago from the territory of Mauritius as a condition of the grant of independence to Mauritius;
- (iv) International condemnation of the unlawful excision;
- (v) The agreement between the UK and the US, and the forcible removal of the Chagossians;
- (vi) The UK's recognition of, and formal undertakings to respect, Mauritius' fishing, mineral and other rights in the Chagos Archipelago and its surrounding waters; and
- (vii) Mauritius' continuous assertion of its sovereignty over the Chagos Archipelago.

1.13 As Chapter 3 shows, this history involves a series of dealings between powerful nations, in which the interests of the emerging Mauritian State and its people counted for little. Scant regard was paid to the legal requirement to respect the territorial integrity of Mauritius or the right of self-determination. This is a history of bland public pronouncements, undercut by the overt cynicism of internal memoranda. Documents continue to emerge from the UK archives which show how sordid and dishonest was this series of events. The excision of the Chagos Archipelago and the forcible removal of its former residents constitute a shameful episode in twentieth century British colonial history. The "MPA" is a further expression and continuation of this illegality, and has perpetuated that tragedy into a further phase, still more inimical to the rights of Mauritius under the Convention and general international law.

1.14 It is important to emphasise that the case is not about the legitimacy of the US military base on Diego Garcia, or the uses to which it is put. The Tribunal will not be called upon to make any decisions on those matters, and the resolution of this dispute by the Tribunal need not have any effect on that issue, since the Government of Mauritius has stated publicly that it has no objection to the continued use of Diego Garcia as a military base.⁷ It has communicated this position both to the UK⁸ and the US.⁹ An

⁷ Statement by Hon. A.K. Gayan, Minister of Foreign Affairs and Regional Cooperation to the National Assembly of Mauritius, 14 November 2000, Annex 114; Reply to PQ No. B/185 by the Hon. Prime Minister, 14 April 2009, Annex 143; National Assembly of Mauritius, 12 June 2012, Reply to Private Notice Question: Annex 176; and Reply to PQ No. B/457 by the Hon. Prime Minister, 10 July 2012, Annex 177.

⁸ Letter dated 21 December 2000 from the Minister of Foreign Affairs and Regional Cooperation of Mauritius to the UK Foreign Secretary, Annex 115; Letter dated 22 July 2004 from the Prime Minister of Mauritius to the UK Foreign Secretary, Annex 129; and Letter dated 22 October 2004 from the Minister of

Award by the Tribunal will have no consequences for the continuation of that base. Nor is the Tribunal called upon to form any view upon the prior uses of the base. Matters such as this are entirely outside this case, which concerns only the illegality of the “MPA” under the Convention.

1.15 Chapter 4 continues the narrative by setting out the history of “environmental” measures taken by the UK in respect of the Chagos Archipelago. These have occurred by way of a step-by-step extension of the UK’s use of the waters around the Chagos Archipelago. What began in 1965 as a limited use of a narrow, three-mile territorial sea for defence purposes was then extended, first to a twelve-mile zone in 1969, and then into an area beyond the territorial sea up to 200 miles, in 1991. The extension was also in relation to the subject matter, originally limited to matters of defence and later extended to encompass the appropriation of an area of more than 640,000 square kilometres, in which most significant human activity is prohibited and the waters are reserved for purported conservation purposes.

1.16 The “MPA” is the culmination of a series of steps by the UK, in violation of Mauritius’ rights in the maritime areas appurtenant to the Chagos Archipelago, including (1) the establishment of a Fisheries Conservation and Management Zone (“FCMZ”) in 1991 (to which Mauritius objected); and (2) the establishment of an Environment Protection and Preservation Zone (“EPPZ”) in 2003 (to which Mauritius also objected).

1.17 These actions have been adopted against the background of (1) bilateral exchanges in which the UK has regularly given commitments or made statements that it has then failed to respect; and (2) rights exercised by Mauritius over the Chagos Archipelago, including the submission of Preliminary Information in 2009 to the CLCS, in which Mauritius submitted under the Convention, without objection from the UK, particulars of the outer limits of an extended continental shelf in areas beyond 200 nautical miles from the archipelagic baselines of the Chagos Archipelago.

1.18 As Chapter 4 explains, the purported establishment of the “MPA” marks a shift from the blunt rhetoric of military interests, to the rhetoric of environmental protection. The UK has repeatedly claimed that the “MPA” is a purely environmental measure, not even initiated by the Government itself, but rather by various NGOs, to whose concerns the UK has simply responded after “full” consultation of all affected parties. Chapter 4 shows that this is untrue.

1.19 A document made public in 2010 records a meeting on 12 May 2009 between Colin Roberts, Director of the Overseas Territories Department at the UK Foreign and Commonwealth Office, and a Political Counsellor at the US Embassy in London. Mr Roberts observed that “BIOT’s¹⁰ former inhabitants would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos

Foreign Affairs, International Trade and Regional Cooperation of Mauritius to the UK Foreign Secretary, Annex 130.

⁹ Letter dated 14 May 2002 from the Prime Minister of Mauritius to the President of the United States, Annex 118.

¹⁰ “BIOT” stands for the so-called “British Indian Ocean Territory” (hereinafter “BIOT”).

Archipelago were a marine reserve.” Noting that “the UK’s environmental lobby is far more powerful than the Chagossians’ advocates”, Mr Roberts stated that “establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents.” Mr Roberts promised that “according to HMG’s [Her Majesty’s Government’s] current thinking on a reserve, there would be ‘no human footprints or Man Fridays on the BIOT’s uninhabited islands.’”¹¹

II. The Legal Chapters of the Memorial

1.20 The three factual chapters lay the foundation for the legal chapters which follow. Chapter 5 deals with jurisdiction, setting out Mauritius’ submission that the Tribunal has jurisdiction over the totality of the dispute. It has jurisdiction to rule that the UK is not entitled to declare an “MPA” and further, even if it is so entitled (contrary to the claim of Mauritius), that its declaration of the “MPA” violates the Convention.

1.21 On the first set of arguments, the UK’s entitlement to establish the “MPA” turns on the interpretation and application of the words “the coastal State” as used in the Convention. There is abundant authority to support the jurisdiction of a court or tribunal acting under Part XV of the Convention to decide whether a State is or is not to be treated as “the coastal State”, particularly where, as in this case, the matter is incidentally and necessarily connected to the legality of the UK’s uses of the sea. The dispute is about the UK’s purported use of the waters, not a stand-alone claim about insular sovereignty that is unconnected to the exercise of rights under the Convention.

1.22 Chapter 5 shows that the second set of arguments also comes within the jurisdiction of the Tribunal, and are also not suitable for resolution as a preliminary issue of jurisdiction, separate from the facts. As to the procedural requirements of the Convention, there has been a full exchange of views between Mauritius and the UK concerning the dispute. By December 2010, it was plain that any further exchange of views would be futile, as the UK was fully committed to the unilateral establishment of the “MPA”, which had the effect of further impeding the exercise by Mauritius of its sovereignty over the Chagos Archipelago and preventing the exercise of the Chagossians’ right of return.

1.23 Chapter 6 addresses the merits of Mauritius’ claim that the UK is not “the coastal State” within the meaning of the Convention, and therefore does not have the right unilaterally to establish maritime zones, including the “MPA”, around the Chagos Archipelago. The unlawful excision of the Chagos Archipelago by the UK prior to Mauritius’ independence does not entitle the UK to be considered “the coastal State” within the meaning of the Convention. Accordingly, the UK has no right under the Convention to claim maritime zones in respect of the Chagos Archipelago. In developing this submission, Mauritius sets out the respects in which the UK’s claim to sovereignty – the essential foundation of its right to claim maritime zones – is incompatible with the fundamental right to self-determination for Mauritius and its people. This unlawfulness is not affected by the reluctant “agreement” of the Mauritian

¹¹ See paras 4.45 to 4.49 below.

Ministers, obtained under conditions of duress and coercion in the margins of the 1965 Constitutional Conference.

1.24 In addition, Mauritius contends that the undertakings which the UK made to Mauritius at the time, and repeated frequently thereafter, are such as to deny to the UK any entitlement to act as “the coastal State”, as that term is used in the Convention. It cannot be regarded as having exclusive rights as the coastal State within the meaning of the Convention. The UK has repeatedly recognised the rights and legal interests of Mauritius in the Chagos Archipelago. It has undertaken that the Archipelago will “revert” to Mauritius when it is “no longer required for defence purposes” – an undertaking which implies a pre-existing and legitimate right on the part of Mauritius. It has repeatedly acknowledged Mauritian fishing rights in the waters of the Chagos Archipelago. It has undertaken that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should “revert” to Mauritius when the Archipelago is ceded – an undertaking which, again, implies a pre-existing right on the part of Mauritius. Most recently, it has not objected to Mauritius’ submission to the CLCS of Preliminary Information concerning the Extended Continental Shelf in the Chagos Archipelago Region. It has made no such submission of its own, and cannot now do so, the deadline for the presentation of submissions having passed.

1.25 By these commitments, the UK recognises that Mauritius is entitled to the rights of a coastal State under the Convention. There is no requirement under the Convention for accepting the UK as the “coastal State” in relation to the Chagos Archipelago, merely because of its exercise of *de facto* powers, unlawfully obtained and retained. At the very least, in the absence of a final determination on sovereignty, Mauritius is entitled to claim the status of a “coastal State” under the Convention in relation to the Chagos Archipelago, such that an “MPA” could not be established unilaterally by the UK. Under the Convention, the consent of Mauritius is required.

1.26 Chapter 7 addresses the incompatibility of the “MPA” with the Convention. It demonstrates the illegality of the UK’s purported “MPA” by reference to Mauritius’ longstanding fishing practices in the waters of the Chagos Archipelago, and the recognition of fishing rights in the 1965 Lancaster House undertakings and subsequently. As noted in Chapter 3, this material demonstrates a consistent practice of respecting Mauritius’ rights, and in particular fishing rights, in regard to the Chagos Archipelago and its surrounding waters.

1.27 Chapter 7 sets out the particular respects in which the UK has breached its international legal obligations by adopting an “MPA” which ignores Mauritius’ rights in the waters adjacent to the Chagos Archipelago. These breaches include:

- (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 it 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;

- (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 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;
- (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 62, 63 and 64 of the Convention, 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 cooperate 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 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; and
- (vii) The breach of the obligation that the UK must act in a manner that does not constitute an abuse of right under Article 300 of the Convention, in particular by disregarding the rights and interests of Mauritius as acknowledged by the UK itself.

1.28 This Memorial comprises additional volumes that are integral to the pleading. Volumes 2 and 3 of this Memorial comprise the Annexes. Volume 4 contains all the Plates.

CHAPTER 2: GEOGRAPHY AND EARLY HISTORY

2.1 This Chapter describes the geography of Mauritius and provides a concise historical account prior to and during British colonial rule. The UK detached the Chagos Archipelago from the territory of Mauritius by an Order in Council on 8 November 1965, in breach of the UN Charter as applied and interpreted by UN General Assembly resolutions 1514(XV) and 2066(XX).¹² The purported excision of the Chagos Archipelago from Mauritius prior to its accession to independence involved a denial of the right to self-determination – a universally recognised principle of international law – and as a consequence is void and without legal effect. Mauritius retains sovereignty over the Chagos Archipelago.¹³

2.2 Against this backdrop, this Chapter examines the broader historical background and geography of the dispute over the “MPA”. Part I describes the geography of Mauritius and Part II sets out the early history of Mauritius and its administration by the Dutch and the French. Part III examines the relevant historical record during British colonial rule, and finally Part IV describes the political structure and administration of Mauritius on its journey towards independence during the 1960s.

I. Geography

2.3 The Republic of Mauritius consists of a group of islands in the Indian Ocean. The main Island of Mauritius is located at longitude 57° 30’ east and latitude 20° 00’ south, approximately 900 kilometres east of Madagascar, and is part of the Mascarene Islands. The total land area of the Republic of Mauritius is approximately 1,950 square kilometres. Under the Constitution of Mauritius, the territory of Mauritius includes, in addition to the main island: the islands of Cargados Carajos (the St Brandon Group of 16 Islands and Islets), located some 402 kilometres north of the main Island of Mauritius; Rodrigues Island, located 560 kilometres north-east; Agalega, located 933 kilometres north; Tromelin, located 580 kilometres north-west; and the Chagos Archipelago, including Diego Garcia.¹⁴ A plate illustrating the location of the Republic of Mauritius is at Figure 1 in Volume 4.

¹² “British Indian Ocean Territory” Order No. 1 of 1965: Annex 32. See paras 3.41-3.42 below.

¹³ See further paras 6.10-6.36.

¹⁴ Section 111 of the Constitution of Mauritius provides:

““Mauritius” includes –

- (a) the Islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including Diego Garcia and any other island comprised in the State of Mauritius;
- (b) the territorial sea and the air space above the territorial sea and the islands specified in paragraph (a);
- (c) the continental shelf; and
- (d) such places or areas as may be designated by regulations made by the Prime Minister, rights over which are or may become exercisable by Mauritius”.

2.4 The island of Mauritius was formed by volcanic activity, and is dominated by tropical vegetation with plains in the north, west and in the south-east. A central plateau rises to some 600 metres, and is encircled by jagged rocky peaks. The highest point is Piton de la Petite Rivière Noire, which is 828 metres in height. The island of Mauritius is fringed by coral reefs that provide shelter for an abundance of marine life. Mauritius was home to the flightless grey dodo and aphanapteryx, both extinct since the late 17th century.¹⁵

2.5 Mauritius has a population of 1.2 million, of which almost 129,000 reside in the capital city of Port Louis.¹⁶ Sugar cane has traditionally been of vital importance to the Mauritian economy; it is grown on 90% of all cultivated land and was first introduced by Dutch settlers in the 17th century. Since independence from the UK, Mauritius' economy has diversified.

2.6 The Chagos Archipelago is composed of atolls and islands, and is located at 06° 26' south and 72° 00' east, approximately 2200 kilometres north-east of the main island of Mauritius. To the north of the Chagos Archipelago are Peros Banhos, Salomon Islands and Nelsons Island; to the south-west are Three Brothers, Eagle, Egmont and Danger Islands. Diego Garcia is in the south-east of the Archipelago. The largest individual islands are Diego Garcia (27.20 square kilometres), Eagle (Great Chagos Bank, 2.45 square kilometres), île Pierre (Peros Banhos, 1.50 square kilometres), Eastern Egmont (Egmont Islands, 1.50 square kilometres), île du Coin (Peros Banhos, 1.28 square kilometres) and île Boddam (Salomon Islands, 1.08 square kilometres). A plate of the Chagos Archipelago is at Figure 2 in Volume 4.

II. The Early History of Mauritius

2.7 Mauritius was probably known to Arab sailors as early as the 10th century. Phoenician sailors as well as Malays and Indonesians might have visited the island even earlier, although no record exists of these visits.¹⁷ The recorded history of Mauritius begins with Portuguese explorers at the end of the 15th century. No attempt was made to establish a permanent settlement on Mauritius until the first Dutch attempt during the 17th century.¹⁸

2.8 Portuguese explorers led expeditions into the Indian Ocean in the late 15th and 16th centuries.¹⁹ In 1497, a Portuguese explorer, Vasco da Gama, rounded the Cape of Good Hope and entered the Indian Ocean.²⁰ Diogo Dias, a Portuguese captain, is said to have discovered Mauritius in July 1500.²¹ The island and its neighbours were

¹⁵ Auguste Toussaint, *History of Mauritius*, 8th Ed., Macmillan (1977), (hereinafter "Toussaint"), p. 7.

¹⁶ Digest of Demographic Statistics 2010, Central Statistics Office, Mauritius.

¹⁷ Addison & Hazareesingh, *A New History of Mauritius*, Macmillan (1984), (hereinafter "Addison & Hazareesingh"), p. 1.

¹⁸ Addison & Hazareesingh, p. 1.

¹⁹ Addison & Hazareesingh, p. 2.

²⁰ Addison & Hazareesingh, p. 2.

²¹ North-Coombes, *La découverte des Mascareignes par les Arabes et les Portugais – rétrospective et mise au point*, (1979), p. 141.

collectively known as the Mascarenes after another Portuguese captain, Pedro Mascarenhas. The Portuguese also discovered Réunion and Rodrigues. The Chagos Archipelago (known to the Portuguese as *Chagas*) did not appear on Portuguese maps until 1538.²² It was “discovered” by Diego Garcia de Moguer.

2.9 Despite numerous expeditions, the Portuguese showed no interest in colonising any of the islands discovered in the Indian Ocean, and Mauritius remained apparently uninhabited. At the end of the 16th century the Dutch and English arrived in the Indian Ocean and respectively established the Dutch and English East India Companies, to challenge Portuguese commercial hegemony in the Indian Ocean.

2.10 In 1598 Dutch admiral Wybrandt van Warwyck landed at Grand Port in south-west Mauritius and took possession of the island, naming it in honour of Maurice of Nassau, Prince of Orange.²³ However, the Dutch made no attempt to colonise Mauritius for a number of years, opting instead for Indonesia as their first establishment in the region.²⁴ In 1638 agents for the Dutch East India Company occupied Mauritius, together with a contingent of convicts and slaves from Indonesia and Madagascar. This first attempt to colonise Mauritius lasted only 20 years, primarily motivated by a desire to counter British and French plans to do so.²⁵ The Dutch abandoned Mauritius in 1710 and the French took control of the island in 1715, renaming it *Ile de France*. The Chagos Archipelago remained largely untouched during this period and was rarely visited by Europeans.²⁶

2.11 In 1744 a Dutch captain, van Keulen, reported the position of Diego Garcia, and slaves were sought from Mozambique and Madagascar to work on coconut plantations on the larger islands of the Chagos Archipelago. The first slave colony was probably situated on Peros Banhos, claimed by the French in 1744. The French surveyed the Archipelago in the 1740s, and claimed Diego Garcia in 1769. Permanent settlement on Diego Garcia probably came about through a concession granted in 1783 by the French colonial government in *Ile de France* to a prominent French planter, Pierre Marie Normande. However, there is also a historical account of the grant of Diego Garcia by the French Governor in *Ile de France* to a Mr. Dupuit de la Faye in 1778.²⁷ The French authorities in *Ile de France* also granted fishing rights to a Sieur Dauguet.²⁸

2.12 A coconut plantation society was gradually set up in the Chagos Archipelago by commercial enterprises under further concessions granted by the French authorities in *Ile de France*. Lying only 8° from the Equator, the Chagos Archipelago’s climate was well suited to the cultivation of coconuts and, unlike Mauritius further to the south,

²² Toussaint, p. 16.

²³ Addison & Hazareesingh, p. 3.

²⁴ Toussaint, p. 19.

²⁵ *Ibid.*

²⁶ Richard Edis, *Peak of Limuria – The Story of Diego Garcia and the Chagos Archipelago*, Revised Edition (2004), (hereinafter “Edis”), p. 22.

²⁷ Edis, p. 29.

²⁸ Edis, p. 32.

the Archipelago is far less threatened by tropical cyclones. The Chagos Archipelago became dependent on the coconut plantations for the production of copra, dried coconut flesh used to produce coconut oil.²⁹ Most of the copra was sent from the Chagos Archipelago to Mauritius, but some coconut oil was extracted in Diego Garcia on the initiative of a Mr Lapotaire in 1793.³⁰ During the 1790s, salted fish, sea slugs and rope made of coconut fibre were exported from the Chagos Archipelago.³¹ During this period France was at war with Britain, and a British blockade caused a significant rise in oil prices, spurring Mauritian businessmen to establish more coconut plantations on Diego Garcia and the outlying islands.³²

2.13 The French and British surveyed and mapped the islands of the Chagos Archipelago throughout the later stages of the 18th century, as they became prizes fought over by the two powers. A British party from the British East India Company set off from Bombay in March 1786 with the intention of colonising Diego Garcia to establish a provisions station. The British expedition landed on Diego Garcia in April of that year and to their surprise came across French planters. The French planters retreated to *Ile de France* and the British expedition took possession of the island, claiming it for Britain.

2.14 On the news of the British expedition, the French Governor in Mauritius, Vicomte de Souillac, sent a letter of protest to the British authorities in Bombay and a French warship set off for the Chagos Archipelago.³³ To avoid any conflict with the French, the British Governor in Bombay, Rawson Hart Boddam, instructed the British expedition to evacuate Diego Garcia immediately. They did so in October 1786.³⁴ Following the departure of the British expedition, the French erected a stone marker on Diego Garcia to proclaim France's sovereignty over the island.³⁵

2.15 French power in the Indian Ocean waned towards the end of the 18th century when the British captured Seychelles in 1794, and eventually *Ile de France* itself in 1810. France ceded *Ile de France* and all its dependencies to the United Kingdom through the Treaty of Paris, signed on 30 May 1814. Article VIII of the Treaty of Paris provides:

“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

²⁹ Coconut oil was of such importance to the Chagos Archipelago that the Archipelago has been historically referred to as the “Oil Islands”.

³⁰ Edis, pp. 32-33.

³¹ Edis, p. 33. By the end of the 19th century the Chagos Archipelago was producing copra, coconut oil, salted fish, vegetables, timber, honey, pigs, maize, wooden ships, guano and model boats: see David Vine, *Island of Shame*, Princeton University Press (2009), (hereinafter “Vine”), p. 29.

³² Edis, p. 33.

³³ Edis, pp. 30-31.

³⁴ Edis, pp. 31-32.

³⁵ Edis, p. 32.

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.”

2.16 The 1814 Treaty of Paris clearly recognised the Chagos Archipelago as part of the territory of Mauritius. Throughout the period of French rule in *Ile de France*, France had governed the Chagos Archipelago, along with Seychelles, as dependencies of *Ile de France*. There is no dispute that the Chagos Archipelago formed part of Mauritius when it was transferred to the United Kingdom.

III. Mauritius under British Colonial Rule

2.17 Britain was the colonial occupier of Mauritius from 1810 until independence on 12 March 1968. The administration of the Chagos Archipelago as a constituent part of Mauritius continued without interruption throughout that period of British rule: the Archipelago was legally connected to and administered from Mauritius until its unlawful excision from the territory of Mauritius on 8 November 1965. The UK Order in Council purporting to dismember the territory of Mauritius recognises this fact:

“3. As from the date of this Order—

(a) the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius

[...]

shall [together with the Farquhar Islands, the Aldabra Group and the Island of Desroches] form a separate colony which shall be known as the British Indian Ocean Territory.”³⁶

2.18 After the British conquest of 1810, *Ile de France* was renamed *Mauritius*. Mauritius largely retained French laws, customs, culture, religion, language, and way of life. By the time the British colonised Mauritius, a plantation system of agriculture was well established on the island as well as in the Chagos Archipelago. Enslaved labourers worked on large-scale plantations, producing specialised goods for distant markets. In contrast to the sugar cane of Mauritius, the copra collected in the Chagos Archipelago was largely reserved for the Mauritian market.³⁷

³⁶ “British Indian Ocean Territory” Order No. 1 of 1965: Annex 32.

³⁷ Vine, p. 26.

2.19 The plantation society was common to both the Chagos Archipelago and the main Island of Mauritius. By the early 1800s there were several hundred slaves in the Archipelago, working on the coconut plantations and operating fishing settlements. Following the arrival in 1783 of 22 enslaved Africans, hundreds more came, predominantly from Mozambique and Madagascar.³⁸ Some of the Mauritian citizens who were former residents of the Chagos Archipelago can trace their roots back as much as 200 years to the first 22 slaves.³⁹

2.20 Over time, there was a well-established community in the Chagos Archipelago. By 1826 the Chagos Archipelago supported a plantation society numbering more than 400,⁴⁰ and in 1880 the population had risen to 760.⁴¹ The plantation society provided employment, housing, pensions and education.⁴²

2.21 Slavery was a defining feature of life in the Chagos Archipelago until its abolition in Mauritius in 1833, when 60,000 were set free.⁴³ Some of the freed slaves emigrated to work on the plantations on Diego Garcia, where the Chagossians overwhelmingly outnumbered the small minority of plantation managers of European descent.

2.22 Like the French, the British governed the Chagos Archipelago as a dependency of Mauritius. Special Commissioners and Magistrates made visits to the islands of the Chagos Archipelago, tasked by the British Governor to ensure that no one was brought to or held in the Archipelago against their will.⁴⁴ Laws were enacted to prevent the continuation of conditions of slavery.⁴⁵ The British recruited amateur radio enthusiasts to develop closer communications between the island of Mauritius and the Chagos Archipelago.⁴⁶

2.23 In 1835, the British Assistant Protector of Slaves was sent to the Chagos Archipelago to supervise the emancipation of former slaves.⁴⁷ Special Justice Charles

³⁸ *Ibid*, p. 24. Figures 12 to 17 of Volume 4 are maps of the Chagos Archipelago dating from *circa* 1829, by H. D. Werner and C. T. Hoart, from the UK National Archives, held under “CO700/Mauritius” in the division “Records of the Colonial Office”, subdivision “Records of the Chief Clerk’s and General Departments”. Figures 10 and 11 of Volume 4 are Admiralty Charts from 1897 and 1837 respectively, also held by the UK National Archives under “CO700/Mauritius” in the same division and subdivision.

³⁹ *Ibid*, p. 21.

⁴⁰ *Ibid*, p. 25.

⁴¹ *Ibid*, p. 29.

⁴² *Ibid*, p. 3.

⁴³ Moonindra Nath Varma, *The Road to Independence*, (1976), (hereinafter “Varma, *The Road to Independence*”), p.1.

⁴⁴ Edis, p. 44.

⁴⁵ Vine, p. 28.

⁴⁶ Edis, p. 63. The British developed communications and meteorological stations to connect the Chagos Archipelago with Mauritius and Seychelles.

⁴⁷ Edis, p. 38.

Anderson visited the Archipelago three years later, and complete emancipation was achieved in the Archipelago by 1840.⁴⁸

2.24 By 1883, three plantations on Diego Garcia were merged, creating the Société Huilière de Diégo et Péros. This operated for almost eighty years until 1962, when a joint Mauritian and Seychellois company, Chagos Agalega Ltd, acquired most of the freeholds in the Archipelago.⁴⁹

2.25 The Chagossians fished and raised chickens and pigs and maintained vegetable gardens. Shops sold basic items for everyday use, and basic healthcare was available. Land was passed down through the generations, and the Chagossians built their own houses. A Catholic priest, Father Roger Dussercle, who visited Diego Garcia in 1933, provided an account of life on the island. He wrote that in 1933 about 60% of the population on Diego Garcia were “children of the islands”, having been born and raised there.

2.26 The British Government in Mauritius subsidised a transport and cargo service between Mauritius and the Chagos Archipelago. Throughout the 19th and 20th centuries, the only point of arrival and departure from the Chagos Archipelago was via Mauritius. During the late 19th century, the Chagos Archipelago briefly served as a coal refuelling station, following the opening of the Suez Canal in 1869. In 1882 the Orient and Pacific Steam Navigation Company established a coaling station on Diego Garcia.⁵⁰

2.27 At around this time, the British authorities decided to station a permanent police office on Diego Garcia.⁵¹ In 1931 a Magistrate from Mauritius and 12 police officers were sent to Peros Banhos in order to suppress a Chagossian disturbance.⁵² The British authorities in Mauritius sent specialists to investigate health and agricultural conditions on the islands. Nurseries and schools were established, and a refuse collection system provided. The infrastructure included small roads connecting different parts of the islands. Chagossians no longer solely worked on the plantations – some were blacksmiths or bakers, mechanics, carpenters or had carved out some other specialised roles.⁵³

2.28 As described below in Chapter 3, after the excision of the Chagos Archipelago from Mauritius in 1965, the British Government took steps to remove all the former residents of the Archipelago, about 2000-strong. This started in 1968 and was completed in 1973.⁵⁴

⁴⁸ *Ibid*, p. 39.

⁴⁹ *Ibid*, p. 40.

⁵⁰ Edis, p. 48.

⁵¹ Edis, p. 51. By the turn of the 20th century there were six villages on Diego Garcia alone (see Vine, pp. 29-30).

⁵² Vine, p. 33.

⁵³ *Ibid*, p. 35.

⁵⁴ See paras 3.59-3.63 below.

IV. The Struggle for Independence

2.29 Against the rise of anti-colonialism in the 20th century, the British Government agreed in principle in 1945 to work towards self-government and independence for all of its colonial territories.⁵⁵ With the accession of India to independence in 1947, it became more difficult for the British Government to ignore demands for self-determination, including in Mauritius. At that time, out of a population of nearly 420,000 in Mauritius, there were only slightly over 11,000 registered electors, largely made up of wealthy Franco-Mauritians.⁵⁶

2.30 A Council of Government had been introduced in 1831, consisting of 7 *ex-officio* members and 7 members nominated by the British Governor. It was later enlarged to comprise 8 *ex-officio* members, including the UK Colonial Secretary, 9 members nominated by the Governor and 10 elected members.

2.31 In 1947 a new Constitution was drawn up for Mauritius by the UK Government, giving the vote to all those able to read and write simple sentences in any of the languages used in the island.⁵⁷ For the 1948 election, and for the first time in Mauritius, the electorate was composed of a significant number of literate labourers. The 1947 Constitution ended the Council of Government and introduced two new institutions: a Legislative Council consisting of the Governor as President, 19 elected members, 12 members nominated by the Governor and 3 *ex-officio* members (the Colonial Secretary, the *Procureur* and Advocate General, and the Financial Secretary), and an Executive Council which included four elected Legislative Council members.⁵⁸

2.32 The Mauritius Labour Party (“MLP”) obtained 12 of the 19 seats available for elected members in the Legislative Council after the first election in 1948, and increased this tally to 14 seats in the 1953 election, just short of an overall majority (as a result of the 12 members nominated by the Governor and the 3 *ex-officio* members). After the 1953 election, the MLP publicly complained that the Governor, rather than exercising his right to nominate members to the Legislative Council to reflect the overwhelming preference which electors had shown for the MLP candidates, had flouted the electors’ wishes by nominating members who sought to prolong the domination of the wealthy Franco-Mauritians at the expense of the labourers.⁵⁹

2.33 Following the 1953 election, at the request of the MLP, the Secretary of State for the Colonies agreed to receive a Mauritian delegation in London to discuss further constitutional reforms. A Constitutional Conference was held in London in July 1955. The MLP demanded universal suffrage, a ministerial system of government, more

⁵⁵ Addison & Hazareesingh, p. 87.

⁵⁶ Varma, *The Road to Independence*, p. 34.

⁵⁷ Addison & Hazareesingh, p. 88. There were 11,427 registered voters for the 1936 election; this rose to 71,236 for the 1948 election. There was limited female suffrage for the 1948 elections and the right to vote was extended to anyone able to read and write simple sentences in any language used in Mauritius. See also Christian Carlos Guillermo le Comte, *Mauritius From its Origin*, (2007), p. 68.

⁵⁸ Varma, *The Road to Independence*, pp. 43-46.

⁵⁹ Addison & Hazareesingh, p. 88.

elected and fewer nominated members of the Legislative Council. It also argued that Mauritians should be able to manage their own internal affairs without interference from the British Government, and sought to curtail the sweeping powers of the Governor.⁶⁰

2.34 A second Constitutional Conference was held in 1957, followed by a new Constitution in 1958. The Governor still retained virtually absolute power in Mauritius: he could “declare a bill passed even if it had not been tabled provided that such a bill was in the larger interests of the public. Moreover, no bill could become law without his assent.”⁶¹ The largely elected Legislative Council had very limited powers, and was subject to override by the British Governor at his own discretion.

2.35 The MLP maintained its majority in the Legislative Council after the 1959 election.⁶² Led by Dr Seewoosagar Ramgoolam, the MLP again demanded that Britain grant Mauritius immediate internal autonomy, and formally declared that it would seek complete independence by 1964.⁶³

2.36 A third Constitutional Conference took place in June 1961, where it was agreed that Mauritius could achieve self-government after successful implementation of

⁶⁰ Moonindra Nath Varma, *The Political History of Mauritius – Volume One (1883 – 1983)*, (hereinafter Varma, *The Political History of Mauritius – Volume One*), p. 92. The British Governor not only presided over the Executive Council and personally nominated 12 and 9 members to the Legislative and Executive Councils respectively, but also controlled the judiciary, civil service and government finances. An elected Legislative Council majority could not overrule a decision of the Executive Council.

⁶¹ Varma, *The Road to Independence*, p. 79.

⁶² The 1959 election featured 277,500 electors and was contested by 4 political parties: the MLP; the Ralliement Mauricien (which had now been renamed the Parti Mauricien Social Démocrate (PMSD)); the Muslim Committee of Action (MCA) and the Independent Forward Bloc (IFB). In contrast to the PMSD, the MCA and IFB were largely supportive of the MLP’s efforts to reduce Britain’s influence over internal Mauritian affairs. Elections were held on 9 March 1959 and of the 40 contested seats in the Legislative Council, the MLP won 24 seats, the IFB 6 seats, the MCA 5 seats and PMSD only 3 seats. Two further seats went to independent candidates. In the run-up to the election the MLP had entered into coalition with the MCA and now found themselves with a strong majority in the Legislative Council (Addison & Hazareesingh, p. 89.)

⁶³ At the second Constitutional Conference in February 1957, the Colonial Secretary proposed to implement universal suffrage. He proposed to enlarge the Legislative Council to 40 elected members, but 12 members would still be nominated by the Governor. The Executive Council would consist of 7 members elected by the Legislative Council, 3 *ex-officio* members and 2 nominated by the Governor. The Colonial Secretary’s proposals were debated in the Legislative Council but the MLP, despite having 13 votes in the Council, lost out because the 3 members of the largely conservative Ralliement Mauricien party (which represented the interests of the wealthy Franco-Mauritians) voted with the nominated and *ex-officio* members. A large majority of elected members had found themselves in the minority. As a result of the imposition of these new constitutional measures, the MLP’s members staged a walkout and boycotted the Legislative Council, leading to a serious constitutional crisis. These new measures were completely unacceptable to the MLP, which accused the British Government of blindly accepting the views of the Governor. The new constitutional measures were not deemed to go far enough to stem the Governor’s power and absolute discretion to control Mauritian political life (see Varma, *The Road to Independence*, pp. 68-70 and Sydney Selvon, *A Comprehensive History of Mauritius*, Mauritius Printing Specialists (2005), p. 414).

constitutional reforms in two stages.⁶⁴ The first stage was achieved after Dr S. Ramgoolam became Chief Minister in 1962. At the time, Dr S. Ramgoolam complained that he did not run a free and unfettered government, and that Mauritius was “a colony subject to colonial laws and subject to the control and direction of the Secretary of State through his officers.”⁶⁵

2.37 The MLP performed strongly in the 1963 elections, winning 23 out of 40 contested seats in coalition with the Muslim Committee of Action, and remained easily the largest party.⁶⁶ Dr S. Ramgoolam wanted to reassure the Mauritian electorate that all Mauritians would be represented in government, and to be able to approach the Colonial Office with a united front for discussions on independence. He therefore decided to form an all-party coalition government, in the spirit of solidarity and for the good of the whole nation.

2.38 The second stage was implemented on 12 March 1964, after a motion was passed by 41 votes to 11 in the Legislative Assembly on 19 November 1963. The Legislative Council became the Legislative Assembly, and the Executive Council was restyled the Council of Ministers. Dr S. Ramgoolam became the Premier, and was responsible for Home Affairs. However, the British Colonial Secretary refused to fix any firm date for Mauritius’ independence.

2.39 Despite these constitutional developments, the Governor of Mauritius and the UK Colonial Office continued to exercise far-reaching powers over Mauritian internal affairs. The Governor continued to preside over a Council of Ministers, which now comprised the Premier, the Chief Secretary and between 10 and 13 Ministers. Although the Governor was advised to consult the Council of Ministers, he still retained considerable power. It was left to his discretion to appoint up to 15 members of the Legislative Assembly, and it was his responsibility to appoint the Premier.⁶⁷

2.40 The fourth and final Constitutional Conference took place between 7 and 24 September 1965 in London. On the final day of the Conference, on 24 September 1965, the British Government agreed to grant Mauritius independence from the United Kingdom, and independence was formally achieved on 12 March 1968. Such independence was granted on condition that Mauritian Ministers agreed to the excision of the Chagos Archipelago from the territory of Mauritius. The following chapter describes the manner in which this was done, in violation of general international law and resolutions of the UN General Assembly.

⁶⁴ During the Conference there was a rift between the PMSD, which favoured some form of integration or association with Britain, and the other political parties, led by the MLP, which were calling for independence (Addison & Hazareesingh, p. 90.)

⁶⁵ Varma, *The Political History of Mauritius – Volume One*, p. 106.

⁶⁶ Addison & Hazareesingh, p. 91. The election took place on 21 October 1963. The MLP in coalition with the MCA obtained 49% of the popular vote and thus won 19 seats out of 40. The PMSD won 8 seats, the IFB won 7 seats and independent candidates won 2 seats.

⁶⁷ Sections 27, 58-60 and 68(1) of the Constitution of Mauritius as set out in Schedule 2 to the Mauritius (Constitution) Order 1964.

CHAPTER 3: THE UNLAWFUL DETACHMENT OF THE CHAGOS ARCHIPELAGO

3.1 This Chapter sets out the facts surrounding the UK's excision of the Chagos Archipelago from the territory of Mauritius as a condition of granting independence to Mauritius. It also provides the factual record of (a) the UK's recognition of Mauritius' rights in regard to the Chagos Archipelago, notwithstanding the excision; and (b) the continuous assertion of sovereignty by Mauritius over the entire former colonial territory, including the Chagos Archipelago, after independence was achieved. In particular, this Chapter addresses:

- (i) The plan devised in the early 1960s by the UK and the US to detach the Chagos Archipelago from the territory of Mauritius, in response to US military aspirations in the Indian Ocean;
- (ii) The September 1965 Constitutional Conference in London, at which negotiations on independence were held between the UK and the leaders-in-waiting of Mauritius;
- (iii) The UK's excision of the Chagos Archipelago from the territory of Mauritius as a condition of its grant of independence to Mauritius;
- (iv) International condemnation of the unlawful excision;
- (v) The agreement between the UK and the US, and the forcible removal of all the Mauritian citizens who were former residents of the Chagos Archipelago;
- (vi) The UK's recognition of, and formal undertakings to respect, Mauritius' fishing, mineral and other rights in the Chagos Archipelago and its surrounding waters; and
- (vii) Mauritius' continuous assertion of its sovereignty over the Chagos Archipelago.

3.2 The historical record reveals a series of secret dealings between powerful nations, in which the interests of the emerging Mauritian State and its people counted for little. In this process, the fundamental legal obligations to respect the territorial integrity of Mauritius, and the right of self-determination of its people, were ignored.

I. The United Kingdom and United States Plan to Detach the Chagos Archipelago

(a) Development of the initial proposals in the early 1960s

3.3 The UK's excision of the Chagos Archipelago from the territory of Mauritius stems from its decision in the early 1960s to accommodate the United States' desire to

use certain islands in the Indian Ocean for defence purposes.⁶⁸ In October 1962, the UK and the US held talks on the “use of British bases in time of war by U.S. forces.”⁶⁹ In April 1963, the US State Department proposed further talks on the “strategic use of certain small British-owned islands in the Indian Ocean”. In August of that year, the State Department expressed “interest in establishing a military communications station on Diego Garcia and asked to be allowed to make a survey.”⁷⁰

3.4 On 11 December 1963, the US Ambassador in London submitted a memorandum to the UK Foreign Office proposing further discussions on “the Island Base question and communications facilities on Diego Garcia”.⁷¹ In January 1964, a US memorandum set out proposals for the UK Government to “acquire certain islands, compensating and resettling the inhabitants as necessary; U.S. first requirements would be ‘austere’ support facilities on Diego Garcia with Aldabra [an island administered by the UK as part of Seychelles] next as a possible staging post.”⁷²

3.5 The first round of formal UK-US talks on US defence interests in the Indian Ocean was held from 25 to 27 February 1964. The parties agreed to carry out a joint survey of several islands in the Indian Ocean, in order to consider their suitability for defence purposes, and the administrative implications of using islands belonging to Mauritius or Seychelles for defence. The participants decided that in order to effectuate their plans, the islands in question would have to be excised from Mauritius and Seychelles. They decided that the UK would “provide the land, and security of tenure, by detaching islands and placing them under direct U.K. administration”.⁷³ The UK would also be “responsible for payment of compensation to Mauritius and Seychelles Governments and to land-owners and displaced inhabitants.”⁷⁴ A memorandum was jointly prepared in April by the Colonial Office, the Ministry of Defence and the Foreign Office, recommending that UK Ministers approve the proposals resulting from the talks with US officials. The memorandum emphasised that by encouraging the US to develop facilities “in places where there was no anti-colonial bias, or better still no inhabitants”, adverse implications for the UK might be reduced.⁷⁵

3.6 These plans were to be developed in secret: on 6 May 1964, UK Ministers approved in principle proposals “for the development of joint facilities”, but resolved that their plans should not be disclosed to the relevant authorities in Mauritius and Seychelles. In particular, they agreed that Mauritian Ministers and the Seychelles

⁶⁸ “British Indian Ocean Territory” 1964-1968, Chronological Summary of Events relating to the Establishment of the “B.I.O.T.” in November, 1965 and subsequent agreement with the United States concerning the Availability of the Islands for Defence Purposes, FCO 32/484 (hereinafter “UK Chronological Summary”): Annex 3, p. 1.

⁶⁹ *Ibid.*, item no. 1.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, item no. 2. See also Permanent Under-Secretary’s Department (Foreign Office), Secretary of State’s Visit to Washington and New York, 21-24 March, Defence Interests in the Indian Ocean, Brief No. 14, 18 March 1965, FO 371/184524: Annex 8, para. 2.

⁷² UK Chronological Summary: Annex 3, item no. 4.

⁷³ *Ibid.*, item no. 5.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, item no. 9.

Executive Council would only “at a suitable time be informed in general terms about [the] proposed detachment of [the] islands”.⁷⁶ In June 1964, the British Governor of Mauritius, Sir John Rennie, consulted for the first time with the Mauritian Premier, Sir Seewoosagur Ramgoolam, who expressed his unease about the proposed detachment of the Chagos Archipelago from the territory of Mauritius. Governor Rennie reported that although Premier Ramgoolam was “favourably disposed to provision of facilities” he had “reservations on detachment” and “expressed preference for [a] long-term lease”.⁷⁷ In July 1964, Governor Rennie is reported to have informed the Mauritian Council of Ministers of the proposed survey of certain islands in the Indian Ocean; he failed, however, to indicate that the UK intended to detach the Chagos Archipelago from Mauritius.⁷⁸

(b) The 1964 UK-US survey of the Chagos Archipelago

3.7 In July and August 1964, a joint UK-US survey of the Chagos Archipelago and the Seychelles islands of Coetivy, Desroches and Farquhar was carried out. The survey team comprised three British members and nine Americans. Robert Newton, the UK Colonial Office member of the survey party, prepared a detailed report. Consistent with the policy of secrecy, the true nature and purpose of the survey was concealed from the local population. Mr Newton explained that he “took the line with island Managers that in a scientific age there was a growing need for accurate scientific surveys” and “made vague allusions to the developments in radio communications”.⁷⁹ Efforts were also made to conceal the presence of American military personnel.⁸⁰

3.8 The Chagos Archipelago was surveyed from 17 to 31 July 1964, with a strong focus on Diego Garcia, which was regarded as “the most promising for technical purposes”.⁸¹ The purpose of the survey was “to determine the implications on the civilian population of strategic planning, and especially to assess the problems likely to arise out of the acquisition of the islands of Diego Garcia and Coetivy for military purposes.”⁸² Among Mr. Newton’s broad conclusions was that “There should be no insurmountable obstacle to the removal, resettlement and re-employment of the civilian population of islands required for military purposes”.⁸³

3.9 The Newton Report concluded, *inter alia*, that Diego Garcia was “eminently suitable” for the construction of an airstrip, naval storage tanks and jetty, radio installations and housing, recreational and administrative facilities. The population of

⁷⁶ *Ibid.*, item no. 11.

⁷⁷ *Ibid.*, item no. 12.

⁷⁸ *Ibid.*, item no. 13.

⁷⁹ Robert Newton, Report on the Anglo-American Survey in the Indian Ocean, 1964, CO 1036/1332: Annex 2, covering letter, para. 7.

⁸⁰ *Ibid.*

⁸¹ Robert Newton, Report on the Anglo-American Survey in the Indian Ocean, 1964, CO 1036/1332: Annex 2, para. 1.

⁸² *Ibid.*, para. 2.

⁸³ *Ibid.*, para. 3.

the Chagos Archipelago as of July 1964 was reported to be 1,364.⁸⁴ The Report acknowledged that the “acquisition” of the islands “for military purposes, and changes in their administration, will almost certainly involve repercussions in the local politics of Mauritius and the Seychelles.”⁸⁵ It recommended that the UK Government should accept responsibility for “facilitating re-employment of the Mauritians and Seychellois on other islands and for the re-settlement in Mauritius and the Seychelles of those unwilling or unable to accept re-employment.” The Report warned that the cost of resettlement “will be relatively heavy.”⁸⁶

3.10 The Report further recommended that the islands surveyed should “become direct dependencies of the British Crown” and should be “administered under the authority of the Governor of the Seychelles as High Commissioner.”⁸⁷ It warned of “a risk that to remove the islands from the jurisdiction of Mauritius would give rise to considerable political difficulties.”⁸⁸ In this regard, recognising Mauritius’ continuing “beneficial interest” in the islands, it considered that:

“[t]he issue is primarily one of relative advantages and disadvantages in regard to long-term strategy and is not a matter that can be examined in this report. It can be summarised in the question, how far adverse, but doubtless temporary, reactions in Mauritius should outweigh the need for security of tenure in certain of the islands, or at least in Diego Garcia. A further issue is the assessment of the extent to which Mauritius might embarrass H.M.G.’s existing interests in the island before they can be replaced. Stated thus, the problem may appear over simplified. The final decision cannot be independent of any obligations or commitments that H.M.G. might have towards Mauritius arising out of past history or any beneficial interest of Mauritius in the [Chagos Archipelago].”⁸⁹

(c) The United States’ demand for the islands, and the issue of compensation

3.11 Following the joint survey, the US sent its proposals to the UK. Three categories of islands were listed in order of priority. First, the US “required” Diego Garcia “for the establishment of a communications station and supporting facilities, to include an air strip and improvement of off-loading capability.” The US considered that “detachment proceedings should include the entire Chagos Archipelago, primarily in the interest of security, but also to have other sites in the archipelago available for future contingencies.”⁹⁰ Second, the island of Aldabra (in Seychelles) was singled out as a

⁸⁴ *Ibid.*, para. 7.

⁸⁵ *Ibid.*, para. 13.

⁸⁶ *Ibid.*, para. 35.

⁸⁷ *Ibid.*, para 60.

⁸⁸ *Ibid.*, para. 49.

⁸⁹ *Ibid.*

⁹⁰ Letter dated 14 January 1965 from the Counselor for Politico-Military Affairs at the US Embassy in London to the Head of the Permanent Under-Secretary’s Department, UK Foreign Office: Annex 5, p. 1.

potential air staging post, although no plans had yet been drawn up. The third category comprised a list of five other islands – Coetivy, Agalega, Farquhar, Desroches and Cosmoledo – listed in order of preference. As the UK intended “single bite [...] detachment proceedings”,⁹¹ the US urged it to “consider stockpiling”⁹² these islands and to detach them “on a precautionary planning basis”.⁹³ The US explicitly recognised “the difficulties that Her Majesty’s Government will face in undertaking the necessary steps to detach these islands.”⁹⁴

3.12 In line with suggestions made by the US, the British Embassy in Washington agreed that the UK “could not take two bites of the cherry of detachment” and that it would be prudent to detach all the islands which could be useful in the long run. Whether the entire Chagos Archipelago should be detached, or just the island of Diego Garcia, was raised by the UK at a meeting with US officials in January 1965. The US response was:

“[w]e would not regard the detachment of the entire Chagos Archipelago as essential, but consider it highly desirable. It appears to us that full detachment now might more effectively assure that Mauritian political attention, including any recovery pressure, is diverted from Diego Garcia over the long run. In addition [...] full detachment is useful from the military security standpoint, and provides a source for additional land areas should requirements arise which could not be met on Diego Garcia.”⁹⁵

3.13 A brief prepared for a UK Minister’s visit to Washington and New York in March 1965 set out that any island required for military purposes “must be free from local pressures which would threaten security of tenure, and [...] in practice this must mean that the islands would be detached from the administration of Mauritius”.⁹⁶

3.14 It was also reported that UK Ministers would “shortly be asked to reaffirm Her Majesty’s Government’s general support for this scheme and to agree that the Colonial Office should undertake the necessary constitutional steps in Mauritius and the

⁹¹ Letter dated 15 January 1965 from the British Embassy, Washington to the UK Foreign Office: Annex 6, p. 4.

⁹² *Ibid.*

⁹³ Letter dated 14 January 1965 from the Counselor for Politico-Military Affairs at the US Embassy in London to the Head of the Permanent Under-Secretary’s Department, UK Foreign Office: Annex 5, p. 2. See also Record of a Meeting with an American Delegation headed by Mr. J.C. Kitchen, on 23 September, 1965, Mr. Peck in the chair, Defence Facilities in the Indian Ocean, FO 371/184529, Annex 20, p. 3: (“Mr. Peck made the point that we would want to avoid a second row in the United Nations if possible, and therefore to carry out the detachment as a single operation.”)

⁹⁴ *Ibid.*

⁹⁵ Letter dated 10 February 1965 from the Counselor for Politico-Military Affairs at the US Embassy in London to the Head of the Permanent Under-Secretary’s Department, UK Foreign Office: Annex 7, p. 1.

⁹⁶ Permanent Under-Secretary’s Department (Foreign Office), Secretary of State’s Visit to Washington and New York 21-24 March, Defence Interests in the Indian Ocean, Brief No. 14, 18 March 1965, FO 371/184524: Annex 8, para. 2.

Seychelles.”⁹⁷ On 30 April 1965, a Foreign Office telegram to the UK Embassy in Washington stated that the UK Prime Minister, Harold Wilson, had already told the US Secretary of State that the UK was “anxious to press ahead with this project as rapidly as possible”. The UK Prime Minister had also raised with the US Secretary of State the question of a financial contribution towards the cost of detaching the islands.⁹⁸ The telegram stated that “the islands chosen for defence facilities [...] should be Diego Garcia and the rest of the Chagos Archipelago (Mauritius) and the islands of Aldabra, Farquhar and Des Roches (Seychelles).”⁹⁹

3.15 The telegram recorded the unambiguous view of the Foreign Office that:

“[i]t is now clear that in each case the islands are legally part of the territory of the colony concerned.”¹⁰⁰

3.16 The Foreign Office also noted that generous compensation would be required “to secure the acceptance of the proposals by the local Governments”, and that such acceptance was “fundamental for the constitutional detachment of the islands concerned.”¹⁰¹ The Foreign Office estimated that the total cost could be as much as £10 million, and made a formal request to the US for a contribution.¹⁰² During official talks in London in mid-May 1965, the US was open to making one. However, since the US Congress was unlikely to agree to provide funds, “[g]reat secrecy was essential”.¹⁰³ In June, the US agreed to contribute up to half the cost of detaching the islands.¹⁰⁴ The UK agreed to keep the US contribution secret from the Mauritian authorities.¹⁰⁵

(d) The communication of the UK-US plans for the Chagos Archipelago to the Mauritius Council of Ministers

3.17 On 19 July 1965, the Governor of Mauritius was instructed to communicate detachment proposals to the Mauritius Council of Ministers and to report on the “‘unofficials’ reactions” as soon as possible.¹⁰⁶ The Colonial Secretary explained to the

⁹⁷ *Ibid.*, paras 6 and 7. UK Ministers subsequently accepted the US proposals, but decided to request that the US contribute financially to the cost of detaching the islands. See UK Chronological Summary: Annex 3, item no. 25.

⁹⁸ Foreign Office Telegram No. 3582 to Washington, 30 April 1965, FO 371/184523: Annex 9. See also UK Chronological Summary: Annex 3, item no. 26, which records that on 15 April 1965 “Prime Minister tells Mr. Rusk in Washington that HMG wished to press ahead, despite possible political embarrassment in U.N. and elsewhere.”

⁹⁹ Foreign Office Telegram No. 3582 to Washington, 30 April 1965, FO 371/184523: Annex 9, para. 2.

¹⁰⁰ *Ibid.*, para. 3.

¹⁰¹ *Ibid.*, para. 3. See also Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965, FO 371/184526: Annex 10, p. 1, where the Secretary of State for the Colonies states that the “agreement of the two governments” is “regard[ed] as essential”.

¹⁰² Foreign Office Telegram No. 3582 to Washington, 30 April 1965, FO 371/184523: Annex 9, para. 3.

¹⁰³ UK Chronological Summary: Annex 3, item no. 29.

¹⁰⁴ *Ibid.*, item no. 30.

¹⁰⁵ See paras 3.55-3.57 *infra*.

¹⁰⁶ Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965, FO 371/184526: Annex 10; see UK Chronological Summary: Annex 3, item no. 32. Prior to Mauritius’ Independence, the

Governor that the UK was “willing in principle to pursue proposed joint development further on the basis that, subject to the agreement of the [Government of Mauritius], which we regard as essential, we would be prepared to detach” the Chagos Archipelago from Mauritius.¹⁰⁷ It was also stated that the UK “attach[es] considerable importance to securing the support” of Mauritius Ministers.¹⁰⁸ Governor Rennie was instructed to explain that the Chagos Archipelago would be “constitutionally separated” from Mauritius and, together with the Seychelles islands of Aldabra, Farquhar and Desroches, be “established by Order in Council as a separate British administration.”¹⁰⁹ The islands would not be made available on any other basis, such as a lease.¹¹⁰

3.18 The Governors of Mauritius and Seychelles were instructed that the US financial contribution “must be kept strictly secret” but that an indication was to be sought as to the amount of compensation “necessary to secure [Mauritian] [...] agreement.”¹¹¹

3.19 Legal and administrative arrangements were agreed within the Colonial Office as a *fait accompli* before the Mauritius Ministers and the Executive Council of Seychelles were approached by the respective Governors. The Chagos Archipelago and Aldabra, Desroches and Farquhar would form a separate territory “established by Order in Council similar to [the] British Antarctic Territory Order in Council 1962.”¹¹²

3.20 Governor Rennie wrote to Colonial Secretary Anthony Greenwood on 23 July 1965 to report that the Mauritian Ministers had asked for more time to consider the British proposals.¹¹³ However, Premier Ramgoolam expressed “dislike of detachment”, and Governor Rennie expressed the view that any attempt to detach the Chagos Archipelago without agreement would “provoke strong protest”.¹¹⁴ At the subsequent meeting of the Mauritius Council of Ministers, held on 30 July 1965, the Ministers made clear their strong objection to any detachment of the Chagos Archipelago. Governor Rennie reported that:

“Ministers objected however to detachment which would be unacceptable to public opinion in Mauritius. They therefore asked that you [Secretary of State for the Colonies] consider

Governor was the Queen’s representative and formal head of the Government of Mauritius: see paras 2.29-2.40 above.

¹⁰⁷ Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965, FO 371/184526: Annex 10, para. 1.

¹⁰⁸ *Ibid.*, para. 7.

¹⁰⁹ *Ibid.*, para. 8.

¹¹⁰ On the lease issue see also: Record of a Meeting with an American Delegation headed by Mr. J.C. Kitchen, on 23 September, 1965, Mr. Peck in the chair, Defence Facilities in the Indian Ocean, FO 371/184529: Annex 20, p. 2.

¹¹¹ Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965, FO 371/184526: Annex 10, para. 4.

¹¹² Colonial Office Telegram No. 199 to Mauritius, No. 222 to Seychelles, 21 July 1965, FO 371/184524: Annex 11, para. 2.

¹¹³ Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965, FO 371/184526: Annex 12.

¹¹⁴ *Ibid.*, para. 2.

‘with sympathy and understanding’ how U.K./U.S. requirements might be reconciled with the long term lease e.g. for 99 years. They wished also that provision should be made for safeguarding mineral rights to Mauritius and ensuring preference for Mauritius if fishing or agricultural rights were ever granted.”¹¹⁵

Governor Rennie also reported that the views expressed by Premier Ramgoolam “were subscribed to by all the Ministers present”.¹¹⁶ His conclusion was that:

“[a]ttitude to detachment is awkward but not unexpected despite my warning that lease would not be acceptable. Proposals for compensation are also highly inconvenient though Ministers are setting sights high in the hope of doing the best for Mauritius. I should like to emphasise [...] that Ministers have taken responsible line and given collective view after consultation among themselves, and that so far there has been no attempt to exploit for party advantage with a view to constitutional conference.”¹¹⁷

3.21 Colonial Secretary Greenwood responded to Governor Rennie, telling him that he should reiterate to the Mauritian Ministers that a lease was not possible.¹¹⁸ Nevertheless, the Mauritian Ministers continued to oppose UK proposals to detach the Chagos Archipelago, and renewed suggestions for talks with UK and US representatives. Governor Rennie was unable to obtain the agreement sought by the UK Government, and suggested that Colonial Secretary Greenwood meet with Premier Ramgoolam in London before the Constitutional Conference.¹¹⁹

II. The September 1965 Constitutional Conference in London

3.22 The UK decided that detachment would not be discussed with the Mauritian Ministers during official plenary meetings at the Constitutional Conference. Instead, private meetings on “defence matters” were to be held between select Mauritian political leaders and Colonial Office officials. A first session was held at the Colonial Office on 13 September 1965, between Colonial Secretary Greenwood and Premier Ramgoolam and three other Mauritian party leaders and a leading independent Mauritian Minister.¹²⁰ Governor Rennie and six other UK representatives were also present. During this session, Premier Ramgoolam once again expressly stated to

¹¹⁵ Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965, FO 371/184526: Annex 13, para. 2.

¹¹⁶ *Ibid.*, para. 5.

¹¹⁷ *Ibid.*, para. 6.

¹¹⁸ Colonial Office Telegram No. 214 to Mauritius, 10 August 1965, FO 371/184526: Annex 14, para. 2.

¹¹⁹ Mauritius Telegram No. 188 to the Colonial Office, 13 August 1965, FO 371/184526: Annex 15.

¹²⁰ The three other Mauritian party leaders were Attorney General Jules Koenig (Parti Mauricien Social Democrate), Minister Sookdeo Bissoondoyal (Independent Forward Bloc) and Minister Abdool Razack Mohamed (Muslim Committee of Action) and the leading independent Minister was Minister Maurice Paturau.

Colonial Secretary Greenwood his desire for a lease, rather than detachment of the Chagos Archipelago.¹²¹

3.23 A second session took place on 20 September 1965. Premier Ramgoolam again made clear that Mauritius could not accept detachment of the Chagos Archipelago:

“the Mauritius Government was not interested in the excision of the islands and would stand out for a 99-year lease. They envisaged a rent of about £7 [million] a year for the first twenty years and say £2 [million] for the remainder. They regarded the offer of a lump sum of £1 [million] as derisory and would rather make the transfer *gratis* than accept it. The alternative was for Britain to concede independence to Mauritius and allow the Mauritius Government to negotiate thereafter with the British and United States Governments over Diego Garcia.”¹²²

Colonial Secretary Greenwood argued that Diego Garcia “was not [...] a source of wealth to Mauritius” and that it would be in Mauritius’ own interest to have an Anglo-US military presence in the area. In response, Premier Ramgoolam reiterated that he understood the facilities to be in the interest of the whole Commonwealth, and repeated that:

“he would prefer to make the facilities available free of charge rather than accept a lump sum of £1 [million] which was insignificant seen against Mauritius’ annual recurrent budget amounting to about £13.5 [million] – with the development budget the total was about £20 [million].”¹²³

The four other Mauritian Ministers shared the views expressed by Premier Ramgoolam.¹²⁴

3.24 Premier Ramgoolam reiterated that excision was not an option, insisting instead on a 99-year lease.¹²⁵ In response, Colonial Secretary Greenwood stated that the US Government had been “categorical in insisting that British sovereignty must be retained over Chagos” and warned the Mauritian Ministers that if detachment could not be achieved “the whole project might well fall through and the United States Government [will] look elsewhere for the facilities”.¹²⁶ Premier Ramgoolam responded that “Mauritius ministers had not come to bargain” and added that “[t]hey could not bargain over their relationship with the United Kingdom and the Commonwealth.”¹²⁷

¹²¹ UK Chronological Summary: Annex 3, item no. 40.

¹²² Record of a Meeting in the Colonial Office at 9.00 a.m. on Monday, 20th September, 1965, Mauritius – Defence Issues, FO 371/184528: Annex 16, pp. 2-3, (emphasis in the original).

¹²³ *Ibid.*, pp. 3-4.

¹²⁴ *Ibid.*, p. 4.

¹²⁵ *Ibid.* p. 5.

¹²⁶ *Ibid.*, pp. 5-6.

¹²⁷ *Ibid.*, p.7.

3.25 Three days later, on 23 September 1965, the UK Prime Minister, Harold Wilson, had a meeting with Premier Ramgoolam at Downing Street. A minute submitted to the Prime Minister highlighted the objective of the meeting:

“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.”¹²⁸

The brief prepared by the Colonial Office referred to the proposed defence facilities and the secret agreement with the US, which was to contribute half of the estimated £10 million cost by “writing off equivalent British payments towards Polaris development costs.”¹²⁹ It confirmed that the four Mauritian party leaders and a leading independent Minister “cannot contemplate detachment but propose a long lease”,¹³⁰ and addressed the subject of compensation, indicating Mauritius’ concerns.

3.26 The conclusion of the brief, including the “key last sentence”, stated that:

“[t]hroughout consideration of this problem, all Departments have accepted the importance of securing consent of the Mauritius Government to detachment. The Premier knows the importance we attach to this. In the last resort, however, detachment could be carried out without Mauritius consent, and this possibility has been left open in recent discussions in Defence and Overseas Policy Committee. 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.”¹³¹

3.27 A second document, a minute from Colonial Secretary Greenwood, was appended to the briefing note.¹³² It expressed anxiety that the “bases issue” would make the Constitutional Conference more difficult, and that care should be taken not to make it obvious that the UK was conditioning the independence of Mauritius on the detachment of the Chagos Archipelago:

¹²⁸ Colonial Office, Note for the Prime Minister’s Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, 22 September 1965, PREM 13/3320: Annex 17, (emphasis added).

¹²⁹ *Ibid.*, p.1. In the margin of the document, it is stated that this secret financial agreement is “not for mention”.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

“I am sure that we should not seem to be trading Independence for detachment of the Islands. That would put us in a bad light at home and abroad and would sour our relations with the new state. And it would not accord well with the line you and I have taken about the Aden base (which has been well received in the Committee of 24).”¹³³

3.28 According to the record of the 23 September 1965 meeting, Prime Minister Wilson opened the discussion by explaining that he:

“wished to discuss with Sir Seewoosagur a matter which was not strictly speaking within the Colonial Secretary’s sphere: it was the Defence problem and in particular the question of the detachment of Diego Garcia.”¹³⁴

Following the advice of Colonial Secretary Greenwood, for the sake of appearances Prime Minister Wilson added:

“This was of course a completely separate matter and not bound up with the question of Independence.”¹³⁵

However, in the end, the connection between independence and detachment was made clear:

“The Prime Minister [said that] 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.”

3.29 On the same day as Prime Minister Wilson’s meeting with Premier Ramgoolam, the UK held separate (and secret) talks on the detachment of the Chagos Archipelago with a large US delegation in London.¹³⁶ A Colonial Office official, Mr.

¹³³ *Ibid.*

¹³⁴ Record of a Conversation Between the Prime Minister and Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 A.M. on Thursday, September 23, 1965, FO 371/184528: Annex 18, p. 1.

¹³⁵ *Ibid.*, pp. 1-2.

¹³⁶ List of Officials who took part in U.S./U.K. talks on Defence Facilities in the Indian Ocean 23-24 September, 1965, FO 371/184529; Record of a Meeting with an American Delegation headed by Mr. J.C. Kitchen, on 23 September, 1965, Mr. Peck in the chair, Defence Facilities in the Indian Ocean, FO 371/184529; Record of a Meeting of U.K. and U.S. Officials on 24 September, 1965, to Discuss Draft B, Mr. Peck in the Chair, Defence Facilities in the Indian Ocean, FO 371/184529; Summary record of ‘Plenary’ meeting between the United Kingdom and United States officials (led by Mr. Kitchen), Mr. Peck in the Chair on 24 September, 1965, Defence Facilities in the Indian Ocean, FO 371/184529, see Annex 20.

Fairclough, described to the Americans the talks that had thus far been held with the Mauritian Ministers:

“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. One main party in Mauritius with a different policy from that of Dr. Ramgoolam but belonging to his coalition government, favoured some continuing link with Britain. Dr. Ramgoolam’s party wanted full independence. It seemed that the conference was moving towards agreement on “free association” [...] Both pro and anti independence parties regarded the defence project as a bargaining counter which they might use either to achieve or to avoid complete independence.”¹³⁷

Mr. Fairclough recognised that none of the Mauritian party leaders “wanted to settle the defence project before the independence issue was settled”.¹³⁸ The US again made clear its position that a lease was out of the question.¹³⁹

3.30 A third session of talks between UK officials and the Mauritius Ministers was held later the same day. Premier Ramgoolam and three other Ministers met with the UK representatives. Colonial Secretary Greenwood explained that he was required to inform his colleagues “at 4 p.m. that afternoon” of the outcome of the talks, and wanted a decision to be reached at the meeting.¹⁴⁰ He urged the Mauritius Ministers to agree to the detachment of the Chagos Archipelago.¹⁴¹ The Colonial Secretary argued that “it would be possible for the British Government to detach [the Chagos Archipelago] from Mauritius by Order in Council.”¹⁴² This was interpreted by the Mauritius Ministers as a threat by the UK to detach the Chagos Archipelago from Mauritius with or without their agreement.

3.31 The record of that meeting sets out the UK’s view of the understanding that was eventually reached:

“22. Summing up the discussion, the SECRETARY OF STATE asked whether he could inform his colleagues that Dr. Ramgoolam, Mr Bissoondoyal and Mr Mohamed were prepared to agree to the detachment of the Chagos Archipelago on the understanding that he would recommend to his colleagues the following:

¹³⁷ *Ibid.* (emphasis added).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: Annex 19.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, p. 2.

- (i) negotiations for a defence agreement between Britain and Mauritius;
- (ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;
- (iii) compensation totalling up to £3 [million] should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
- (iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concession over sugar imports and the supply of wheat and other commodities;
- (v) [...] the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;
- (vi) 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:
 - (a) Navigational and Meteorological facilities;
 - (b) Fishing Rights;
 - (c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers.
- (vii) [...] if the need for the facilities on the islands disappeared the islands should be returned to Mauritius;
- (viii) [...] the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.”¹⁴³

3.32 Faced with the UK's intention to detach the Chagos Archipelago from Mauritius with or without the consent of the Mauritius Ministers, Premier Ramgoolam reluctantly told Colonial Secretary Greenwood that these proposals were “acceptable to him and [two of the Mauritian Ministers] in principle”, but that he would discuss the matter with his other ministerial colleagues.¹⁴⁴

3.33 Another UK-US meeting was held that afternoon. Mr. Fairclough reported to the US delegation that “Dr. Ramgoolam and a majority of Ministers present had agreed

¹⁴³ *Ibid.*, para. 22.

¹⁴⁴ *Ibid.*, para. 23.

to the detachment of the Chagos Archipelago.”¹⁴⁵ Mr. Fairclough went on to assure the Americans that “the necessary legal measures would be comparatively quick”.¹⁴⁶ However, it was agreed that:

“the term ‘detachment’ should be avoided in any public statements on this subject, and that some other phrase – e.g. the retention under the administration of Her Majesty’s Government – should be devised in its place.”¹⁴⁷

The record of the meeting concluded that the UK would “make the necessary constitutional and administrative arrangements for the detachment of the Chagos Archipelago”.¹⁴⁸

3.34 At a side meeting between UK and US officials, the UK explained how it would carry out the detachment:

“the Colonial Office envisaged the detachment operation taking place in three stages. During the first stage normal life would continue on the islands detached but not yet needed for defence facilities. In the middle stage the population would have to be cleared off any island when it was needed for defence purposes. This process would take a little time. During the final stage it was envisaged that an island with defence facilities installed on it would be free from local civilian inhabitants.”¹⁴⁹

III. Detachment of the Chagos Archipelago from Mauritius

3.35 Before detaching the Chagos Archipelago, the UK sought to obtain approval from the Mauritian Government. In a despatch to the Foreign Office, a Colonial Office official explained that this was necessary because “the Governor [of Mauritius] originally broached the subject with the full Council of Ministers, and our talks in London were only with the main party leaders and an Independent Minister.”¹⁵⁰ Furthermore, “the last and critical meeting” had taken place without Mr. Koenig, the leader of the PMSD, who had walked out of the Constitutional Conference.¹⁵¹

¹⁴⁵ Summary record of ‘Plenary’ meeting between the United Kingdom and United States officials (led by Mr. Kitchen), Mr. Peck in the Chair on 24 September, 1965, Defence Facilities in the Indian Ocean, FO 371/184529: Annex 20, p. 1.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*, Note on Further Action.

¹⁴⁹ Record of a Meeting of U.K. and U.S. Officials on 24 September, 1965, to Discuss Draft B, Mr. Peck in the Chair, Defence Facilities in the Indian Ocean, FO 371/184529: Annex 20, para. 3.

¹⁵⁰ Letter dated 8 October 1965 from the UK Colonial Office to the UK Foreign Office, FO 371/184529: Annex 22, para. 2.

¹⁵¹ *Ibid.* See also Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529: Annex 26, para. 4.

3.36 On 6 October 1965, instructions were sent to Governor Rennie to secure the agreement of the Mauritius Government to the detachment “on the conditions enumerated in (i) – (viii) in paragraph 22” of the Record of the Meeting held on 23 September 1965.¹⁵² In the meantime, on 27 October, the Foreign Office wrote to the UK Mission to the UN in New York to find out when discussions on Mauritius were likely to take place, citing concern that “any hostile reference” to the detachment of the Chagos Archipelago could have the effect of “jeopardis[ing] final discussions in the Mauritius Council of Ministers”.¹⁵³ The UK Mission replied that discussions on “miscellaneous territories” were imminent, but that it was not possible to indicate exactly when.¹⁵⁴

3.37 Governor Rennie informed the Colonial Office on 5 November that the “Council of Ministers today confirmed agreement to the detachment of Chagos Archipelago” on the conditions set out at paragraph 22 of the Record of the Meeting held on 23 September 1965.¹⁵⁵ He added that PMSD Ministers had dissented and felt “obliged to withdraw from the government”.¹⁵⁶

3.38 Colonial Secretary Greenwood then wrote to Prime Minister Wilson to confirm that the Mauritius Council of Ministers had agreed to detachment.¹⁵⁷ He added that it is “essential that the arrangements for detachment of these islands should be completed as soon as possible.”¹⁵⁸ He explained the need for rapid action as follows:

“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.

¹⁵² Colonial Office Despatch No. 423 to the Governor of Mauritius, 6 October 1965, FO 371/184529: Annex 21. Subsequently, on 20 October 1965, formal instructions were sent to the Governor of the Seychelles to confirm the agreement of the Executive Council to detach Aldabra, Farquhar and Desroches islands from the Seychelles. See also UK Chronological Summary: Annex 3, item no. 47.

¹⁵³ Foreign Office Telegram No. 4104 to the UK Mission to the United Nations, New York, 27 October 1965, FO 371/184529: Annex 23.

¹⁵⁴ UK Mission to the United Nations, New York, Telegram No. 2697 to the Foreign Office, 28 October 1965, FO 371/184529: Annex 24.

¹⁵⁵ Mauritius Telegram No. 247 to the Colonial Office, 5 November 1965, FO 371/184529: Annex 25, para. 1.

¹⁵⁶ *Ibid.*, para. 2.

¹⁵⁷ Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529: Annex 26, para. 3.

¹⁵⁸ *Ibid.*, para. 5.

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.

8. In these circumstances I propose to arrange for an Order in Council to be made on Monday 8th November. A prepared Parliamentary Question will be tabled on 9th November and answered on 10th November in the terms of the attached draft. Supplementary background guidance has been prepared for use with the press.

9. If we can meet the timetable set out in the previous paragraph we shall have a good chance of completing the operation before discussion in the Fourth Committee reaches 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.”¹⁵⁹

3.39 On 6 November, Colonial Secretary Greenwood informed Governor Rennie that for “planning purposes” they were assuming that an Order in Council would be made on 8 November 1965 with immediate effect, but that no publicity would be given until 10 November 1965. The Colonial Secretary explained that the Order would *inter alia* detach the islands and create “a separate colony”.¹⁶⁰

3.40 On the same date, the Foreign Office reported to the UK Mission to the UN in New York that the Mauritius Ministers had “accepted proposals on 5 November subject to certain understandings”.¹⁶¹ The Foreign Office, like the Colonial Office, considered it best to act as quickly as possible to detach the Chagos Archipelago:

¹⁵⁹ *Ibid.*, pp. 3-4 (emphasis in the original). See also: Foreign Office Telegram No. 4104 to the UK Mission to the United Nations, New York, 27 October 1965: Annex 23; UK Mission to the United Nations, New York, Telegram No. 2697 to the Foreign Office, 28 October 1965: Annex 24; Foreign Office Telegram No. 4310 to the UK Mission to the United Nations, New York, 6 November 1965: Annex 28; Foreign Office Telegram No. 4327 to the UK Mission to the United Nations, New York, 8 November 1965: Annex 30; UK Mission to the United Nations, New York, Telegram No. 2837 to the Foreign Office, 8 November 1965: Annex 31; Foreign Office Telegram No. 4361 to the UK Mission to the United Nations, New York, 10 November 1965: Annex 33.

¹⁶⁰ Colonial Office Telegram No. 267 to Mauritius, No. 356 to Seychelles, 6 November 1965, FO 371/184529: Annex 27.

¹⁶¹ Foreign Office Telegram No. 4310 to the UK Mission to the United Nations, New York, 6 November 1965, FO 371/184529: Annex 28, para. 1.

“2. In view of possible publicity and consequent pressure on the Mauritius and Seychelles Governments to change their minds, we are proceeding with detachment immediately. We are arranging for an Order in Council to be made on 8 November and for a prepared Parliamentary Question to be tabled on 9 November for written answer on 10 November. [...]

3. If this operation is complete before Mauritius comes up in the Fourth Committee it seems to us that you will then be better placed to deal with the inevitable criticism. We hope therefore that you will do your best to ensure that discussion of Mauritius and other territories in the Indian Ocean is put off for as long as possible, and at least until 11 November.”¹⁶²

The Foreign Office advised the UK Mission to “concert tactics with the United States Delegation”¹⁶³, and sent additional Guidance to the UK Mission.¹⁶⁴ The Guidance falsely stated that “[t]he islands chosen have virtually no permanent inhabitants”.¹⁶⁵ Lord Caradon, the British Ambassador at the UN, told London that there was nothing that could be done to prevent a debate on the detachment, and that this position “may well lead to charges of failure to carry out our Charter obligations to those who are permanent inhabitants.”¹⁶⁶

3.41 On 8 November 1965, Colonial Secretary Greenwood informed Governor Rennie that the “British Indian Ocean Territory” had been established by Order in Council:

“5. A meeting of the Privy Council was held this morning, 8th November, and an Order in Council entitled the British Indian Ocean Territory Order 1965 [...], has been made constituting the ‘British Indian Ocean Territory’ consisting of the Chagos Archipelago and Aldabra, Farquhar and Desroches islands.”¹⁶⁷

3.42 This Order in Council established the “BIOT”¹⁶⁸ with a “Commissioner” having wide-ranging powers *inter alia* to make laws and appointments. Section 18 of

¹⁶² *Ibid.*, paras 2 and 3.

¹⁶³ *Ibid.*, para. 5.

¹⁶⁴ Foreign Office Telegram No. 4327 to the UK Mission to the United Nations, New York, 8 November 1965: Annex 30.

¹⁶⁵ *Ibid.*, paras 2(a), (b) and (h). On the expulsion of the Chagossians by the UK, see paras 3.58-3.63 below.

¹⁶⁶ UK Mission to the United Nations, New York, Telegram No. 2837 to the Foreign Office, 8 November 1965: Annex 31, para. 2.

¹⁶⁷ Colonial Office Telegram No. 298 to Mauritius, 8 November 1965, FO 371/184529: Annex 29, para. 5.

¹⁶⁸ “British Indian Ocean Territory” Order No. 1 of 1965: Annex 32. Section 3 of the Order provides that:

“3. As from the date of this Order—

(a) the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius, and

the Order amended Section 90(1) of the 1964 Mauritius Constitution to exclude the Chagos Archipelago from the definition of “Mauritius”.¹⁶⁹

3.43 Following the detachment, there was widespread international condemnation of the UK’s actions. On 16 November 1965, the UK Permanent Representative to the UN (Lord Caradon) reported to the Foreign Office that the “BIOT” had been raised at a UN General Assembly Fourth Committee debate and that speakers had accused the UK of:

- “(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 had been persuaded to agree; and
- (d) violation of resolution 1514 (XV).”¹⁷⁰

3.44 Lord Caradon attached the statement made by the UK Representative, Mr. Brown, at the Fourth Committee meeting, in which he stated that “All that is involved here is an administrative re-adjustment, freely worked out with the Government and elected representatives of the people concerned.”¹⁷¹

3.45 On 16 December 1965, the UN General Assembly adopted resolution 2066 (XX) on the Question of Mauritius. The resolution noted that the UK, the administering

(b) the Farquhar Islands, the Aldabra Group and the Island of Desroches, being islands which immediately before the date of this Order were part of the Colony of Seychelles,
shall together form a separate colony which shall be known as the British Indian Ocean Territory.”

The 1965 Order was amended in 1968 by the “British Indian Ocean Territory (Amendment) Order 1968” (26 January 1968), to correct inaccuracies in the description of the Chagos Archipelago and the Aldabra Group in Schedules 2 and 3 of the 1965 Order.

¹⁶⁹ “British Indian Ocean Territory” Order No. 1 of 1965: Annex 32, Section 18(2):

“(2) Section 90(1) of the Constitution set out in schedule 2 to the Mauritius (Constitution) Order 1964 is amended by the insertion of the following definition immediately before the definition of ‘the Gazette’:-

‘Dependencies’ means the islands of Rodrigues and Agalega, and the St. Brandon Group of islands often called the Cargados Carajos;”

Section 18 also amended the Seychelles Letter Patent 1948, deleting the words “and the Farquhar Islands” from the definition of “the Colony” in Article 1(1); deleting references to “Desroches”; and the “Aldabra Group” from the first schedule and also made corresponding deletions to Section 2(1) of the Seychelles (Legislative Council) Order in Council 1960.

¹⁷⁰ UK Mission to the United Nations, New York, Telegram No. 2971 to the Foreign Office, 16 November 1965: Annex 35. Resolution 1514 (XV) was passed by the UN General Assembly on 14 December 1960. It is entitled ‘Declaration on the granting of independence to colonial countries and peoples’, and includes a provision that “6. 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.” See Annex 1.

¹⁷¹ UK Mission to the United Nations, New York, Telegram No. 2972 to the Foreign Office, 16 November 1965: Annex 36, p. 2.

Power, “has not fully implemented resolution 1514 (XV)” with regard to Mauritius, and noted

“*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 [resolution 1514 (XV)], and in particular paragraph 6 thereof.”¹⁷²

3.46 The resolution reaffirmed the “inalienable right of the people of the Territory of Mauritius to freedom and independence” and invited the UK to “take effective measures with a view to the immediate and full implementation of resolution 1514 (XV)”. It called on the UK “to take no action which would dismember the Territory of Mauritius and violate its territorial integrity”,¹⁷³ referring to the relevant parts of the reports of the Committee of 24 relating to Mauritius.¹⁷⁴

3.47 The UK Mission to the UN admitted that “it would not be difficult for our critics to develop the arguable thesis that detachment by itself was a breach of Article 73.”¹⁷⁵ From the UK’s point of view, there was no getting around the conclusion that the “BIOT” would be considered a non-self-governing territory:

“[o]n the basis of the information available it seems to us difficult to avoid the conclusion that the new territory is a non-self-governing territory under Chapter XI of the Charter, particularly since it has and will or may have a more or less settled population, however small. We cannot disclaim Charter obligations to the inhabitants because they are not indigenous, since this would destroy our case on the Falklands and Gibraltar; nor apparently would the facts substantiate a plea that the inhabitants are not permanent – even if (which is not necessarily the case) Chapter XI of the Charter were confined to permanent populations.”¹⁷⁶

3.48 However, the Colonial Office was still keen for the UK to avoid its obligations under Article 73 of the Charter, in part to avoid upsetting the US and jeopardising the joint UK-US plan to establish American military facilities in the Chagos Archipelago:

“we cannot in respect of the Indian Ocean Territory accept that the ‘interests of the inhabitants of these territories are paramount’. We should therefore get into a false position at

¹⁷² United Nations General Assembly Resolution 2066 (XX), 16 December 1965: Annex 38 (emphasis in original).

¹⁷³ *Ibid.*, paras. 2-4.

¹⁷⁴ The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

¹⁷⁵ Despatch dated 2 February 1966 from F.D.W. Brown, UK Mission to the United Nations, New York to C.G. Eastwood, Colonial Office: Annex 40, para. 11.

¹⁷⁶ *Ibid.* (emphasis in original).

once if we agreed that the Territory fell within the scope of Chapter XI of the Charter. We also believe that the Americans would be strongly opposed to acceptance by us of a Charter responsibility for the Territory.”¹⁷⁷

3.49 Further criticism of the detachment of the Chagos Archipelago was made at meetings of Sub-Committee I, as reported to London by the UK Mission to the UN in New York, on 1, 9 and 12 September 1966:

- (i) Mr. Malecela representing Tanzania, the Chairman of the meeting held on 9 September, reiterated the predominant view of Afro-Asian countries, opposing the establishment of military bases in the Indian Ocean, and asked for assurances from the UK that such bases would not be established. He stated that negotiations between a colony and the colonial Power could not be valid as these “could not be on an equal basis.”¹⁷⁸
- (ii) Another Tanzanian representative at the meeting on 12 September noted that “[i]t was significant that dismemberment of Mauritius and Seychelles had been carried out by the United Kingdom a few days before General Assembly resolution 2066(XX)” and that although the UK asserted that the islands were uninhabited they “belonged to Mauritius and Seychelles.”¹⁷⁹ The representative “demanded guarantees that the territories’ integrity would be respected” and urged that no troops be stationed in the area.¹⁸⁰
- (iii) The Syrian representative urged the Committee to investigate UK and US military plans and the “creation of a new colony”.¹⁸¹
- (iv) The representative of Mali stated that the UK’s foreign military bases were illegal and “contrary to the colonial peoples’ right to self-determination and independence.”¹⁸²
- (v) The Russian representative questioned the UK denial of an Anglo-American agreement on the establishment of military bases in the Indian Ocean, and urged that the Committee should be allowed to make investigations *in situ*.¹⁸³

¹⁷⁷ Despatch dated 7 January 1966 from C.G. Eastwood to F.D.W Brown, para. 3.

¹⁷⁸ UK Mission to the United Nations, New York, Telegram No. 1872 to the Foreign Office, 9 September 1966: Annex 42, para. 5.

¹⁷⁹ UK Mission to the United Nations, New York, Telegram No. 1877 to the Foreign Office, 12 September 1966: Annex 43, para. 2.

¹⁸⁰ *Ibid.*

¹⁸¹ UK Mission to the United Nations, New York, Telegram No. 1872 to the Foreign Office, 9 September 1966: Annex 42, para. 1.

¹⁸² *Ibid.*, para. 2.

¹⁸³ *Ibid.*, para. 4.

- (vi) The Representative from Yugoslavia aligned himself with the Declaration adopted at the recent Non-Aligned Movement Conference, providing that the presence of foreign military bases was an impediment to decolonisation.¹⁸⁴ He also said that the PMSD Ministers who had resigned, and the Mauritian people “had demonstrated in protest against British bases in [the] Indian Ocean” and that “[t]he United Kingdom was not entitled to dismember the territories or to use them for military purposes.”¹⁸⁵

3.50 Mr. Brown of the UK made a statement at the meeting of the Committee of 24 held on 6 October 1966. He made clear that he was “not seeking to argue or defend a case, but rather to establish what the facts are.” Nevertheless, he offered the following inaccurate and misleading response to the recommendations on detachment that had been made by Sub-Committee I:

“[m]y delegation explained what was involved in this in our statement in the Fourth Committee on 16 November [1965]. We made clear that the new arrangements represented an administrative readjustment which was fully agreed after consultations by the elected governments of Mauritius and Seychelles. [...] No decisions have yet been reached about the construction of any facilities anywhere in the British Indian Ocean Territory.”¹⁸⁶

3.51 On 20 December 1966, the UN General Assembly adopted resolution 2232 (XXI) concerning a number of non-self governing territories, including Mauritius and the Seychelles. The resolution cited the “chapters of the report of the Special Committee”, recalled resolutions 1514 (XV) and 2066 (XX), and expressed deep concern at:

“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”.¹⁸⁷

The General Assembly also reiterated:

“its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the

¹⁸⁴ UK Mission to the United Nations, New York, Telegram No. 1877 to the Foreign Office, 12 September 1966: Annex 43, para. 3.

¹⁸⁵ *Ibid.*

¹⁸⁶ Statement by Mr. Francis Brown in the Committee of 24: Mauritius, the Seychelles and St. Helena (Report of Sub-Committee I), 6 October 1966: Annex 44, p. 2

¹⁸⁷ United Nations General Assembly Resolution 2232 (XXI), 20 December 1966: Annex 45.

purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)”¹⁸⁸.

Both of these paragraphs were repeated in General Assembly resolution 2357 (XXII), adopted on 19 December 1967.¹⁸⁹

3.52 On 21 April 1967, Lord Caradon reported further strong criticism at the Committee of 24’s Sub-Committee I on Mauritius, Seychelles and St. Helena:

- (i) The representative from Mali had argued that “[t]he Charter requirement of respect for territorial integrity had not been observed”.¹⁹⁰
- (ii) The representative from Ethiopia had said that the UK had done little “to implement numerous United Nations resolutions”.¹⁹¹
- (iii) The Syrian representative asked whether the “BIOT” facilities “had the truly free consent of the Mauritian people who owned the islands”.¹⁹²
- (iv) The Russian representative stated that the UK decision not to abandon military plans in the Chagos Archipelago was “causing growing concern in many countries including India.”¹⁹³

IV. Post-Excision Actions

(a) The 1966 Agreement between the United Kingdom and the United States

3.53 The UK-US “Agreement Concerning the Availability for Defense Purposes of the British Indian Ocean Territory” (“the 1966 Agreement”) was concluded on 30 December 1966.¹⁹⁴ It provided that the “BIOT” was to remain under UK sovereignty and to be available to “meet the needs of both Governments for defense.”¹⁹⁵ The Agreement provided that “[t]he required sites shall be made available to the United States authorities without charge”¹⁹⁶ and that “the islands shall remain available to meet

¹⁸⁸ *Ibid.*

¹⁸⁹ United Nations General Assembly Resolution 2357 (XXII), 19 December 1967: Annex 51.

¹⁹⁰ UK Mission to the United Nations, New York, Telegram No. 60 to the Foreign Office, 21 April 1967: Annex 47, para. 1.

¹⁹¹ *Ibid.*, para. 2.

¹⁹² *Ibid.*, para. 3.

¹⁹³ *Ibid.*, para. 7.

¹⁹⁴ Exchange of Notes Constituting an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of United States of America Concerning the Availability for Defense Purposes of the British Indian Ocean Territory, in force 30 December 1966, 603 *U.N.T.S.* 273 (No. 8737): Annex 46.

¹⁹⁵ *Ibid.*, paras. (1) and (2).

¹⁹⁶ *Ibid.*, para. (4).

the possible defense needs of the two Governments for an indefinitely long period.”¹⁹⁷ The Agreement made no mention of the secret financial contribution made by the US, or the fate of the Mauritian population of the Chagos Archipelago.

3.54 Two further Agreements were signed on 30 December 1966: a Secret Exchange of Notes on Financing and an Exchange of Notes on the Seychelles Satellite Tracking Facility.¹⁹⁸

(b) The secret financial agreement

3.55 In 1967 the secret US financial contribution for the establishment of the “BIOT” gave rise to “a serious disagreement between [the UK] and the Americans”.¹⁹⁹ A minute dated 12 May 1967 from the UK Secretary of State for Defence, addressed to the Foreign Secretary and copied *inter alia* to Prime Minister Wilson, the Chancellor of the Exchequer and the Commonwealth Secretary, set out in detail the secret arrangement whereby the US had agreed to waive UK payments up to £5 million in connection with the development of Polaris nuclear-armed missiles.²⁰⁰ A minute dated 5 November 1965 from the Colonial Secretary to the UK Prime Minister explains that the US had insisted that their contribution should “be kept secret for Congressional reasons and in order to restrain the local governments from trying to put up the price.”²⁰¹

3.56 It subsequently emerged that the US position had changed and that, if pressed to do so, they would disclose their financial contribution.²⁰² A minute of 22 May 1967 from an official at the Colonial Office recorded that “the fact that they now seem to be changing their attitude is not only surprising but must be seriously disturbing for [UK] Ministers.” It was reported to the Foreign Secretary that “[t]his is embarrassing because we took steps to secure the agreement of the Comptroller and Auditor General that there was no need to draw Parliament’s attention to the transaction. [...] The situation is

¹⁹⁷ *Ibid.*, para. (11). Paragraph (11) also stipulates that “after an initial period of 50 years, this Agreement shall continue in force for a further period of twenty years unless, not more than two years before the end of the initial period, either Government shall have given notice of termination to the other, in which case this Agreement shall terminate two years from the date of such notice.”

¹⁹⁸ The Seychelles Satellite Tracking Station Agreement was published on 25 January 1967.

¹⁹⁹ Minute dated 22 May 1967 from a Colonial Office official, A. J. Fairclough, to a Minister of State, with a Draft Minute appended for signature by the Secretary of State for Commonwealth Affairs addressed to the Foreign Secretary, FCO 16/226: Annex 49.

²⁰⁰ Minute dated 12 May 1967 from the Secretary of State for Defence to the Foreign Secretary, FO 16/226: Annex 48. The minute also states that the US “insisted that their contribution should be kept secret, since they said that public knowledge that a U.S. subsidy was being made in respect of a British Colonial Territory would embarrass them in Congress. We accepted this, and have faithfully observed it. We and the Americans have just (simultaneously) published the White Paper (Cmnd.3231) on the availability of B.I.O.T. for defence purposes. It contained no mention of any American payment or contribution.”

²⁰¹ Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529: Annex 26, para. 2.

²⁰² Minute dated 12 May 1967 from the Secretary of State for Defence to the Foreign Secretary, FO 16/226: Annex 48, para. 2. The minute explains that US “think they would have to disclose [the secret financial contribution] because some U.S. scientists seem to be aware of the U.S. financial participation and have mentioned a figure of \$14 million.”

therefore potentially so embarrassing, if it breaks on either side of the Atlantic, that we must have a clear understanding with the U.S. Government as to how we handle it.”²⁰³ The British Embassy in Washington was to be requested to approach the US Secretary of State to explain that revealing the secret arrangement would put the UK “in acute Parliamentary and constitutional difficulties”.

3.57 A further draft minute addressed to the Foreign Secretary, and copied *inter alia* to Prime Minister Wilson, the Chancellor of the Exchequer and the Secretary of State for Defence, foresaw “acute embarrassment in [the UK] relationship with Mauritius” if the secret arrangement were to be revealed.²⁰⁴ It explained that “the Prime Minister himself flatly told the Premier of Mauritius that the matter was only between Britain and Mauritius. There is no doubt that the Premier believed that the full amount of the compensation paid to Mauritius was being found by Britain.”²⁰⁵ The minute stated that:

“[i]t is well nigh certain that accusations would be made that the British Government and the Prime Minister personally, had deliberately deceived the Mauritius Government in order to secure their agreement to the separation from Mauritius of the Chagos Archipelago at a low level of compensation.”²⁰⁶

(c) The expulsion of the residents of the Chagos Archipelago

3.58 The UK feared that it might be subjected to the obligations under Article 73(e) of the UN Charter, a provision which requires reports to be transmitted to the UN regarding economic and social conditions in non-self-governing territories. It had already been decided secretly by the UK that the residents of the Archipelago would be removed, but the UK recognised that this “may make it difficult to avoid an obligation to report on the territory under Article 73(e)”.²⁰⁷ The UK was “most anxious [...] not to have to do this”.²⁰⁸ In fact, the UK did all it could to depopulate the Chagos Archipelago to avoid the “BIOT” being added by the UN Committee of 24 to its list of non-self-governing territories.

3.59 The UK Mission to the UN acknowledged that “it would not be difficult for our critics to develop the arguable thesis that detachment by itself was a breach of

²⁰³ *Ibid.*, para. 3.

²⁰⁴ Minute dated 22 May 1967 from a Colonial Office official, A. J. Fairclough, to a Minister of State, with a Draft Minute appended for signature by the Secretary of State for Commonwealth Affairs addressed to the Foreign Secretary, FCO 16/226: Annex 49, para. 1 of Draft Minute.

²⁰⁵ *Ibid.*, para. 2 of the Draft Minute.

²⁰⁶ *Ibid.*, para. 3 of the Draft Minute.

²⁰⁷ Foreign Office Telegram No. 4361 to the UK Mission to the United Nations, New York, 10 November 1965: Annex 33, para. 5.

²⁰⁸ Foreign Office Telegram No. 4361 to the UK Mission to the United Nations, New York, 10 November 1965: Annex 33, para. 5. See also Despatch dated 7 January 1966 from C. G. Eastwood, Colonial Office to F. D. W. Brown, UK Mission to the United Nations, New York: Annex 39.

Article 73.”²⁰⁹ From the UK’s point of view, there was no getting around the fact that the “BIOT” would be considered a non-self-governing territory.²¹⁰

3.60 The UK and US were acutely aware of the attention that expulsion would raise at the UN, and particularly at the Committee of 24. The Foreign Office noted the US recommendation to use the term “migrant laborers” when referring to the residents of the Chagos Archipelago, but conceded that although “it was a good term for cosmetic purposes [...] it might be difficult to make completely credible as some of the ‘migrants’ are second generation Diego residents.”²¹¹

3.61 Between 1968 and 1973, the UK forcibly removed all the Chagossians. The UK Ministry of Defence negotiated the purchase of all private freeholds on the Chagos Archipelago, and in the interim period during which the US made preparations for the construction of the military base on Diego Garcia, the UK leased the islands back to their former owners.²¹²

3.62 In March 1967, the US announced that it intended to begin construction work on Diego Garcia in the second half of 1968. A survey to that end took place in June and July 1967.²¹³ The US proposal was for a \$46 million facility, including a 12,000-foot runway.²¹⁴ A US telegram in August 1968 formally requested the removal of the residents of Diego Garcia.²¹⁵ There was a delay while the US Defence Department obtained Congressional approval for the proposal, but then in 1970, the US gave notice to the UK that Diego Garcia would be required in July 1971. Accordingly, the “BIOT” Commissioner passed the Immigration Ordinance 1971, s.4(1) of which provided that “no person shall enter the Territory or, being in the Territory, shall be present or remain in the Territory, unless he is in possession of a permit [...]” This provided the purported legal basis for the expulsion, and then the continued exclusion, of the inhabitants of the Chagos Archipelago.²¹⁶

3.63 On 23 February and 23 June 1972, the Prime Minister of Mauritius held talks with UK representatives on a resettlement scheme for the former residents of the Chagos Archipelago.²¹⁷ The UK agreed to pay £650,000 to the Mauritian Government, “provided that the Mauritius Government accept such payment in full and give full and final discharge of [the UK’s] undertaking, given at Lancaster House, London, on 23 September 1965, to meet the cost of resettlement of persons displaced from the Chagos

²⁰⁹ Despatch dated 2 February 1966 from F.D.W. Brown, UK Mission to the United Nations, New York to C. G. Eastwood, Colonial Office, Annex 40, para. 11.

²¹⁰ *Ibid.*, para. 6. See also para. 3.57 above.

²¹¹ See: David Vine, *Island of Shame*, Princeton University Press (2009), (hereinafter “Vine”), p. 102.

²¹² UK Chronological Summary: Annex 3, item no. 70.

²¹³ *Ibid.*, item no. 78.

²¹⁴ Vine, p. 100.

²¹⁵ *Ibid.*

²¹⁶ The Immigration Ordinance 1971 was subsequently declared unlawful by the High Court in London: see further para. 3.78 below.

²¹⁷ Letter dated 26 June 1972 from the British High Commission, Port Louis, to the Prime Minister of Mauritius: Annex 66.

Archipelago”.²¹⁸ On 4 September 1972, the Mauritian Prime Minister accepted payment of £650,000 as the cost of the resettlement scheme, but added that “[o]f course, this does not in any way affect the verbal agreement giving [Mauritius] all sovereign rights relating to minerals, fishing, prospecting and other arrangements.”²¹⁹

(d) The return of Aldabra, Farquhar and Desroches to Seychelles

3.64 During UK-US talks on the Indian Ocean in November 1975, the Head of the UK Foreign and Commonwealth Office Hong Kong and Indian Ocean Department indicated that the UK was minded to return the islands of Aldabra, Farquhar and Desroches to Seychelles, in order to allow the peaceful transition of Seychelles to independence by June 1976.²²⁰ Both the US and the UK recognised the impossibility of using the islands for defence purposes in the future, as they were populated, and “[a]fter the outcry over the workers removed from the Chagos Archipelago, it would be extremely difficult politically to do the same thing in the ex-Seychelles islands”.²²¹

3.65 A primary concern for both the US and the UK was the reaction from Mauritius. A briefing document of 14 July 1975 to the UK Prime Minister raised the following concerns:

“Might Mauritius not be encouraged, or even compelled by a need not to be seen to be outdone by the Seychelles, to press for the Chagos Archipelago to be handed back to her? Or would Mauritius [...] accept our action as an earnest of our intention to hand back that archipelago [when it no longer has a defence value] and be ready to wait patiently for that to happen?”²²²

3.66 The US, the UK and Seychelles held talks from 16-18 March 1976 to set out the conditions on which the islands would be returned to Seychelles. The UK refused to allow Mauritius to participate in the talks. On 18 March 1976, representatives of the UK and Seychelles signed an agreement to return the islands of Aldabra, Desroches and Farquhar to Seychelles on 29 June 1976, Seychelles Independence Day.²²³

²¹⁸ *Ibid.*

²¹⁹ Letter dated 4 September 1972 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: Annex 67. The Prime Minister reiterated Mauritian fishing rights in the Chagos Archipelago on 24 March 1973: Letter dated 24 March 1973 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: Annex 69; see para. 3.97 below.

²²⁰ British Embassy, Washington, November 1975, Minutes of Anglo-US Talks on the Indian Ocean held on 7 November 1975 (Extract): Annex 76, para. 48.

²²¹ Anglo/US Consultations on the Indian Ocean: November 1975, Agenda Item III, Brief No. 4: Future of Aldabra, Farquhar and Desroches: Annex 75, para. 2(d).

²²² Briefing note dated 14 July 1975 from John Hunt to the Prime Minister: Annex 73, para. 3(a).

²²³ Heads of Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, the Administration of the British Indian Ocean Territory and the Government of Seychelles Concerning the Return of Aldabra, Desroches and Farquhar to Seychelles to be Executed on Independence Day, FCO 40/732: Annex 79. See also Figure 3 of Volume 4.

(e) Mauritian independence, and domestic reaction to the excision and expulsions

3.67 General elections were held in Mauritius on 7 August 1967, and independence from the UK was achieved on 12 March 1968, along with the promulgation of a new Constitution.

3.68 After the unlawful excision of the Chagos Archipelago in November 1965, some members of the Opposition in Mauritius criticised both Premier Ramgoolam's government and the other Mauritius Ministers who had attended the 1965 talks for not preventing the excision. However, at the same time there was widespread recognition that the excision had been carried out by the UK in exchange for the grant of independence.²²⁴ In response to criticism from opposition parties, the Mauritian government consistently explained that it had not been possible to prevent the UK's unilateral detachment of the Chagos Archipelago from Mauritius. During a Parliamentary debate on 26 June 1974, Prime Minister Ramgoolam²²⁵ set out in more detail the modalities of the detachment and explained why it was unavoidable.²²⁶ The illegality of the detachment was recognised across the political spectrum.²²⁷

3.69 On 8 November 1977, Prime Minister Ramgoolam stated that Mauritius was now seeking the return of the Chagos Archipelago from the UK. He called for "patient diplomacy at bilateral and international levels."²²⁸

3.70 Sir Harold Walter, then Minister of External Affairs of Mauritius, explained how the Government perceived the excision of the Chagos Archipelago:

"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!"²²⁹

²²⁴ See for example Mauritius Legislative Assembly, 9 April 1974, Speech from the Throne – Address in Reply, Statement by Hon. G. Ollivry: Annex 70, p. 266.

²²⁵ Sir Seewoosagur Ramgoolam became Prime Minister of Mauritius on 12 March 1968 when Mauritius obtained its independence.

²²⁶ Mauritius Legislative Assembly, 26 June 1974, Committee of Supply: Annex 71, pp. 1946-1947.

²²⁷ See for example Mauritius Legislative Assembly, 15 March 1977, Speech from the Throne – Address in Reply, Statement by Hon. M.A. Peeroo: Annex 81.

²²⁸ Mauritius Legislative Assembly, 15 March 1977, Speech from the Throne – Address in Reply, Statement by Hon. M.A. Peeroo: Annex 82, p. 3179. This commitment to recover the Chagos Archipelago by diplomacy at bilateral and international levels was reiterated by the Prime Minister on 20 November 1979 (Mauritius Legislative Assembly, 20 November 1979, Reply to PQ No. B/967: Annex 88, p. 5025).

²²⁹ Mauritius Legislative Assembly, 26 June 1980, Interpretation and General Clauses (Amendment) Bill (No. XIX of 1980), Committee Stage, Statement by Sir Harold Walter: Annex 92, p. 3413.

3.71 Prime Minister Ramgoolam made clear that he was forced to acquiesce in the UK's unilateral detachment of the Chagos Archipelago. "[W]e had no choice."²³⁰ He added: "We were a colony and Great Britain could have excised the Chagos Archipelago."²³¹

3.72 On 21 July 1982, the Mauritius Legislative Assembly set up a Select Committee to look into the circumstances which had led to the excision of the Chagos Archipelago from the territory of Mauritius. The Select Committee was composed of nine members of the Mauritian Parliament, chaired by the Minister of External Affairs. The Report of the Select Committee, published in June 1983, recognised that the excision of the Chagos Archipelago had been the price to pay in order to achieve independence.²³² The Select Committee concluded that the "blackmail element [...] strongly puts in question the legal validity of the excision", and that the UK had acted in violation of the Charter of the United Nations.²³³

3.73 On numerous occasions since gaining its independence in 1968, Mauritius has asserted its sovereignty over the Chagos Archipelago and its desire, as *parens patriae* of its citizens, to protect the rights of the former inhabitants of those islands, including their right of return to the Archipelago. It has asserted these rights in general statements, including 28 statements to the UN General Assembly,²³⁴ and in bilateral communications with the UK.²³⁵ It has also objected to the UK's designation of the

²³⁰ Mauritius Legislative Assembly, 11 April 1979, Speech from the Throne – Address in Reply, Statement by the Prime Minister of Mauritius: Annex 85, p. 456.

²³¹ Mauritius Legislative Assembly, 25 November 1980, Reply to PQ No. B/1141: Annex 96, p. 4223.

²³² Mauritius Legislative Assembly, Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983 (extract): Annex 97, p. 36.

²³³ *Ibid*, p. 37.

²³⁴ 28 statements between 1980 and 2011. See Extracts from Annual Statements Made by Mauritius to the United Nations General Assembly (Chagos Archipelago): Annex 95.

²³⁵ For example see letter dated 9 January 1998 from the Prime Minister of Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs: Annex 106 (in which the Mauritian Prime Minister proposed that in order to remedy the "historic injustice" committed by the UK, former residents of the Chagos Archipelago should be allowed to return, if they wished, to some of the outer islands of the Chagos Archipelago); Note Verbale dated 5 July 2000 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No. 52/2000 (1197): Annex 111; Note Verbale dated 6 November 2000 from the Ministry of Foreign Affairs and Regional Cooperation, Mauritius to the British High Commission, Port Louis, No. 97/2000 (1197/T4): Annex 113 (in which the Mauritian Ministry of Foreign Affairs wrote to the British High Commission in Port Louis, noting the High Court judgment in the *Bancoult* case which "declares unlawful the removal of the Mauritian citizens from the Chagos Archipelago and the deprivation of their right to return there"); Letter dated 6 July 2001 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Minister of Foreign Affairs and Regional Cooperation, Mauritius: Annex 116 (in which the UK Foreign Secretary stated that "[t]he British Government acknowledges that Mauritius has a legitimate interest in the future of the islands and recognises Mauritius as the only State which could assert a claim to the territory in the event that the United Kingdom relinquishes its own sovereignty"); 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: 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: Annex 162; 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): Annex 167; Letter dated 20 October 2011 from the Minister of Foreign Affairs, Regional

Chagossians as “contract workers” and has maintained that the Chagossians have “always been, and are citizens of Mauritius and as such have always been residing in Mauritius.”²³⁶ It has consistently protested against the UK’s creeping assertion of maritime zones in that territory, culminating in the 2010 Marine Protected Area.²³⁷

3.74 Mauritius has made clear that “there is no strategic or defence impediment” for the return of persons of Mauritian origin who were living in the Chagos Archipelago to the outer islands of the Archipelago, and that “we have no objection to the continued presence of the US military base on Diego Garcia and we have informed the United States that there is no risk with regard to their security of tenure on the island.”²³⁸

(f) Subsequent legal developments in relation to the expelled former residents of the Chagos Archipelago

3.75 In 1975, Michel Vencatassen, a former resident of the Chagos Archipelago who was forcibly removed in 1971, brought a compensation claim in the High Court in London against several UK Government Ministers. The claim “was for damages for intimidation and deprivation of liberty in connection with his departure from Diego Garcia, but the proceedings came to be accepted on both sides as raising the whole question of the legality of the removal of the Chagossians from the islands.”²³⁹ After lengthy negotiations, the claim was settled in 1982 on the basis that the UK Government pay £4 million into a trust fund for the former residents of the Chagos Archipelago, on the condition that they renounce their rights to future claims and to return to the Chagos Archipelago.²⁴⁰ On 7 July 1982, Mauritius and the UK signed an Agreement relating to the payment of further compensation.²⁴¹ The Mauritian Minister of External Affairs stated that “the Agreement has had, and has, no bearing whatsoever

Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs: Annex 172; Letter dated 21 March 2012 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs: Annex 173.

²³⁶ See Note Verbale dated 11 May 1999 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No. 29/99 (1197/25): Annex 108; Note Verbale dated 5 July 2000 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No. 52/2000 (1197): Annex 111.

²³⁷ These protests are considered in detail in Chapter 4, *infra*.

²³⁸ Letter dated 21 December 2000 from the Minister of Foreign Affairs and Regional Cooperation, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs: Annex 115.

²³⁹ As summarised by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, para. 12. The UK caselaw discussed in this section has not been annexed, but can be provided if required.

²⁴⁰ *Ibid.*, para. 13.

²⁴¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius concerning the Ilois, Port Louis, 7 July 1982, with amending Exchange of Notes, Port Louis, 26 October 1982, Cmnd. 8785.

on the issue of sovereignty”, but was solely concerned with the issue of compensation for the Mauritian citizens who were former residents of the Chagos Archipelago.²⁴²

3.76 In a subsequent Parliamentary debate, Mauritian Prime Minister Sir Anerood Jugnauth explained that:

“[t]his Bill²⁴³ also safeguards the sovereignty of Mauritius over the Chagos Archipelago including Diego Garcia, and follows on the Agreement which, we have made absolutely sure, has no bearing whatsoever, explicitly or implicitly, on the question of sovereignty but is concerned solely with the compensation to the *Ilois* [Chagossians] and the *Ilois* Community.”²⁴⁴

3.77 The Ilois Trust Fund Act was enacted on 30 July 1982, and put in place the mechanism required by the 1982 Agreement. Section 12 of the Act provided that:

“12. Nothing in this Act shall affect the sovereignty of Mauritius over the Chagos Archipelago, including Diego Garcia.”²⁴⁵

3.78 In 1998, another former resident of the Chagos Archipelago, Olivier Bancoult, applied to the High Court in London for judicial review of the UK Immigration Ordinance 1971.²⁴⁶ He sought a declaration that the Ordinance was void because it purported to authorise the expulsion of Chagossians from the Chagos Archipelago, and a declaration that the policy which prevented him from returning to and residing in the Archipelago was unlawful. On 3 November 2000, the High Court gave judgment in favour of Mr Bancoult, holding that the 1971 Ordinance was unlawful on the basis that the Government had purported to make it under a power to legislate for the “peace, order and good government” of the territory, which did not include the power to expel the residents. Accordingly, the Court quashed the Ordinance.²⁴⁷

3.79 In response, the then Foreign Secretary Robin Cook stated that the British Government accepted the ruling and did not intend to appeal; that work on the feasibility of resettling the former residents took on a new importance in light of the judgment; that in the meantime a new Immigration Ordinance would be put in place in order to allow the former residents to return to the outer islands of the Archipelago; and

²⁴² Government House, Port Louis, Speech by the Hon. Jean Claude G. R. De L’Estrac, Minister of External Affairs, Tourism & Emigration on the Occasion of the Signing of an Agreement Between the Mauritius and the British Governments on Compensation to the Ilois and the Ilois Community, on Wednesday, the 7th July, 1982.

²⁴³ The Ilois Trust Fund Bill, designed to set up a fund to ensure that the income from the money provided for in the July 1982 Agreement was used for the benefit of the former residents of the Chagos Archipelago.

²⁴⁴ Parliamentary debate on the Ilois Trust Fund Bill (No. IX of 1982).

²⁴⁵ Ilois Trust Fund Act 1982, Act No 6 of 1982, 30 July 1982.

²⁴⁶ See para. 3.62 above.

²⁴⁷ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2001] QB 1067 (Laws LJ and Gibbs J).

that “the Government has not defended what was done or said 30 years ago. As Laws LJ recognised, we made no attempt to conceal the gravity of what happened.”²⁴⁸

3.80 The UK Government then passed the Immigration Ordinance 2000, largely identical to the Immigration Ordinance 1971, but providing that the restrictions on entry to the Chagos Archipelago did not apply to Chagossians, save in respect of Diego Garcia.

3.81 In April 2002, the High Court dismissed a case brought by former residents of the Chagos Archipelago against the Attorney General and other UK Ministers, claiming compensation and restoration of their property rights, and declarations of their entitlement to return to all the islands of the Chagos Archipelago, and to measures facilitating their return.²⁴⁹ On 9 October 2003, the High Court dismissed additional claims.²⁵⁰ The Court of Appeal refused leave to appeal on grounds relating to English law, while recognising that the compensation which the former residents had received “has done little to repair the wrecking of their families and communities, to restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record.”²⁵¹

3.82 In 2004, in complete disregard of the previous commitment to work towards resettlement of the Chagos Archipelago, the UK Government repealed the Immigration Ordinance 2000 and introduced the “British Indian Ocean Territory (Constitution) Order 2004”, section 9 of which restored the pre-2001 position of complete exclusion of all persons from the Chagos Archipelago, including the former residents whose right to be present on all islands other than Diego Garcia had been recognised in 2001.

3.83 Mr Bancoult challenged the 2004 Order by way of a second claim for judicial review. The High Court held that the 2004 Order, and an immigration order made in parallel to it,²⁵² were irrational in that they promoted the interests of the UK and not the former residents; the Court therefore quashed the Orders.²⁵³ The Court of Appeal upheld this decision, on the basis that (1) the removal or subsequent exclusion of the Chagossians for reasons unconnected with their collective wellbeing was an abuse of the power of colonial governance exercisable by Her Majesty in Council; and (2) Foreign Secretary Robin Cook’s press statement after the 2000 High Court decision, and the Immigration Ordinance 2000, were promises to the former residents which gave rise to a legitimate expectation that, in the absence of a relevant change of circumstances (and none had been identified), their rights of entry to and abode in the Chagos Archipelago would not be revoked.²⁵⁴

²⁴⁸ Quoted by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, para. 17.

²⁴⁹ Summarised by Lord Hoffmann at *ibid.*, para. 20.

²⁵⁰ *Chagos Islanders v Attorney General* [2003] EWHC 2222 (Ouseley J).

²⁵¹ *Chagos Islanders v Attorney General* [2004] EWCA Civ 997, per Sedley LJ at para. 54.

²⁵² “British Indian Ocean Territory” (Immigration) Order 2004.

²⁵³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2006] EWHC 1038 (Admin).

²⁵⁴ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365.

3.84 The UK Government appealed to the House of Lords (then the highest court in the UK), which allowed the appeal by a 3-2 majority, holding that the power to take the measures in question was not limited to objectives connected to the “peace, order and good government” of the territory, but extended to the wider interests of the UK; that such matters were the primary responsibility of the executive, not the courts; and that the measures could not be said to be irrational, given a broader interpretation of the power to make them.²⁵⁵ The Court was, however, highly critical of the Government’s conduct in the Chagos Archipelago. Lord Hoffmann stated that:

“My Lords, it is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous disregard of their interests.”²⁵⁶

V: The United Kingdom’s Undertakings with Regard to Fishing, Mineral and Oil Rights

3.85 Notwithstanding the unlawful excision, the UK has long acknowledged Mauritius’ fishing and mineral rights in the Chagos Archipelago. The US too has expressed its understanding of Mauritius’ rights in relation to fishing and minerals.²⁵⁷ The following section sets out the history of the UK’s undertakings in this regard; the significance of those undertakings is examined in Chapters 6 and 7, together with the UK’s recognition of Mauritius’ right to submit preliminary information to the Commission on the Limits of the Continental Shelf established by the Convention, in support of its submission for an extended continental shelf around the Chagos Archipelago.

(a) Fishing rights

3.86 The UK had acknowledged Mauritius’ fishing rights in the Chagos Archipelago long before the creation of the “BIOT”. It had sought to obtain information about “fishing rights and practice in the Chagos Archipelago” in order to assist in its discussions with the US “on maintaining the access of Mauritian fishermen to the islands.”²⁵⁸ An official at the Colonial Office, writing to the Foreign Office, explained

²⁵⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453.

²⁵⁶ *Ibid.*, para. 10. Mr Bancoult has challenged the decision of the House of Lords before the European Court of Human Rights, where the case is currently pending (*Bancoult v United Kingdom*). In August 2010, Mr Bancoult issued a further judicial review claim before the High Court in London challenging the lawfulness of the UK’s decision to establish the “MPA”, on the basis that the decision had an ulterior motive (namely the continued exclusion of the former residents of the Chagos Archipelago), and that the purported process of consultation had been seriously flawed by reason of the non-disclosure of significant information. The case is currently pending.

²⁵⁷ The US has recognised that Mauritius “retained fishing and minerals (but not tourism) rights to the Chagos Archipelago”: see Office of International Security Operations Bureau, Politico-Military Affairs, United States Department of State, “Disposition of the Seychelles Islands of the BIOT”, 31 October 1975, para. 11: Annex 74.

²⁵⁸ Letter dated 8 February 1966 from K.W.S. MacKenzie, Colonial Office to A. Brooke-Turner, UK Foreign Office, FO 371/190790: Annex 41. The letter refers to a previous communication dated 28 October 1965, in which Mauritius’ fishing rights are discussed.

that the UK was “anxious to avoid anything in the nature of blanket restrictions on activities by Mauritian fishermen”.²⁵⁹

3.87 A crucial recognition of Mauritius’ fishing rights in the Chagos Archipelago is contained in the Lancaster House undertakings of 23 September 1965. As mentioned above,²⁶⁰ the record of the meeting sets out the UK’s view of the understanding that was eventually reached, which included a commitment that “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: [...] Fishing Rights.”²⁶¹

3.88 Two days after the promulgation of the 1965 Order in Council which excised the Chagos Archipelago and incorporated it into the newly established “BIOT”, the Colonial Office wrote to the Governor of Mauritius to enquire as to the “nature of fishing practised by people in [the] Chagos Archipelago”, and the “value to Mauritius of waters in the Archipelago as sources of fish.”²⁶² The Governor replied that the nature of fishing practised was “mainly handline with some basket and net fishing by local population for own consumption”. With regard to the value to Mauritius of waters in the Chagos Archipelago as a source of fish, the Governor noted that the fishable area was roughly 2,433 square miles, and that this represented a potential 95,000 tons of fish and 147,000 tons of shark.²⁶³

3.89 The Colonial Secretary also asked for an “indication of use made of international waters in [the] Archipelago” and about the “extent of territorial waters round islands”. Governor Rennie replied that there was no use of international waters, and that the extent of territorial waters was unknown but that an area of roughly 6,000 square miles was covered by banks.²⁶⁴

3.90 On 12 July 1967, the Commonwealth Office wrote to Governor Rennie about the preservation of the fishing rights of Mauritius in the Chagos Archipelago. This was in view of “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.”²⁶⁵

3.91 The Commonwealth Office also referred to two further matters: fishing limits and the limits of territorial waters. The application of UK law to the “BIOT” would

²⁵⁹ Letter dated 8 February 1966 from K.W.S. MacKenzie, Colonial Office to A. Brooke-Turner, UK Foreign Office, FO 371/190790: Annex 41.

²⁶⁰ Para. 3.31.

²⁶¹ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: Annex 19, para. 22.

²⁶² Colonial Office Telegram No. 305 to Mauritius, 10 November 1965: Annex 34.

²⁶³ Mauritius Telegram (unnumbered) to the Secretary of State for the Colonies, 17 November 1965: Annex 37.

²⁶⁴ *Ibid.*

²⁶⁵ Letter dated 12 July 1967 from the UK Commonwealth Office to the Governor of Mauritius, FCO 16/226: Annex 50, para. 2.

result in a 3-mile territorial sea and a 12-mile fishery limit around the Chagos Archipelago. In accordance with the 1958 Territorial Sea Convention, Mauritius would be granted “habitual fishing rights” between six and twelve miles.²⁶⁶ As an alternative, the Commonwealth Office proposed that the UK could declare “an exclusive fishing zone” from the limit of the 3-mile territorial sea up to 12 miles.²⁶⁷ The Commonwealth Office was “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.”²⁶⁸ As such, the Commonwealth Office thought “it would be convenient to be able to base any special arrangements made for Mauritius (and Seychelles) on habitual or traditional fishing arrangements, provided that no other countries can claim similar use in the past.”²⁶⁹

3.92 On 10 July 1969, the “BIOT” Commissioner issued Proclamation No. 1, establishing “a fisheries zone contiguous to the territorial sea of the British Indian Ocean Territory” which extended from the limit of the territorial sea to an outer limit of 12 nautical miles from the coast.²⁷⁰ The Proclamation further stated that “Her Majesty will exercise the same exclusive rights in respect of fisheries in the said fisheries zone as She has in respect of fisheries in the territorial sea of the British Indian Ocean Territory, subject to such provisions as may hereafter be made by law for the control and regulation of fishing [...]”²⁷¹

3.93 Further correspondence dated 24 March 1970 from the Foreign and Commonwealth Office, and 30 May 1970 from the Governor of Seychelles, described plans to enact fishing ordinances.²⁷² The latter despatch noted that “[o]ur dependence on fisheries is such that it may later be in our interests to extend fisheries limits beyond 12 miles.”²⁷³ A minute dated 5 June 1970 from a Foreign and Commonwealth Office official, which refers to the despatch of 30 May 1970 from the Governor of Seychelles, explains that as the proposed fishing regime is “exceedingly complicated”, the US Government should be forewarned “as we undertook at the Lancaster Conference in

²⁶⁶ *Ibid.*, para. 4(a).

²⁶⁷ *Ibid.*, para. 5.

²⁶⁸ *Ibid.*, para. 6.

²⁶⁹ *Ibid.*, para. 6. See also Despatch dated 28 April 1969 from J. W. Ayres, Foreign and Commonwealth Office to J. R. Todd, Administrator, “BIOT”, FCO 31/2763: Annex 52.

²⁷⁰ “British Indian Ocean Territory” Proclamation No. 1 of 1969: Annex 53. See also Figure 4 of Volume 4.

²⁷¹ *Ibid.*

²⁷² Despatch dated 24 March 1970 from A. F. Knight, Foreign and Commonwealth Office to J. R. Todd, “BIOT” Administrator: Annex 57; Telegram No. BIOT 12 dated 30 May 1970 from the Governor of Seychelles to the Foreign and Commonwealth Office: Annex 58.

²⁷³ Telegram No. BIOT 12 dated 30 May 1970 from the Governor of Seychelles to the Foreign and Commonwealth Office: Annex 58. See also Minute dated 5 June 1970 from J. Thomas (Defence Department) to J. W. Ayres (Aviation and Marine Department), UK Foreign and Commonwealth Office, FCO 32/716: Annex 59.

September 1965 to use our good offices to protect Mauritian fishing interests in Chagos waters.”²⁷⁴

3.94 The Fishery Limits Ordinance was enacted by the “BIOT” Commissioner on 17 April 1971.²⁷⁵ Section 3 provided that it was an offence for a person to fish within the territorial sea or contiguous zone of the “BIOT” on board a foreign fishing vessel. However, Section 4 carved out an exemption by which the Commissioner could “designate any country outside the Territory and the area in which and descriptions of fish or marine product for which fishing boats registered in that country may fish.” This had the purpose of “enabling fishing traditionally carried out in any area within the contiguous zone by foreign fishing boats to be continued.” A Foreign and Commonwealth Office letter dated 3 June 1971 made clear that Section 4 was intended to preserve the fishing rights of Mauritius in the Chagos Archipelago.²⁷⁶

3.95 The Foreign and Commonwealth Office wrote to the British High Commission in Port Louis on 2 July 1971, referring to Mauritius’ traditional fishing rights in the Chagos Archipelago, preserved by the undertaking given by the UK at the Lancaster House meeting of 23 September 1965. The Foreign and Commonwealth Office suggested that an approach be made to the Mauritius Government setting out the fishing regime, and stated that:

“[i]ncluded within the BIOT fishing zone are certain waters which have been traditionally fished by vessels from Mauritius. [...] The Commissioner of BIOT will use his powers under Section 4 of BIOT Ordinance No 2/1971, to enable Mauritian fishing boats to continue fishing in the 9-mile contiguous zone in the waters of the Chagos Archipelago. This exemption 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”.²⁷⁷

²⁷⁴ Minute dated 5 June 1970 from J. Thomas (Defence Department) to J. W. Ayres (Aviation and Marine Department), UK Foreign and Commonwealth Office, FCO 32/716: Annex 59.

²⁷⁵ “British Indian Ocean Territory” Ordinance No. 2 of 1971: Annex 60.

²⁷⁶ Despatch dated 3 June 1971 from M. Elliott, UK Foreign and Commonwealth Office to F.R.J. Williams, Seychelles, FCO 31/2763: Annex 61: “[i]t is clearly important that the Mauritian Government in particular should be informed, and presumably given an assurance that the Commissioner for the B.I.O.T. will use his discretion under the ordinance to permit Mauritian vessels to fish in the waters of the Chagos Archipelago [...]. [C]an you confirm that the Commissioner will use his discretion in this way?” The response was unambiguous and confirmed that “the Commissioner who has approved this letter in draft, will use his powers under section 4 of the Ordinance to enable Mauritian fishing boats to fish within the contiguous zone in the waters of the Chagos Archipelago.” (Despatch dated 16 June 1971 from F.R.J. Williams, Seychelles to M. Elliott, UK Foreign and Commonwealth Office, BIOT/54/61: Annex 62.)

²⁷⁷ Despatch dated 2 July 1971 from M. Elliott, UK Foreign and Commonwealth Office to R. G. Giddens, British High Commission, Port Louis, FCO 31/2763: Annex 63. On 29 November 1977, Sir S. Ramgoolam referred to the UK’s recognition of Mauritius’ rights in the waters of the Chagos Archipelago in a Parliamentary Answer (Mauritius Legislative Assembly, 29 November 1977, Reply to PQ No. B/634: Annex 83, p. 3513).

This information was transmitted to the Government of Mauritius by the British High Commission on 15 July 1971.²⁷⁸

3.96 On 26 May 1972, the Office of the Deputy Governor in Seychelles confirmed that “Mauritians have been declared as traditional fishermen in BIOT as the islands formerly formed part of Mauritius.”²⁷⁹

3.97 Mauritius has consistently reminded the UK of the undertaking which it gave on 23 September 1965 to preserve Mauritius’ fishing rights in the Chagos Archipelago. 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 in any way affect the UK agreement to give Mauritius “all sovereign rights relating to minerals, fishing, prospecting and other arrangements.”²⁸⁰ By letter of 24 March 1973 to the British High Commissioner in Port Louis, the Prime Minister of Mauritius reiterated the UK’s commitments set out at paragraph 22 of the record of the meeting held on 23 September 1965. He stated that the payment of £650,000 by the UK Government “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.²⁸¹

3.98 Mauritian fishing rights in the Chagos Archipelago were set out in the Mauritius Fisheries Act 1980,²⁸² and were further recognised by the UK in the “BIOT” Fishery Limits Ordinance 1984. Section 4 of the 1984 Ordinance is almost identical to section 4 of the 1971 Ordinance.²⁸³ Pursuant to Section 4 of the 1984 Ordinance, in February 1985 the “BIOT” Commissioner published the following notice in the “BIOT” Official Gazette:

“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

²⁷⁸ Note from R. G. Giddens, British High Commission, Port Louis, 15 July 1971: Annex 64.

²⁷⁹ Despatch dated 26 May 1972 from J. R. Todd, “BIOT” Administrator to P. J. Walker, UK Foreign and Commonwealth Office, FCO 31/2763: Annex 65.

²⁸⁰ Letter dated 4 September 1972 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: Annex 67.

²⁸¹ Letter dated 24 March 1973 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: Annex 69. Further, in reply to a PQ on 29 November 1977, the Mauritian Prime Minister confirmed that “[t]he British Government has since July 1971 recognised the jurisdiction of Mauritius over the waters surrounding Diego Garcia.” (Mauritius Legislative Assembly, 29 November 1977, Reply to PQ No. B/634: Annex 83, p. 3513) The Mauritian Minister of Fisheries has also confirmed that as of 1978 a Mauritian fishing vessel, the *Nazareth*, was operating in the waters of the Chagos Archipelago. (Mauritius Legislative Assembly, 5 July 1978, Committee of Supply: Annex 84, p. 3116.)

²⁸² Fisheries Act 1980, Act No. 5 of 1980: Annex 91. See also statement of the Mauritian Minister of Fisheries during the passage of the Act through Parliament: Mauritius Legislative Assembly, 13 May 1980, Second Reading of the Fisheries Bill (No. IV of 1980), Statement by the Minister of Fisheries and Cooperatives and Co-operative Development: Annex 90, pp. 934-935.

²⁸³ See para. 3.62 above.

fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius.”²⁸⁴

3.99 On 23 July 1991, the British High Commission wrote to the Government of Mauritius to inform it of the UK’s intention to extend the fishing zone around the Chagos Archipelago to 200 miles.²⁸⁵ The Note Verbale is significant because of its express recognition (in the context of the grant of fishing licences) of “the traditional fishing interests of Mauritius in the waters surrounding British Indian Ocean Territory.”²⁸⁶

3.100 On 1 July 1992, the British High Commissioner in Mauritius stated in a letter to the Mauritian Prime Minister that “[t]here are no plans to establish an exclusive economic zone around the Chagos islands” and added that:

“[t]he British Government has honoured the commitments entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practicable.”²⁸⁷

3.101 The UK Government also emphasised that it would continue to issue licences to Mauritius fishing vessels free of charge and that:

“[t]he British Government reaffirms that it remains open to discussions with the Government of the Republic of Mauritius over the present arrangements governing such issues and recognises the special position of Mauritius and its long-term interest in the future of the British Indian Ocean Territory.”²⁸⁸

3.102 In a letter dated 13 December 2007 to the UK Prime Minister, Prime Minister Navinchandra Ramgoolam reiterated that “Mauritius has historically exercised [fishing] rights over the waters of the Chagos Archipelago”²⁸⁹

²⁸⁴ “British Indian Ocean Territory” Notice No. 7 of 1985: Annex 98.

²⁸⁵ Note Verbale No. 043/91 dated 23 July 1991 from the British High Commission, Port Louis, to the Government of Mauritius: Annex 99. In particular, the note refers to the protection and conservation of tuna stocks to “protect the future fishing interests of the Chagos group.”

²⁸⁶ *Ibid.*

²⁸⁷ Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103.

²⁸⁸ *Ibid.* See also Note Verbale dated 13 April 1999 from the British High Commission, Port Louis to the Ministry of Foreign Affairs and International Trade, Mauritius, No. 15/99: Annex 107. The Mauritian Government responded by reaffirming “the position of the Government [of Mauritius] that sovereignty over the Chagos Archipelago rests with the Republic of Mauritius.” (Note Verbale dated 1 July 1999 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No.37/99 (1100/20)): Annex 109). See also the British High Commission Speaking Notes, “Chagos – Inshore Fisheries Licences”, 13 April 1999: Annex 107.

²⁸⁹ Letter dated 13 December 2007 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom: Annex 135.

(b) Mineral and oil rights

3.103 Four years after the 1965 Constitutional Conference in London, the Mauritian Prime Minister's Office reasserted the rights of Mauritius over minerals and oil in the Chagos Archipelago. By Note Verbale dated 19 November 1969, Mauritius reminded the UK of "the understanding [reached at the Lancaster House meeting of 23 September 1965] that the benefit of any minerals and oil discovered on or near the Chagos Archipelago would revert to the Government of Mauritius."²⁹⁰ This understanding recognised that Mauritius has rights in the minerals discovered in or around the Chagos Archipelago, including in its sea bed. The Government of Mauritius reminded the UK of its undertaking with regard to the mineral and oil rights:

"The Government of Mauritius intends introducing, in the very near future, legislation vesting in its ownership the sea-bed and the sub-soil of the territorial sea and the continental shelf of all the islands under its territorial jurisdiction. The Government of Mauritius wishes to inform the British Government that it will, at the same time, vest in its ownership any minerals or oil that may be discovered in the off-shore areas of the Chagos Archipelago."²⁹¹

3.104 The Government of Mauritius also informed the British Government of its intention to "issue licences for the exploration and prospecting of minerals and oil in the off-shore areas of the Chagos Archipelago."²⁹² The response from the British High Commission recognised that "one of the understandings reached between the British Government and the Government of Mauritius in 1965" was that "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Government of Mauritius."²⁹³ However, the British High Commission considered that:

"The understanding in question was that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Government of Mauritius. [...] The British Government feel bound to state that they consider the Government of Mauritius have misconstrued the understanding, which was only to the effect that the Government of Mauritius should receive the benefit of any minerals or oil discovered in or near the Chagos Archipelago. It is not considered that the wording of the understanding can be construed as indicating any intention that ownership of minerals or oil in the areas in question should be vested in the Government of Mauritius or that the Authorities of Mauritius should have any right to

²⁹⁰ 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): Annex 54.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ Note Verbale dated 18 December 1969 from the British High Commission, Port Louis to the Prime Minister's Office (External Affairs Division), Mauritius: Annex 55.

legislate with respect to or otherwise regulate matters relating to the ownership, exploration or exploitation of such minerals or oil nor is it believed that the correspondence and discussions which took place in 1965 contained anything to suggest such an intention on the part of the British Government.”²⁹⁴

3.105 At the same time, the British High Commission reassured Mauritius that:

“the British Government have no intention of departing from the undertaking that the Government of Mauritius should receive the benefit of any minerals or oil discovered in the Chagos Archipelago or the off-shore areas in question in the event of the matter arising as a result of prospecting being permitted while the Archipelago remains under United Kingdom sovereignty.”²⁹⁵

3.106 A Speaking Note prepared on 2 February 1970 by the British Foreign and Commonwealth Office, on the occasion of the visit of Prime Minister Ramgoolam to the UK, acknowledged “how important it would be for the economy of Mauritius if oil were to be discovered in marketable quantities” and recognised that “under the understanding arrived at in the Lancaster House talks in 1965, Mauritius would receive the benefit of any oil discovered there while the Archipelago remains under United Kingdom sovereignty.”²⁹⁶

3.107 In 1979 Prime Minister Ramgoolam twice recalled in Parliament the UK’s commitment that any benefits derived from minerals or oil in or near the Chagos Archipelago would revert to Mauritius.²⁹⁷ In November 1979, he also confirmed in Parliament that Mauritius was still exercising its rights over natural resources within the 200-mile maritime zone around the Chagos Archipelago.²⁹⁸

3.108 The UK has reaffirmed its undertakings regarding oil and mineral rights in more recent years. On 10 November 1997 the UK Foreign Secretary wrote to Prime Minister Ramgoolam, reiterating the UK’s position that “the Territory will be ceded to Mauritius when no longer required for defence purposes” and, significantly for present purposes, stating that “I also reaffirm that this Government has no intention of permitting prospecting for oil and minerals while the territory remains British, and acknowledges that any oil and mineral rights will revert to Mauritius when the Territory

²⁹⁴ *Ibid.* Prime Minister Ramgoolam contested this UK interpretation on a number of occasions, and consistently maintained that mineral rights had been expressly reserved to Mauritius at the Lancaster House talks: see for example paras 3.97 above and 3.107 below.

²⁹⁵ Pacific and Indian Ocean Department [Foreign and Commonwealth Office], Visit of Sir Seewoosagur Ramgoolam, Prime Minister of Mauritius, 4 February 1970, Speaking Note, dated 2 February 1970: Annex 56, Flag A, p. 3.

²⁹⁶ *Ibid.*

²⁹⁷ See Mauritius Legislative Assembly, 10 July 1979, Reply to PQ No. B/754: Annex 86, p. 3877; Mauritius Legislative Assembly, 13 November 1979, Reply to PQ No. B/844: Annex 87, p. 4857.

²⁹⁸ Mauritius Legislative Assembly, 27 November 1979, Reply to PQ No. B/982: Annex 89, p. 5170.

is ceded.”²⁹⁹ Most significantly in the context of mineral and oil rights, in a July 2009 joint communiqué following the second round of Mauritius-UK bilateral talks on the Chagos Archipelago, both the UK and Mauritius agreed that “it would be desirable to have a coordinated submission for an extended continental shelf in the Chagos Archipelago [...] region to the UN Commission on the Limits of the Continental Shelf, in order not to prejudice the interest of Mauritius in that area and to facilitate its consideration by the Commission.” This development is considered further in Chapter 4 below.³⁰⁰

VI. Recent Reflections of the International Community’s Views on Sovereignty of Mauritius over the Chagos Archipelago

3.109 There has been continued and sustained opposition and international condemnation directed at the UK’s unlawful excision of the Chagos Archipelago from the territory of Mauritius. This is reflected in actions adopted inter alia at the Non-Aligned Movement,³⁰¹ the Africa-South America Summit,³⁰² the Organisation of African Unity³⁰³ and subsequently the African Union³⁰⁴, and the Group of 77 and China.³⁰⁵

²⁹⁹ Letter dated 10 November 1997 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Prime Minister of Mauritius: Annex 105.

³⁰⁰ Paras 4.31-4.35.

³⁰¹ NAM Declaration, “Programme for Peace and International Co-operation”, adopted at the NAM Conference held on 5-10 October 1964 in Cairo, Egypt, pp. 25-26; NAM Summit Declaration, 7-12 March 1983, New Delhi, India, para. 81; NAM Summit Declaration, 1-6 September 1986, Harare, Zimbabwe, para.137; NAM Summit Declaration, 4-7 September 1989, Belgrade; NAM Summit Declaration, 1-6 September 1992, Jakarta, Indonesia, NAC 10/Doc.2/Rev.2, para.14; NAM Summit Declaration, 18-20 October 1995, Cartagena, Columbia, para.171; NAM Summit Declaration, 2-3 September 1998, Durban, South Africa, para.227; NAM Summit Declaration, 20-25 February 2003, Kuala Lumpur, Malaysia, para.184; NAM Summit Declaration, 11-16 September 2006, Havana, Cuba, NAM 2006/Doc.1/Rev.3, para.155; NAM Summit Declaration, 11-16 July 2009, Sharm el Sheikh, Egypt, NAM2009/FD/Doc.1, para.213; NAM Ministerial Conference Declaration, 23-27 May 2011, Bali, Indonesia, paras.260-262; NAM Ministerial Meeting Final Document, 7-10 May 2012, Sharm El Sheikh, Egypt, paras. 285-287 (see Annex 4). See also Note Verbale dated 9 May 1997 from High Commission of India, Port Louis to Ministry of Foreign Affairs, International and Regional Cooperation, Mauritius: Annex 104.

³⁰² Declaration of Nueva Esparta, 2nd Africa-South America Summit, 26-27 September 2009, Isla de Margarita, Venezuela, para. 40: Annex 149.

³⁰³ Resolution on Diego Garcia, AHG/Res.99 (XVII), adopted by OAU Summit, 1-4 July 1980, Freetown, Sierra Leone: Annex 93; Decision on Chagos Archipelago, AHG/Dec.159(XXXVI), adopted by OAU Summit, 10-12 July 2000, Lomé, Togo: Annex 112; Decision on the Chagos Archipelago, including Diego Garcia, CM/Dec.26 (LXXIV), adopted by OAU Council of Ministers, 5-8 July 2001, Lusaka, Zambia: Annex 117.

³⁰⁴ African Union Assembly of Heads of States and Government, Decision on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago, Assembly/AU/Dec.331(XV), 27 July 2010, Kampala, Uganda: Annex 168; African Union Assembly of Heads of States and Government, Resolution adopted at the 16th Ordinary Session, Assembly/AU/Res.1(XVI), 30-31 January 2011, Addis Ababa, Ethiopia: Annex 170.

³⁰⁵ Ministerial Declaration of the Group of 77 and China on the occasion of UNCTAD XIII, 21 April 2012, Doha, Qatar: Annex 174, para. 20.

3.110 In 2010, the African Union Assembly reaffirmed that the Chagos Archipelago had been unlawfully excised from the territory of Mauritius in violation of UN General Assembly resolutions 1514 (XV) and 2066 (XX), and called on the UK to “expeditiously put an end to its continued unlawful occupation of the Chagos Archipelago with a view to enabling Mauritius to effectively exercise its sovereignty over the Archipelago.”³⁰⁶ In 2011, the African Union Assembly also noted with grave concern that “the United Kingdom has proceeded to establish a ‘marine protected area around the Chagos Archipelago on 1 November 2010 in a manner that was inconsistent with its international legal obligations, thereby further impeding the exercise by the Republic of Mauritius of its sovereignty over the Archipelago.”³⁰⁷

3.111 The Final Document adopted by the last Non-Aligned Movement Ministerial Meeting, held from 7 to 10 May 2012 in Sharm El Sheikh, Egypt, stated that:

“285. The Ministers reaffirmed that the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory 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.

286. The Ministers further noted with grave concern that despite the strong 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 of return of Mauritian citizens who were forcibly removed from the Archipelago by the United Kingdom.

287. Cognizant that the Government of the Republic of Mauritius is committed to taking all appropriate measures to affirm the territorial integrity of the Republic of Mauritius and its sovereignty over the Chagos Archipelago under international law, the Ministers resolved to fully support such measures including any action that may be taken in this regard at the United Nations General Assembly.”³⁰⁸

³⁰⁶ African Union Assembly of Heads of States and Government, Decision on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago, Assembly/AU/Dec.331(XV), 27 July 2010, Kampala, Uganda: Annex 168.

³⁰⁷ African Union Assembly of Heads of States and Government, Resolution adopted at the 16th Ordinary Session, Assembly/AU/Res.1(XVI), 30-31 January 2011, Addis Ababa, Ethiopia: Annex 170.

³⁰⁸ Ministerial Meeting of the NAM Coordinating Bureau, Sharm El Sheikh Final Document, 7-10 May 2012, Sharm El Sheikh, Egypt, paras. 285-287: Annex 4.

CHAPTER 4: CREATION OF THE “MARINE PROTECTED AREA”

4.1 This Chapter relates the history of “environmental” measures taken by the UK in respect of the Chagos Archipelago, culminating in the purported establishment of the “MPA” in April 2010:

- (i) The establishment of a Fisheries Conservation and Management Zone in 1991, and Mauritius’ objections.
- (ii) The establishment of an Environment Protection and Preservation Zone in 2003, and Mauritius’ objections.
- (iii) The rights exercised by Mauritius over the Chagos Archipelago, including the Preliminary Information submitted in 2009 to the UN Commission on the Limits of the Continental Shelf, in which Mauritius claimed an extended continental shelf in areas beyond 200 nautical miles from the archipelagic baselines of the Chagos Archipelago.
- (iv) The bilateral talks between Mauritius and the UK in 2009.
- (v) The UK’s purported consultation, in 2009, on the establishment of an “MPA” around the Chagos Archipelago, Mauritius’ objections, and the UK’s decision unilaterally to impose such a measure.
- (vi) The implementation of the “MPA”.

I. Events Before The Creation Of The “MPA”

(1) 1977: Mauritius establishes an EEZ around the Chagos Archipelago

4.2 By its Maritime Zones Act of 1977, Mauritius declared territorial waters up to 12 nautical miles from its baseline, a 200-nautical mile exclusive economic zone (“EEZ”) and a continental shelf to the outer edge of the continental margin, or 200 nautical miles from its baseline, around all of its territory. A plate illustrating Mauritius’ EEZ is at Figure 7 of Volume 4. These acts of Mauritius were internationally recognised, for example in 1989, when Mauritius concluded an agreement with the European Economic Community on fishing in Mauritian waters. The agreement recalled that:

“in accordance with [the] Convention, Mauritius has established an exclusive economic zone extending 200 nautical miles from its shores within which it exercises its sovereign rights for the purpose of exploring, exploiting, conserving and managing the resources of the said zone, in accordance with the principles of international law.”

(2) 1991: The United Kingdom purports to establish an FCMZ

4.3 As set out in Chapter 3, in the years following its unlawful excision of the Chagos Archipelago, the UK had purported to establish fishing limits and a territorial sea.³⁰⁹ Then on 1 October 1991, the UK purported to establish a 200-mile “Fisheries Conservation and Management Zone” (“FCMZ”) through a formal proclamation issued by the Commissioner for the “BIOT”.³¹⁰

4.4 The UK subsequently enacted legislation to regulate fishing within the FCMZ.³¹¹ This development marked the starting point of the change in position adopted by the UK in relation to the waters of the Chagos Archipelago, including the extension beyond the initial (and unlawful) excision for the purposes of defence, and the taking of additional measures, including restrictions purportedly based on the protection of the environment.

4.5 By Note Verbale of 7 August 1991, Mauritius protested against the purported establishment of the FCMZ, as being incompatible with its sovereignty and sovereign rights over the Chagos Archipelago.³¹² That Note Verbale noted the UK’s offer of free licences for inshore fishing. As will be seen throughout this Chapter, Mauritius has consistently protested against the creeping extension of powers that the UK has purported to appropriate for itself, and then sought to apply to the Chagos Archipelago in the form of restrictions. Mauritius’ protests stem, not from any lack of concern for the environment of that region, but from the illegality of the UK’s purported actions.

4.6 There followed a letter of 1 July 1992 from the British High Commissioner to the Prime Minister of Mauritius. The relevant passages are as follows:

- (i) The UK had “declared a 200 mile exclusive fishing zone on 1 October 1991 as its contribution to safeguarding the tuna and other fish stocks of the Indian Ocean.”
- (ii) “There are no plans to establish an exclusive economic zone around the Chagos islands.”
- (iii) “The British Government has honoured the commitments entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practicable.”

³⁰⁹ Paras 3.91-3.92, above.

³¹⁰ See Note Verbale dated 23 July 1991 from British High Commission, Port Louis to Government of Mauritius, No. 043/91, recording the purported extension of the fishing zone around the Chagos Archipelago from 12 to 200 miles: Annex 99; and “British Indian Ocean Territory” Proclamation No. 1 of 1991: Annex 101. See also Figure 5 of Volume 4.

³¹¹ “British Indian Ocean Territory” Ordinance No. 1 of 1991: Annex 102.

³¹² Note Verbale dated 7 August 1991 from Ministry of External Affairs, Mauritius to British High Commission, Port Louis, No. 35(91) 1311: Annex 100.

- (iv) The British Government had “issued free licences for Mauritian fishing vessels to enter both the original 12 mile fishing zone of the territory and now the wider waters of the exclusive fishing zone” and that “[i]t will continue to do so, provided that the Mauritian vessels respect the licence conditions laid down to ensure proper conservation of local fishing resources.”³¹³

(3) 2003: The United Kingdom purports to establish an EPPZ

4.7 The next major step in the imposition of unilateral measures came a decade later, with the purported establishment of an Environmental Protection and Preservation Zone (“EPPZ”).

4.8 By letter of 8 July 2003, the Director of the Overseas Territories Department, Foreign and Commonwealth Office, informed the High Commissioner of Mauritius to the UK of a “recent decision to close the area enclosed by the following [geographical coordinates].”³¹⁴ This letter came without warning, although it noted that “There was a commitment on our part to keep the Mauritius Government fully informed of any changes to the management of the [Chagos Archipelago] inshore fishery.”

4.9 On 13 August 2003, the Director of the Overseas Territories Department wrote again to the High Commissioner of Mauritius to the United Kingdom, stating that:

“The [Convention] permits 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. They may do so for the purpose, among other things, of conserving and managing the natural resources of the waters, seabed and subsoil, and also for the protection and preservation of the marine environment of the zone.”³¹⁵

4.10 The letter recounted the purported formation, by formal Proclamation, of the FCMZ, and stated that:

“The Government of Mauritius will wish to be aware that in order to help preserve and protect the environment of the Great Chagos Bank, the British Government proposes to issue a similar Proclamation by the Commissioner for BIOT, but this

³¹³ Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103.

³¹⁴ Letter dated 8 July 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London: Annex 119. The coordinates included were: 05010”S, 072050”E; 05010”S, 072000”E; 05020”S, 072050”E; 05020”S; 072000”E. See also Figures 5 and 9 of Volume 4.

³¹⁵ Letter dated 13 August 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London: Annex 120.

time establishing an Environmental (Protection and Preservation) Zone.”

4.11 The letter further noted that the zone “will be defined so as to have the same geographical extent as BIOT’s FCMZ” and that a copy of the Proclamation, along with relevant charts and coordinates, would be deposited later in the year with the UN under Article 75 of the Convention. The letter made no mention of the assurances given to the Prime Minister of Mauritius by the British High Commission in Port Louis, in July 1992, that the UK had no intention of declaring an EEZ in relation to the Chagos Archipelago.

4.12 On 17 September 2003, the UK purported to declare a 200-mile EPPZ.³¹⁶ This was purportedly established by Proclamation of the Commissioner for the “BIOT”.³¹⁷ The Proclamation stated that:

“1. There is established for the British Indian Ocean Territory an environmental zone, to be known as the Environment (Protection and Preservation) Zone, contiguous to the territorial sea of the Territory.

2. The said environmental zone has as its inner boundary the outer limits of the territorial sea of the Territory and as its seaward boundary a line drawn so that each point on it is two hundred nautical miles from the nearest point on the low-water line on the coast of the Territory or other baseline from which the territorial sea of the Territory is measured or, where this line is less than two hundred nautical miles from the baseline and unless another line is declared by Proclamation, the median line. The median line is a line every point on which is equidistant from the nearest point on the baseline of the Territory and the nearest point on the baseline from which the territorial sea of the Republic of the Maldives is measured.

3. Within the said environmental zone, Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the zone.”

4.13 This development marked a more aggressive exercise by the UK of the rights which it claimed over the Chagos Archipelago and its surrounding waters, and a new reliance on the language of “environmental protection” in place of “defence needs” to justify its behaviour.

³¹⁶ 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: Annex 141.

³¹⁷ “British Indian Ocean Territory” Proclamation No. 1 of 2003: Annex 121.

(4) The Chagos Conservation Management Plan

4.14 In October 2003, the “BIOT” Administration produced a document entitled “Chagos Conservation Management Plan” (“CCMP”).³¹⁸ The CCMP was prepared without any consultation with the Government of Mauritius. It recommended three actions:

- (i) “To conserve within BIOT a representative and viable sample of all terrestrial and marine habitats (The 30% Protected Areas system)”: the plan suggested that “within these areas, no extractive activity of any kind should be permitted, including fishing to the extent feasible.”
- (ii) “Establishment of a scientific advisory group.”
- (iii) “Support for information gathering.”

4.15 The CCMP noted that the “BIOT” Administration had “claimed the 200 nm EEZ” permitted under the Convention, and that the EPPZ declared in 2003 “has as its outer boundary the 200 mile limit of the Fisheries EEZ”.

(5) Mauritius protests against the declaration of the EPPZ

4.16 Mauritius was both surprised and disappointed at the UK’s unilateral proclamation of a purported EPPZ, given the assurances which the UK had given in the past that it would not establish an EEZ, and that it would continue to respect the fishing rights of Mauritius. Mauritius’ concerns were conveyed in a letter of 7 November 2003 from the Mauritian Minister of Foreign Affairs to the UK Foreign Secretary. The Minister requested “the UK Government not to proceed with the issue of a Proclamation establishing an Environment (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.”³¹⁹ The letter went on to make clear that:

“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.”

4.17 The letter further recalled that Mauritius had protested against the formation of the FCMZ in 1991, and that the British High Commissioner had affirmed to the Prime

³¹⁸ Chagos Conservation Management Plan for the “British Indian Ocean Territory” Administration, Foreign and Commonwealth Office by Dr Charles Sheppard, Department of Biological Sciences, University of Warwick and Dr Mark Spalding, October 2003, available at: http://www.zianet.com/tedmorris/dg/chagos_conservation_management_plan_2003.pdf.

³¹⁹ 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: Annex 122.

Minister of Mauritius in 1992 that the UK had no plans to establish an EEZ around the Chagos Archipelago. The letter stated that Mauritius:

“had no doubt that the UK Government will stand by its undertaking that, should the Government of Mauritius have further concerns over the future of the Chagos Archipelago, the UK Government remained ready to pursue these through normal bilateral discussions.”

4.18 The letter emphasised that Mauritius has “always given great importance to the preservation and protection of the flora and fauna in the waters of the Chagos Archipelago”. It welcomed the suggestion to revive the Scientific Sub-Committee of the British-Mauritian Fisheries Commission, and suggested that this bilateral forum “should address itself in priority to the environmental protection and preservation of the waters around the Chagos Archipelago.”

4.19 On 12 December 2003, the Minister responsible for Overseas Territories, FCO, responded to this letter³²⁰. He claimed that “the proposed Zone is not a full economic exclusive zone for all purposes” but that “the purpose of the proposed Zone is simply to help protect and preserve the environment of the Great Chagos Bank.”

4.20 The letter noted that the UK had enacted legislation to regulate fishing activities within the FCMZ, “whilst protecting traditional Mauritian fishing rights there”. The UK added that it did not “propose at this stage to enact new legislation to regulate other activities which might impinge on the environment within the EPPZ, though of course we may wish to do so if environmental considerations make that necessary”. Instead, the letter stated that the UK planned “for the time being simply to rest on the proclamation of the Zone as the public expression of our concern for the environment of the archipelago.”

4.21 The letter confirmed that the EPPZ was defined so as to have the “same geographical extent as the FCMZ” and that the UK had “no intention to undertake or to allow any economic exploitation or geological exploration in the area which these zones cover.” The letter restated that the UK acknowledged that “Mauritius has a legitimate interest in the future of the Chagos Islands and recognises Mauritius as the only state which has a right to assert a claim to sovereignty over them when the UK relinquishes its own sovereignty.”

4.22 This letter failed to allay Mauritius’ concerns about the UK’s unilateral approach. It was a further expression of the gradual encroachment on long-standing Mauritian activities in the Chagos Archipelago, based on purported expressions of concern about the environment. The letter reflected a position that was not only inconsistent with the sovereignty of Mauritius over the Chagos Archipelago, but also inconsistent with the positions previously adopted by the UK and its own approach to the rights of Mauritius.

³²⁰ 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: Annex 124.

4.23 Notwithstanding Mauritius' clear expressions of concern, the UK proceeded to deposit geographical co-ordinates of points with the UN Secretary-General on 12 March 2004. It claimed to do so pursuant to Article 75(2) of the Convention: this made it clear that, despite its protestations to the contrary, the UK was in fact establishing an EEZ.³²¹

(6) Mauritius protests against the United Kingdom's deposit of coordinates

4.24 On 14 April 2004, Mauritius sent a Note Verbale to the Secretary-General of the UN protesting against the UK's deposit of coordinates.³²² This was on the basis that "the United Kingdom of Great Britain and Northern Ireland is purporting to exercise over that zone rights which only a coastal state may have over its exclusive economic zone." Mauritius reiterated that "it does not recognise the so-called 'British Indian Ocean Territory'" and reasserted "its complete and full sovereignty over the Chagos Archipelago, including its maritime zones, which forms part of the national territory of Mauritius."

4.25 This was followed by a Note Verbale to the UK on 20 April 2004, in which Mauritius outlined its view that the legal consequence of the UK's proclamation of an EPPZ and deposit of coordinates under Article 75 of the Convention "implicitly amounts to the exercise by the UK of sovereign rights and jurisdiction within an Exclusive Economic Zone, which only Mauritius as coastal state can exercise under Part V of the UNCLOS."³²³

4.26 The Note Verbale further stated that:

"The Government of the Republic of Mauritius is very concerned at this unilateral decision of the UK pertaining to the Chagos Archipelago, which forms an integral part of the State of Mauritius. The Government of the Republic of Mauritius also believes that the UK Government has not upheld its undertaking made in a letter dated 1 July 1992 from the British High Commissioner in Mauritius, Mr M.E Howell, where mention is made:

'The British Government also reaffirms its undertakings that there is no intention of permitting prospecting for minerals and oils while the islands remain British. There are no plans to establish an exclusive economic zone around the Chagos islands.'

³²¹ Hansard, House of Lords, 31 March 2004, col. WS62, Statement of Baroness Symons of Vernham Dean: Annex 125. The proclamation was deposited with the UN on 12 March 2004 (Law of the Sea Bulletin No. 54 (2004), 99).

³²² 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) (Annex 126), and Law of the Sea Bulletin No. 54 (2004), p. 128.

³²³ Note Verbale dated 20 April 2004 from the Mauritius High Commission, London to the UK Foreign and Commonwealth Office, Ref. MHCL 886/1/03: Annex 127.

4.27 Mauritius reiterated that it did not recognise the “BIOT”, that the “proclamation of the Environment (Protection and Preservation) Zone by the UK in no way alters the sovereignty of Mauritius over the Chagos Archipelago” and that it “hereby reasserts its complete and full sovereignty over the Chagos Archipelago, including its maritime zones, which forms part of the national territory of Mauritius”. Mauritius reserved 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.”

4.28 The UK responded, by Note Verbale of 13 May 2004³²⁴, to the effect that the UK’s letter of 12 December 2003 “explained that the Zone is not a full exclusive economic zone for all purposes and that its purpose is simply to help protect and preserve the environment of the Great Chagos Bank.” The Note claimed that “there is no intention on the part of the British Government to undertake or to allow any economic exploitation or geological exploration in the area which the Zone covers.”

(7) Mauritius reaffirms its EEZ, territorial sea and continental shelf

4.29 By its Maritime Zones Act 2005, Mauritius reaffirmed its 200-nautical mile EEZ, 12-nautical mile territorial sea, and continental shelf.³²⁵ On 26 July 2006, pursuant to Articles 75(2) and 84(2) of the Convention, Mauritius submitted geographical coordinates to the UN Division for Ocean Affairs and the Law of the Sea, including in regard to the maritime zones generated by the Chagos Archipelago.³²⁶

4.30 At the eighteenth meeting of States Parties to the Convention, on 20 June 2008, it was decided that the 10-year time limit for submission of claims to an extended continental shelf beyond 200 nautical miles, which commenced on 13 May 1999³²⁷,

³²⁴ Note Verbale dated 13 May 2004 from UK Foreign and Commonwealth Office to Mauritius High Commission, London, No. OTD 016/05/04: Annex 128.

³²⁵ Mauritius Maritime Zones Act 2005: Annex 131. See also Figure 7, Volume 4, and the Maritime Zones (Baselines and Delineating Lines) Regulations 2005, available at: http://un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin67e.pdf

³²⁶ Note Verbale of 26 July 2006 from the Permanent Mission of the Republic of Mauritius to the United Nations, New York, to the UN Secretary General, No. 4678/06: Annex 134. Mauritius provided further clarification by 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 (NY/UN/395): Annex 136. In a Note Verbale to the Secretary-General of the UN of 19 March 2009, the UK protested against the deposit of charts and lists of geographical coordinates by Mauritius to the UN (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: Annex 141). The Note stated: “a. that the British Indian Ocean Territory is an Overseas Territory of the United Kingdom; b. the UK has no doubts over its sovereignty over the British Indian Ocean Territory; and c. a 200 nautical mile Environmental (Protection and Preservation) Zone was established around this Territory on 17 September 2003 and a list of geographical coordinates establishing the outer limits of this zone was deposited pursuant to article 75, paragraph 2 of the Convention subsequently published in the Law of the Sea Bulletin No. 54.” The UK concluded that “Consequently, no other State is entitled to claim maritime zones deriving from the British Indian Ocean Territory.”

In a Note Verbale of 9 June 2009 to the UN Secretary-General, Mauritius stated: “The Government of the Republic of Mauritius strongly believes that the protest raised by the United Kingdom against the deposit by Mauritius of the geographical coordinates reported in Circular Note M.Z.N. 63.2008-LOS of 27 June 2008 has no legal basis inasmuch as the Chagos Archipelago forms an integral part of the territory of

would be satisfied by submitting to the UN Secretary-General preliminary information indicative of the outer limits of the continental shelf.³²⁸

4.31 At the first round of bilateral talks between Mauritius and the UK, held in London on 14 January 2009, the UK stated that it was not interested in submitting on its own a claim for an extended continental shelf in respect of the Chagos Archipelago. The UK, however, indicated that it was open to the possibility of a joint submission. Mauritius pointed out that it was receptive to a joint submission, on the condition that there should be an equitable sharing of resources generated by the extended continental shelf.³²⁹

4.32 On 6 May 2009, Mauritius submitted to the UN Commission on the Limits of the Continental Shelf (“CLCS”) Preliminary Information concerning the Extended Continental Shelf in the Chagos Archipelago Region.³³⁰ The Preliminary Information provides an indication of the outer limits of the continental shelf of Mauritius that lie beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in respect of the Chagos Archipelago.

4.33 Pursuant to the decision of States Parties on 20 June 2008, the UN Secretary-General is required to notify the States Parties to the Convention of the receipt of preliminary information and to make the information publicly available on the CLCS website.³³¹ Notification of Mauritius’ submission of Preliminary Information occurred on 22 May 2009. Mauritius notes that no State, including the UK, has lodged any objection with regard to Mauritius’ submission. This compares with other situations where objections have been lodged.³³² Mauritius also notes that that the UK has not made any submission (not even of preliminary information) to the CLCS concerning the Chagos Archipelago. The 10-year time limit now having passed, the UK has, on the

Mauritius. The Government of the Republic of Mauritius further wishes to refer to its Note No. 4780/04 (NY/UN/562) dated 14 April 2004 in which it protested strongly against the deposit by the Government of the United Kingdom of Great Britain and Northern Ireland of a list of geographical coordinates of points defining the outer limits of the so-called Environment (Protection and Preservation) Zone.” (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: Annex 147.).

³²⁷ Mauritius ratified the Convention on 4 November 1994, and the United Kingdom acceded to the Convention on 25 July 1997. On 29 May 2001, the States Parties to the Convention decided that, for States for which the Convention entered into force before 13 May 1999 (which include Mauritius and the United Kingdom), the 10-year time period within which submissions for an extended continental shelf have to be made to the Commission on the Limits of the Continental Shelf shall be taken to have commenced on 13 May 1999 (SPLOS/72).

³²⁸ SPLOS/183. Preliminary information is submitted without prejudice to an ensuing complete submission, and as such is not considered by the CLCS.

³²⁹ See further para. 4.36 below.

³³⁰ May 2009, United Nations Convention on the Law of the Sea: Preliminary Information Submitted by the Republic of Mauritius Concerning the Extended Continental Shelf in the Chagos Archipelago Region Pursuant to the Decision Contained in SPLOS/183: Annex 144. See Figure 8, Volume 4.

³³¹ Mauritius’ Preliminary Information was duly notified to States Parties on 22 May 2009 (SPLOS/INF/12) and is available on the website of the Commission at: http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/mus_2009_preliminaryinfo.pdf

³³² See the list of relevant communications at: http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm

basis of its claim to sovereignty, foregone any right to avail itself of the procedures under the Convention with respect to an extended continental shelf for the Chagos Archipelago.

4.34 At the second round of bilateral talks held between Mauritius and the UK in Port Louis on 21 July 2009, both parties expressed the view that “it would be desirable to have a coordinated submission for an extended continental shelf in the Chagos Archipelago [...] region to the UN Commission on the Limits of the Continental Shelf, in order not to prejudice the interest of Mauritius in that area and to facilitate its consideration by the Commission.”³³³ The UK indicated that it would support Mauritius in making its submission to the CLCS, including through assistance from its technical experts.

4.35 These actions and inactions by the UK recognise that Mauritius has rights as a coastal State in relation to the extended continental shelf of the Chagos Archipelago. Having regard to the principle that a continental shelf is indivisible,³³⁴ the UK also recognises *a fortiori* the rights of Mauritius in regard to the continental shelf *within* 200 nautical miles of its baselines.

(8) *Bilateral talks in 2009*

4.36 As discussed above in the context of the CLCS submission, the first round of bilateral talks to establish a dialogue between the UK and Mauritius on the Chagos Archipelago was held in London on 14 January 2009. The British delegation was led by Mr Colin Roberts, Director of the Overseas Territories Department at the FCO. The Mauritius delegation was led by Mr S.C Seeballuck, Secretary to Cabinet and Head of the Civil Service.

4.37 A Joint Communiqué was issued by the parties following the talks. This stated that “the delegations discussed the latest legal and policy developments relating to the [...] Chagos Archipelago.”³³⁵ It noted that both parties had set out their views on sovereignty and that there was “also mutual discussion of fishing rights, environmental concerns, the continental shelf, future visits to the Territory by the Chagossians and respective policies towards resettlement.” The delegations agreed “the need to maintain a dialogue on a range of issues relating to the Territory and to meet again at a date to be agreed.”

4.38 Both parties affirmed that the meeting did not alter their positions on sovereignty, and that:

³³³ Joint Communiqué, 2nd round of bilateral talks on the Chagos Archipelago, Port Louis, Mauritius: Annex 148.

³³⁴ See for example *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, International Tribunal for the Law of the Sea, Judgment of 14 March 2012, para. 361.

³³⁵ Joint Communiqué, Bilateral discussions between UK and Mauritius on Chagos Archipelago, 14 January 2009: Annex 137.

“no act or activity carried out by the United Kingdom, Mauritius or third parties as a consequence and in implementation of anything agreed to in the present meeting or in any similar subsequent meetings shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or Mauritius regarding sovereignty of the [...] Chagos Archipelago.”

II. The Establishment of the “MPA”

(1) Initial announcements and Mauritius’ reaction

4.39 On 9 February 2009, the British newspaper *The Independent* published an article entitled “Giant marine park plan for Chagos”.³³⁶ The article stated that “An ambitious plan to preserve the pristine ocean habitat of the Chagos Islands by turning them into a huge marine reserve on the scale of the Great Barrier Reef or the Galapagos will be unveiled at the Royal Society next Monday.” The article noted that the reserve, at 250,000 square miles, would be in the “‘big league’ globally.”

4.40 The news surprised and alarmed Mauritius, which had no prior knowledge of any plans for a marine reserve in or surrounding the Chagos Archipelago. In response, on 5 March 2009 the Mauritian Ministry of Foreign Affairs, Regional Integration and International Trade sent a Note Verbale to the UK,³³⁷ stating that:

“both under Mauritian law and international law, the Chagos Archipelago is under the sovereignty of Mauritius and the denial of enjoyment of sovereignty to Mauritius is a clear breach of United Nations General Assembly Resolutions and international law. The creation of any Marine Park in the Chagos Archipelago will therefore require, on the part of all parties that have genuine respect for international law, the consent of Mauritius.”

4.41 On 9 March 2009, a specific proposal for a marine protected area was put forward by the Chagos Environment Network at the Royal Society, UK.³³⁸ The proposal

³³⁶ “Giant marine park plan for Chagos”, *The Independent*, Sadie Gray, 9 February 2009 at <http://www.independent.co.uk/environment/nature/giant-marine-park-plan-for-chagos-1604555.html> (Annex 138). Similar pieces appeared on that date in other British publications: see “Ocean Blues: A new conservation plan for the Chagos Islands”, *The Economist.com*, 9 February 2009 at <http://www.economist.com/node/13089462> and “Turn disputed Chagos Islands into marine reserve, say conservationists”, *The Telegraph*, 9 February 2009 at <http://www.telegraph.co.uk/news/uknews/4558122/Turn-disputed-Chagos-Islands-into-marine-reserve-say-conservationists.html>.

³³⁷ Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 2009(1197/28): Annex 139.

³³⁸ Marine conservation in the “British Indian Ocean Territory” (“BIOT”): science issues and opportunities; Report of workshop held 5-6 August 2009 at National Oceanography Centre Southampton, supported by NERC Strategic Ocean Funding Initiative (SOFI) at

asserted that “a more robust and comprehensive framework for conservation is needed to meet future challenges from destructive impacts of pollution, unsustainable fishing, poaching, habitat degradation, imported invasive species, construction, or other forms of interference.”³³⁹ It recommended, *inter alia*, that a “comprehensive Chagos marine and fisheries management and conservation system should be established, to include a ‘no-take’ fishing zone, building on the proposal already included in the approved Chagos Conservation Management Plan.” It added that “Wider international support should be promoted for a comprehensive Chagos Archipelago Reserve Area, using existing protocols such as Ramsar and World Heritage.”

4.42 On 13 March 2009, the UK responded to Mauritius’ Note Verbale of 5 March 2009.³⁴⁰ The UK claimed that “the proposal for a marine park in the Chagos Archipelago (BIOT) is the initiative of the Chagos Environment Network and not of the Government of the United Kingdom of Great Britain and Northern Ireland”. The Note added that the UK Government “welcomes and encourages recognition of the global importance of the British Indian Ocean Territory and notes the very high standards of preservation there that have been made possible by the absence of human settlement in the bulk of the territory and the environmental stewardship of the BIOT administration and the US military”. The FCO observed that the UK Government had “already signalled its desire to work with the international environmental and scientific community to develop further the preservation of the unique environment of the British Indian Ocean Territory.” Through such statements, the UK sought to portray the “MPA” as an initiative of NGOs, rather than the Government.

4.43 Mauritius made clear in a Note Verbale of 10 April 2009 that, while it was “supportive of domestic and international initiatives for environmental protection, [it] would like to stress that any party initiating proposals for promoting the protection of the marine and ecological environment of the Chagos Archipelago, should solicit and obtain the consent of the Government of Mauritius prior to implementing such proposals.” The Note, at Annex 142, observed that “the Government of the United Kingdom has an obligation under international law to return the Chagos Archipelago in its pristine state to enable Mauritius to exercise and enjoy effectively its sovereignty over the Chagos Archipelago.”

4.44 The UK responded by Note Verbale on 6 May 2009³⁴¹, in which it stated that “it has no doubt about its sovereignty over the British Indian Ocean Territory which was ceded to Britain in 1814 and has been a British dependency ever since”. It added that “As the United Kingdom has reiterated on many occasions, we have undertaken to cede

http://www.oceans2025.org/PDFs/SOFI%20Workshop%20Reports/SOFI_Workshop_Report_10_BIOT_09.pdf.

³³⁹ See “The Chagos Archipelago: Its nature, and the future”, Chagos Conservation Trust, at http://www.reefnewmedia.co.uk/cmt_chagos/uploads/PDF/The%20Chagos%20Archipelago%20Its%20Nature%20and%20the%20Future_2009.pdf.

³⁴⁰ Note Verbale dated 13 March 2009 from the UK Foreign and Commonwealth Office to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. OTD 04/03/09: Annex 140.

³⁴¹ Note Verbale dated 6 May 2009 from the UK Foreign and Commonwealth Office to Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. OTD 06/05/09: Annex 145.

the Territory to Mauritius when it is no longer required for defence purposes.” The reference to “defence purposes” is a reminder of the original stated purpose of the UK’s excision of the Chagos Archipelago from Mauritius, which had no relation to environmental protection, and the extent to which the UK has, in the past two decades, gradually abandoned its original position and embraced a more extensive role in relation to the Chagos Archipelago.

(2) The UK/US meeting on 12 May 2009

4.45 While the above exchange of Notes Verbales was taking place, a meeting was held between Colin Roberts, Director of the Overseas Territories Department at the FCO, and a Political Counsellor at the US Embassy in London on 12 May 2009. A cable from the US Embassy addressed to the US Secretary of State, recounting the outcome of the meeting, was published on the “Wikileaks” website in December 2010. The cable stated that:

“The [FCO] official insisted that the establishment of a marine park – the world’s largest – would in no way impinge on the USG use of the BIOT, including Diego Garcia, for military purposes. He agreed that the UK and US should carefully negotiate the details of the marine reserve to assure that US interests were safeguarded and the strategic value of BIOT was upheld. He said that BIOT’s former inhabitants would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve.”³⁴²

4.46 Mr Roberts outlined three matters which would have to be considered:

- (i) US assent: Mr Roberts reassured the US official that “the proposal would have absolutely no impact on the right of US or British military vessels to use the BIOT for passage, anchorage, prepositioning, or other uses”, adding that “the terms of reference for the establishment of a marine park would clearly state that the BIOT, including Diego Garcia, was reserved for military use” and that “the primary purpose of the BIOT is security.”
- (ii) In relation to Mauritius, Mr Roberts told the US official that the UK Government would “seek assent from the Government of Mauritius, which disputes sovereignty over the Chagos Archipelago, in order to avoid the GOM ‘raising complaints with the UN’”, and alleged that “the GOM had expressed little interest in protecting the archipelago’s sensitive environment and was primarily interested in the archipelago’s economic potential as a fishery.”

³⁴² Cable from US Embassy, London, on UK Government’s Proposals for a Marine Reserve Covering the Chagos Archipelago, May 2009: Mauritius Application, 20 December 2010, Annex 2: Annex 146.

- (iii) In relation to the expelled Chagossians, Mr Roberts acknowledged that “we need to find a way to get through the various Chagossian lobbies”, but stated that “according to HMG’s current thinking on a reserve, there would be ‘no human footprints’ or ‘Man Fridays’ on the BIOT’s uninhabited islands”. Mr Roberts emphasised that “establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents”. Mr Roberts noted that “the UK’s environmental lobby is far more powerful than the Chagossians’ advocates.”

4.47 Mr Roberts continued that “We do not regret the removal of the population,” since “the removal was necessary for the BIOT to fulfil its strategic purpose.”

4.48 Following the meeting, Ms Joanne Yeadon, Head of the FCO’s Overseas Territories Directorate’s “BIOT” and Pitcairn Section, “urged (US) Embassy officers in discussions with advocates for the Chagossians, including with members of the “All Party Parliamentary Group on Chagos Islands (APPG)” to “affirm that the USG requires the entire BIOT for defence purposes” as “[m]aking this point would be the best rejoinder to the Chagossians’ assertion that partial settlement of the outer islands of the Chagos Archipelago would have no impact on the use of Diego Garcia.” Ms Yeadon “dismissed the APPG as a ‘persistent’ but relatively non-influential group within parliament or with the wider public.”

4.49 In its summary of the meeting, the US Embassy observed that “We do not doubt the current government’s resolve to prevent the resettlement of the islands’ former inhabitants”, concluding that “Establishing a marine reserve might, indeed, as the FCO’s Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands’ former inhabitants or their descendants from resettling in the BIOT.”

*(3) Exchanges between the United Kingdom and Mauritius on the proposed
“MPA”*

4.50 On 21 July 2009, delegations of the Mauritius and UK Governments released a Joint Communiqué following the second round of talks on the Chagos Archipelago in Port Louis, Mauritius.³⁴³ The British delegation was led by Mr Colin Roberts, and the Mauritius delegation by Mr S.C Seeballuck, Secretary to Cabinet and Head of the Civil Service. The Mauritius delegation was unaware of the meeting that had taken place between the UK and the US on 12 May 2009, and in the course of the talks Mr Roberts did not express to Mr Seeballuck any of the views which are recorded in the cable referred to above. Both sides reiterated their respective positions on sovereignty and resettlement.

4.51 The Communiqué went on to record that “The British delegation proposed that consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago [...] by establishing a marine protected area in the region.” In response, the Mauritius delegation “welcomed, in principle, the proposal for

³⁴³ Joint Communiqué, 2nd round of bilateral talks on the Chagos Archipelago, Port Louis Mauritius: Annex 148.

environmental protection and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with a view to informing the next round of talks.”

4.52 The Mauritius delegation also “reiterated the proposal it made in the first round of the talks for the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago.” The UK delegation “agreed to examine this proposal and stated that such examination would also include consideration of the implications of the proposed marine protected area.”

4.53 Both sides agreed to “meet in London on a date to be mutually agreed upon during the first fortnight of October 2009.” The UK subsequently proposed a meeting on dates which were impossible for Mauritius, as they coincided with the presentation of the national budget. Mauritius proposed alternative dates in January 2010, but the proposed meeting did not take place.³⁴⁴

4.54 On 5 and 6 August 2009, a workshop entitled “Marine conservation in the British Indian Ocean Territory (BIOT): science issues and opportunities” took place at the National Oceanography Centre Southampton, UK.³⁴⁵ The report of the workshop includes a section on fisheries issues, which concludes 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.”

4.55 On 10 November 2009, a copy of an FCO document entitled “Consultation on whether to establish a marine protected area in the British Indian Ocean Territory”³⁴⁶ was sent to the Mauritian authorities. The document claimed to be responding to the proposal put forward by the Chagos Environment Network.

4.56 On the same day, the Government of Mauritius asked the FCO to amend the document on the basis that:

“the Government of the Republic of Mauritius has not welcomed the establishment of a marine protected area during the bilateral talks on the Chagos Archipelago held in Mauritius

³⁴⁴ Note Verbale dated 5 November 2009 from Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 46/2009 (1197/28/4): Annex 150. See para. 4.68 below.

³⁴⁵ Marine conservation in the “British Indian Ocean Territory” (“BIOT”): science issues and opportunities; Report of workshop held 5-6 August 2009 at National Oceanography Centre Southampton, supported by NERC Strategic Ocean Funding Initiative (SOFI) at http://www.oceans2025.org/PDFs/SOFI%20Workshop%20Reports/SOFI_Workshop_Report_10_BIOT_09.pdf.

³⁴⁶ UK Foreign and Commonwealth Office, Consultation on Whether to Establish a Marine Protected Area in the “British Indian Ocean Territory”, November 2009: Annex 152.

last July, contrary to what is stated on page 12 of the Consultation Document.

In that regard, the Ministry of Foreign Affairs, Regional Integration and International Trade would like to point out that what was stated in the Joint Communiqué issued following the bilateral talks of last July was that the Mauritian side had welcomed, in principle, the proposal for environmental protection 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.”³⁴⁷

4.57 The UK agreed to amend the wording of the document.³⁴⁸ On 23 November 2009, the Mauritian Foreign Ministry welcomed the amendment to the consultation document³⁴⁹ but noted that the “precise stand of the Mauritian side on the MPA project, as stated in the Joint Communiqué issued following the bilateral talks of last July and in its Note Verbale of 10 November 2009, has not been fully reflected in the amended Consultation Document.” In particular, Mauritius was concerned that:

“since there is an on-going bilateral Mauritius-UK mechanism for talks and consultations on issues relating to the Chagos Archipelago and a third round of talks is envisaged early next year, the Government of the Republic of Mauritius believes that it is inappropriate for the consultation on the proposed marine protected area, as far as Mauritius is concerned, to take place outside this bilateral framework.”

4.58 Mauritius further emphasised that:

“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

³⁴⁷ Note Verbale dated 10 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 48/2009 (1197/28/10): Annex 153; and 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: Annex 151.

³⁴⁸ Note Verbale dated 11 November 2009 from the British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 54/09: Annex 154.

³⁴⁹ 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: Annex 155.

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.”

4.59 The matter was discussed by Prime Minister Ramgoolam and the Minister of Foreign Affairs of Mauritius with their British counterparts at the Commonwealth Heads of Government Meeting in Trinidad and Tobago in November 2009. The Mauritian side made clear Mauritius’ deep concerns about the UK’s decision to carry out what the UK described as a “consultation” on the MPA proposal. They insisted that the matter of a marine protected area for the Chagos Archipelago be dealt with and resolved bilaterally between Mauritius and the UK.

4.60 The UK’s Consultation Document, to which Mauritius objected, stated that “Any decision to establish a marine protected area would be taken in the context of the Government’s current policy on the Territory”, in other words that “there is no right of abode in the Territory and all visitors need a permit before entering the Territory.” The document posed the overall question “Do you believe we should create a marine protected area in the British Indian Ocean Territory?” The document presented broad options for a possible framework:

- (i) A full no-take marine reserve for the whole of the territorial waters and EPPZ / FCMZ; or
- (ii) A no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain forms of pelagic fishery (e.g., tuna) in certain zones at certain times of the year.
- (iii) A no-take marine reserve for the vulnerable reef systems only.

4.61 The Consultation Document placed the costs of the “MPA” at around £1 million per annum “if a decision was taken to move to a no-take fishery”. This is because the cost of the patrol vessel, at around £1.7 million per annum, would no longer be offset by fishing licence income varying between £700,000 and £1 million per year. The document went on to state that some groups will be “directly or indirectly affected by the establishment of a marine protected area and any resulting restrictions or a ban on fishing.” The first group considered was the US. The document noted that:

“The US has a military base on Diego Garcia. The use of that facility is governed by a series of Exchanges of Notes between the UK and US and imposes Treaty obligations on both parties. Because of our Treaty obligations, we have been discussing the possible creation of a marine protected area with the US. Neither we nor the US would want the creation of a marine protected area to have any impact on the operational capability of the base on Diego Garcia. For this reason, it may be necessary to consider the exclusion of Diego Garcia and its 3 mile territorial waters from any marine protected area.”

4.62 Under the heading “Mauritius”, at page 12, the Consultation Document stated that:

“We have discussed the establishment of a marine protected area with the Mauritian government in bilateral talks on the British Indian Ocean Territory – the most recent being in July 2009 [...]. The Mauritian government has in principle welcomed the concept of environmental protection in the area. The UK government has confirmed to the Mauritians that the establishment of a marine protected area will have no impact on the UK’s commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes. We will continue to discuss the protection of the environment with the Mauritians.”

4.63 Under the heading “Chagossian community” the document stated that:

“Following the decision of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 on 22 October 2008 [...], the current position under the law of BIOT is that there is no right of abode in the Territory and all visitors need a permit. Under these current circumstances, the creation of a marine protected area would have no direct immediate impact on the Chagossian community. However, we recognise that these circumstances may change following any ruling that might be given in the proceedings currently pending before the European Court of Human Rights in Strasbourg in the case of *Chagos Islanders v UK*. Circumstances may also change when the Territory is ceded to Mauritius. In the meantime, the environment will be protected and preserved.”

4.64 The proposed establishment of an MPA around the Chagos Archipelago was raised at the twelfth session of the Scientific Committee of the Indian Ocean Tuna Commission (hereinafter “IOTC”) held in Mahé, Seychelles from 30 November to 4 December 2009.

4.65 The UK informed the IOTC Scientific Committee that it was launching a consultation on whether to establish an MPA around the Chagos Archipelago. This gave rise to a strong objection by Mauritius, which stated that the setting up of any MPA around the Chagos Archipelago should be dealt with in the framework of the ongoing bilateral talks between Mauritius and the UK. Both parties issued statements on their respective positions. Mauritius stated that:

“Since there is an ongoing bilateral Mauritius-UK mechanism for talks and consultations on issues relating to Chagos Archipelago and a third round of talks is envisaged early next year, it is inappropriate for the British Government to embark on consultation globally on the proposed Marine Protected Area outside the bilateral framework. This position was brought to the

attention of the British Government by way of Note Verbale dated 23 November 2009 issued by the Ministry of Foreign Affairs, Regional Integration and International Trade to the UK Foreign and Commonwealth Office.

The establishment of a Marine Protected Area in the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago. A Marine Protected Area project in the Chagos Archipelago should address the issues of resettlement (Chagossians), access to the resources and the economic development of the islands in a manner which would not prejudice the effective exercise by Mauritius of its sovereignty over the Archipelago. A total ban on fisheries exploitation and omission of those issues from any Marine Protected Area project would not be compatible with the resolution of the sovereignty issue and progress in the ongoing talks.

The existing framework for bilateral talks between Mauritius and the United Kingdom and the related environmental issues should not be overtaken or bypassed by the process of consultation unilaterally launched by the British Government on the proposed Marine Protected Area.”³⁵⁰

4.66 On 15 December 2009, the UK Foreign Secretary wrote to the Mauritian Minister of Foreign Affairs, noting Mauritius’ view that “the UK should have consulted Mauritius further before launching the consultation exercise,” and assuring Mauritius that the UK was disposed to address the proposed MPA in bilateral talks, adding that the UK “welcome[s] the prospect of further discussion in the context of these talks, the next round of which now look likely to happen in January.”³⁵¹

4.67 In response, the Mauritian Minister of Foreign Affairs wrote to the UK Foreign Secretary on 30 December 2009, reminding him that “I had conveyed to you that the Government of Mauritius considers that the establishment of a Marine Protected Area around the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago.”³⁵² He emphasised that:

“the issues of resettlement in the Chagos Archipelago, access to the fisheries resources and the economic development of the islands in a manner that would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos

³⁵⁰ Indian Ocean Tuna Commission, Report of the Twelfth Session of the Scientific Committee, Victoria, Seychelles, 30 November – 4 December 2009, IOTC-2009-SC-R[E], p. 187.

³⁵¹ 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: Annex 156.

³⁵² 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: Annex 157.

Archipelago are matters of high priority to the Government of Mauritius. The exclusion of such important issues 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.”

4.68 On the same day, the Mauritian Foreign Ministry informed the FCO by Note Verbale,³⁵³ referring to its previous Note Verbale of 23 November 2009 (see para. 4.56 above), that:

“the next round of bilateral talks between the two Governments cannot take place during the month of January 2010, in the absence of satisfactory clarification and reassurances on the part of the Government of the United Kingdom on issues raised by the Government of Mauritius in the above-mentioned Note Verbale in relation to the Marine Protected Area project and in view of the continuation by the Government of the United Kingdom of the initial consultation process it had embarked upon.”

4.69 On 10 January 2010, in a letter to the *Sunday Times* regarding the proposed MPA, the Mauritius High Commissioner in London wrote: “There can be no legitimacy to the project without the issue of sovereignty and resettlement being addressed to the satisfaction of Mauritius.”³⁵⁴

4.70 On 4 February 2010, the Mauritius High Commissioner in London submitted written evidence on the MPA proposal to the UK House of Commons Select Committee on Foreign Affairs.³⁵⁵ The High Commissioner stated that “The manner in which the Marine Protected Area proposal is being dealt with makes us feel that it is being imposed on Mauritius with a predetermined agenda”, and that:

“Moreover, the issue of resettlement in the Chagos Archipelago, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos Archipelago are matters of high priority to the Government of Mauritius.

³⁵³ 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: Annex 158.

³⁵⁴ Letter of 30 December 2009 from Mauritius High Commissioner in London to *The Sunday Times*, published on 10 January 2010: Annex 159.

³⁵⁵ Written Evidence of the Mauritius High Commissioner, London, on the UK Proposal for the Establishment of a Marine Protected Area around the Chagos Archipelago, to the House of Commons Select Committee on Foreign Affairs: Annex 160.

The exclusion of such important issues from any MPA project and a total ban on fisheries exploitation 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.

The existing framework of talks between Mauritius and the UK on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the public consultation launched by the British Government on the proposed establishment of an MPA around the Chagos Archipelago.”

The High Commissioner also emphasised the Mauritian Government’s commitment to environmental sustainability, noting the “Maurice: Ile Durable” programme and Mauritius’ high ranking in the 2010 Environmental Performance Index.³⁵⁶

4.71 On 15 February 2010, the British High Commission in Port Louis informed the Mauritian Foreign Ministry that “due to significant interest in the public consultation on the proposal for a Marine Protected Area in the British Indian Ocean Territory the Foreign Secretary has extended the deadline for submission of views until 5 March 2010.”³⁵⁷

4.72 In response, the Mauritian Secretary to Cabinet and Head of the Civil Service wrote to the British High Commissioner on 19 February 2010.³⁵⁸ The letter reiterated:

“the position of the Government of Mauritius to the effect that the [public] consultation process on the proposed MPA should be stopped and the current Consultation Paper, which is unilateral and prejudicial to the interests of Mauritius withdrawn. Indeed, the Consultation Paper is a unilateral UK initiative which ignores the agreed principles and spirit of the ongoing Mauritius-UK bilateral talks and constitutes a serious setback to progress in these talks.”

4.73 The letter made clear that:

“any proposal for the protection of the marine environment in the Chagos Archipelago area needs to be compatible with and

³⁵⁶ On 28 January 2010 the Environmental Performance Index was released at the World Economic Forum Annual Meeting in Davos, Switzerland. The 2010 EPI ranked 163 countries on 25 performance indicators. Mauritius was ranked 6th in the world, ahead of the UK which was ranked 14th. See 2010 Environmental Performance Index, Yale Center for Environmental Law & Policy, Yale University, and Center for International Earth Science Information Network, Columbia University in collaboration with World Economic Forum and Joint Research Centre of the European Commission at <http://www.epi2010.yale.edu>.

³⁵⁷ Note Verbale dated 15 February 2010 from British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 07/2010: Annex 161.

³⁵⁸ Letter dated 19 February 2010 from the Secretary to Cabinet and Head of the Civil Service, Mauritius to the British High Commissioner, Port Louis: Annex 162.

meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issues of resettlement and access by Mauritians to fisheries resources in that area.”

4.74 The letter concluded that “the Government of Mauritius is keen to resume the bilateral talks on the premises outlined above.”

4.75 On 19 March 2010, the UK High Commissioner responded to this letter.³⁵⁹ He claimed that “the United Kingdom should like to reiterate that no decision on the creation of an MPA has yet been taken”, adding that “the United Kingdom is keen to continue dialogue about environmental protection within the bilateral framework or separately. The public consultation does not preclude, overtake or bypass these talks.”

4.76 The letter continued that “The United Kingdom is aware of Mauritius’ position on the sovereignty of the Territory; however it does not recognise this claim”, reaffirming that “[n]evertheless, the United Kingdom has undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes.” These statements were reiterated by the UK on 26 March 2010 in a Note Verbale to the Mauritian Ministry of Foreign Affairs.³⁶⁰

(4) The United Kingdom’s sudden and unilateral announcement of the creation of an “MPA”

4.77 On 1 April 2010, the UK announced the creation of an “MPA” around the Chagos Archipelago, including a “‘no take’ marine reserve where commercial fishing will be banned.”³⁶¹ In a press statement, the UK Foreign Secretary stated that “I have taken the decision to create this marine reserve following a full consultation, and careful consideration of the many issues and interests involved”, adding that “This measure is a further demonstration of how the UK takes its international environmental responsibilities seriously.”

4.78 The purported “MPA” covered an area of around a quarter of a million square miles,³⁶² constituting the largest “no-take” area in the world.³⁶³

³⁵⁹ Letter dated 19 March 2010 from the British High Commissioner, Port Louis to the Secretary to Cabinet and Head of the Civil Service, Mauritius: Annex 163.

³⁶⁰ Note Verbale dated 26 March 2010 from British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 14/2010: Annex 164.

³⁶¹ UK Foreign and Commonwealth Office Press Release, 1 April 2010, “New Protection for marine life”: Annex 165.

³⁶² *Ibid.* On 12 April 2012, the FCO website changed the size of the “MPA” from 544,000 to 640,000 square kilometres. When a question about the change was raised in the UK Parliament, the Minister of State for the FCO stated that this had been corrected due to a ‘clerical error’: Hansard, HL Deb, 11 June 2012, c149W (Annex 175).

³⁶³ UK Foreign and Commonwealth Office, Consultation on Whether to Establish a Marine Protected Area in the “British Indian Ocean Territory”, November 2009: Annex 152. “Chagos Islands marine

4.79 The “MPA” was formally declared by the Commissioner for the “BIOT”:

“1. 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.

2. Within the said Marine Protected Area, Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the Marine Protected Area. The detailed legislation and regulations governing the said Marine Protected Area and the implications for fishing and other activities in the Marine Protected Area and the Territory will be addressed in future legislation of the Territory.”³⁶⁴

4.80 Mauritius was astonished by the announcement of the “MPA”, less than a week after the UK had assured Mauritius that no decision had yet been taken on the matter.³⁶⁵ On 2 April 2010, the day following the announcement, the Mauritian Ministry of Foreign Affairs informed the UK by Note Verbale³⁶⁶ that “The Government of the Republic of Mauritius strongly objects to the decision of the British Government to create a Marine Protected Area (MPA) around the Chagos Archipelago”. The Note recalled that “on several occasions” the Government of Mauritius “conveyed its strong opposition to such a project being undertaken without consultation with and the consent of the Government of the Republic of Mauritius.” The Note continued:

“It was explained in very clear terms during the above-mentioned meetings that Mauritius does not recognise the so-called British Indian Ocean Territory and that the Chagos Archipelago, including Diego Garcia, forms an integral part of the sovereign territory of Mauritius both under our national law and international law. It was also mentioned that the Chagos Archipelago, including Diego Garcia, was illegally excised from Mauritius by the British Government prior to grant of independence in violation of United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965.

protection plan comes under fire from three sides”, *The Guardian*, 6 April 2010 at <http://www.guardian.co.uk/environment/2010/apr/06/chagos-islands-conservation-area>.

³⁶⁴ “British Indian Ocean Territory” Proclamation No. 1 of 2010: Annex 166. See Figure 6, Volume 4.

³⁶⁵ Note Verbale dated 26 March 2010 from British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 14/2010 (Annex 164) following letter of 19 March 2010 from British High Commissioner, Port Louis to the Secretary to Cabinet and Head of the Civil Service, Mauritius (Annex 163).

³⁶⁶ 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): Annex 167.

The Government of the Republic of Mauritius further believes that the creation of an MPA at this stage is inconsistent with the right of settlement in the Chagos Archipelago of Mauritians, including the right of return of Mauritians of Chagossian origin which presently is under consideration by the European Court of Human Rights following a representation made by Mauritians of Chagossian origin.

The Government of the Republic of Mauritius will not recognise the existence of the marine protected area in case it is established and will look into legal and other options that are now open to it. The [...] Anglo-US Lease Agreement in respect of the Chagos Archipelago, concluded in breach of the sovereignty rights of Mauritius over the Chagos Archipelago, is about to expire in 2016 and the Chagos Archipelago, including Diego Garcia, should be effectively returned to Mauritius at the expiry of the Agreement.”

4.81 On 6 April 2010, *The Guardian* reported that the UK Government’s decision to create the “MPA” had been condemned by British MPs, the Government of Mauritius, and representatives of the Chagossian community:

“Anger mounted today over Britain’s decision last week to create the world’s largest marine protection zone around the Chagos islands as an influential group of British MPs joined the government of Mauritius and a large group of islanders to condemn the way the decision was made.”³⁶⁷

The UK Government’s failure to honour its commitment to brief MPs before any final decision was taken was raised as an Urgent Question in both Houses of Parliament on 6 April 2010.³⁶⁸ A judicial review challenge to the lawfulness of the decision to create the MPA is currently pending before the High Court in London.³⁶⁹

4.82 On 1 November 2010, the UK purported to bring the “MPA” into force. Its implementation has been less than transparent. For example, any implementing legislation would be expected to be published in the 2011 edition of the “BIOT” Gazette, a publication in very limited circulation, though usually deposited in the British Library in London in January following the relevant year. This was not done in January 2012. A copy of Issue 1 of the “BIOT” Gazette for 2011 had been filed at the library of the Institute of Advanced Legal Studies in London on 13 July 2012, shortly before the filing of this Memorial. This contained no regulations relating to the “MPA”.

³⁶⁷ ‘Chagos Islands marine protection plan comes under fire from three sides’, *The Guardian*, 6 April 2010 at <http://www.guardian.co.uk/environment/2010/apr/06/chagos-islands-conservation-area>.

³⁶⁸ House of Commons Hansard, Vol. 508, 6 April 2010, column 819; House of Lords Hansard, Vol. 718, 6 April 2010, col. 1363. Both available at: <http://www.publications.parliament.uk>.

³⁶⁹ See Chapter 3, fn 256.

4.83 Some information about the implementation of the “MPA” can be gleaned from answers to Parliamentary questions in the House of Commons. The UK Government has stated that:

“The BIOT Administration are no longer issuing new fishing licences but are honouring those already issued. These licences expire at the end of October [2010]. The BIOT Administration are continuing to work on the implementation of the MPA. This includes preparing implementing legislation in BIOT law, enforcement arrangements, establishing administrative and scientific research frameworks, funding, dialogue with interested parties and exploring the opportunities for involving representatives of the Chagossian community in environmental work in the territory.”³⁷⁰

“Enforcement is led by a marine protection officer working on board the Pacific Marlin patrol boat. The British Indian Ocean Territory Administration operates a system of permits to control access to and activities within the Marine Protected Area. We also work closely with the Indian Ocean Tuna Commission to limit illegal fishing.”³⁷¹

4.84 According to information provided by the UK to the IOTC, the “MPA” applies to the Territorial Sea of the Chagos Archipelago.³⁷² The UK has also informed the IOTC that no further fishing licences have been issued since the “MPA” was declared on 1 April 2010. The last longline licence expired on 18 June 2010 and the last purse seine licences expired on 31 October 2010, and “[f]rom 1 November 2010 onwards the whole of the BIOT Fisheries Conservation Management Zone (FCMZ, to 200nm) is a no-take MPA to commercial fishing.”³⁷³ However, “[a]n MPA exclusion zone covering Diego Garcia and its territorial waters exists where pelagic and demersal recreational fisheries are permitted. Recreational fishing is permitted with hooks and lines only and some tuna and tuna like species are caught.”³⁷⁴ The “recreational fishery” at Diego Garcia accounted for 28.4 tonnes of tuna and tuna like species in 2010, representing 67% of the “recreational” catch.³⁷⁵ At a meeting of the IOTC Scientific Committee in December 2011, Mauritius again made clear that:

³⁷⁰ Hansard, House of Commons Written Answers, 21 October 2010: Annex 169.

³⁷¹ Hansard, House of Commons Written Answers, 16 May 2011: Annex 171.

³⁷² UK (British Indian Ocean Territory) National Report to the Scientific Committee of the Indian Ocean Tuna Commission, 2011, IOTC-2011-SC14-NR28, pp. 2 and 3. There, the UK states that the “MPA” applies to the Chagos Archipelago but excludes the territorial sea of Diego Garcia: it therefore follows that the “MPA” applies to the territorial sea and EEZ of the remaining parts of the Chagos Archipelago.

³⁷² *Ibid.*

³⁷³ Indian Ocean Tuna Commission, United Kingdom Report of Implementation for the year 2010, IOTC-2011-S15-CoC51[E].

³⁷⁴ UK (British Indian Ocean Territory) National Report to the Scientific Committee of the Indian Ocean Tuna Commission, 2011, IOTC-2011-SC14-NR28, p. 3.

³⁷⁵ *Ibid.*

“the Chagos Archipelago, including Diego Garcia, forms an integral part of the territory of Mauritius under both Mauritian law and international law. The Government of the Republic of Mauritius does not recognise the existence of the ‘marine protected area’ which the United Kingdom has purported to establish around the Chagos Archipelago.”³⁷⁶

³⁷⁶ Report of the Fourteenth Session of the IOTC Scientific Committee, Mahé, Seychelles, 12-17 December 2011, IOTC-2011-SC14-R[E], p. 14. The statement by Mauritius went on to inform the IOTC of the initiation of the present Annex VII proceedings. The UK responded that it “has no doubt about its sovereignty over the British Indian Ocean Territory which was ceded to Britain in 1814 and has been a British dependency ever since. As the UK Government has reiterated on many occasions, we have undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes”: p. 15.

CHAPTER 5: JURISDICTION

5.1 This Chapter addresses the jurisdiction of the Tribunal to adjudicate the claims raised by Mauritius in its Application instituting proceedings on 20 December 2010 (as corrected on 27 January 2012) (hereinafter “the Application”). As set out below, the dispute between Mauritius and the UK raises a number of issues concerning the interpretation and application of the Convention, all of which fall squarely within the jurisdiction of this Tribunal.

5.2 As noted in Chapter 1, the dispute has arisen because the UK has acted without lawful authority to establish the “MPA”. Specifically:

- (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 may not impose the purported “MPA” or establish any 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, 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.

5.3 In regard to this second point, 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.

5.4 In relation to both points, Mauritius submits that the Tribunal plainly has jurisdiction to establish the nature of Mauritius’ rights in accordance with the Convention, and the extent to which they have been violated by the UK.

5.5 This Chapter first sets out the relevant provisions of the Convention that relate to jurisdiction, as provided by Part XV of the Convention. It then addresses the various aspects of the dispute that concern the interpretation and application of specific provisions of the Convention, and shows that none of the jurisdictional exceptions set out in Article 297 operate so as to preclude the Tribunal’s exercise of jurisdiction. A third section deals with the relationship between Mauritius’ jurisdictional arguments and the merits. A fourth and final section explains that, since all procedural requirements have been met, there is no bar to admissibility.

I. Jurisdiction under the Convention

5.6 Mauritius and the UK are both parties to the Convention. Mauritius ratified the Convention on 4 November 1994, and the UK acceded to it on 25 July 1997.³⁷⁷ As regards the 1995 Agreement, Mauritius acceded thereto on 25 March 1997 and the UK ratified it on 10 December 2001.³⁷⁸

5.7 Part XV of the Convention is entitled “Settlement of Disputes”, and governs the jurisdiction of this Tribunal. It comprises twenty-one Articles and is divided into three Sections.

5.8 Section I of Part XV is entitled “General Provisions”. Two Articles are relevant to this case. Article 279 confirms the central importance placed by the negotiators of the Convention on the obligation to settle disputes, providing that:

“States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.”

Article 283(1) sets out the procedural steps that are to be taken before the procedures established under the Convention for the settlement of disputes may be invoked. It provides that:

“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.”

As set out below,³⁷⁹ Mauritius has exchanged views with the UK in accordance with the Convention. These have not resolved the dispute.

5.9 Section 2 of Part XV provides for “Compulsory Procedures Entailing Binding Decisions” (Articles 286 to 296).

5.10 Article 286 emphasises that the scope of jurisdiction under Part XV is intended to be broad. It provides that:

“Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has

³⁷⁷ Upon depositing its instrument of accession, the Government of the United Kingdom also stated that “*Extent*: [This] instrument of accession [...] extend[s] to: [...] British Indian Ocean Territory [...].”

³⁷⁸ On 3 December 1999, an instrument of ratification was lodged by the United Kingdom “[...] in respect of [...] British Indian Ocean Territory [...].” Article 30(1) of the 1995 Agreement provides that “The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation of application of this Agreement, whether or not they are also Parties to the Convention.”

³⁷⁹ Para. 5.38.

been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”

The provision sets forth a presumption that jurisdiction extends to “any dispute concerning the interpretation and application of the Convention”. The exercise of jurisdiction is limited only by (1) any declarations concerning the choice of a court or tribunal, and (2) the operation of Section 3 of Part XV.

5.11 As regards the choice of compulsory procedures, Article 287(1) permits a State Party by written declaration to choose one or more of the means listed in the paragraph for the settlement of disputes, which include an arbitral tribunal established under Annex VII. Mauritius has made no declaration. The UK has made a declaration opting for recourse to the International Court of Justice. By operation of Article 287(5), the parties are accordingly deemed to have accepted arbitration in accordance with Annex VII for the settlement of any disputes between them under the Convention.

5.12 Article 288(1) is entitled “Jurisdiction”. It provides that:

“A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”

It follows from Articles 287 and 288 that this Annex VII Tribunal has jurisdiction over the dispute concerning the interpretation and application of the Convention as submitted to it by Mauritius, in accordance with Part XV.

5.13 Article 293 of the Convention provides that:

“A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”

5.14 Section 3 of Part XV provides for “Limitations and Exceptions to Applicability of Section 2” (Articles 297 to 299). These are the only exceptions provided for in the Convention. As exceptions to the otherwise broad scope of jurisdiction that is intended to be established under Part XV, the purpose of which is to facilitate the resolution of “any dispute” concerning the interpretation and application of the Convention, the provisions of Section 3 should not be expansively interpreted, and in particular should not be interpreted in such a way as to deny practical effect to Part XV.

5.15 Article 297 provides for “Limitations on the applicability of section 2” of Part XV. For the reasons set out below, none of the specified limitations precludes the exercise of jurisdiction by this Tribunal over the dispute submitted to it by Mauritius.

5.16 Article 297(1) provides in positive terms that “Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal

State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2” in relation to:

- (i) “contravention of the provisions of the Convention by a coastal State in regard to freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58” (Article 297(1)(a) and (b)); and
- (ii) “contravention by a coastal State of specified international rules and standards for the protection and preservation of the marine environment” (Article 297(1)(c)).

It is apparent from this text that Article 297(1) recognises that a dispute that is not about “the exercise by a coastal State of its sovereign rights or jurisdiction provided by this Convention” is within the jurisdiction of an Annex VII Tribunal acting under Part XV.

5.17 Article 297(1) is to be read alongside Article 297(3), which provides in paragraph (a) that:

“Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise [...]”

5.18 Taking the two provisions together, it is clear that Article 297(1) does not preclude the exercise of jurisdiction over any dispute concerning fisheries (that relates to the “exercise” of sovereign rights or jurisdiction under the Convention), unless such dispute relates to sovereign rights in respect of living resources in the EEZ. Thus, 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.³⁸⁰ It is also clear that any dispute concerning fisheries in the EEZ which does not concern “sovereign rights with respect to living resources [...] or their exercise” is also subject to compulsory jurisdiction: a dispute concerning an *entitlement* to establish an EEZ is not covered by Article 297(1). Such exclusionary benefit as the UK might seek to invoke under Article 297(3)(a) simply does not apply where the State invoking it is not “the coastal State”, as in the present case.

5.19 Article 298 of the Convention is entitled “Optional exceptions to applicability of section 2” of Part XV of the Convention. Paragraph 1 provides that:

“When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the

³⁸⁰ Article 55 states that “The exclusive economic zone is an area beyond and adjacent to the territorial sea”.

obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a)(i) 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.”

Neither Mauritius nor the UK has made any declaration under Article 298(a)(i) of the Convention.³⁸¹ It follows that there is no bar to the exercise of jurisdiction by the Tribunal in relation to matters that would be caught by Article 298(1)(a).

II. The Tribunal has Jurisdiction to Interpret and Apply the Convention in Relation to the Dispute

5.20 In determining whether this Tribunal has jurisdiction, it is necessary to examine the “dispute concerning the interpretation or application of [the] Convention” that Mauritius has submitted to it.

(1) The dispute

5.21 The dispute is addressed in detail in the other Chapters of this Memorial. At paragraph 9 of its Application, Mauritius stated that:

“The dispute between Mauritius and the United Kingdom relates to the interpretation and application of numerous provisions of UNCLOS, including but not limited to Parts II, V, VI, XII and XVI.”

With regard to the relief sought, Mauritius requested the Tribunal:

³⁸¹ On 7 April 2003 the UK made a declaration to exclude disputes referred to in Article 298(1)(b) and (c) from procedures provided for in Section 2 of Part XV of the Convention.

“to declare, in accordance with the provisions of UNCLOS and the applicable rules of international law not incompatible with the Convention that, in respect of the Chagos Archipelago:

- (1) the “MPA” is not compatible with the 1982 Convention, and is without legal effect; and/or
- (2) the UK is not a “coastal state” within the meaning of the 1982 Convention and is not competent to establish the “MPA”; and/or
- (3) only Mauritius is entitled to declare an exclusive zone under Part V of the 1982 Convention within which a marine protected area might be declared.”

5.22 As noted above at paragraph 5.2, the dispute between Mauritius and the UK concerning the “MPA” has arisen because (1) 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; and has acknowledged the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago; and (2) independently of the question of sovereignty, the “MPA” is fundamentally incompatible with the rights and obligations provided for by the Convention.

5.23 Mauritius submits that the Tribunal has jurisdiction over each and every aspect of the dispute: it has jurisdiction to rule that the UK is not entitled to declare an “MPA” or, if it is so entitled (contrary to the claim of Mauritius), that its exercise of any such entitlement violates the Convention. As set out in detail in Chapters 6 and 7 of this Memorial, the dispute requires the Tribunal to interpret and apply a number of provisions of the Convention, relating to the territorial sea, the EEZ, the continental shelf and abuse of rights. It is convenient for the purposes of presentation to address the different elements of the dispute in the order in which they are to be found in the Convention. They are as follows:

- (i) Article 2(1): whether the UK is a “coastal State” for the purpose of establishing and applying the “MPA” in the territorial sea (this is addressed in Chapter 6);
- (ii) Article 2(3): whether the UK’s claimed exercise of sovereignty in the territorial sea around the Chagos Archipelago complies with “other rules of international law”, having regard to Mauritius’ fishing and mineral rights in those waters (Chapter 7);
- (iii) Article 55: whether the UK is “the coastal State” having rights and jurisdiction in “an area beyond and adjacent to the territorial sea” of the Chagos Archipelago and is entitled to establish the “MPA” in that area (Chapter 6);
- (iv) Article 55: whether the UK’s claimed exercise of rights and jurisdiction complies with “the relevant provisions” of the Convention (Chapter 7);

- (v) Article 56(2): whether, on the basis of its claim that it is the “coastal State”, the UK by establishing the “MPA” has had “due regard to the rights and duties” of Mauritius and acted “in a manner compatible with the provisions of this Convention” (Chapter 7);
- (vi) Article 62(5): whether, on the basis of its claim that it is the “coastal State”, the UK has complied with the obligation to “give due notice of conservation and management laws and regulations” (Chapter 7);
- (vii) Article 63(1): whether, on the basis of its claim that it is the “coastal State”, the UK by establishing the “MPA” has complied with its obligation to seek agreement on the measures necessary to co-ordinate and ensure the conservation and development of stocks of tuna, either directly with Mauritius, or through the IOTC or other “appropriate subregional or regional organisations” (Chapter 7);
- (viii) Article 63(2): whether, on the basis of its claim that it is the “coastal State”, the UK by establishing the “MPA” has complied with its obligation to seek, either directly with Mauritius or through the IOTC or other “appropriate subregional or regional organisations”, agreement upon the measures necessary for the conservation of stocks of tuna in the area adjacent to the “MPA” (Chapter 7);
- (ix) Article 64(1): whether, on the basis of its claim that it is the “coastal State”, the UK by establishing the “MPA” has complied with its obligation to cooperate directly with Mauritius and other States, or through appropriate international organisations, to ensure conservation and promote the objective of optimum utilisation of highly migratory species throughout the Indian Ocean region, both within and beyond the exclusive economic zone (Chapter 7);
- (x) Article 7 of the 1995 Agreement: whether, on the basis of its claim that it is the “coastal State”, the UK has complied with its obligation to “make every effort to agree on compatible conservation and management measures within a reasonable period of time” (Chapter 7);
- (xi) Articles 76, 77 and 81: whether the UK is “the coastal State” exclusively entitled, by establishing the “MPA”, to prohibit any exploration of the seabed and subsoil of the submarine areas that extend beyond the territorial sea of the Chagos Archipelago (Chapter 6);
- (xii) Article 194(1): whether, on the basis of its claim that it is the “coastal State”, the UK by establishing the “MPA” has complied with its obligation to “endeavour to harmonise” its policies with those of Mauritius and other States in the region (Chapter 7);
- (xiii) Article 300: whether the UK by establishing the “MPA” has exercised rights (without prejudice to whether such rights exist) in a manner that constitutes an “abuse of right”, in particular by disregarding the rights

and interests of Mauritius as acknowledged by the UK, and in the light of the circumstances set out in Chapter 7 of this Memorial.

5.24 As described above, the dispute between Mauritius and the UK concerns the interpretation and application of the Convention. The only limitations to the exercise of jurisdiction are to be found in Article 297 (see above at paras. 5.15 to 5.18) and Article 298 (which is not brought into play because neither party has made a declaration in relation to Article 298(1)(a)(i)). For the reasons set out below, none of the claims of Mauritius are outside the jurisdiction of the Tribunal. There is nothing in Article 297 (or elsewhere in the Convention) to prevent the Tribunal from deciding that the UK is not “the coastal State” in relation to this dispute, so that it has no right under the Convention to establish an EEZ and/or establish the “MPA” and/or exercise sovereignty in the territorial sea and/or exercise sovereign rights over the seabed and subsoil beyond the territorial sea. Nor is there anything in Article 297 or elsewhere in the Convention to exclude the jurisdiction of the Tribunal, even assuming the UK is a “coastal State”, in relation to the dispute concerning the establishment of the “MPA” and its purported exercise of rights in the territorial sea, EEZ or continental shelf in violation of the rights of Mauritius and third States under various provisions of the Convention.

(2) The Tribunal has jurisdiction to determine that the United Kingdom is not the “coastal State” under the Convention

5.25 The issue of whether the UK is the “coastal State”, and entitled to establish the “MPA”, turns on the interpretation and application of the words “the coastal State” within the meaning of Articles 2(1), 55, 76 and/or 77 and/or 81 of the Convention. The issue is the subject of the elements of the dispute identified in paragraphs 23(i), (iii) and (xi) above, matters which are dealt with in Chapter 6 of this Memorial. These aspects of the dispute fall within the jurisdiction of the Tribunal and are not excluded by Article 297, since they do not concern “the exercise by a coastal State of its sovereign rights provided for in [the] Convention”. There is nothing in Article 297 that excludes jurisdiction over disputes about entitlement to declare an “MPA” – and thus about entitlement to declare an EEZ – and about the existence of the territorial sea or continental shelf. These are matters that are clearly within the jurisdiction of the Tribunal.

5.26 Further, Mauritius notes that there is ample authority in support of the proposition that a court or tribunal acting under Part XV of the Convention has jurisdiction to decide whether a State is a “coastal State”. Even in the circumstance that the interpretation and application of the words “coastal State” require the Tribunal to form a view on sovereignty over the Chagos Archipelago, there is no bar to the exercise of jurisdiction. In the absence of any declaration by Mauritius and the UK, Article 298(1)(a) makes clear that an Annex VII Tribunal can resolve a dispute between Mauritius and the UK concerning the “consideration of any unsettled dispute concerning the sovereignty or other rights [of Mauritius]” over the Chagos Archipelago. Issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation and to other issues raised under the Convention, self-evidently concern the interpretation or application of the Convention, and therefore fall within its scope. The International Tribunal for the Law of the Sea

“has noted that its jurisdiction over maritime delimitation disputes also includes those which involve issues of land or islands”³⁸².

5.27 The point has been put clearly by Judge Rao of the International Tribunal for the Law of the Sea:

“[S]ince the exclusionary clause [in Article 298(1)(a)] does not apply to a compulsory procedure provided for in section 2 of part XV, a mixed dispute, whether it arose before or after the entry into force of the Convention, falls within the jurisdiction of a compulsory procedure.”³⁸³

5.28 Judge Rao was writing about mixed disputes relating to delimitation, but the approach is equally pertinent to other mixed disputes involving land and sea, such as the present one, which raises the question of whether the UK’s actions in the process of decolonisation, in 1965 and subsequently, are compatible with the exercise of rights in the maritime areas surrounding the Chagos Archipelago. Judge Rao recognises the consequences of such an approach:

“If a court or tribunal were to refuse to deal with a mixed dispute on the ground that there are no substantive provisions on land sovereignty issues, the result would be to denude the provisions of the Convention relating to sea boundary delimitations of their full effect and of every purpose and reduce them to an empty form.”³⁸⁴

5.29 Given the Convention’s status as the first global “post-colonial” multilateral convention, it would be surprising for it to be interpreted and applied in such a manner as to preclude its provisions from being invoked to determine whether rights may be claimed in circumstances where there has been a manifest violation of the obligations relating to decolonisation. Noting that Article 293 requires a court or tribunal to apply “other rules of international law not incompatible with the Convention”, Judge Rao observes that:

“A court or tribunal referred to in Article 288 being thus empowered to apply general international law suffers from no inherent limitation even in resolving disputes involving the land element”³⁸⁵.

³⁸² See Statement by Judge Albert Hoffmann, 46th Session of the Asian-African Legal Consultative Organisation, Cape Town, Republic of South Africa, 2-6 July 2007, available at: <http://www.itlos.org/index.php?id=68&L=0>

³⁸³ P. Chandrasekhara Rao, “Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, p. 877, at p. 890.

³⁸⁴ *Ibid.*, p. 891.

³⁸⁵ *Ibid.*

5.30 The view is shared by others. For example, Professor Alan Boyle confirms that the exclusionary language of Article 298(1)(a) means that a court or tribunal can deal with a land dispute so long as it is related to a maritime dispute:

“While parties to the Convention do have the option of excluding such disputes from compulsory jurisdiction under Article 298(1), the implication must be that, where this option is not exercised, a tribunal, including the ITLOS, may if necessary deal with both the land and the maritime dispute.”³⁸⁶

Professor Boyle explicitly recognises there is no bar to a court or tribunal under Part XV dealing with the question of entitlement to claim an EEZ where there is a “land [...] dispute”:

“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. But suppose, instead, that it is reformulated as a claim that on equitable grounds the island or rock should be given no weight as a basepoint in a delimitation under Article 74? *Prima facie* this appears to be caught by Article 298(1). It is not necessary for present purposes to answer these questions, but they should suffice to show that everything turns in practice not on what each case involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside.”³⁸⁷

5.31 The case submitted to this Tribunal is “a dispute involving EEZ claims around a disputed island”. It is about entitlement, not about the exercise of rights where

³⁸⁶ A. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction”, 46 *ICLQ* 37, at p. 49 (1997).

³⁸⁷ *Ibid.*, p. 44, emphasis added.

entitlement is not in issue. As such, the present dispute is “not excluded from compulsory jurisdiction under either Article 297 or 298”, in the manner recognised by Professor Boyle. There is no bar to the Tribunal exercising jurisdiction to determine whether the UK, having violated the rule reflected in UN General Assembly resolution 1514 (XV) in the process of decolonisation, is entitled *inter alia* to establish an EEZ and, within that area, an “MPA”.

5.32 The Tribunal is under no obligation to turn a blind eye to “other rules of international law not incompatible with [the] Convention”. To the contrary, it must apply them. Such rules include those reflected in General Assembly resolution 1514 (XV) which confirms that:

“[a]ny 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”.

The resolution reflects a principle of *ius cogens*,³⁸⁸ and it is properly to be applied by the Tribunal not only in relation to the merits of the dispute, but also in respect of the interpretation and application of Part XV. Having regard to the fact that the Convention is widely recognised as a “constitution for the oceans”,³⁸⁹ it would be anomalous for that constitution to allow a State to take the benefit of a manifest wrongdoing in the process of decolonisation.

5.33 As the Annex VII Tribunal in *Guyana v Suriname* unanimously observed,³⁹⁰ ITLOS has “interpreted Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force)”. That Annex VII Tribunal concluded that “this is a reasonable interpretation of Article 293”, and one that allowed it “to adjudicate alleged violations of the United Nations Charter and general international law”.³⁹¹ If an Annex VII Tribunal can exercise jurisdiction over alleged violations of the UN Charter, it can equally exercise jurisdiction to adjudicate violations of obligations deriving from the peremptory norm reflected in United Nations General Assembly resolution 1514 (XV), within the framework of the United Nations Charter.

5.34 In summary, jurisdiction in respect of the Articles of the Convention listed in paragraph 23 above which fall to be interpreted with regard to this part of Mauritius’ submission (Articles 2(1) and (3), 55, 76, 77 and 81) is not excluded by Article 297. Having regard also to Article 298(1)(a), there is nothing to preclude the Annex VII Tribunal from exercising jurisdiction over a “mixed” dispute involving territorial sea,

³⁸⁸ See paras 6.10-6.14 below.

³⁸⁹ The words are attributed to Ambassador Tommy Koh in statements made on 6 and 11 December 1982 at the final session of UNCLOS III: see M. H. Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. 1, (Center for Oceans Law and Policy, University of Virginia, 1985), p. 11.

³⁹⁰ *Guyana v Suriname*, Annex VII Arbitral Tribunal, Award of 17 September 2007, para. 404.

³⁹¹ *Ibid.*, para. 406.

EEZ and continental shelf claims around a disputed island, as well as claims to be entitled to establish an “MPA”.

(3) The Tribunal has jurisdiction to determine whether, even if the United Kingdom is a “coastal State”, it is exercising rights consistently with the Convention

5.35 This Tribunal also has jurisdiction to determine whether, if the UK has any of the entitlements it claims, it is exercising rights consistent with its obligations under the Convention. There is nothing in Article 297 to exclude such jurisdiction. These elements of the dispute are listed in paragraph 5.23 above, and are addressed in Chapter 7 of this Memorial:

- (i) The dispute concerning the interpretation and application of Article 2(3) (para. 5.23(ii) above) relates to the exercise of Mauritius’ fishing and related rights in the territorial sea, and is therefore not excluded from the jurisdiction of the Tribunal by Article 297.
- (ii) The dispute concerning the interpretation and application of Article 55 (para. 5.23(iv) above) falls within the jurisdiction of the Tribunal because the UK “has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention”, (in contravention of inter alia Article 56(2) of the Convention); jurisdiction is accordingly provided by Article 297(1)(c).
- (iii) The dispute concerning the interpretation and application of Article 56(2) (para. 5.23(v) above) is within the jurisdiction of the Tribunal because the UK has established the “MPA” without having “due regard to the rights” of Mauritius in respect of non-living resources in the part of the “MPA” that is beyond the territorial sea of the Chagos Archipelago; this is not excluded from jurisdiction by reason of Article 297(3)(a), since the dispute does not relate to sovereign rights with respect to the living resources in the exclusive economic zone or their exercise.
- (iv) The dispute concerning the interpretation and application of Article 62(5) (para. 5.23(vi) above) is within the jurisdiction of the Tribunal because the UK has not given due notice of conservation and management laws and regulations and has thus “acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention”; jurisdiction is accordingly provided by Article 297(1)(c).

- (v) The dispute concerning the interpretation and application of Article 63(1) (para. 5.23(vii) above) is within the jurisdiction of the Tribunal because the failure to seek agreement upon the measures necessary to co-ordinate and ensure the conservation and development of stocks of tuna, either directly with Mauritius or through the IOTC or other “appropriate subregional or regional organisations”, is not excluded from jurisdiction by Article 297(1)(a) or (c), and/or is not covered by Article 297(3)(a) (the dispute does not relate to sovereign rights with respect to the living resources in the EEZ, or their exercise).
- (vi) The dispute concerning the interpretation and application of Article 63(2) (para. 5.23(viii) above) is within the jurisdiction of the Tribunal because the failure to agree upon the measures necessary for the conservation of stocks of tuna in the area adjacent to the “MPA”, directly with Mauritius or through the IOTC or other “appropriate subregional or regional organisations”, is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention).
- (vii) The dispute concerning the interpretation and application of Article 64(1) (para. 5.23(ix) above) is within the jurisdiction of the Tribunal because the failure to cooperate directly with Mauritius and other States, or through appropriate international organisations, to ensure conservation and promote the objective of optimum utilisation of highly migratory species throughout the Indian Ocean region beyond the exclusive economic zone is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention).
- (viii) The dispute concerning the interpretation and application of Article 7 of the 1995 Agreement (para. 5.23(x) above) is within the jurisdiction of the Tribunal because Article 30 of the Agreement provides that the dispute settlement provisions of the 1982 Convention apply to disputes regarding the interpretation or application of the Agreement and because the failure of the UK to “make every effort to agree on compatible conservation and management measures within a reasonable period of time” is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention).
- (ix) The dispute concerning the interpretation and application of Article 194(1) (para. 5.23(xii) above) is within the jurisdiction of the Tribunal because the failure of the UK to comply with its obligation to “endeavour to harmonise” its policies with those of Mauritius and other States in the region falls within Article 297(1)c) of the Convention.
- (x) The dispute concerning the interpretation and application of Article 300 (para. 5.23(xiii) above) is within the jurisdiction of the Tribunal because the UK has failed to give effect to its obligation to exercise rights in a

manner that does not “constitute an abuse of right”; this is a dispute concerning the application or interpretation of the Convention which is not excluded by Article 297.

III. Relationship With the Merits

5.36 The UK has indicated that it is likely to object to jurisdiction and to seek to have the issue of jurisdiction dealt with as a preliminary matter.³⁹² Article 11 of the Rules of Procedure adopted by the Tribunal provides for the procedure and timetable to be followed in such circumstances.

5.37 In this regard, Mauritius notes the unanimous decision of the Arbitral Tribunal in *Guyana v Suriname* that issues of jurisdiction are to be joined to the merits where “the facts and arguments in support of [...] submissions in [...] Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend, and the objections are not of an exclusively preliminary character”.³⁹³ This adopts the approach taken by the ICJ, which has ruled that where an objection is not of an exclusively preliminary nature, it should be joined to the merits.³⁹⁴

IV. Exchange of Views

5.38 As set out in Chapter 4, there is evidently a dispute between Mauritius and the UK concerning the legality of the “MPA” under the Convention and the 1995 Agreement. This is reflected in a series of Notes Verbales and other communications and exchanges taking place in 2009 and 2010, and again following the purported establishment of the “MPA” in April 2010.³⁹⁵ As set out in Chapter 4, there has been a full exchange of views between Mauritius and the UK concerning the dispute in regard to the “MPA” and related matters, including the deposit with the UN Secretary-General of coordinates of delimitation, in accordance with Article 75 of the Convention. Those exchanges encompass both the UK’s claimed entitlement to establish an “MPA”, as a “coastal State”, and its exercise of purported rights under the Convention. By December 2010 it was plain that any further exchange of views would be futile, as the UK was fully committed to the establishment of the “MPA”, including as a means of preventing the return of the Chagossians. Mauritius was therefore entitled to initiate these arbitration proceedings.

5.39 Mauritius cannot be expected to wait endlessly before submitting its dispute with the UK to an Annex VII Tribunal. See for example:

³⁹² Letter of 24 February 2012 from Mr Chris Whomersley, Agent of the United Kingdom, to Mr Brooks Daly, Permanent Court of Arbitration.

³⁹³ *Guyana v Suriname*, Order No. 2 of 18 July 2005.

³⁹⁴ The ICJ has determined that where a jurisdictional argument requires the “elucidation” of facts and “their legal consequences”, the objection should be determined with the merits: see *Rights of Passage* (Preliminary Objection), ICJ Reports 1957, p. 125, at 150. The approach is also adopted by courts and tribunals in other areas of international law.

³⁹⁵ See paras 4.39-4.44; 4.50-4.59; 4.66-4.76; 4.80-4.84 above.

- (i) The *Southern Bluefin Tuna Cases*, where ITLOS ruled that “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.”³⁹⁶
- (ii) The *MOX Plant Case*, where ITLOS concluded that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted.”³⁹⁷
- (iii) The *Land Reclamation Case*, where the Annex VII Tribunal confirmed that “Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result.”³⁹⁸

5.40 Accordingly, all the requirements of Article 283(1) are met.

V. Conclusion

5.41 For the reasons set out above, this Tribunal has jurisdiction over this dispute. Both States are parties to the Convention, and have not made any declaration under Article 298(1)(a). This dispute concerns the interpretation and application of various provisions of the Convention, relating to both the UK’s entitlement to establish an “MPA” in the waters around the Chagos Archipelago and, to the extent that it may have any such entitlement, to its exercise of rights under the Convention. There is no bar to jurisdiction under Article 297, and all procedural requirements have been met.

³⁹⁶ *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Order of 27 August 1999, International Tribunal for the Law of the Sea, para. 60.

³⁹⁷ *The Mox Plant Case* (Ireland v United Kingdom), International Tribunal for the Law of the Sea, Order of 3 December 2001, para. 60.

³⁹⁸ *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor* (Malaysia v Singapore), International Tribunal for the Law of the Sea, Order of 8 October 2003, para. 48.

CHAPTER 6: THE UNITED KINGDOM IS NOT A COASTAL STATE ENTITLED TO DECLARE THE “MPA”

6.1 This Chapter concerns the submission of Mauritius that the UK is not “the coastal State” within the meaning of Articles 55, 76 and 2 of the 1982 Convention, and therefore does not have the right to establish maritime zones, including the “MPA”, around the Chagos Archipelago.

6.2 The unlawful excision of the Chagos Archipelago by the UK prior to Mauritius’ independence does not give the UK an entitlement to be considered “the coastal State” in relation to the Archipelago within the meaning of the Convention; the UK therefore has no right under the Convention to claim maritime zones in respect of the Archipelago. Only Mauritius has that right. Further, the undertakings which the UK made to Mauritius at the time it unlawfully excised the Chagos Archipelago – undertakings which it has frequently repeated – are such as to entitle Mauritius to avail itself of the rights of a “coastal State” under the Convention, and accordingly the UK has no right under the Convention unilaterally to declare an “MPA” in respect of the Chagos Archipelago.

I. The United Kingdom is Not the Coastal State

6.3 As the International Court of Justice has observed on a number of occasions, “the land dominates the sea.”³⁹⁹ Accordingly, it is “the terrestrial territorial situation that must be taken as the starting point for the determination of the maritime rights of a coastal State.”⁴⁰⁰ The Tribunal should not be deterred from entering upon this consideration in the present case, neither because of its jurisdiction (which is established, as explained in Chapter 5 above) nor out of concern that the determination of the question will lead in the future to a plethora of claims being made to Convention tribunals by parties to land boundary disputes. As noted in Chapter 1 above, this case is readily distinguishable from the many sovereignty disputes existing around the world. The case concerns a unique situation left over from the decolonisation era of the last century. It concerns the entitlement of a former colony to the maritime zones around its rightful territory, an entitlement which is a consequence of the full implementation of its right to self-determination. The dispute results from the purported excision of a group of islands from a former colonial territory in circumstances where all the Mauritian citizens residing in those islands at the time were forcibly removed by the colonial master: a situation which has been recognised as unlawful by the vast majority of States. As such, the case can be regarded by the Tribunal as *sui generis*.

³⁹⁹ *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports 1969, p. 51, para. 96; *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, ICJ Reports 1978, p. 36, para. 86; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment, ICJ Reports 2001, p. 97, para. 185.

⁴⁰⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment, ICJ Reports 2001, p. 97, para. 185.

6.4 Nor should the Tribunal be deterred by the fact that this matter requires the application of certain rules of international law which go beyond the express provisions of the Convention. Article 293 of the Convention requires a court or tribunal to apply the Convention and “other rules of international law not incompatible with the Convention” in adjudicating a dispute: for the reasons given in Chapter 5 above, the Tribunal is not precluded from applying – indeed is bound to apply – the fundamental principles and rules of international law discussed in this Chapter.

(1) *The “MPA” is purportedly established under Part V of the Convention*

6.5 Part V of the Convention establishes the legal regime applicable to the exclusive economic zone, within which “the coastal State” may exercise certain rights, jurisdiction and duties. Article 55 provides:

“The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part [Part V], under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”

Article 56 sets out the rights, jurisdiction and duties of “the coastal State”, and Article 57 provides for the breadth of the exclusive economic zone. Under Article 75(2) the “coastal State” is required to deposit with the UN charts or lists of geographical coordinates showing the outer limit lines of the exclusive economic zone (“EEZ”).

6.6 The 200-mile Environment (Protection and Preservation) Zone (“EPPZ”), which the UK declared around the Chagos Archipelago on 17 September 2003,⁴⁰¹ was purportedly established as an EEZ under Part V of the Convention. While it was sometimes said that the EPPZ was not a “full EEZ for all purposes”, the responsible UK Minister made a written statement in Parliament on 31 March 2004, noting that a “copy of the proclamation, together with the relevant chart and co-ordinates, has been deposited with the UN under Article 75 of UNCLOS”.⁴⁰² The UK has also described the zone as an EEZ in the proceedings of the IOTC.⁴⁰³ The zone was declared in spite of the statement in writing made by the British High Commissioner to Mauritius in 1992 that “[t]here are no plans to establish an exclusive economic zone around the Chagos islands”.⁴⁰⁴ It is in this zone that in April 2010 the “MPA” was purportedly established.

6.7 Although the UK acted on the basis that the EPPZ, and thus the “MPA”, were established under Part V of the Convention, the declaration of the “MPA” also assumes

⁴⁰¹ Paras 4.7–4.13 above.

⁴⁰² Hansard, House of Lords, 31 March 2004, col. WS62, Statement of Baroness Symons of Vernham Dean: Annex 125. The proclamation was deposited with the UN on 12 March 2004 (Law of the Sea Bulletin No. 54 (2004), 99).

⁴⁰³ Report of the Fifteenth Session of the Indian Ocean Tuna Commission, Colombo, Sri Lanka 18–22 March 2011, IOTC–2011–S15–R[E], at para 72, <http://www.iotc.org/files/proceedings/2011/s/IOTC-2011-S15-R%5BE%5D.pdf>

⁴⁰⁴ Letter of 1 July 1992 from British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103. See para. 4.6 above.

an entitlement by the UK to a continental shelf under Article 76 of the Convention, the rights in the shelf under Article 77 and Article 81, and an entitlement to a territorial sea (Article 2).

(2) The purported establishment by the United Kingdom of maritime zones for the Chagos Archipelago is based upon a breach of fundamental principles of international law

6.8 The UK's claim to be "the coastal State" for the purpose of Part V of the Convention, and thus to be entitled to establish an EEZ and the "MPA", is founded upon its purported claim to sovereignty over the Chagos Archipelago, following the UK's unlawful detachment of the Archipelago from the territory of Mauritius in 1965. The same is true of the UK's claim with regard to the territorial sea and to continental shelf rights under the Convention. Before 1965, the Chagos Archipelago had been a dependency of, and thus part of, the non-self-governing territory of Mauritius. It had been treated as such by the UK ever since Mauritius – including the Chagos Archipelago – had been ceded to the UK by the Treaty of Paris in 1814.⁴⁰⁵ The UK detached the Archipelago from the territory of Mauritius in 1965, by promulgating a law which established the "BIOT" and by amending the law of Mauritius to remove the Archipelago from the definition of "Mauritius".⁴⁰⁶ It is in respect of the Archipelago, now administered as one of the British overseas territories under the name of "the British Indian Ocean Territory", that the UK claims to be entitled to declare the "MPA" and other maritime zones.

6.9 The circumstances of the detachment of the Chagos Archipelago from Mauritius – the removal of all the residents of the Archipelago at the time,⁴⁰⁷ the misleading statements to UN organs regarding the former residents,⁴⁰⁸ the timing of the actions,⁴⁰⁹ and the secret financial benefit obtained from the US contrary to the UK's public position⁴¹⁰ - are set out in Chapter 3 above. They do not reflect well on those in power at the time. But above all, the excision was carried out in breach of fundamental principles of international law.

⁴⁰⁵ See paras 2.15-2.16 above.

⁴⁰⁶ The definition of Mauritius was changed by amendment to section 90(1) of the Constitution of Mauritius set out in Schedule 2 to the Mauritius (Constitution) Order 1964. The "BIOT" was created by the "British Indian Ocean Territory" Order No. 1 of 1965, which provides that from the date of the Order, "the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius" shall with certain islands previously part of the colony of Seychelles "together form a separate colony which shall be known as the British Indian Ocean Territory." (See Annex 32). The process of detachment is described in detail in Part III of Chapter 3: paras 3.35-3.52.

⁴⁰⁷ Paras 3.58-3.63 above. The expulsion was described by a former UK Foreign Secretary, Robin Cook, as "one of the most sordid and morally indefensible episodes in our post colonial history." (Reported in *The Guardian* on 8 June 2012).

⁴⁰⁸ Paras 3.38-3.52 above.

⁴⁰⁹ Para. 3.38 above.

⁴¹⁰ Paras 3.55-3.57 above.

(3) *The principle of self-determination*

6.10 The detachment of the Chagos Archipelago was, first and foremost, contrary to the right of Mauritius to self-determination. This right – and the duty to recognise it – is a fundamental norm of international law which is enshrined in the UN Charter, in General Assembly resolutions interpreting and applying it, in the law and practice of UN organs and in customary international law.

6.11 The right to self-determination has been affirmed by the International Court of Justice in well-known terms:

“The principle of self-determination of peoples has been recognised by the United Nations Charter and in the jurisprudence of the Court [...]; it is one of the essential principles of contemporary international law.”⁴¹¹

In 1995 the Court referred to the *erga omnes* character of the principle and, in a later advisory opinion, noted:

“[O]ne of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination.”⁴¹²

6.12 The principle of self-determination was interpreted and developed as a fundamental right by the General Assembly in its Declaration on the granting of independence to colonial countries and peoples (resolution 1514(XV)), as follows:

“2. 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.

[...]

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”⁴¹³

The resolution “has achieved a semi-constitutional status”.⁴¹⁴ Nearly five decades ago the International Court of Justice referred to the resolution as providing “the basis for

⁴¹¹ *East Timor* (Portugal v. Australia) Judgment, ICJ Reports 1995, p. 90, at p. 102, para. 29.

⁴¹² *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, 22 July 2010, para. 82.

⁴¹³ Adopted on 14 December 1960 by 89 votes to none, with 9 abstentions: Annex 1.

⁴¹⁴ James Crawford, *The Creation of States in International Law*, (2006), p. 604.

the process of decolonisation which has resulted since 1960 in the creation of many States which are today Members of the United Nations.”⁴¹⁵

6.13 It is clear that the right to self-determination was already well-developed by the time the independence of Mauritius was in contemplation. As Professor Tomuschat has said:

“Self-determination became a driving legal force as from 1960, when the UN General Assembly adopted resolution 1514(XV) on the Granting of Independence to Colonial Countries and Peoples. The existing structural network of international relations was profoundly shaken by that almost revolutionary act which proclaimed the right of all peoples to self-determination.”⁴¹⁶

Writing in 1963, Dame Rosalyn Higgins stated that resolution 1514(XV) regarded the right of self-determination “as a legal right enforceable here and now”.⁴¹⁷ The same author concluded that it “seems inescapable that self-determination has developed into an international legal right.”⁴¹⁸ It is scarcely necessary to show support in the literature for such a long-established principle as self-determination, but if any is needed, reference may be made to the discussion of the principle in *Starke’s International Law*.⁴¹⁹

6.14 The status of the norm as a rule of *ius cogens* has also been widely recognised. As was noted by Professor Malcolm Shaw:

“It would indeed be difficult to conceive of a treaty providing for the continuation of a colonial relationship against the wishes of the inhabitants of the territory being upheld as valid. Self-determination is a basic principle of international law of universal application, while the weight of international opinion appears to suggest that the right may be part of *ius cogens*.”⁴²⁰

The International Law Commission has recognised the prohibition of the denial of the right to self-determination as a peremptory norm of international law.⁴²¹

⁴¹⁵ *Western Sahara* Advisory Opinion, ICJ Reports 1975, p. 12 at p. 32, para. 57.

⁴¹⁶ Christian Tomuschat, *Modern law of self-determination*, (1993), p. vii.

⁴¹⁷ R. Higgins, *Development of International Law through the Political Organs of the United Nations*, (1963), p. 100. She also noted that the 1960 Declaration “must be taken to represent the wishes and beliefs of the full membership of the United Nations” (p.103).

⁴¹⁸ *Ibid.* at p. 103. She added: “It should also be added that a denial of self-determination is now widely regarded as a denial of human rights, and as such a fitting subject for the United Nations” (p. 104).

⁴¹⁹ Ed. Ivan Shearer (11th ed. 1994); discussion at pp. 111-113.

⁴²⁰ Malcolm Shaw, *Title to Territory in Africa*, (1986), p. 91.

⁴²¹ ILC Commentary on Draft Articles on State Responsibility, adopted 2001.

(a) The unit of self-determination

6.15 The entity which enjoyed the right to decolonisation in international law and UN practice – the unit of self-determination – was the whole territorial unit concerned. The “self” of self-determination was understood in largely territorial terms, so that the right inhered in a colonial people within the framework of the existing territorial unit. The principle of territorial integrity for the non-self-governing territory was (and continues to be) paramount. General Assembly resolution 1514(XV) affirms in paragraph 6 that:

“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.”

6.16 Thus, in the case of Mauritius, the unit of self-determination in relation to which the UK as the administering power owed the duty to accord the right to self-determination was the whole of the territory of Mauritius before independence, including the Chagos Archipelago. As described above, however, before Mauritius became independent the UK promulgated laws to dismember Mauritian territory by the excision of the Archipelago. The excision was effected as a pre-emptive move, in contemplation of independence, following the final Constitutional Conference for Mauritius in September 1965, and was effected in order to ensure that after Mauritian independence the UK could still purport to have the power to lease Diego Garcia to the US.

6.17 This excision of part of Mauritius’ territory raises a temporal question: under the law of self-determination could changes by the colonial power in contemplation of independence have any effect on the self-determination unit? It is clear from paragraph 6 of resolution 1514(XV) that they could not: actions of the colonial power before independence were not permitted to override the territorial integrity of the entity concerned. Professor Shaw has commented on the temporal issue in relation to the Chagos Archipelago: “As a rule, the need to maintain the colonial unit during the period leading up to independence is clearly a crucial element in the viability of the concept of self-determination”.⁴²² The history of the mandated territory of South-West Africa presents an analogous situation. The UN General Assembly, from the establishment of the United Nations, had the objective of maintaining the territorial integrity of South-West Africa and preventing South Africa from annexing or partitioning it. General Assembly resolutions over the decades showed the concern of the United Nations that the unit of self-determination was the whole territory and that, prior to the independence of Namibia, territorial integrity was to be maintained, against all attempts by South Africa to dismember it.⁴²³

6.18 To permit the excision of a part of a territory before independence also removes the right to self-determination of the people of that territory. In its advisory

⁴²² Shaw, *Title to Territory in Africa*, (1986), p. 134.

⁴²³ A brief account is given in Shaw, *supra* at pp. 105-110.

opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice found that the route taken by the Wall in the occupied Palestinian territory contributed to the departure of some of the population and presented a risk to the demographic composition of the area. In view of that, the Court found that the construction of the Wall, with other measures taken, “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.”⁴²⁴

(b) The General Assembly had the competence to interpret the right of self-determination

6.19 It was through the policy of the General Assembly and its Committee of 24 that the right of self-determination was developed and implemented. The General Assembly acquired a recognised competence to decide the status of a territory with regard to the right, and competence to decide how the right should be exercised.⁴²⁵ The International Court of Justice in the *Western Sahara* case recognised and accepted the role of the General Assembly in overseeing the exercise of the right to self-determination and in taking decisions regarding the way in which the right is implemented.⁴²⁶ The Court affirmed that “the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which the right is to be realised.”⁴²⁷

6.20 The General Assembly recognised the *undivided* territory of Mauritius as the unit of self-determination in its resolution 2066(XX) on the Question of Mauritius. In that resolution the Assembly noted:

“*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 [resolution 1514(XV)], and in particular paragraph 6 thereof.”⁴²⁸

⁴²⁴ *Legal Consequences of the Construction of a Wall in The Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 122.

⁴²⁵ See A. Rigo Sureda, *The Evolution of the right of self-determination: a study of United Nations Practice* (1973) pp. 65-82 and *passim*. See also: Oscar Schachter, ‘The Relation of Law, Politics and Action in the United Nations’, in *Recueil des Cours*, 1963, Vol. II 187: “[...] the right of the United Nations General Assembly to determine which territories fall within the scope of Article 73 has received such continuing support that it may now be regarded as fairly well settled. [...] [W]hen the practice of states in the United Nations has served by general agreement to vest in the organs the competence to deal definitively with certain questions, then the decisions of the organs in regard to those questions acquire an authoritative juridical status even though these decisions had not been taken by unanimous decision or ‘general approval.’”

⁴²⁶ *Western Sahara* Advisory Opinion, ICJ Reports 1975, p. 12 at pp. 35-37.

⁴²⁷ *Ibid.* para. 71.

⁴²⁸ Annex 38. Para. 6 states: “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.”

In fact, by 16 December 1965, the date on which resolution 2066(XX) on the Question of Mauritius was finally adopted by the General Assembly, the UK had already promulgated the laws which excised the Archipelago from the territory of Mauritius. It had, in effect, acted to present the United Nations with a *fait accompli*, and internal documents reveal that this was its intention.⁴²⁹ General Assembly resolution 2066(XX) nevertheless invited the UK to “take effective measures with a view to the immediate and full implementation of resolution 1514(XV)” and “to take no action which would dismember the Territory of Mauritius and violate its territorial integrity.”⁴³⁰ Mauritius did not achieve independence until March 1968, and it would have been possible for the UK to have rescinded the laws dismembering Mauritius before it granted the colony independence, in conformity with the General Assembly resolutions. The UK chose not to do so.

6.21 The General Assembly repeated the requirement to maintain the territorial integrity of non-self-governing territories in its resolutions 2232(XXI) and 2357(XXII); Mauritius was included in the list of the territories to which both of the resolutions applied. Each resolution expressed deep concern at:

“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.”⁴³¹

6.22 The General Assembly resolutions cited above – in the general terms of paragraph 6 of the Declaration in resolution 1514(XV), and in the specific application of the right of self-determination to Mauritius in later resolutions – must be regarded as confirming the right of Mauritius to come to independence with its territory intact: that is, with the whole of its territory, including the Chagos Archipelago, and the whole of its population, including the residents of the Archipelago. That right gave rise to a legal obligation on the UK as the administering power.

(4) *The principle of uti possidetis*

6.23 As indicated above, in order that the principle of self-determination can be applied to non-self-governing territories, 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*. In the *Burkina Faso and Mali Frontier Dispute*, a Chamber of the International Court of

⁴²⁹ Para. 3.38 above.

⁴³⁰ Paras 2-4.

⁴³¹ Para. 3.51 above.

Justice stated that the principle is “logically connected with the phenomenon of the obtaining of independence”:

“The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. [...] *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonisation wherever it occurs.”⁴³²

The Chamber added that “the principle of *uti possidetis* has kept its place amongst the most important legal principles”.⁴³³

(5) The “agreement” of former representatives of Mauritius to the excision of the Chagos Archipelago does not validate the dismemberment of Mauritius

6.25 The proposal by the UK Government to detach the Chagos Archipelago was reluctantly accepted by representatives of Mauritius, under conditions which amounted to duress.⁴³⁴ The “agreement” of some of the Mauritian delegates at the final Constitutional Conference was given “in principle” on 23 September 1965, subject to consultation with the Council of Ministers; the Council met on 5 November 1965 and gave their “agreement”.

6.26 The records of the UK Government prepared before and after the meetings with Mauritian Ministers indicate the circumstances in which this agreement was elicited. A note to the UK Prime Minister in preparation for his meeting on 23 September 1965 with the Mauritius Premier states:

“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.”⁴³⁵

⁴³² ICJ Reports, 1986, para. 23.

⁴³³ *Ibid.* para 26.

⁴³⁴ Paras 3.22-3.34 above.

⁴³⁵ Para. 3.25 above.

At the meeting, the UK Prime Minister is recorded as saying that the “Premier and his colleagues could return to Mauritius either with Independence or without it.”⁴³⁶ The UK Government had thus made clear the link between the achievement of independence and Mauritian consent to the excision of the Chagos Archipelago. It was also made clear that the excision could take place even without consent: the record of the meeting between the UK Prime Minister and the Mauritian Premier recorded the former as saying that “Diego Garcia could either be detached by Order in Council or with the agreement of the Premier and his colleagues.”⁴³⁷

6.27 The link between the excision of the Chagos Archipelago and the grant of independence to Mauritius is thus apparent from the records, and was understood by the Mauritian side.⁴³⁸ The Select Committee on the Excision of the Chagos Archipelago, established by the Mauritius Legislative Assembly in 1982, concluded that there was a “blackmail element which strongly puts in question the legal validity of the excision.”⁴³⁹ As was stated by Prime Minister Ramgoolam in the Mauritius Legislative Assembly on 11 April 1979, “we had no choice [...]. We were a colony.”⁴⁴⁰ In 1980 the then Foreign Minister of Mauritius, Sir Harold Walter, put the matter thus:

“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!”⁴⁴¹

6.28 The necessity for the right of self-determination to be exercised by the free will of the people is underlined in General Assembly resolution 1514(XV), which provides in paragraph 5:

“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire [...].”

The International Court of Justice confirmed in the *Western Sahara* advisory opinion that this paragraph confirms and emphasises “that the application of the right of self-determination requires a free and genuine expression of the will of the peoples

⁴³⁶ Para. 3.28 above.

⁴³⁷ *Ibid.* The same message was repeated in a meeting with the UK Colonial Secretary on 23 September 1965: paras 3.68-3.71 above.

⁴³⁸ See paras 3.68-3.71 above.

⁴³⁹ Para. 3.72 above.

⁴⁴⁰ Para. 3.71 above.

⁴⁴¹ Para. 3.70 above.

concerned.”⁴⁴² The same principle is evident in General Assembly resolution 2625(XXV) (the “Friendly Relations Declaration”). The resolution provides in part that:

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

[...]

(b) To bring a speedy end to colonialism, having due regard to *the freely expressed will* of the peoples concerned.”⁴⁴³

The International Court of Justice has gone so far as to say that the principle of self-determination is “*defined* as the need to pay regard to the freely expressed will of peoples.”⁴⁴⁴

6.29 It is clear that the “freely expressed will” of the people of Mauritius was not obtained. The consent of the Mauritius Ministers was given in circumstances which amounted to duress, and the Council of Ministers, presided over by the Governor of Mauritius (a British official appointed by and responsible to the UK Government), did not have the legal capacity to consent to the dismemberment of their country. There was no referendum or consultation with the people of Mauritius. The UN (and the UK) had experience of ascertaining the views of colonial peoples before independence: this was done, for example, by plebiscites and commissions of enquiry, supervised by the UN or by another body. While the General Assembly has on occasion approved the division of a territory before independence in accordance with the freely expressed will of its inhabitants,⁴⁴⁵ it is clear in the present case that the Assembly did not regard the “consent” of the representatives of Mauritius, obtained without proper consultation, as sufficient in the circumstances to constitute the freely expressed will of the people to the form in which their territory would be brought to independence. The General Assembly resolutions noting with concern the dismemberment of Mauritius were adopted *after* the excision had taken place with the “agreement” of Mauritius.

⁴⁴² *Western Sahara* Advisory Opinion, ICJ Reports 1975, p. 12 at p. 25, para. 55.

⁴⁴³ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (emphasis added).

⁴⁴⁴ *Western Sahara* Advisory Opinion, ICJ Reports 1975, p. 12 at p. 25, para. 59 (emphasis added).

⁴⁴⁵ For example, in the case of the non-self-governing territory of the Gilbert and Ellice Islands, there was first an administrative division of the colonial territory and then, as a result of the express wishes of the inhabitants of the Ellice Islands, a partition of the colony; an independent State, Tuvalu, emerged. The Assembly had approved both the administrative division and the later partition: it was clear to the Assembly that the inhabitants had freely agreed. There was a UN mission to the Ellice Islands – at the request of the UK, the administering power – before independence; see GA res. 3288(XXIX) of 13 December 1974. The conduct of the UK in inviting the UN mission and ensuring that the wishes of the inhabitants of the Ellice Islands were properly ascertained must be contrasted with the UK conduct with regard to Mauritius and the Chagos Archipelago.

6.30 The consent of the Mauritius representatives to the detachment of the Chagos Archipelago was extracted as a condition inseparable from the grant of independence, in circumstances which did not allow for the free agreement of the Mauritian people to be obtained. Their acquiescence, obtained as it was under duress and relating to a breach of fundamental principles of law, was not regarded by the General Assembly – and cannot be regarded by the Tribunal – as validating the unlawful dismemberment of Mauritius.

(6) Mauritius has continuously asserted its sovereignty over the Chagos Archipelago

6.31 Mauritius has consistently protested against the establishment both of the EPPZ and the “MPA”, as well as the purported deposit of charts under Article 75 of the Convention, reaffirming its sovereignty over the Chagos Archipelago, including its maritime zones. Mauritius had similarly protested over the purported establishment in 1991 of the FCMZ. Details of Mauritian protests against the establishment by the UK of maritime zones around the Chagos Archipelago are set out in Chapter 4. They include:

- (i) On 7 August 1991, Mauritius protested against the formation of the FCMZ, as incompatible with its sovereignty and sovereign rights over the Archipelago.⁴⁴⁶
- (ii) On 7 November 2003, Mauritius requested “the UK Government not to proceed with the issue of a Proclamation establishing an Environment (Protection and Preservation) Zone around the Chagos Archipelago”; the letter stated that “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.”⁴⁴⁷
- (iii) In a Note Verbale of 14 April 2004 to the UN Secretary-General, Mauritius protested against the deposit of the EPPZ coordinates since “the United Kingdom of Great Britain and Northern Ireland is purporting to exercise over that zone rights which only a coastal state may have over its exclusive economic zone.”⁴⁴⁸
- (iv) In a Note Verbale of 20 April 2004 to the UK, Mauritius protested that the UK’s proclamation of an EPPZ and deposit of coordinates under Article 75 of UNCLOS “implicitly amounts to the exercise by the UK of sovereign rights and jurisdiction within an Exclusive Economic Zone, which only Mauritius as coastal state, can exercise under Part V of the UNCLOS.”⁴⁴⁹

⁴⁴⁶ Para. 4.5 above.

⁴⁴⁷ Para. 4.16 above.

⁴⁴⁸ Para. 4.24 above.

⁴⁴⁹ Para. 4.25 above.

- (v) By its Maritime Zones Act 2005, Mauritius reaffirmed its 200-nautical mile EEZ, 12-nautical mile territorial sea, and continental shelf. On 26 July 2006, pursuant to Articles 75(2) and 84(2) of UNCLOS, Mauritius submitted geographical coordinates to the UN Division for Ocean Affairs and the Law of the Sea, including in regard to the maritime zones generated by the Chagos Archipelago.⁴⁵⁰
- (vi) On 10 April 2009, Mauritius stated that “it has no doubt of its sovereignty over the Chagos Archipelago and does not recognise the existence of the so-called British Indian Ocean Territory. The Government of Mauritius deplores the fact that Mauritius is still not in a position to exercise effective control over the Chagos Archipelago as a result of its unlawful excision from the Mauritian territory by the British Government in 1965.”⁴⁵¹
- (vii) In May 2009, Mauritius submitted to the UN Commission on the Limits of the Continental Shelf Preliminary Information concerning the extended continental shelf in areas beyond 200 nautical miles from the archipelagic baselines of the Chagos Archipelago.⁴⁵²
- (viii) In a Note Verbale of 9 June 2009 to the UN Secretary-General, Mauritius stated: “The Government of the Republic of Mauritius strongly believes that the protest raised by the United Kingdom against the deposit by Mauritius of the geographical coordinates reported in Circular Note M.Z.N. 63.2008-LOS of 27 June 2008 has no legal basis inasmuch as the Chagos Archipelago forms an integral part of the territory of Mauritius. The Government of the Republic of Mauritius further wishes to refer to its Note No. 4780/04 (NY/UN/562) dated 14 April 2004 in which it protested strongly against the deposit by the Government of the United Kingdom of Great Britain and Northern Ireland of a list of geographical coordinates of points defining the outer limits of the so-called Environment (Protection and Preservation) Zone.”⁴⁵³
- (ix) At a meeting of the IOTC Scientific Committee from 30 November to 4 December 2009, Mauritius protested that consultations on the establishment of a MPA should be conducted in the bilateral framework between Mauritius and the UK: “The establishment of a Marine Protected Area in the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago. A Marine Protected Area project in the Chagos Archipelago should address the issues of resettlement (Chagossians), access to the resources and the economic development of the islands in a manner which would not

⁴⁵⁰ Para. 4.29 above.

⁴⁵¹ Para. 4.43 above.

⁴⁵² Paras 4.34-4.37 above.

⁴⁵³ Para. 4.29 above, and accompanying footnotes.

prejudice the effective exercise by Mauritius of its sovereignty over the Archipelago.”⁴⁵⁴

- (x) In a Note Verbale of 2 April 2010 to the UK, Mauritius stated that “The Government of the Republic of Mauritius strongly objects to the decision of the British Government to create a Marine Protected Area (MPA) around the Chagos Archipelago”. The Note went on to say: “It was explained in very clear terms during the above-mentioned meetings that Mauritius does not recognise the so-called British Indian Ocean Territory and that the Chagos Archipelago, including Diego Garcia, forms an integral part of the sovereign territory of Mauritius both under our national law and international law. It was also mentioned that the Chagos Archipelago, including Diego Garcia, was illegally excised from Mauritius by the British Government prior to grant of independence in violation of United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965.”⁴⁵⁵
- (xi) At a meeting of the IOTC Scientific Committee in December 2011, Mauritius stated that: “The Government of the Republic of Mauritius does not recognise the existence of the ‘marine protected area’ which the United Kingdom has purported to establish around the Chagos Archipelago.”⁴⁵⁶

(7) The United Kingdom has in effect recognised Mauritius as the coastal State in relation to its continental shelf

6.32 In January 2009, Mauritius officials informed UK officials that they intended to provide Preliminary Information to the Commission on the Limits of the Continental Shelf regarding the shelf appertaining to the Chagos Archipelago. The UK made no objection. Mauritius filed Preliminary Information with the Commission in May 2009.⁴⁵⁷ The UK made no objection. Indeed at the 2nd round of bilateral talks on the Chagos Archipelago in July 2009, the UK in effect offered its help in relation to the making of a formal submission to the Commission: the delegations from both States at that meeting agreed that “it would be desirable to have a coordinated submission for an extended continental shelf” and agreed that a joint technical team would be set up to look into possibilities and modalities of a coordinated approach. The matter did not proceed on a bilateral basis because the talks were broken off following the actions of the UK regarding the “MPA”. The absence of protest on the part of the UK appears to be a clear recognition that Mauritius has sovereign rights in relation to the continental shelf. Under the Convention there is but one continental shelf.⁴⁵⁸ If Mauritius has rights

⁴⁵⁴ Para. 4.65 above.

⁴⁵⁵ Para. 4.80 above.

⁴⁵⁶ Report of the Fourteenth Session of the IOTC Scientific Committee, Mahé, Seychelles, 12-17 December 2011, IOTC-2011-SC14-R[E], p. 14: see para. 4.84 above.

⁴⁵⁷ Paras 4.31-4.35 above.

⁴⁵⁸ “[T]here is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”: *Dispute Concerning Delimitation of the Maritime Boundary*

in relation to the extended continental shelf, it also has rights in relation to the continental shelf up to 200 nautical miles from the coast of the Chagos Archipelago. It is significant that the UK has itself made no submission to the Commission in relation to the continental shelf of the Chagos Archipelago, and the deadline for any such submission has now passed.

(8) The vast majority of States have recognised the Chagos Archipelago as still belonging to Mauritius

6.33 The excision of the Chagos Archipelago has been recognised as having no lawful effect by resolutions and decisions of a wide section of the international community: the Non-Aligned Movement (“NAM”), the Africa-South America Summit, the Organisation of African Unity (“OAU”) and later the African Union (“AU”), and the Group of 77 and China.⁴⁵⁹ The NAM Ministerial Meeting held in May 2012 reaffirmed “that the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory 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.” The AU Assembly in 2010 reaffirmed that:

“the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of Mauritius in violation of UN resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence, forms an integral part of the territory of the Republic of Mauritius and [the AU] CALLS UPON the United Kingdom to expeditiously put an end to its continued unlawful occupation of the Chagos Archipelago with a view to enabling Mauritius to effectively exercise its sovereignty over the Archipelago.”⁴⁶⁰

(9) Accordingly, Mauritius is “the coastal State” within the meaning of the Convention

6.34 For these reasons, the excision of the Chagos Archipelago involved a breach of the United Nations Charter as applied and interpreted by General Assembly resolutions 1514(XIV) and 2066(XX), a denial of the right to self-determination, and (the subject of

Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Judgment of 14 March 2012, para. 362, citing *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, at para. 213.

⁴⁵⁹ Paras 3.109-3.111 above.

⁴⁶⁰ African Union Assembly of Heads of States and Government, Decision on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago, Assembly/AU/Dec.331(XV), 27 July 2010, Kampala, Uganda: Annex 168.

other proceedings) a denial of the human rights of the Chagossians.⁴⁶¹ In the result, the excision of the Chagos Archipelago from Mauritius was void and without legal effect.

6.35 Mauritius thus retained sovereignty over the Chagos Archipelago at all times. It retained sovereignty when it obtained independence in 1968, at the time it signed and ratified the Convention, at the time it objected to the UK's purported establishment of an EEZ and "MPA", and at the time it initiated these proceedings. The basis of its entitlement is its status as a unit of self-determination, as recognised by the UN General Assembly in accordance with the principles developed in resolution 1514(XV), and its consequent status as an independent State. As such, Mauritius is the "coastal State" in regard to the Chagos Archipelago, and has the right to declare maritime zones in accordance with the Convention. It has declared an EEZ in the same area as that included in the purported EPPZ and "MPA", has notified the UN of the geographical coordinates of its maritime zones around the Chagos Archipelago and has submitted Preliminary Information with regard to an extended continental shelf area beyond 200 nautical miles from the archipelagic baselines.⁴⁶²

6.36 Since, as demonstrated, the excision of the Chagos Archipelago from Mauritius was void, the UK cannot rely on its unlawful act of dismembering Mauritius to base its claim to be the "coastal State" in regard to the Archipelago, and to establish maritime zones around the Archipelago. For the reasons given above, the Tribunal is requested to declare that the UK is not "the coastal State" within Part V of the Convention, and is therefore not entitled to claim an EEZ or an MPA with respect to the Chagos Archipelago. Under fundamental principles of international law which this Tribunal is bound by the Convention to apply, it is Mauritius – and not the UK – which is the "coastal State" in regard to the Archipelago.

II. Mauritius is entitled to avail itself of the rights of a coastal State based on the undertakings of the United Kingdom

6.37 In addition to the fundamental principles of international law discussed above, the specific undertakings made by the UK to Mauritius when it illegally excised the Chagos Archipelago from the territory of Mauritius were such as to deny entitlement to the UK to act as "the coastal State" within the meaning of the Convention. By virtue of the obligations to Mauritius that it assumed in these undertakings, the UK cannot be regarded as having exclusive rights as "the" coastal State within the meaning of Part V of the Convention, such as to allow it unilaterally to establish an EEZ or a marine protected area.

6.38 Part II of Chapter 3 describes meetings which took place at the time of the final Constitutional Conference for Mauritius in September 1965 at Lancaster House in London.⁴⁶³ Paragraph 22 of the official Record of the meeting at Lancaster House on 23 September 1965 notes that the UK was prepared to make specific undertakings to Mauritius in order to secure the agreement of the Ministers of the colony to the excision

⁴⁶¹ Para. 3.84 above, and accompanying footnotes.

⁴⁶² Paras 4.2, 4.28 and 4.32 above.

⁴⁶³ Paras 3.22-3.34 above.

of the Chagos Archipelago, and it was on the basis of the undertakings and conditions there recorded that the Mauritius Council of Ministers gave their “agreement” to the proposal for detachment.⁴⁶⁴ The undertakings reflect concessions that the Mauritian delegation extracted from the UK during the Lancaster House meeting of 23 September 1965. They were not amongst those that the UK had been prepared to offer.⁴⁶⁵ The undertakings relevant to this chapter concern (i) the reversion of the Chagos Archipelago to Mauritius when they were no longer needed for defence purposes, and (ii) the recognition of fishing rights, and the reversion of the benefit of oil and mineral rights.

6.39 Although the validity of these undertakings is premised on the UK having title to the Chagos Archipelago and thus having the power to make the undertakings – a premise which Mauritius rejects – it is not open to the UK to resile from the undertakings, and indeed it has confirmed their continuing validity on numerous occasions. For the purpose of this submission, Mauritius is entitled to rely on these undertakings, whilst reaffirming its rejection of the legal entitlement which the UK claimed in making them.

(1) Undertakings regarding the reversion of the Chagos Archipelago to Mauritius

6.40 In the first place, the excision of the Chagos Archipelago from the territory of Mauritius was subject to the undertaking that the Archipelago would revert to Mauritius when it was no longer needed for defence purposes. The promise was made, as noted in paragraph 22 of the Record of the Meeting at Lancaster House of 23 September 1965, in the following terms: “that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.”⁴⁶⁶ A similar formulation was used by the UK Prime Minister in the House of Commons on 11 July 1980: “in the event of the islands no longer being required for defence purposes, they should revert to Mauritius.”⁴⁶⁷ In both formulations, the UK statement acknowledges the prior right of Mauritius to the Chagos Archipelago. In later iterations of the undertaking the UK changed the formulation to: “we have undertaken to cede the Territory to Mauritius when it is no

⁴⁶⁴ See paras 3.30-3.33 above. For the disputed validity of the agreement of a colony to the dismemberment of its own territory see paras. 6.25-6.30 above.

⁴⁶⁵ The undertakings that the United Kingdom initially presented to the Mauritian Ministers included only: (i) negotiations for a defence agreement between Britain and Mauritius; (ii) if Mauritius became independent, there should be an understanding that the two governments would consult together in the event of a difficult internal situation arising in Mauritius; (iii) the United Kingdom should use its good offices with the United States in support of Mauritius’ request for concessions over the supply of wheat and other commodities; and (iv) compensation in the amount of £3 million should be paid to Mauritius in addition to compensation paid to landowners and others affected in the Chagos Archipelago. These undertakings, the Secretary of State informed the Mauritian Ministers, were “the furthest the British Government could go.” Nonetheless, the United Kingdom, due to the insistence of the Mauritian Ministers, did, in fact, expand its undertakings: Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253: Annex 19, pp. 1-2.

⁴⁶⁶ Para. 3.31 above.

⁴⁶⁷ House of Commons Hansard, HC Deb 11 July 1980, vol. 988 c314W: Annex 94.

longer needed for defence purposes.”⁴⁶⁸ This change of formulation cannot affect the pre-existing commitment to reversion, which is premised on the existence of the sovereign rights of Mauritius. The UK continues to acknowledge the legal interest of Mauritius in the Chagos Archipelago. For example, on 1 July 1992 the British High Commissioner in Mauritius wrote to the Mauritian Prime Minister in the following terms:

“The British Government has always acknowledged [...] that Mauritius has a legitimate interest in the future of [the Chagos Archipelago] and recognises the Government of the Republic of Mauritius as the only State which has a right to assert a claim to sovereignty when the United Kingdom relinquishes its own sovereignty.”⁴⁶⁹

A similar formulation was used by Mr Straw, when Foreign Secretary on 6 July 2001;⁴⁷⁰ it was also used by UK representatives to the Indian Ocean Tuna Commission in 2009.⁴⁷¹

6.41 It should be recalled that the promise of reversion of the Chagos Archipelago to Mauritius acted as an inducement to the “agreement” by the Mauritian Ministers to the proposals for excision. Premier Ramgoolam had initially made clear that Mauritius could not accept detachment of the islands, and proposed that instead a lease should be granted to the US by Mauritius for defence purposes.⁴⁷² This proposal was rejected by the UK, not because the Government did not believe that Mauritius would not have title to lease the territory, but as a result of US objections. The promise to make the reversion – thus restoring to Mauritius the enjoyment of full rights of sovereignty which legally inhere in Mauritius – involves a recognition by the UK of a continuing legal interest of Mauritius in the Chagos Archipelago, indeed a prior title of Mauritius.

(2) Undertakings regarding fishing rights

6.42 The UK undertook that the “British Government would use their good offices with the US Government to ensure” that “Fishing Rights” in “the Chagos Archipelago

⁴⁶⁸ E.g. Indian Ocean Tuna Commission, Report of the 13th Session of the Scientific Committee, 6 - 10 December 2010, IOTC-2010-SC-R[E]/rev1, Appendix XII: [http://www.iotc.org/files/proceedings/2010/sc/IOTC-2010-SC-R\[E\]_rev1.pdf](http://www.iotc.org/files/proceedings/2010/sc/IOTC-2010-SC-R[E]_rev1.pdf); and Indian Ocean Tuna Commission, Report of the 14th Session of the Scientific Committee, 12 - 17 December 2011, IOTC-2011-SC14-R[E], at p. 15: [http://www.iotc.org/files/proceedings/2011/sc/IOTC-2011-SC14-R\[E\].pdf](http://www.iotc.org/files/proceedings/2011/sc/IOTC-2011-SC14-R[E].pdf).

⁴⁶⁹ The context of the letter is set out at para. 3.100 above.

⁴⁷⁰ The “British Government acknowledges that Mauritius has a legitimate interest in the future of the islands and recognises Mauritius as the only State which could assert a claim to the territory in the event that the United Kingdom relinquishes its own sovereignty.” See para. 7.49 below.

⁴⁷¹ E.g. twelfth session of the Indian Ocean Tuna Commission (2009), Report of the 12th Session of the Scientific Committee, 30 November-4 December 2009, IOTC-2009-SC-R[E], Appendix VII. Available at: [http://www.iotc.org/files/proceedings/2009/sc/IOTC-2009-SC-R\[E\].pdf](http://www.iotc.org/files/proceedings/2009/sc/IOTC-2009-SC-R[E].pdf).

⁴⁷² Para. 3.20 above.

would remain available to the Mauritius Government as far as practicable.”⁴⁷³ The US understood this as giving Mauritius fishing rights in the Chagos Archipelago.⁴⁷⁴

6.43 The undertaking was acted upon soon after being made. 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;⁴⁷⁵ it was explained that the enquiry “related to the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius.”⁴⁷⁶ In internal UK papers there can be found many further expressions of the UK recognition of Mauritius fishing rights in accordance with its undertaking.⁴⁷⁷

6.44 Mauritian fishing rights were in fact acknowledged, and accorded respect, in all the fisheries laws and regulations that were adopted by the UK for the “BIOT” prior to the adoption of the “MPA”. Following the proclamation of a fisheries zone contiguous to the territorial sea of the “BIOT”, a Fishery Limits Ordinance was promulgated on 17 April 1971. A licensing regime for fishing was introduced; fishing without licence was prohibited. It is clear from correspondence between the Foreign Office and the “BIOT” administration that this regime was intended to preserve Mauritius fishing rights in the Chagos Archipelago and would “enable Mauritian fishing boats to fish within the contiguous zone in the waters of the Chagos Archipelago.”⁴⁷⁸ The Foreign Office asked the British High Commission to describe the fishing regime to the Mauritius Government and to confirm that an exemption from the fishing prohibition would be made for Mauritian fishing boats. “This exemption stems from the

⁴⁷³ Para. 3.31 above.

⁴⁷⁴ Para. 3.86 above, fn 257.

⁴⁷⁵ Colonial Office Telegram No. 305 to Mauritius, 10 November 1965: Annex 34. The response from the Governor of Mauritius dated 17 November 1965 is to be found at Annex 37 (Mauritius Telegram (unnumbered) to the Secretary of State for the Colonies, 17 November 1965). It is plain from the exchanges between the Secretary of State and the Governor of Mauritius that the United Kingdom understood that the maritime space in which Mauritius enjoyed fishing rights extended well beyond the territorial sea of the Chagos Archipelago, and that these marine resources were of potentially great value for Mauritius. See paras 3.88-3.89 above.

⁴⁷⁶ As indicated in para. 3.90 above.

⁴⁷⁷ See paras 3.86-3.93 above. For example, in February 1966, the Colonial Office wrote to the Foreign Office in connection with a request for “details of present fishing rights and practice in the Chagos Archipelago,” which it said were needed for “discussions with the Americans on maintaining the access of Mauritian fishermen to the islands.” See Letter dated Letter dated 8 February 1966 from K.W.S. MacKenzie, Colonial Office to A. Brooke-Turner, UK Foreign Office, FO 371/190790: Annex 41. The letter further states: “We are ... anxious to avoid anything in the nature of blanket restrictions on activities by Mauritian fishermen...” A letter dated 12 July 1967 from the Commonwealth Office to the Governor of Mauritius (C.A. Seller, Commonwealth Office to Sir John Rennie, K.C.M.G., O.B.E.,) addresses “the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius” regarding the use of the United Kingdom’s “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 Commonwealth Office told the Governor of Mauritius 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 the Chagos as a source of food, in view of the rapidly increasing population.” See Letter dated 12 July 1967 from the UK Commonwealth Office to the Governor of Mauritius, FCO 16/226: Annex 50.

⁴⁷⁸ Despatch dated 16 June 1971 from F.R.J. Williams, Seychelles to M. Elliott, UK Foreign and Commonwealth Office, BIOT/54/61: Annex 62. See discussion at paras. 3.94-3.96 above.

understanding on the fishing rights reached between HMG and the Mauritius Government, at the time of the Lancaster House Conference in 1965”.⁴⁷⁹ Mauritius’ fishing rights in the Chagos Archipelago were further recognised by the UK in the “BIOT” Fishery Limits Ordinance 1984. Pursuant to a licensing regime similar to the earlier Ordinance, the “BIOT” Commissioner used the power in the Ordinance “for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius.”⁴⁸⁰ When the UK extended the fishing zone around the Chagos Archipelago to 200 nautical miles in 1991, traditional fishing rights in the waters of the Archipelago were explicitly recognised by the UK.⁴⁸¹

6.45 On 1 July 1992 the British High Commissioner in Mauritius stated in a letter to the Mauritian Prime Minister that “[t]here are no plans to establish an exclusive economic zone around the Chagos islands” (a commitment from which the UK later resiled). He added that:

“[t]he British Government has honoured the commitments entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practicable.”⁴⁸²

The UK Government also emphasised that it would continue to issue licences to Mauritian fishing vessels free of charge and that it recognised “the special position of Mauritius and its long-term interest in the future of the British Indian Ocean Territory.”⁴⁸³

6.46 These examples of recognition by the UK of the fishing rights enjoyed by Mauritius indicate that the UK accepted its obligation under the 1965 undertaking to accord these rights. The rights are not accorded simply by reason of their being “traditional” rights but, as was frequently acknowledged by the UK authorities, by virtue of the undertaking given to Mauritius at the time of the detachment of the Chagos

⁴⁷⁹ *Ibid.* On 29 November 1977, Sir Seewoosagur Ramgoolam referred to the UK’s recognition of the jurisdiction of Mauritius over the waters of the Chagos Archipelago in a Parliamentary Answer (Mauritius Legislative Assembly, 29 November 1977, Reply to PQ No. B/634: Annex 83).

⁴⁸⁰ “British Indian Ocean Territory” Notice No. 7 of 1985: Annex 98. See para. 3.98 above.

⁴⁸¹ Note Verbale dated 23 July 1991 from British High Commission, Port Louis to Government of Mauritius, No. 043/91: Annex 99. See para. 3.99 above. In particular, the Note refers to the protection and conservation of tuna stocks to “protect the future fishing interests of the Chagos group.”

⁴⁸² Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103. See para. 3.100 above.

⁴⁸³ *Ibid.* Likewise, in 2003, when the United Kingdom declared an EPPZ within 200 nm of the Chagos Archipelago, it again assured Mauritius that its rights would remain unaffected. On 12 December 2003, the United Kingdom formally advised Mauritius that the FCMZ around the Chagos Archipelago regulates fishing activities “whilst protecting traditional Mauritian fishing rights there...” (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: Annex 124. See paras. 4.19-4.21 above).

Archipelago, resulting from the “special position of Mauritius and its long-term interest in the future of” the Archipelago.⁴⁸⁴

(3) *Oil and mineral rights*

6.47 The UK further undertook in 1965 that “the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.”⁴⁸⁵ This was subsequently reaffirmed, for example, on 10 November 1997 by the UK Foreign Secretary, Robin Cook, who wrote to the Prime Minister of Mauritius, stating *inter alia*: “I also reaffirm that this Government has no intention of permitting prospecting for oil and minerals while the territory remains British, and acknowledge that any oil and mineral rights will revert to Mauritius when the Territory is ceded”.⁴⁸⁶ The acknowledgement that rights will *revert* to Mauritius necessarily implies the UK’s belief that Mauritius has a pre-existing right or title and enjoys the rights as regards any oil and mineral deposits in the seabed surrounding the Chagos Archipelago.

6.48 The acknowledgement of such a right or title was also made clear in the statement on behalf of the UK Government in 1970 that:

“The British Government have no intention of departing from the undertaking that the Government of Mauritius should receive the benefit of any minerals or oil discovered in the Chagos Archipelago or the off-shore areas in question in the event of the matter arising as a result of prospecting being permitted while the archipelago remains under United Kingdom sovereignty.”⁴⁸⁷

The statement makes clear that in the view of the UK, Mauritius has existing rights to oil and minerals, should any be discovered. The UK is not permitting exploration or exploitation, and that is what prevents the rights being realised. The adoption of the “MPA” is thus a direct interference with Mauritius’ mineral rights and their exercise.

6.49 It is significant that the UK did not object to Mauritius’ submission in May 2009 to the Commission on the Limits of the Continental Shelf of Preliminary Information regarding the shelf appertaining to the Chagos Archipelago, apparently recognising, as discussed in paragraph 6.32 above, Mauritius’ sovereign rights in regard to the seabed. And in July 2009 it was agreed by both Mauritius and the UK in bilateral talks “that it would be desirable to have a coordinated submission for an extended continental shelf in the Chagos Archipelago [...] region to the UN Commission on the Limits of the Continental Shelf, in order not to prejudice the interest of Mauritius in that

⁴⁸⁴ Para. 6.45 above.

⁴⁸⁵ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: Annex 19. See para. 3.31 above.

⁴⁸⁶ Para. 3.108 above. See paras 3.103-3.108 for other examples of the reaffirmation of the undertaking.

⁴⁸⁷ See para. 3.105 above.

area and to facilitate its consideration by the Commission”.⁴⁸⁸ The proposal for a coordinated continental shelf submission constitutes a clear and significant recognition by the UK of Mauritius’ interests in the Archipelago.

(4) Accordingly, Mauritius is entitled to avail itself of the rights of a coastal State

6.50 Following the unlawful excision of the Chagos Archipelago and until the purported establishment of the “MPA”, the UK has, in word and practice, recognised fishing rights for Mauritius in the maritime zones around the Archipelago. It has also recognised mineral and oil rights for Mauritius which cannot be realised only because the UK has not been prepared to allow exploration or exploitation. While the UK has consistently asserted its claim to sovereignty over the Chagos Archipelago in response to protests by Mauritius, it has at the same time undertaken that sovereignty will “revert” to Mauritius in the future and has given its view that Mauritius is the only State with the right to claim sovereignty once the Archipelago is no longer needed for defence purposes. It has recognised what it calls “the special position of Mauritius and its long-term interest in the future of” the Chagos Archipelago, referring to this as a “beneficial interest” as early as 1964.⁴⁸⁹

6.51 Mauritius has no doubt of its sovereignty over the Chagos Archipelago, and its status as a “coastal State” in regard to the Archipelago. But if, *quod non*, the Tribunal were minded to give deference to the UK’s physical possession of the Archipelago and its *de facto* exercise of powers, the Tribunal should also decide that in view of the unlawful manner in which the UK took and retained possession of the Archipelago, and the rights and interests which the UK has recognised as still belonging to Mauritius, Mauritius should be entitled to avail itself of the rights of a coastal State under Part V (and the other Parts) of the Convention.

6.52 The UK has long acknowledged the rights and legitimate interests of Mauritius in the Chagos Archipelago, rights and interests which are appurtenant to and can only originate in sovereign title, and which give rise to the rights of a “coastal State” under the Convention. Accordingly, even if the Tribunal were to presume that, despite its unlawful excision and retention of the Chagos Archipelago, the UK is also a “coastal State” in regard to the Archipelago – a presumption that Mauritius rejects – there would be no requirement, or justification, for a conclusion that the Convention demands that the UK be regarded as the *only* State entitled to enjoy such status. On the contrary, the Convention is sufficiently broad and flexible to comprehend, in appropriate circumstances (which will be infrequent), the existence of more than one “coastal State” in regard to a particular territorial jurisdiction.

III. Conclusion

6.53 Due to the unlawful basis of the UK’s claim of sovereignty over the Chagos Archipelago, only Mauritius is legally entitled to exercise the rights of the “coastal

⁴⁸⁸ Para. 4.34 above.

⁴⁸⁹ Para. 3.10 above.

State” under the Convention with regard to the Archipelago. Even if the UK, *quod non*, were entitled to claim the status of a “coastal State” in regard to the Archipelago – despite its illegal excision from Mauritian territory – this would not deprive Mauritius of its status as a coastal State with regard to the Archipelago. As a coastal State with rights under the Convention, Mauritius is entitled to obtain a declaration that the purported “MPA” is unlawful under the Convention and without legal effect.

CHAPTER 7: THE “MPA” VIOLATES THE RIGHTS OF MAURITIUS UNDER THE CONVENTION

7.1 In Chapter 6, Mauritius set out its case that the UK is not a coastal State within the meaning of the Convention in regard to the Chagos Archipelago. It therefore lacks authority under the Convention to establish maritime zones of any kind in the waters of the Chagos Archipelago, or to seek to restrict activity in such areas. This Chapter deals with the unlawfulness of the UK’s purported establishment of the “MPA” for the additional reason that, even if *quod non* the UK is a coastal State, the restrictions imposed by the “MPA”, as well as the unilateral manner in which it was adopted, violate the rights of Mauritius and the UK’s obligations under the Convention. These include rights of Mauritius long recognised by the UK and other States, including the United States which has characterised Mauritius as having “retained fishing and mineral [...] rights to the Chagos Archipelago.”⁴⁹⁰

7.2 In Section I, Mauritius demonstrates that the “MPA” breaches the following provisions of the Convention: (i) the obligation imposed on a coastal State under Article 2(3) of the Convention to exercise its sovereignty over the territorial sea subject to the Convention and other rules of international law, which include the general international law obligations to respect traditional rights relating to the exploitation of natural resources and to comply with legally binding undertakings; and (ii) the obligation under Articles 55 and 56, imposed on a coastal State that exercises rights under Part V of the Convention, to have “due regard” for the rights of other States in the coastal State’s exclusive economic zone and to act “subject to the specific legal regime” established under that Part.

7.3 In Section II, Mauritius shows that the UK has also breached the Convention by establishing the “MPA” unilaterally and without entering into meaningful consultations with Mauritius or the responsible regional and international organisations. The UK’s violations include, *inter alia*, its failure to fulfil the obligation to consult with interested States in relation to Mauritius’ rights in the territorial sea and exclusive economic zone of the Chagos Archipelago. The failure of the UK to consult adequately with Mauritius also breaches its specific obligations in connection with straddling stocks and highly migratory species, under Articles 63 and 64 of the Convention, and Article 7 of the 1995 Agreement. The UK has further breached its obligations to endeavour to harmonise with Mauritius and other States its policies for the control of pollution of the marine environment, as required by Article 194 of the Convention. Further, by failing to make readily accessible pertinent laws and regulations, the UK has breached its obligation under Article 62(5) to “give due notice of conservation and management laws and regulations.”

7.4 Finally, in Section III, Mauritius shows that the UK has breached the Convention for the additional reason that it has failed to comply with its obligation

⁴⁹⁰ Office of International Security Operations Bureau, Politico-Military Affairs, United States Department of State, “Disposition of the Seychelles Islands of the BIOT”, 31 October 1975: Annex 74.

under Article 300 to exercise its rights under the Convention in ways that do not constitute an abuse of rights.

I. Breaches of the Convention Relating to the Establishment of the “MPA”.

7.5 As demonstrated in the paragraphs that follow, even if the UK is a “coastal State,” as it claims and Mauritius disputes, the UK has breached its obligations to Mauritius under the Convention because its creation and enforcement of the “MPA” breach the requirements of the Convention regarding the exercise of rights in the territorial sea and exclusive economic zone, including Articles 2(3), 55, and 56(2).

(1) Territorial Sea

7.6 With respect to the territorial sea, Article 2(1) establishes that “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.” Article 2(3) limits the coastal State’s exercise of sovereignty over the territorial sea, by requiring it also to comply with obligations arising under “other rules of international law”. Specifically, Article 2(3) provides that “The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”

7.7 Those “other rules of international law” include (i) the obligation to respect traditional rights to access natural resources; and (ii) the obligation to comply with the legal obligations created by the UK’s declarations concerning Mauritius’ fishing rights in the territorial sea.

7.8 These are both rules of international law that are not incompatible with the Convention within the meaning of Article 293, and the UK has plainly breached both of them. For the reasons set out below, Mauritius enjoys traditional fishing rights in the waters of the Chagos Archipelago, as demonstrated by the longstanding, open and consensual use of those waters by Mauritius, and by the UK’s own undertakings.⁴⁹¹ Further, the UK has, pursuant to unilateral undertakings, acknowledged and committed itself to respect the right of Mauritius to fish in the waters adjacent to the Chagos Archipelago. Thus, by establishing and applying the “MPA” in a manner that purports to deny the exercise by Mauritius of its rights, the UK has breached Article 2(3) of the Convention.

(a) Traditional rights

7.9 Even if the UK is the coastal State with respect to the territorial sea adjacent to the Chagos Archipelago (which it is not), it is subject to an obligation under the Convention to respect historically acquired rights in those waters and in particular – as attested by long and consistent international case law – traditional fishing rights.

⁴⁹¹ See paras 3.86 to 3.102.

7.10 Under general international law, even if the Chagos Archipelago was lawfully detached from Mauritius (which, as Mauritius sets out in Chapter 6, it was not), the detachment cannot render void any existing rights of access or use, or other rights related to the exploitation of natural resources. The Arbitral Tribunal in the *Abyei* arbitration (*Government of Sudan v. Sudan People's Liberation Movement/Army*) has recently confirmed the existence of a clear rule of international law that where title to territory is transferred, that transfer does not *per se* “extinguish traditional rights to the use of transferred territory.” Thus, the Tribunal held that international jurisprudence and treaty practice support the:

“principle that, in the absence of an explicit prohibition to the contrary, 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).”⁴⁹²

7.11 The same principle is known in the international law of the sea more generally, where new claims to maritime jurisdiction may conflict with other States' traditional use of an area of the sea. Sir Gerald Fitzmaurice put the point as follows:

“[I]f the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them [...] acquired a vested interest that the fisheries of that area should remain available to its fishing vessel (of course on a non-exclusive basis) – so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognised, this can only be subject to the acquired rights of fishery in question, which must continue to be respected.”⁴⁹³

The rationale for this rule is that historically acquired traditional fishing rights are the *stronger* right in issue, “since it only involves the retention and continued exercise of an existing right, not the acquisition of a new one.”⁴⁹⁴ The principle was applied in the *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, where the Court

⁴⁹² *Government of Sudan v. Sudan People's Liberation Movement/Army*, Final Award of 22 July 2009, para. 753 (emphasis added). This is a straightforward application of the general international law principle that “[c]ustomary rights ‘run with the land,’ and whichever party in international adjudication is assigned title to a particular territory is bound to give effect to these rights as a matter of international law”: *Abyei Arbitration*, para. 754 (quoting *Eritrea v. Yemen*, First Stage of the Proceedings, para. 126). This is because “customary rights are [...] servitudes *jure gentium* or ‘servitudes internationales.’” *Abyei Arbitration*, para. 754 (quoting *Eritrea v. Yemen*, First Stage of the Proceedings, para. 126). See also, e.g., *Case Concerning Right of Passage over Indian Territory* (Portugal v. India), paras 35-43 (Portugal continued to enjoy certain rights of passage over Indian territory that had previously been Portuguese).

⁴⁹³ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, 1986, p. 181. See further *Case Concerning Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, 25 July 1974, para. 61.

⁴⁹⁴ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, 1986, p. 181.

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 Applicant."⁴⁹⁵

7.12 International courts and tribunals have applied this principle to require that traditional fishing rights be respected. Indeed, as early as the *Behring Sea Arbitration* in 1893, arbitral tribunals have acted to preserve traditional fishing rights in the context of maritime delimitation. In that case, the tribunal exempted "Indians dwelling on the coasts of the territory of the United States or of Great Britain" from the otherwise applicable legal regimes.⁴⁹⁶

7.13 More recently, in *Eritrea v. Yemen*, the arbitral tribunal ruled that its award of sovereignty over the islands in dispute did not displace the parties' traditional fishing rights in the waters adjacent to those islands. It held that:

"In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. This existing regime has operated, as the evidence presented to the Tribunal amply testifies, around the Hanish and Zuqar islands and the islands of Jebel al-Tayr and the Zubayr group. In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men."⁴⁹⁷

7.14 On this basis, the Tribunal ruled in its *Dispositif* that "the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen."⁴⁹⁸

7.15 In its Second Stage Award on Maritime Delimitation, the Tribunal elaborated on the continuing existence of the traditional fishing regime:

"The traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them. Rather, it entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty,

⁴⁹⁵ *Case Concerning Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, 25 July 1974, para. 61. See further para. 54 (where the Court held that Iceland's preferential rights "cannot imply the extinction of the concurrent rights of other States and particularly of a State which, like the Applicant [the Federal Republic of Germany], have for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned".)

⁴⁹⁶ *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Behring's sea and the preservation of fur seals*, 15 August 1893, RIAA, Vol. XXVII, p. 271.

⁴⁹⁷ *Eritrea v. Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, 9 October 1998, para. 526.

⁴⁹⁸ *Ibid.*, para. 527(vi).

the Tribunal attributed to Yemen. This is to be understood as including diving, carried out by artisanal means, for shells and pearls. Equally, these fishermen remain entitled freely to use these islands for those purposes traditionally associated with such artisanal fishing – the use of the islands for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of repairs.”⁴⁹⁹

7.16 The Tribunal in the *Abyei* arbitration reached a similar conclusion in regard to traditional grazing rights (while making clear that the principle at issue applied equally to “maritime resources”).⁵⁰⁰ It ruled that, notwithstanding the boundary delimitation, the parties were legally obligated to continue to respect traditional grazing rights. In that connection, it held that:

“As a matter of ‘general principles of law and practices’ [...] traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation.”

Consequently, historic users were found to have “retain[ed] their established secondary rights to the use of land north and south of this boundary.”⁵⁰¹

7.17 Respect for traditional fishing rights is also reflected in State treaty practice, including that of the UK.⁵⁰²

7.18 Further, a coastal State is not entitled to vitiate historically acquired rights under the guise of enacting otherwise lawful environmental regulations. In *Eritrea v. Yemen*, the Tribunal made clear that Yemen could not, without Eritrea’s consent, weaken Eritrea’s traditional fishing rights by enacting environmental regulations that would undermine those rights. The Tribunal held: “Insofar as environmental considerations may in the future require regulation, any administrative measures impacting upon these traditional rights shall be taken by Yemen only with the agreement of Eritrea...”⁵⁰³

7.19 As described in Chapter 3, Mauritius possesses rights in the territorial sea in relation to fisheries resources. The UK has acknowledged those rights, and is obligated to respect them. As set out in Chapter 3, that recognition is long-standing. The UK

⁴⁹⁹ *Eritrea v. Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, 17 December 1999, para. 103.

⁵⁰⁰ *Abyei Arbitration*, para. 753.

⁵⁰¹ *Ibid.*, para. 766.

⁵⁰² David Anderson, *Modern Law of the Sea*, 2008, p. 413 (“The preservation of existing fishing patterns is something which has been provided for in recent boundary agreements, for example, the Agreement between Honduras and the United Kingdom (Cayman Islands). The Agreement between Denmark (Faroe Islands) and the United Kingdom in effect perpetuated as a ‘Special Area’ an area of overlapping fisheries jurisdiction, which straddled the agreed continental shelf boundary”).

⁵⁰³ *Eritrea v. Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, 17 December 1999, para. 108 (emphasis added).

unequivocally recognised those rights at the Lancaster House meeting⁵⁰⁴ and on many subsequent occasions.⁵⁰⁵

7.20 Similarly, in April 1969, the FCO referred to the proposed creation of a fishing zone within 12 nautical miles of the coastline of the Chagos Archipelago. “Mauritian fishing vessels,” the FCO stated, should be allowed to exercise their “fishing rights” throughout the 12-mile zone. Any restrictions should be limited to “the immediate vicinity of islands which might in future be used for defence purposes [...] and would be kept to the minimum compatible with our security requirements.”⁵⁰⁶ Beyond the six-mile limit, the FCO considered that there should be no restrictions at all on Mauritian fishing activities. Similarly, on 4 July 1975, the UK affirmed its recognition of Mauritius’ “fishing rights” in the waters of the Chagos Archipelago.⁵⁰⁷

7.21 By adopting the “MPA”, which imposes a “no take” regime with no accommodation for those acknowledged rights of Mauritius in the territorial sea of the Chagos Archipelago, the UK has breached Article 2(3) of the Convention.

(b) Legally binding undertakings

7.22 The UK has further breached Article 2(3) of the Convention because, in exercising rights in the territorial sea of the Chagos Archipelago, it has violated another rule of international law, namely its obligation to comply with its unilateral undertakings to respect the fishing rights of Mauritius in the Archipelago’s territorial sea.

7.23 It is well-established in international law that a State which undertakes by unilateral act a binding commitment engages its international responsibility if it breaches that commitment. This is obviously a rule of international law that is compatible with the Convention, within the meaning of Article 293. The International Law Commission’s Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations states:

“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; interested States may then

⁵⁰⁴ Record of a Meeting Held in Lancaster House at 2:30 p.m. on Thursday 23 September [1965], Mauritius Defence Matters, para. 22: Annex 19. For the context of the Lancaster House meeting, see paras 3.22-3.34 above. For the UK’s recognition of Mauritian fishing rights, see further paras 3.85-3.102 above.

⁵⁰⁵ See paras 3.85-3.102 above.

⁵⁰⁶ Despatch dated 28 April 1969 from J. W. Ayres, Foreign and Commonwealth Office to J. R. Todd, Administrator, “BIOT”, FCO 31/2763: Annex 52.

⁵⁰⁷ Memorandum by the UK Secretary of State for Foreign and Commonwealth Affairs, “British Indian Ocean Territory: The Ex-Seychelles Islands”, 4 July 1975, para. 6: Annex 72.

take them into consideration and rely on them; such States are entitled to require that such obligations be respected.”⁵⁰⁸

7.24 The ICJ ruled in the *Nuclear Test* cases that:

“[i]t is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. 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 negotiation, is binding [...]”⁵⁰⁹

The Court further held that:

“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.”⁵¹⁰

7.25 As described in Chapter 3 and at paras. 7.19 to 7.20 above, the UK, at Lancaster House and on many occasions thereafter, *inter alia* undertook unilateral acts that gave rise to binding legal obligations with regard to Mauritius’ fishing rights in the territorial sea adjacent to the Chagos Archipelago.⁵¹¹ For example, on 23 September 1965, the UK undertook to protect “as far as practicable” the “Fishing Rights” of Mauritius in “the Chagos Archipelago.”⁵¹² This commitment was reaffirmed and reiterated by the UK on numerous occasions thereafter. On 15 July 1971, for instance, the British Deputy High Commissioner in Port Louis informed Mauritius that because

⁵⁰⁸ *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, para. 1, International Law Commission, 58th session, Geneva, 1 May-9 June and 3 July-11 August 2006, Unilateral Acts of States, Report of the Working Group, Conclusions of the International Law Commission Relating to Unilateral Acts of States. A/CN.4/L.703 (20 July 2006).

⁵⁰⁹ *Nuclear Test Case* (Australia v. France), Judgment, 20 December 1974, para. 43.

⁵¹⁰ *Ibid.*, para. 46.

⁵¹¹ See paras 3.85 to 3.102 above.

⁵¹² Record of a Meeting Held in Lancaster House at 2:30 p.m. on Thursday 23 September [1965], Mauritius Defence Matters, para. 22: Annex 19.

“the BIOT fishing zone” – which was located within what is now the territorial sea of the Chagos Archipelago – has been “fished traditionally by vessels from Mauritius,” the UK would “enable Mauritian fishing boats to continue fishing” in those waters, “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.”⁵¹³

7.26 Further, in connection with these undertakings, the UK specifically undertook to continue to grant Mauritian vessels licences to fish in the territorial sea of the Chagos Archipelago. It did so, for example, in July 1991, when it stated that, in light of Mauritius’ “traditional fishing interests” in the area, it had granted “licences free of charge” and “shall continue to offer” such “licences free of charge on this basis.”⁵¹⁴ The specific undertaking to continue to grant licences to Mauritian fishing vessels was later repeated, when the UK informed the Prime Minister of Mauritius that “[i]t has issued free licences for Mauritius fishing vessels” to fish in the “original 12 mile fishing zone of the territory,” that is, in the current territorial sea of the Chagos Archipelago, and that the UK “will continue to do so, provided that the Mauritian vessels respect the licence conditions laid down to ensure proper conservation of local fishing resources.”⁵¹⁵

7.27 By failing to comply with these undertakings to allow Mauritius to exercise its right to fish in the territorial sea of the Chagos Archipelago, the UK has breached Article 2(3) of the Convention.

(2) Exclusive Economic Zone

7.28 The UK is also internationally responsible for breaching its obligations under the Convention with regard to the exclusive economic zone. In particular, the Convention requires that a State purporting to exercise rights under Part V must do so in a manner that respects the rights of other States in the EEZ. This obligation is set forth in Article 56(2), which requires the coastal State to have “due regard” for the rights of other States in the EEZ:

“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.”

7.29 This provision imposes upon the UK a distinct obligation to “have due regard to the rights” of Mauritius. Such rights must include: (i) traditional rights to natural resources; and (ii) rights created or recognised by unilateral acts. Indeed, the duty of coastal States to respect traditional fishing rights in the territorial sea (discussed above at paras. 7.9 to 7.21) applies with equal force in the EEZ. As the Tribunal explained in *Eritrea v. Yemen*:

⁵¹³ See para. 3.95 above.

⁵¹⁴ See para. 3.99 above.

⁵¹⁵ Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103. See further para. 3.100 above.

“The traditional fishing regime is not limited to the territorial waters of specified islands; nor are its limits to be drawn by reference to claimed past patterns of fishing. [...] By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea, the law chosen by the Parties to be applicable to this task in this Second Stage of the Arbitration. The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports, to the extent and in the manner specified in paragraph 107 above.”⁵¹⁶

7.30 The general rule that a coastal State must respect historically acquired traditional rights in its EEZ is plainly compatible with the Convention. Indeed, its compatibility is confirmed by Article 51(1), which states that “an archipelagic State shall respect existing agreements with other States and shall recognise traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters.”⁵¹⁷ The consequence of the introduction of the regime of archipelagic waters in the Convention is that traditional rights of fishing and navigation (as dealt with in Article 53(4) and (12)) might be affected, resulting in precisely the type of conflict of rights described by Sir Gerald Fitzmaurice above (at para. 7.11). To the extent that Article 51 is not said to be directly applicable to the present dispute (on the basis that the UK might not have claimed the status of an archipelagic State under the Convention), the existence of Article 51 confirms that the rule of general international law that a coastal State which purports to change the legal regime applicable to its adjacent waters must respect traditional rights is not incompatible with the Convention.

7.31 Mauritius unquestionably has fishing rights in the exclusive economic zone of the Chagos Archipelago, which the UK has acknowledged and specifically undertaken to respect. For example, on 12 July 1967, the Commonwealth Office acknowledged that “Mauritius fishing vessels” have the right to “unrestricted access” to “the high seas within the [Chagos] Archipelago,” referencing an area that is now encompassed by the Archipelago’s exclusive economic zone.⁵¹⁸ Similarly, on 23 July 1991, the British High Commission in Port Louis, in conveying to Mauritius that the UK intended to extend its fishing zone around the Chagos Archipelago to 200 nautical miles, stated that it would continue to allow Mauritian vessels to fish in the waters of the Chagos Archipelago “[i]n view of the traditional fishing interests of Mauritius in the waters surrounding

⁵¹⁶ *Eritrea v. Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, 17 December 1999, para. 109.

⁵¹⁷ This is an obligation that is also reflected in customary international law: R.R. Churchill & A.V. Lowe, *The Law of the Sea* (3rd. ed.), 1999, p. 130 (“The development of a special regime for archipelagos by the Law of the Sea Convention, and now reflected in customary international law, has succeeded in meeting the aspirations of archipelagic States while at the same time satisfying the interests of maritime States.”).

⁵¹⁸ Letter dated 12 July 1967 from the UK Commonwealth Office to the Governor of Mauritius, FCO 16/226: Annex 50.

British Indian Ocean Territory [...].”⁵¹⁹ Likewise, in July 1992, the British High Commissioner in Port Louis referred to the UK’s undertaking to grant free licences for Mauritian fishing vessels to exercise their fishing rights, not only in the 12-mile territorial sea of the Chagos Archipelago, but also in “the wider waters of the [200 mile] exclusive fishing zone.”⁵²⁰ In December 2003, the UK, referring to the creation of the FCMZ around the Chagos Archipelago, stated that it would continue to “protect [...] traditional Mauritian fishing rights [...]”⁵²¹

7.32 Mauritius’ fishing rights in the Chagos Archipelago’s EEZ, which the UK has acknowledged and undertaken to respect, are plainly rights and obligations to which the UK must have “due regard” under Article 56(2) of the Convention. By establishing an “MPA” that fails to accommodate Mauritius’ rights, the UK has breached its obligations under that provision of the Convention.

7.33 The UK has also separately violated Article 55 of the Convention. Article 55 provides that:

“The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”

7.34 Thus, by its terms, Article 55 requires that the exercise of rights under Part V be “subject to the specific legal regime established” in that Part of the Convention. This includes Article 56(2)’s obligation to have “due regard” for the rights of other States, which necessarily encompasses historically acquired rights to natural resources in the exclusive economic zone and rights created and recognised by unilateral acts. Consequently, because the UK has purported to establish and implement the “MPA” in a manner that fails to respect the rights of Mauritius in the Chagos Archipelago’s exclusive economic zone, it has breached Article 55.⁵²²

7.35 In conclusion, the UK is obliged to respect and accommodate Mauritius’ rights in the territorial sea and exclusive economic zone of the Chagos Archipelago. The “MPA”, which violates those rights, breaches the UK’s obligations to Mauritius under *inter alia* Articles 2, 55 and 56 of the Convention.

⁵¹⁹Note Verbale dated 23 July 1991 from British High Commission, Port Louis to Government of Mauritius, No. 043/91: Annex 99.

⁵²⁰Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103.

⁵²¹Letter 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: Annex 124.

⁵²²In addition, Article 55 is further breached because, as detailed at paragraphs 7.55 to 7.61, the United Kingdom has also failed to adequately consult with Mauritius prior to promulgating the “MPA”.

II. The United Kingdom Failed To Consult Adequately with Mauritius or Relevant Regional or International Organisations

7.36 In Chapter 4, Mauritius described the developments leading to the UK's purported establishment and implementation of the "MPA", and showed that the UK made no meaningful effort to engage in genuine consultation on the proposal. This is despite: (i) Mauritius' expressly recognised rights and interests in the waters of the Chagos Archipelago, especially as regards fishing and conservation generally; and (ii) Mauritius' frequent requests that it be consulted about such matters. Nor did the UK engage adequately with the relevant regional and international organisations, including most notably the IOTC, the regional organisation established for the express purpose of facilitating cooperative arrangements with respect to tuna, a highly migratory species listed in Annex I of the Convention.

7.37 The unilateral approach of the UK to the adoption of the "MPA" breaches, among other things, the following obligations under the Convention and the 1995 Agreement:

- (i) the obligation under Article 2(3) of the Convention to consult with interested States with regard to the exercise of rights in the territorial sea;
- (ii) the obligation under Article 56(2) of the Convention to consult with interested States with regard to the exercise of the coastal State's rights under Part V of the Convention;
- (iii) the obligation under Articles 63 and 64 of the Convention and Article 7 of the 1995 Agreement to consult with interested States with regard to straddling stocks and highly migratory species;
- (iv) the obligation under Article 194(1) of the Convention to "endeavour to harmonise" policies in relation to marine pollution with those of Mauritius and other States in the region; and
- (v) the obligation under Article 62(5) of the Convention of a coastal State to "give due notice of conservation and management laws and regulations."

(1) The obligation to consult

7.38 The UK was required by the Convention to consult with Mauritius with regard to the purported adoption of the "MPA". With respect to the *territorial sea*, the UK's obligation to consult is imposed by Article 2(3) of the Convention, which requires a coastal State to exercise its rights in the territorial sea "subject to this Convention and to other rules of international law."

7.39 This includes the obligation under general international law to consult with interested States in relation to matters that can affect their rights. In that regard, the Arbitral Tribunal in the *Lac Lanoux Case* concluded that unilateral measures affecting another State's interests in a shared resource require consultations and negotiations

which are genuine, which comply with the rules of good faith and which are not conducted as mere formalities.⁵²³ Numerous other cases confirm this basic proposition. As a general principle of law, where States are in dispute as to the delimitation of a shared maritime boundary the ICJ has held that:

“The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation or a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”⁵²⁴

7.40 The ICJ has consistently repeated that States “are under an obligation so to conduct themselves that the negotiations are meaningful”.⁵²⁵ In a different context, the World Trade Organisation Appellate Body formulated the standard as requiring that measures which are undertaken for legitimate environmental purposes, but which may impact other States’ rights under a treaty regime, must involve *inter alia* “ongoing serious, good faith efforts to reach a multilateral agreement,”⁵²⁶ in order not to constitute an *abus de droit*.⁵²⁷ As Professor Bin Cheng has put it:

“Whatever the limits of the right might have been before the assumption of the obligation, from then onwards the right is subject to a restriction. Henceforth, whenever its exercise impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably. A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (i.e., in furtherance of the interests which the right is intended to protect). It should at the same time be fair and equitable as between the parties and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation

⁵²³ *Lac Lanoux Arbitration* (Spain v. France), (1957) XII UNRIAA 281, 315 at para. 22; 24 ILR 101, 139 at para. 22 (“communications [...] cannot be confined to purely formal requirements, such as taking note of complaints, protests or representations made by the downstream State. The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.”)

⁵²⁴ *North Sea Continental Shelf Case* (Federal Republic of Germany v. Denmark), Judgment, ICJ Reports 1969, p. 3, at para. 85(a) (emphasis added).

⁵²⁵ *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7, para. 141; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, para. 146.

⁵²⁶ *United States - Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 22 October 2001), WT/DS58/AB/RW, paras 152-3.

⁵²⁷ *United States - Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 12 October 1998), WT/DS58/AB/R, para. 158.

assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty.”⁵²⁸

7.41 This principle is clearly applicable to Mauritius’ historic fishing rights, as preserved under treaty by Article 2(3) of the Convention. Therefore, if the UK’s imposition of a unilateral “MPA” which effectively extinguishes Mauritius’ traditional fishing rights in the territorial sea surrounding the Chagos Archipelago is not to constitute an abuse of its rights, the UK must have either: (a) secured the agreement of Mauritius; or alternatively (b) at least entered into genuine, serious and good faith efforts to reach an agreement with Mauritius as to how those rights may continue to be exercised. Such discussions may not be conducted as mere formalities.

7.42 This must particularly be the case, given the clear intention of the drafters of the Convention, as expressed in the Third Resolution of the Final Act, that:

“In the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations [...] provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well being and development.”

7.43 The obligation to consult also applies to a proposed regulation that affects a State which has rights appertaining to the coastal State’s *exclusive economic zone*. In this regard, Article 56(2) of the Convention requires a coastal State to have “due regard” for the rights of other States when it exercises jurisdiction pursuant to Part V of the Convention.

7.44 The context of Article 56(2) supports the conclusion that coastal States are obligated to consult, including with regional and international organisations, when considering actions that could infringe upon the rights of other States. The *Virginia Commentary* makes clear that this provision “balances the rights, jurisdiction and duties of the coastal State with the rights and duties of the other States in the exclusive economic zone.”⁵²⁹ That balance must be struck amicably, and with the spirit of co-operation mandated throughout the Convention.⁵³⁰ For that purpose, Article 56(2) not only establishes that a coastal State give “due regard” to the “rights” of other States, it also requires that the coastal State “act in a manner compatible with the provisions of this Convention.” Those provisions include Article 61:

⁵²⁸ B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), p. 125.

⁵²⁹ Center for Oceans Law and Policy, University of Virginia Law School, *United Nations Convention On The Law Of The Sea 1982: A Commentary*, vol. II, p. 543, para. 56.11(f) (“Virginia Commentary”) (emphasis added).

⁵³⁰ Convention, Articles 300-301.

“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 cooperate to this end.”

7.45 The latter obligation is also embodied in Article 197, which establishes the Contracting States’ obligation to cooperate on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules consistent with the Convention, for the protection and preservation of the marine environment. Although the Convention itself does not explicitly set out the parameters of the co-operation that should take place, general international law recognises that the duty of co-operation includes the provision of information on a timely basis, and good faith consultations between the parties.⁵³¹

7.46 The ICJ has stressed the importance of an adequate consultative process in circumstances where a coastal State seeks to regulate fisheries in a manner that could impinge upon the rights of other States. In the *Fisheries Jurisdiction* cases the Court held that:

“The most appropriate method for the solution of the dispute is clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and ‘related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Measures, Order of 12 July 1973*, p. 314, para. 7). This necessitates detailed scientific knowledge of the fishing grounds. It is obvious that the relevant information and expertise would be mainly in the possession of the Parties. The Court would, for this reason, meet with difficulties if it were itself to attempt to lay down a precise scheme for an equitable adjustment of the rights involved.

⁵³¹ *The Mox Plant Case* (Ireland v. United Kingdom), ITLOS Case No. 10, Request for provisional measures, Order of 3 December 2001, para. 82; *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. 92; 1972 Stockholm Declaration, U.N. Doc. A/Conf.48/14, reproduced in 11 I.L.M. 1416 (1972), Principle 24 (“Co-operation through multilateral and bilateral agreements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.”); ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (2001), arts. 4, 9, 12; 1987 *Restatement of the Law: Foreign Relations Law of the United States*, para. 601.

It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights, as was already recognised in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, which constituted the starting point of the law on the subject. This Resolution provides for the establishment, through collaboration between the coastal State and any other States fishing in the area, of agreed measures to secure just treatment of the special situation.

The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes.”⁵³²

7.47 The Court went on to state that “this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognised in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.”⁵³³

7.48 Consistent with the obligation to consult, the UK has repeatedly recognised that Mauritius has special interests and rights that entitle it to be consulted on actions proposed by the UK in relation to the maritime zones adjacent to the Chagos Archipelago.

7.49 For example, on 6 July 2001, the UK Foreign Secretary recognised that:

“[t]he British Government acknowledges that Mauritius has a legitimate interest in the future of the islands and recognises Mauritius as the only State which could assert a claim to the territory in the event that the United Kingdom relinquishes its own sovereignty.”⁵³⁴

Such recognition of a “legitimate interest” implies a particular duty to consult.

7.50 A similar statement was made by the British High Commissioner in Port Louis. On 1 July 1992, he wrote to the Prime Minister of Mauritius, stating that “[t]he British

⁵³² *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Judgment, ICJ Reports 1974, p. 201, paras 65-67.

⁵³³ *Ibid.* para. 67, citing the Court’s decision in the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports 1969, p.47, para. 86.

⁵³⁴ Letter dated 6 July 2001 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Minister of Foreign Affairs and Regional Cooperation, Mauritius: Annex 116.

Government has always acknowledged [...] that Mauritius has a legitimate interest in the future of these islands.”⁵³⁵ The High Commissioner continued:

“The British Government reaffirms that it remains open to discussions with the Government of the Republic of Mauritius over the present arrangements governing such issues and recognises the special position of Mauritius and its long-term interest in the future of the British Indian Ocean Territory. If the Government of the Republic of Mauritius has further concerns over the future of the British Indian Ocean Territory, the British Government remains ready to pursue these through normal bilateral discussions. If the Government of the Republic of Mauritius has proposals which it wishes to put to HMG concerning future arrangements, HMG remains ready to give these close consideration.”⁵³⁶

7.51 The UK’s commitment to consultation in relation to matters that implicate Mauritius’ interests in the Chagos Archipelago is also reflected in an exchange of letters between the Prime Ministers of the two States. On 1 December 2005, Prime Minister Ramgoolam wrote to Prime Minister Blair noting that at their meeting on 26 November 2005 they had “discussed the issue of the Chagos Archipelago.” Prime Minister Ramgoolam stated that he “look[ed] forward to discussing with you in the near future the important issue of fishing rights of Mauritius in the Chagos waters. This has become particularly important in view of the plans of my Government to turn Mauritius into a seafood hub.”⁵³⁷ In his response of 4 January 2006, Prime Minister Blair acknowledged the need for consultations: “The question of fishing rights in the Archipelago and its implications needs to be talked through.”⁵³⁸

7.52 In keeping with these undertakings by the UK, Mauritius has always insisted that conservation measures require consultation with, and consent by, Mauritius. In 1999, upon learning that the UK was considering making the Chagos Archipelago a World Heritage Site, the Mauritius High Commissioner in London wrote to the Minister of State at the FCO:

“Whilst we acknowledge that Diego Garcia is temporarily occupied, we strongly object to any suggestion of the UK Government to propose Chagos Archipelago as a possible World Heritage site.

⁵³⁵ Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius: Annex 103.

⁵³⁶ *Ibid.*

⁵³⁷ Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom: Annex 132.

⁵³⁸ Letter dated 4 January 2006 from the Prime Minister of the United Kingdom to the Prime Minister of Mauritius: Annex 133.

The Government of Mauritius is fully aware of its responsibilities and environmental legacy on the Chagos Archipelago, which is an integral part of the Mauritian territory.

Any proposal regarding the Chagos Archipelago would necessitate the concurrence of the Government of Mauritius.”⁵³⁹

7.53 Indeed, the need for Mauritian participation in decisions that may affect Mauritius’ interests has been recognised by the UK. For example, in 1976 the Mauritius High Commissioner in London requested that Mauritius be included in upcoming tripartite talks between Seychelles, the UK and the US on the islands that had been excised from Seychelles, including their possible return to Seychelles. The High Commissioner stated that Mauritius should be represented at the talks because he understood that issues affecting Mauritius’ interests in the Chagos Archipelago would be discussed, including the “Law of the Sea and mineral rights.”⁵⁴⁰

7.54 The UK’s response to Mauritius’ request did *not* reject the view that Mauritius has interests in the matters identified by the High Commissioner, namely the Law of the Sea and mineral rights with respect to the Chagos Archipelago. Rather, the UK responded that Mauritian participation was unnecessary because those matters “would not be under consideration at these talks.”⁵⁴¹ But the UK conceded the fundamental point: when matters which implicate the interests of Mauritius in the Chagos Archipelago are at stake, including specifically matters that relate to the law of the sea, then consultation with Mauritius is required.⁵⁴² Further consultations took place in 2009, notably with regard to the submission to be made by the coastal State in relation to the extended continental shelf, which eventually led to submission of Preliminary Information by Mauritius only, and no protest or objection by the UK.⁵⁴³

⁵³⁹ Letter dated 16 August 1999 from the Mauritius High Commissioner, London to Mr. G. Hoon MP, UK Foreign and Commonwealth Office: Annex 110.

⁵⁴⁰ Record of Conversation between the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs and the High Commissioner for Mauritius at the FCO on 8 March 1976 at 4 p m., para. 1: Annex 77.

⁵⁴¹ *Ibid.*

⁵⁴² To that end, on 15 March 1976 the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs wrote to the High Commissioner of Mauritius, stating that the forthcoming tripartite meeting would be of a “technical nature between British and American officials and a delegation from Seychelles” and that “[i]t is not our intention to discuss matters such as mineral rights or the law of the sea,” but that he “quite take[s] the point that matters involving the British Indian Ocean Territory generally are of interest to your Government and for this reason I will be glad to keep your Government fully informed of the outcome of the talks.” (Letter dated 15 March 1976 from Parliamentary Under Secretary of State, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London: Annex 78). Later, the point was stressed internally within the British Government that it was necessary to “emphasise to the Mauritians that, as foreseen, there was no discussion whatsoever of matters such as mineral rights, Law of the Sea considerations or any BIOT issues not directly connected with the return of the ex-Seychelles islands. Diego Garcia was not discussed at all. The Mauritians have no grounds for thinking that their interests have been in any way affected by the talks.” (Telegram No. 43 from FCO to British High Commission, Port Louis, 19 March 1976, para. 4: Annex 80).

⁵⁴³ See paras 4.31 to 4.35 above.

(2) Breach of the obligation to consult

(a) The establishment of the “MPA”

7.55 Despite the UK’s obligation to consult with Mauritius, it failed to conduct any meaningful consultations on the proposed establishment of the “MPA”. Consultation implies the provision of timely information, yet Mauritius was never told in advance by the UK of its proposed “MPA”, and learnt about it only from reports in the media: on 9 February 2009, several British publications, including *The Independent*, *The Economist*, and *The Telegraph*, reported on the proposed “MPA”. Mauritius immediately expressed its concern to the UK by Note Verbale.⁵⁴⁴ It was only in response to Mauritius’ note, more than a month after the initial press reports, that the UK informed Mauritius of the possibility that an “MPA” might be declared around the Chagos Archipelago.⁵⁴⁵ Even then, the UK sought to distance itself from the proposal, informing Mauritius that it “is the initiative of the Chagos Environment Network and not of the Government of the United Kingdom of Great Britain and Northern Ireland.”⁵⁴⁶ This response was misleading and inaccurate.

7.56 The first time that the UK notified Mauritius of the possibility of its official endorsement of an “MPA” around the Chagos Archipelago was on 21 July 2009, during the two States’ bilateral talks on the Chagos Archipelago. In particular, the Parties’ Joint Communiqué records that the “British delegation proposed that consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago [...] by establishing a marine protected area in the region.”⁵⁴⁷ Mauritius “welcomed, in principle, the proposal for environmental protection,” but insisted upon the need for consultation. In that regard, Mauritius agreed that “a team of officials and marine scientists from both sides” should “meet to examine the implications of the concept with a view to informing the next round of talks.”

7.57 The UK chose to ignore the call for bilateral consultations. Instead, on 10 November 2009, again without prior information to Mauritius, the UK unilaterally published a document entitled “Consultation on whether to establish a marine protected area in the British Indian Ocean Territory,” inviting public comment on the proposed “MPA”. Mauritius objected: not only did the document falsely state that Mauritius “welcomed the establishment” of an “MPA”, but its unilateral publication was inconsistent with Mauritius’ insistence that the UK should first consult with Mauritius through bilateral diplomatic channels. As Mauritius stated in its Note Verbale,

⁵⁴⁴ Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 2009(1197/28): Annex 139. See further paras 4.39-4.40.

⁵⁴⁵ Note Verbale dated 13 March 2009 from the UK Foreign and Commonwealth Office to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. OTD 04/03/09: Annex 140. See para. 4.42.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ Joint Communiqué, Second round of bilateral talks on the Chagos Archipelago, 21 July 2009, Port Louis, Mauritius: Annex 148. See further paras 4.36-4.38 above.

“since there is an on-going bilateral Mauritius-UK mechanism for talks and consultations on issues relating to the Chagos Archipelago and a third round of talks is envisaged early next year, the Government of the Republic of Mauritius believes that it is inappropriate for the consultation on the proposed marine protected area [...] to take place outside this bilateral framework.”⁵⁴⁸

Mauritius stressed 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”.”⁵⁴⁹

7.58 Mauritius made clear that the UK’s unilateral public consultation document did not satisfy its obligation to consult directly with Mauritius, and that the UK’s promotion of a sham public consultation process was incompatible with engaging in good faith bilateral consultations with Mauritius. For that reason, Mauritius’ Minister of Foreign Affairs, in a letter to the UK Foreign Secretary dated 30 December 2009, stated that “Mauritius is not in a position to hold separate consultations with the team of experts of the UK on the proposal to establish a Marine Protected Area.”⁵⁵⁰ Similarly, on 4 February 2010, the High Commissioner of Mauritius in London informed the UK House of Commons Select Committee on Foreign Affairs that the “existing framework of talks between Mauritius and the UK on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the public consultation launched by the British Government on the proposed MPA.”⁵⁵¹ On 19 February 2010, the Secretary to Cabinet of Mauritius wrote to the British High Commissioner in Port Louis, reiterating “the position of the Government of Mauritius to the effect that the consultation process on the proposed MPA should be stopped and the current Consultation Paper, which is unilateral and prejudicial to the interests of Mauritius withdrawn”. He added that “the Consultation Paper is a unilateral UK initiative which ignores the agreed principles and spirit of the ongoing Mauritius-UK bilateral talks and constitutes a serious setback to progress in these talks.” He also informed the British High Commissioner that “the Government of Mauritius insists that any proposal for the protection of the marine environment in the Chagos Archipelago area needs to be compatible with and meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issues of resettlement and access by Mauritians to fisheries resources in the area.”⁵⁵² The Secretary to Cabinet’s offer to the British High Commissioner “to resume the bilateral talks on the premises outlined above” met with no response.

⁵⁴⁸ 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: Annex 155. See para. 4.57 above.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ See para. 4.67 above. As to the remainder of the events summarised in para. 7.58-7.60, see paras 4.72-4.77 above.

⁵⁵¹ Para. 4.70 above.

⁵⁵² Paras 4.72-4.74 above.

7.59 A month later, on 19 March 2010, the British High Commissioner informed Mauritius that “no decision on the creation of an MPA has yet been taken,” and that “the United Kingdom is keen to continue dialogue about environmental protection within the bilateral framework or separately.”⁵⁵³ The same commitments were repeated by the UK a week later, in a Note Verbale dated 26 March 2010.⁵⁵⁴

7.60 Despite these assurances, just six days later and without any further effort at consultation or communication, the UK announced the creation of the “MPA”. No further consultation with Mauritius took place.

7.61 In short, it is plain that the UK made no serious effort to engage Mauritius in proper consultations prior to creating the “MPA”. As is clear from the discussion above, and the facts set out in more detail in Chapter 4, the UK’s failure to attempt meaningful consultations with Mauritius breached both its obligations to engage Mauritius in “ongoing serious, good faith efforts to reach [...] [an] agreement”,⁵⁵⁵ and to have “due regard” for the rights of Mauritius in the maritime zones of the Chagos Archipelago.

(b) Straddling stocks and highly migratory species

7.62 The UK has further breached its specific obligations to consult in relation to straddling stocks and highly migratory species.

7.63 With respect to stocks that occur within the exclusive economic zones generated by the entire territory of Mauritius, including the Chagos Archipelago, Article 63(1) requires cooperation in relation to measures for their conservation and development. This 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 organisations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.”

7.64 Article 63(2) concerns stocks that straddle the EEZ of the Chagos Archipelago and the adjacent high seas. It also imposes on the UK an obligation to consult with Mauritius:

“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, the coastal State and the States fishing

⁵⁵³ Para. 4.75 above.

⁵⁵⁴ Para. 4.76 above.

⁵⁵⁵ *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 22 October 2001), WT/DS58/AB/RW, paras 152-3; *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 12 October 1998), WT/DS58/AB/R, para. 158.

for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.”

7.65 Further, the obligation to consult attaches in particular with respect to measures regarding highly migratory species. In that regard, Article 64 of the Convention provides:

- (i) The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work.
- (ii) The provisions of paragraph 1 apply in addition to the other provisions of this Part.

7.66 These obligations are supplemented by the 1995 Agreement. The UK purported to sign the 1995 Agreement on behalf of the “BIOT” on 4 December 1995; Mauritius protested against this action upon acceding to the 1995 Agreement on 25 March 1997.⁵⁵⁶ The UK ratified the 1995 Agreement in respect of the “BIOT” on 3 December 1999, and as regards its metropolitan territory on 10 December 2001.⁵⁵⁷ Article 3(1) of the 1995 Agreement provides that Article 7 of that instrument “appl[ies] [...] to the conservation and management of such [fish] stocks within areas under national jurisdiction.”⁵⁵⁸ Amongst the obligations included in Article 7 is the obligation that, “[i]n giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.”

7.67 Articles 63 and 64 of the Convention, and Article 7 of the 1995 Agreement, are applicable to the waters in question and to the relevant stocks located therein. Further, with respect to Article 64, Annex I of the Convention lists tuna (which is present in the exclusive economic zone of the Chagos Archipelago) amongst those highly migratory species for which cooperative efforts are required.

7.68 The failure of the UK to consult directly with Mauritius prior to promulgating the “MPA”, as described in paragraphs 7.55 to 7.61, thus breaches the obligations set

⁵⁵⁶ See, in particular at End Note 5:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&lang=en

⁵⁵⁷ *Ibid.* (The UK explained this delay by reference to certain requirements of EU law.)

⁵⁵⁸ This is “subject to the different legal regimes that apply within areas under national jurisdiction”: see Art. 3(1).

forth in Articles 63(1), 63(2) and 64 of the Convention, and Article 7 of the 1995 Agreement.

7.69 Further, the UK has violated its obligation to consult with the IOTC, which is the relevant international organisation for the purposes of Articles 63 and 64 of the Convention. In lieu of consultation, the UK did nothing more than inform the IOTC that it was considering various options in regard to the establishment of an “MPA”, and that its decision “could have implications for the IOTC”. Such implications were not spelt out or explained in any detail, but the statement constitutes a clear admission by the UK that its purported actions touched on the interests of the IOTC. This information was communicated in the UK’s report to the IOTC Scientific Committee at the Committee’s 30 November-4 December 2009 Session:

“The Chagos Environmental Network have advocated the creation of an MPA encompassing the whole of the BIOT FCMZ. In order to assess whether this is the right option for environmental protection in BIOT the FCO launched a public consultation on 10 November 2009. Details of the consultation are available at: [internet address]. The consultation refers to 3 broad options for a possible MPA framework:

- (i) Declare a full no-take marine reserve for the whole of the territorial waters and Environmental Preservation and Protection Zone (EPPZ)/Fisheries Conservation and Management Zone (FCMZ);
- (ii) Declare a no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain forms of pelagic fishery (e.g., tuna) in certain zones at certain times of the year;
- (iii) Declare a no-take marine reserve for the vulnerable reef systems only.

The final decision is expected in April 2010 following public consultation, and depending upon the option selected could have implications for the IOTC.”⁵⁵⁹

⁵⁵⁹ IOTC Twelfth Session of the Scientific Committee, Mahé, Seychelles 30 November-4 December 2009, UK (“BIOT”) national report, IOTC-2009-SC-INF08, p. 7. In response to the UK’s submission to the IOTC, Mauritius stated that because “the Chagos Archipelago is under the sovereignty of Mauritius,” the “creation of any Marine Protected Area [...] would therefore require the consent of Mauritius.” Further, with respect to the United Kingdom’s public consultation document, Mauritius stated that “Since there is an ongoing Mauritius-UK mechanism for talks and consultations on issues relating to the Chagos Archipelago and a third round of talks is envisaged early next year, it is inappropriate for the British Government to embark on consultation globally on the proposed Marine Protected Area outside the bilateral framework”: Report of the Twelfth Session of the Scientific Committee, Victoria, Seychelles, 30 November-4 December 2009, Indian Ocean Tuna Commission, IOTC-2009-SC-R[E], Appendix VII. See also *ibid.* at para. 31 (“The SC was informed that UK is launching a consultation on whether to establish a Marine Protected Area in the Chagos archipelago (British Indian Ocean Territory). The principle of such consultation gave rise to an objection by Mauritius which stated that the setting up of any “MPA” in the

7.70 As is readily apparent, the UK's submission to the IOTC's Scientific Committee merely informed the Commission that the UK was engaged in a public consultation process. It did not seek to utilise the machinery of the IOTC in any efforts to consult with the organisation itself or its Member States. Thus, the UK has plainly violated its obligation to "cooperate directly or through appropriate international organisations" as required by Article 64 of the Convention. Nor, as required by Article 7 of the 1995 Agreement, has the UK complied with its obligation to "make every effort to agree on compatible conservation and management measures within a reasonable period of time." The mere provision of information with respect to the conduct of a consultation, as described above, is not sufficient to meet the requirements of Article 7. Specifically, if the obligation is to be implemented in good faith this must entail entering into "ongoing serious, good faith efforts to reach [...] [an] agreement".⁵⁶⁰

7.71 This could, for example, take the form of seeking to agree upon a multilateral measure better designed to protect highly migratory species. The IOTC has noted that mere closure to fishing of areas of the Indian Ocean is unlikely to benefit tuna stocks, and indeed such measures are "likely to be ineffective, as fishing effort will be redirected to other fishing grounds in the Indian Ocean."⁵⁶¹ In the cases of a highly migratory species, closing only one part of the total ocean area through which a stock moves is self-evidently unlikely to provide an effective safe haven from the impacts of fishing. The UK failed, however, to engage in any such efforts.

(3) *Marine pollution*

7.72 The UK has also breached its obligations under the Convention to cooperate with respect to the adoption of measures concerning pollution of the marine environment.

7.73 In particular, Article 194(1) of the Convention provides:

"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."

Chagos Archipelago should be dealt under the ongoing bilateral talks between Mauritius and the UK. Both parties made a statement on their respective position, those statements are presented in Appendix VII. No further discussion took place on this issue as it was not related to scientific matters.")

⁵⁶⁰ *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 22 October 2001), WT/DS58/AB/RW, paras 152-3; *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 12 October 1998), WT/DS58/AB/R, para. 158.

⁵⁶¹ Indian Ocean Tuna Commission, Report of the 14th Session of the Scientific Committee, 12-17 December 2012, IOTC-2011-SC14-R[E], at pp. 34-5 and especially at para. 178.

7.74 This requirement serves an important function. According to Professor McCaffrey, the “requirement of harmonisation” provided for by Article 194 “addresses the problems that can arise when States adopt different policies and standards for the prevention, reduction and control of a watercourse they share”. In that regard, he observes that “[f]ailure to coordinate pollution control efforts may frustrate, or at least reduce the effectiveness of, measures taken by individual countries.”⁵⁶²

7.75 This interpretation of Article 194 is also expressed in the *Virginia Commentary*:

“In the concluding expression ‘shall endeavour to harmonise their policies in this connection,’ the harmonisation relates both to the substantive rule of law and to the enforcement of national legislation, including the penalties. This is to avoid creating a mosaic of legal regimes, differing in their content as in their provenance. This aspect is developed in detail in section 5 (articles 207 to 212) as regards the establishment of the international standards and in section 6 (articles 213 to 222) as regards the enforcement of those standards through national organs, whether judicial or others, operating on the basis of the national legislation; in those provisions the relationship between the international rules and the national legislation is specified. In all cases the State adopting laws and regulations has the initial responsibility of meeting the requirements of the Convention, and the Convention lays down the degree of conformity with the international rules, standards and recommended practices and procedures required on the national level.”⁵⁶³

7.76 Thus, as one commentator has observed, referring to Articles 194-196, “[w]hereas previously states were to a large degree free to determine for themselves whether and to what extent to control and regulate marine pollution, they will now in most cases be bound to do so on terms laid down by the Convention.”⁵⁶⁴

7.77 By its plain terms, the imposition of an obligation in Article 194(1) to “endeavour” requires that States must “try hard to do or achieve” the harmonisation of policies regarding pollution prevention, reduction and control.⁵⁶⁵ The objective of “harmonis[ation]” therefore requires, at a minimum, undertaking such efforts to make

⁵⁶² Stephen C. McCaffrey, “International Watercourses, Environmental Protection”, in *Max Planck Encyclopedia of Public International Law* (2012).

⁵⁶³ Center for Oceans Law and Policy, University of Virginia Law School, *United Nations Convention On The Law Of The Sea 1982: A Commentary*, vol. IV, p. 64 (para. 194.10(d)).

⁵⁶⁴ Alan E. Boyle, “Marine Pollution Under the Law of the Sea Convention,” 79 *American Journal of International Law* 347, 350 (Vol. 79, 1985).

⁵⁶⁵ “Endeavour,” Oxford Dictionaries Online (last accessed 20 July 2012). See also *New Oxford American Dictionary* (2001).

pollution-related policies for the Chagos Archipelago “consistent or compatible”⁵⁶⁶ with those of regional States.

7.78 The UK, however, manifestly failed to comply with this obligation. It purported to establish the “MPA”, including all measures thereunder to prevent, reduce and control pollution of the marine environment. But it made no attempt to engage with Mauritius or other States to harmonise the pollution policies of them “MPA” with their own. Instead, the UK proceeded unilaterally and without proper notice. In so doing, the UK breached its obligations under Article 194(1).

(4) Notice of laws and regulations

7.79 Finally, the UK has breached its obligation to make its laws and regulations concerning the “MPA” readily accessible. In that regard, Article 62(5) of the Convention provides that “[c]oastal States shall give due notice of conservation and management laws and regulations.” However, the UK has not done so. As set out in Chapter 4, any implementing legislation would be expected to be published in the 2011 edition of the “BIOT” Gazette, a publication in very limited circulation, though usually deposited in the British Library in London in January following the relevant year. This was not done in January 2012. A copy of Issue 1 of the “BIOT” Gazette for 2011 had been filed at the library of the Institute of Advanced Legal Studies in London on 13 July 2012, shortly before the filing of this Memorial. This contained no regulations relating to the “MPA”.

7.80 In conclusion, by failing to consult meaningfully with Mauritius and/or the relevant international organisations, the UK breached Articles 56, 62, 63, 64, and 194 of the Convention and Article 7 of the 1995 Agreement.

III. The United Kingdom Has Acted in Abuse of Rights

7.81 The UK has further failed to fulfil its obligations under the Convention by exercising its purported rights in ways that constitute an abuse of the rights of third States, including especially Mauritius, in violation of Article 300.

7.82 Article 300 of the Convention provides:

“States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of rights.”

7.83 By its plain terms this provision imposes upon States an obligation not to undertake actions that constitute an “abuse of rights”, even if those actions are otherwise permitted by the Convention. This provision reflects the well-established principle in general international law that, as Professor Lauterpacht has stated, “the

⁵⁶⁶ “Harmonise,” Oxford Dictionaries Online (last accessed 20 July 2012).

prerogatives of State sovereignty do not imply an unrestricted and indiscriminate use of formal rights”.⁵⁶⁷

7.84 The principles of general international law, which are reflected in Article 300, make clear that an abuse of rights arises where a State exercises rights in a manner that prevents the fulfilment of rights possessed by another State. As Professor Bin Cheng has observed, the doctrine 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.”⁵⁶⁸ Thus, as noted by another commentator, a State commits an abuse of rights when it “exercises its rights in such a way that another State is hindered in the exercise of its own rights.”⁵⁶⁹ The WTO Appellate Body reflected this view when it ruled that the “doctrine of *abus de droit*” reflects the “general principle” that “prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.” The Appellate Body accordingly held that:

“An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”⁵⁷⁰

7.85 Incorporating the general international law rule regarding abuse of rights was an important achievement of the Convention. It reflects the intention of the drafters to ensure that States exercising rights provided by the Convention do not do so in ways that transgress other States’ rights. In that regard, the Report of the President on the Work of the Informal Plenary meeting of the Conference on General Provisions states that the “acceptance” of the prohibition against the abuse of rights “by consensus” was predicated on the “understanding” that it would be “interpreted as meaning that the abuse of rights was in relation to those of other States.”⁵⁷¹

7.86 The Convention’s prohibition on exercising rights in an abusive way is especially important in circumstances that involve “common space” and “matters of

⁵⁶⁷ H. Lauterpacht, *The Doctrine of Abuse of Rights as an Instrument of Change* 286, 287 (1933). See also, e.g., *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 1926 P.C.I.J. (ser. A) No. 7, p. 30 (holding that although “Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property” a “misuse of this right could endow an act of alienation with the character of a breach of the Treaty”); *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, 1932 P.C.I.J. (ser. A/B) No. 46, p. 167 (“A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.”).

⁵⁶⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), 131, quoted in Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill L. J.* 389, 411 (2002).

⁵⁶⁹ Alexandre Kiss, “Abuse of Rights”, in *Max Planck Encyclopedia of Public International Law* (2012).

⁵⁷⁰ *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 12 October 1998), WT/DS58/AB/R, (quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953).

⁵⁷¹ See Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, U.N. Doc. A/CONF.62/L.58, para. 4 (22 August 1980).

common concern.”⁵⁷² In that regard, the UK has itself recognised that the “abuse of rights” doctrine is especially germane in relation to rights of access to marine resources, where a coastal State exercises jurisdiction in waters that historically have been used by other States. In a section of its Memorial in the *Fisheries Jurisdiction* case dealing with “the general rules of law that are relevant to claims by coastal States to exercise fisheries jurisdiction in waters adjacent to their coasts,” the UK stated that:

“[T]he sovereign right of a State to delimit in the first instance the sea areas to which it is entitled (or which it is bound to possess) is matched by the duty under international law to respect the rules concerning the delimitation which international law prescribes for the protection of other States. Moreover, this correlation between rights and duties – a point emphasised by Judge Huber in the *Island of Palmas* case – is not confined to the delimitation of the sea areas in question. It covers, too, the rights that may be exercised in the relevant zones and the corresponding duties.

This correlation was emphasised by Judge Alvarez in his individual opinion in the *Anglo-Norwegian Fisheries* case:

‘2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided that it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other States, that it does no harm to general interests and does not constitute an abus de droit. [...]

3. States have certain rights over their territorial sea, particularly rights as to fisheries; but they also have certain duties [...]

4. States may alter the territorial sea which they have fixed, provided that they furnish adequate grounds to satisfy the change.

5. States may fix a greater or lesser area beyond their territorial sea over which they may reserve for themselves certain rights: customs, police rights, etc. [...]

[...]

7. Any State directly concerned may raise an objection to another State’s decision as to the extent of its territorial sea or of the area beyond it, if it alleges that the conditions

⁵⁷² Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 McGill L. J. 389, 423 (2002).

set out above for the determination of these areas have been violated.⁵⁷³

It is therefore clear that the UK has long recognised the significance and the application of the abuse of rights doctrine in relation to marine resources. This predates the adoption of Article 300, which reinforces its central importance to the law of the sea.

7.87 In the present case, even if *quod non* the UK had rights as a coastal State that entitled it to declare the “MPA”, and even if the creation and enforcement of the “MPA” did not violate the Convention in relation to obligations owed to Mauritius, its purported establishment of the “MPA” does not meet the requirements of Article 300.

7.88 First, enforcing the “MPA” vis-à-vis Mauritius is an abuse of rights because Mauritius has rights over the natural resources of the waters adjacent to the Chagos Archipelago. This is not in dispute. As described in Chapter 3, Mauritius has traditionally fished in these waters, a fact that the UK has repeatedly acknowledged.⁵⁷⁴ Thus, even if the establishment of the “MPA” can be said to be a lawful exercise of rights in the territorial sea and exclusive economic zone of the Chagos Archipelago (which it is not), the particular circumstances in which the UK has purported to exercise those rights make it abusive and thus a breach of Article 300.

7.89 Second, that the UK has engaged in an abuse of rights is reinforced by the fact that the UK is purporting to apply and enforce the “MPA” restrictions in ways that are opposable to Mauritius. This is despite the fact that, as described in Chapter 3,⁵⁷⁵ the UK has repeatedly undertaken to allow Mauritius continuing access to the marine resources in the area covered by the “MPA”. Thus, even if the UK was permitted by the Convention to adopt and enforce the “MPA”, its exercise of that right, in the circumstances present here, constitutes an abuse of that right.

7.90 Third, the conclusion that the UK has abused any right it may have under the Convention to create the “MPA” is strengthened because, as set out in detail in paragraphs 7.55 to 7.61, the UK enacted the “MPA” without engaging in any meaningful consultations with Mauritius, either bilaterally or through the diplomatic machinery of the relevant regional and international organisations. The UK failed to do so despite the fact that it has repeatedly acknowledged that Mauritius has a legitimate interest in the future of the Chagos Archipelago, and has accepted that a coordinated approach is required in relation to the extended continental shelf. Consequently, even if the UK’s creation of the “MPA” was otherwise a lawful exercise of authority under the Convention, the particular circumstances present here make the exercise of that authority abusive and, as a result, a breach of Article 300.

7.91 Fourth, the abuse of rights by the UK is confirmed and reinforced by the circumstances surrounding the adoption and enforcement of the “MPA”. As Alexandre

⁵⁷³ 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 (July 31, 1973) (emphasis added).

⁵⁷⁴ Paras 3.85-3.102 above.

⁵⁷⁵ *Ibid.*

Kiss has observed, an abuse of rights may arise where a State exercises a right “intentionally for an end which is different from that for which the right has been created.”⁵⁷⁶ Thus, according to Lauterpacht, “the exercise of a hitherto legal right” may become an unlawful abuse of right when “the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognised, individual right.”⁵⁷⁷

7.92 This is the case here. The protection of the environment is a laudable objective, and Mauritius puts a very high value on it.⁵⁷⁸ But the UK’s conduct is not entirely consistent with the purpose of protecting the environment.

7.93 In the first place, it is usual to expect the adoption of any “MPA” to be accompanied by detailed implementing regulations that would set out with particularity measures to protect and conserve the environment. Indeed, the 1 April 2010 Proclamation that purports to establish the “MPA” around the Chagos Archipelago states that “[t]he detailed legislation and regulations governing the said Marine Protected Area and the implications for fishing and other activities in the Marine Protected Area and the Territory will be addressed in future legislation of the Territory.”⁵⁷⁹ However, at the time of the submission of this Memorial – more than two years after the proclamation of the “MPA” – Mauritius is not aware of any such legislation or regulations having been enacted.⁵⁸⁰

7.94 The lack of implementing regulations for the “MPA” stands in marked contrast to other MPAs of comparable scale and purpose. For example, the US Proclamation in 2006 establishing the Northwestern Hawaiian Islands Marine National Monument (subsequently renamed the Papahānaumokuākea Marine National Monument), which covers over 360,000 square km, includes detailed regulations regarding all relevant aspects of the area’s environmental management.⁵⁸¹ The Proclamation was later supplemented by additional regulations which address in detail, *inter alia*, the Monument’s scope and purpose and which promulgate rules that prohibit or otherwise regulate activities in the area.⁵⁸² In addition, the United States prepared and published a 411-page Monument Management Plan that sets out a comprehensive and coordinated management regime for the next 15 years.⁵⁸³ No comparable document has been produced and made public by the UK for its purported “MPA”.

7.95 Second, it is to be expected that the enforcement of a maritime zone to protect the environment would require significant expenditure. Yet the UK has failed to

⁵⁷⁶ Alexandre Kiss, “Abuse of Rights”, in *Max Planck Encyclopedia of Public International Law* (2012).

⁵⁷⁷ H. Lauterpacht, *The Function of Law in the International Community* p. 286 (1933).

⁵⁷⁸ See para. 1.2 above.

⁵⁷⁹ “British Indian Ocean Territory” Proclamation No. 1 of 2010, paras 1-2 (1 April 2010): Annex 166.

⁵⁸⁰ See paras 4.82 to 4.83 above.

⁵⁸¹ Establishment of the Northwestern Hawaiian Islands Marine National Monument, United States Presidential Proclamation 8031 of June 15, 2006. F.R. Vol. 71, No. 122, p. 36433.

⁵⁸² 71 F.R. 51134, 40 C.F.R. Part 404.

⁵⁸³ Papahānaumokuākea Marine National Monument, Monument Management Plan (December 2008), located at http://www.papahānaumokuākea.gov/management/mp/vol1_mmp08.pdf

appropriate any budget for the “MPA” which is commensurate with what is required to implement the purported environmental objectives of the “MPA”. This again contrasts with the Papahānaumokuākea Marine National Monument, the Monument Management Plan for which estimates that it will cost over 15 years in excess of US\$358 million to fund the relevant activities, including “understanding and interpreting” the Monument, “conserving wildlife and habitats,” “reducing threats to Monument resources,” and “coordinating conservation and management activities”.⁵⁸⁴

7.96 Third, a maritime zone to protect the environment must, in order to be effective, be properly enforced. Yet the UK has not provided any effective enforcement presence in the “MPA”: there is only one vessel to patrol the 640,000 square kilometres of the “MPA”.⁵⁸⁵

7.97 Fourth, there is a substantial area carved out from the “MPA”: according to the UK’s submissions to the IOTC, the “MPA” is itself subject to an “MPA exclusion zone covering Diego Garcia and its territorial waters.”⁵⁸⁶ In this large exclusion area, “pelagic and demersal recreational fisheries are permitted,” including the catching of tuna and tuna-like species.⁵⁸⁷ The amount of fish caught in this area is very significant indeed: the UK reports that “28.4 tonnes of tuna and tuna like species were caught in 2010 representing 67% of the recreational catch...”⁵⁸⁸

7.98 These facts raise doubts as to the effectiveness of the “MPA” with regard to its purported objectives, and therefore as to the objectives themselves. The doubts are reinforced by evidence of views within the FCO. As noted in Chapter 4, in May 2009 the Director of the Overseas Territories Department at the FCO, Colin Roberts, is reported to have told a Political Counsellor at the US Embassy in London that the UK Government’s “thinking” on the “MPA” was that there would be “no human footprints” or “Man Fridays” on the uninhabited islands of the Chagos Archipelago and that “establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents.”⁵⁸⁹

7.99 In summary, even if *quod non* the UK possessed any rights as the coastal State, and even if it could exercise those rights in a manner that does not violate its obligations under Article 2, 55, 56, and 191 of the Convention, the creation of the “MPA” is an abuse of rights and thus breaches the UK’s obligations under Article 300 of the Convention.

⁵⁸⁴ *Ibid.*, p. 113-115.

⁵⁸⁵ Hansard, House of Commons Written Answers, 16 May 2011: Annex 171. See para. 4.83.

⁵⁸⁶ UK (British Indian Ocean Territory) National Report to the Scientific Committee of the Indian Ocean Tuna Commission, 2011 (Received 25 November 2011), IOTC-2011-SC14-NR28, p. 3.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.* (emphasis added).

⁵⁸⁹ Cable from US Embassy, London, on UK Government’s Proposals for a Marine Reserve Covering the Chagos Archipelago, May 2009: Mauritius Application, 20 December 2010, Annex 2: Annex 146. See paras 4.45-4.49 above.

IV. Conclusion

7.100 The UK has engaged its international responsibility by failing to accommodate Mauritius' traditional rights in the waters within the "MPA", and by adopting the "MPA" in an unlawful, unilateral manner without the legally required bilateral and multilateral consultations.

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 obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 62, 63, 64, 194, 300, as well as under 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

1 August 2012

CERTIFICATION

I certify that the annexes are true copies of the documents referred to.

A handwritten signature in black ink. The first part of the signature, 'DK', is enclosed in a circle. The rest of the signature is written in a cursive style.

Dheerendra Kumar Dabee G.O.S.K, S.C.
Solicitor-General of Mauritius
Government of the Republic of Mauritius Agent

1 August 2012

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- Annex 98** “British Indian Ocean Territory” Notice No. 7 of 1985
- Annex 99** Note Verbale dated 23 July 1991 from British High Commission, Port Louis to Government of Mauritius, No. 043/91

- Annex 100** Note Verbale dated 7 August 1991 from Ministry of External Affairs, Mauritius to British High Commission, Port Louis, No. 35(91) 1311
- Annex 101** “British Indian Ocean Territory” Proclamation No. 1 of 1991
- Annex 102** “British Indian Ocean Territory” Ordinance No. 1 of 1991
- Annex 103** Letter dated 1 July 1992 from the British High Commissioner, Port Louis to the Prime Minister of Mauritius
- Annex 104** Note Verbale dated 9 May 1997 from High Commission of India, Port Louis to Ministry of Foreign Affairs, International and Regional Cooperation, Mauritius
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- Annex 106** Letter dated 9 January 1998 from the Prime Minister of Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs
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- Annex 109** Note Verbale dated 1 July 1999 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No.37/99 (1100/20)
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- Annex 111** Note Verbale dated 5 July 2000 from the Ministry of Foreign Affairs and International Trade, Mauritius to the British High Commission, Port Louis, No. 52/2000 (1197)
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- Annex 114** Statement by Hon. A.K. Gayan, Minister of Foreign Affairs and Regional Cooperation, to the National Assembly of Mauritius, 14 November 2000

- Annex 115** Letter dated 21 December 2000 from the Minister of Foreign Affairs and Regional Cooperation, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs
- Annex 116** Letter dated 6 July 2001 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Minister of Foreign Affairs and Regional Cooperation, Mauritius
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- Annex 118** Letter dated 14 May 2002 from the Prime Minister of Mauritius to the President of the United States
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- Annex 120** Letter dated 13 August 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London
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- Annex 122** 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
- Annex 123** Joint Statement Issued on the Occasion of the Visit of the Prime Minister of Mauritius to India, 19-24 November 2003
- Annex 124** 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
- Annex 125** Hansard, House of Lords, 31 March 2004, col. WS62, Statement of Baroness Symons of Vernham Dean
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- Annex 128** Note Verbale dated 13 May 2004 from UK Foreign and Commonwealth Office to Mauritius High Commission, London, No. OTD 016/05/04

- Annex 129** Letter dated 22 July 2004 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom
- Annex 130** Letter dated 22 October 2004 from Minister of Foreign Affairs, International Trade and Regional Cooperation, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs
- Annex 131** Mauritius Maritime Zones Act 2005
- Annex 132** Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom
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- Annex 136** 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 (NY/UN/395)
- Annex 137** Joint Communiqué, Bilateral talks between Mauritius and the UK on the Chagos Archipelago, 14 January 2009
- Annex 138** “Giant marine park plan for Chagos”, The Independent, Sadie Gray, 9 February 2009
- Annex 139** Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 2009(1197/28)
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- Annex 143** National Assembly of Mauritius, 14 April 2009, Reply to PQ No. B/185

- Annex 144** Preliminary Information Submitted by the Republic of Mauritius Concerning the Extended Continental Shelf in the Chagos Archipelago Region Pursuant to the Decision Contained in SPLOS/183
- Annex 145** Note Verbale dated 6 May 2009 from the UK Foreign and Commonwealth Office to Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. OTD 06/05/09
- Annex 146** Cable from US Embassy, London, on UK Government's Proposals for a Marine Reserve Covering the Chagos Archipelago, May 2009: Mauritius Application, 20 December 2010, Annex 2
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- Annex 149** Declaration of Nueva Esparta, 2nd Africa-South America Summit, 26-27 September 2009, Isla de Margarita, Venezuela (extract)
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- Annex 156** 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

- Annex 157** 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
- Annex 158** 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
- Annex 159** Letter dated 30 December 2009 from the Mauritius High Commissioner, London to *The Sunday Times*, published on 10 January 2010
- Annex 160** Written Evidence of the Mauritius High Commissioner, London, on the UK Proposal for the Establishment of a Marine Protected Area around the Chagos Archipelago, to the House of Commons Select Committee on Foreign Affairs
- Annex 161** Note Verbale dated 15 February 2010 from British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 07/2010
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- Annex 174** Ministerial Declaration of the Group of 77 and China on the occasion of UNCTAD XIII, 21 April 2012, Doha, Qatar
- Annex 175** Hansard, House of Lords Debates, 11 June 2012, c149W
- Annex 176** National Assembly of Mauritius, 12 June 2012, Reply to Private Notice Question
- Annex 177** National Assembly of Mauritius, 10 July 2012, Reply to PQ No. B/457