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

REPUBLIC OF MAURITIUS

v.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

REPLY OF THE REPUBLIC OF MAURITIUS

VOLUME V

ANNEXES 147 - 185

18 November 2013

Annex 147

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

[redacted]

From: [redacted]
Overseas Territories Directorate
Date: 29 October 2009
cc: [redacted]

To: Colin Roberts
PS/Foreign Secretary

Agreed Dr 31/x

BRITISH INDIAN OCEAN TERRITORY (BIOT): PUBLIC CONSULTATION ON PROPOSED MARINE PROTECTED AREA

ISSUE

1. How to move forward the proposal to establish a large scale Marine Protected Area (MPA) in British Indian Ocean Territory (BIOT)?

TIMING

2. Priority. We propose the Foreign Secretary launches the consultation on 10 November.

PREFERRED OPTIONS

3. That the Foreign Secretary:

(i) notes progress to date on the proposed MPA, agrees the main elements and timing of a 3-month public consultation exercise to be launched on 10 November;

(ii) agrees the "Foreword" in the draft consultation document and also agrees the media and parliamentary strategies as set out in paragraphs 7 and 8 below; and

(iii) agrees our recommendation that he telephones Prime Minister Ramgoolam in advance of the consultation launch (see para 11).

AGREED BY

[redacted]

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4. Legal Advisers, Communications Directorate, FCO, SW1A 2AH, Post Locals, Victoria and Webdirectorate

PARLIAMENTARY AND MEDIA

5. There has been some parliamentary interest in the proposal for a marine protected area in BIOT, mainly from the All Party Parliamentary Group on Chagos (BIOT). The APPG is likely to oppose any MPA proposal that does not encompass the resettlement of the outer islands by Chagossians. The APPG which comprises of around 50 MPs is active, meets on a monthly basis and has written frequently to both the Minister and the Foreign Secretary on Chagossian issues. The Foreign Affairs Committee maintains its keen interest in all the Overseas Territories following its recent Inquiry.

6. There has also been some interest in the UK media as well as coverage in the Mauritian media and specialist environmental/scientific magazines. A supportive article has just appeared in the latest edition of "Science in Parliament". We anticipate that the level of both parliamentary and media interest will rise with the launch of a public consultation.

Media Strategy

7. Press office will issue a press release announcing the consultation on 10 November and target the UK media including local press in Crawley. They also plan to post an article on the FCO website encouraging people to contribute to the consultation. Port Louis and Victoria will target local media in Mauritius and Seychelles. OTD will draft a blog. We will clear the press release and blog with Private Office beforehand.

Parliamentary Strategy

8. We recommend that the Foreign Secretary writes to Jeremy Corbyn MP, Chairman of the APPG on Chagos and also to Mike Gapes MP, Chairman of the Foreign Affairs Committee informing them of the launch of the consultation. We recommend, too, that the Foreign Secretary agrees a Written Ministerial Statement on the launch of the consultation. We will provide drafts nearer the time of the launch.

RISKS

9. [redacted]

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[redacted]

the risk of opposition from the US military or from the Government of Mauritius, although there is more to do to convince both sets of stakeholders.

US

10. The US obviously recognises UK sovereignty over BIOT and appreciate our efforts to consult with them over a possible MPA. They accept our assurance that creating an MPA in BIOT will have no impact on the operational capability of the base on Diego Garcia. They remain concerned, however, that the environmental lobby will continue to ratchet up pressure for further controls which may eventually end up affecting the base. We will continue to work with the US to mitigate this risk.

Mauritius

11. Our High Commissioner in Port Louis advises that while Prime Minister Ramgoolam can see the advantages in supporting the consultation, the fact that it is a "unilateral" UK consultation will be difficult for him in the run up to the elections in Mauritius next Spring. It would help if he could play up our bilateral dialogue. For this reason, we recommend that the Foreign Secretary telephones the Prime Minister ahead of the launch, to discuss the matter and so help opties in Mauritius.

Chagossians

12. The risk of an aggressive reaction from the Chagossians and their supporters is high. They may claim that we are establishing a Marine Protected Area in order to ensure that they can never return to BIOT. This is not the case. By going out to public consultation we hope to counter this claim and any potential claims that a decision on establishing an MPA has already taken place and to that extent, public consultation is part of the risk strategy. However, there is a risk that the Chagossians may well seek a judicial review of the consultation process.

3 [redacted]

[redacted]

[redacted]

[redacted]

MPA MEM

14. Our engagement with key stakeholders (US, Mauritius and environmental NGOs) has so far been smoother than expected. There is good understanding of the principle of what we are aiming to achieve, but there is still more to do to resolve the details of US and Mauritian interests. We have not had separate discussions with the Chagossians on the issue of an MPA. However, Olivier Bancoult (Leader of the Mauritian-based Chagos Refugees Group) wrote to the Chagos Conservation Trust immediately following their launch of the MPA proposal to state that any conservation plan or project for the Chagos Islands must be made in consultation with the Chagossians and that any proposal must start with resettlement and the creation of employment for the Chagossians. This appears to be the position of the APPG and the Chagos Supporters Association in the UK.

15. So, while continuing our private dialogue with the US and Mauritius we need now to move to a public consultation process as suggested by the Foreign Secretary in the course of which the different Chagossian communities in Mauritius, Seychelles and Crawley will have an opportunity to express their views.

16. Although the BIOT Administration is not bound by UK Government guidelines on public consultation, we recommend the consultation follows BIS guidelines as far as possible. I attach a copy of the draft consultation (Flag B). [redacted] We have also hired an independent facilitator to gather opinion among the Chagossian communities in Mauritius, Seychelles and Crawley (where many of the Chagossians who moved to the UK following the 2002 Overseas Territories Act have settled) The main question will be whether we should create a Marine Protected Area in BIOT but we will also invite comment on options for the BIOT fishery (ie., do we move to a full or partial no-take zone) and are also seeking opinions on other environmental protection measures beyond marine protection. We have made sure that there is no inconsistency between this consultation exercise and DEFRA's work on the UK Marine Bill.

17. On substance, the key issue remains the scope of MPA designation. The technical work so far has identified three potential approaches:

i. Immediate designation of the whole EEZ as a no-take MPA

[redacted]

[redacted]

[redacted]

ii) The same, qualified by maintaining a limited amount of commercial fishing in designated areas and seasons for a 3-5 year interim period during which further scientific work would be done to provide a basis for moving to full no-take status

iii) Immediate designation of the most vulnerable and valuable sites (ie the reef systems and surrounding waters out 12 miles from the 200m depth contour) as a no-take MPA, reserving a decision on the rest of the EEZ for 3-5 years.

We need to take account of the results of the consultation before deciding which option to pursue.

18. In parallel we need to continue our work to evaluate the options from the perspectives of conservation benefit, enforcement challenge and impact on BIOTA and the FCO's budget.

BACKGROUND

19. Since our last submission on this subject:

- We held talks with the Government of Mauritius in July. This produced a joint communiqué in which the Government of Mauritius welcomed the proposal for an MPA. The Foreign Minister was supportive in principle. The key to their support or acquiescence is likely to be some form of recognition of their interests, although this must not breach our red lines on sovereignty. The next round of talks is scheduled for January 2010. We also used the visit to talk with Mauritian fishing interests and the Chagossian communities.

- The Commissioner's visit to BIOT in July included an opportunity to assess the enforcement capability currently at the disposal of the BIOT Administration (BPV Pacific Marlin and its varied complement of marines, police, immigration and customs officers and fisheries protection officer; the deterrent value of the way detected illegal fishing is dealt with in the courts and prison on Diego Garcia).

- With our approval, the National Oceanography Centre in Southampton ran a two-day workshop in August to assess the level of knowledge of BIOT in the scientific and environmental community. The report of this event (copy of executive summary attached at Flag C) provides a strong endorsement for moving to MPA designation

The US Pew Foundation appointed Mr Ian Granditto as International Director of PSPB in May. Mr Granditto was previously responsible in support of MPA [redacted]

[redacted]

- In September in Washington we covered the MPA proposal in the annual UK/US Pol-Mil talks on BIOT. The US response was constructive. We gave them a set of assurances which went some way to addressing their concerns. We had a follow-up meeting with the US on 28 October. We will continue to work with them to alleviate their remaining concerns.

- Drafted the consultation document.

RESOURCE IMPLICATIONS

20. The consultation process will cost around £25,000. We will meet this initially from the BIOT Administration Account with help from the OTPF if necessary. We may be able to persuade the Pew Foundation to help with costs.

21. The decision to move ahead with consultation does not commit us to any particular outcome. When we come to decide the scope of MPA designation, the resource implications will become a factor. In general terms, of the options set out in para 17 above, i) will bring a reduction in BIOTA revenue of c £800,000 per annum reduced by any new sources of revenue iii) will be budget neutral to BIOTA and ii) will be somewhere in between depending on the amount of fishing permitted. As the FCO, through the OTPF effectively provides budgetary aid to BIOTA, any budgetary impacts on BIOTA will be passed through to OTPF/FCO.

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Annex 148

Extract of Information Paper CAB (2009) 953 – Commonwealth Heads of Government Meeting, 9 December 2009

Extract of Information Paper CAB (2009)953 - Commonwealth Heads of Government Meeting of 9 December 2009

Meeting with the Prime Minister of United Kingdom, HE the Rt Hon Gordon Brown

33. A tête-à-tête meeting took place between the British Prime Minister and myself in the morning of Friday 27 November 2009. Two main subjects were covered:

(a) Mauritian Sovereignty over the Chagos Archipelago; and

(b) the Marine Protected Area.

34. I explained to the British Prime Minister that the bilateral talks which we have engaged with the British side are going on in a positive atmosphere and that it is imperative that the issue of sovereignty continues to be addressed.

35. I stated that Mauritius does not recognize the British Indian Ocean Territory and therefore, we cannot even discuss the issue of a Marine Protected Area with them. I emphasized that the issue of resettlement remains a pending issue and Mauritian fishing rights have to be taken into consideration. I therefore indicated that since bilateral talks were intended to deal with all the issues concerning Chagos progressively, this is the venue we should continue to use to further our discussions.

36. The British Prime Minister paid tribute to the leadership role played by Mauritius in the deliberations of the meeting particularly on the issue of Climate Change from the perspective of Small Island Developing Countries. On the issue of Marine Protected Area, he assured me that nothing would be done to undermine resettlement and the sovereignty claim of Mauritius over the Chagos Archipelago and that he would put a hold on this project.

Annex 149

Keyuan, Z., "The International Tribunal for the Law of the Sea: Procedures, Practices and Asian States" (2010) 41 Ocean Development and International Law 131

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The International Tribunal for the Law of the Sea: Procedures, Practices, and Asian States

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Although most international disputes are resolved through political means, particularly bilateral negotiation and consultation, international adjudication and arbitration are indispensable as an important component of dispute settlement. While there are various institutions that can serve as a venue to solve law of the sea disputes, the International Tribunal for the Law of the Sea (ITLOS) is the specialized judicial organ designed specifically to handle such disputes. This article is limited mainly to the procedure and practices of the ITLOS, though some comparisons will be made between it and other judicial institutions. In addition, East Asian states' attitudes toward and practices in judicial dispute settlement will be examined based on a number of recent cases submitted to the ITLOS.

Keywords dispute settlement, International Tribunal for the Law of the Sea (ITLOS), law of the sea

Introduction

International disputes are not uncommon in the world community. An *international legal dispute*, as defined at the Web site of the International Court of Justice (ICJ), refers to "a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests."[1] In international law, there are a number of mechanisms for the settlement of these disputes, including political means such as negotiation and consultation, mediation and good offices, conciliation, and investigation as well as judicial means such as arbitration and international adjudication as listed in the Charter of the United Nations.[2] In addition, international organizations, whether global or regional, have played an active role in dispute settlement.

Judicial settlement in this article refers to the ICJ and the International Tribunal for the Law of the Sea (ITLOS).[3] There also exists arbitration as a legal means of dispute settlement, which is more flexible than adjudication. Pursuant to Article 287(3) of the 1982 Law of the Sea Convention (LOS Convention), arbitration is the default means of

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dispute settlement if a state has not expressed any preference with respect to the means of dispute resolution available under Article 287(1) of the Convention.[4] Since the LOS Convention came into force in 1994, five cases have been arbitrated. The Permanent Court of Arbitration (PCA) has acted as registry in four of those cases including: *Ireland v. United Kingdom* (*MOX Plant Case*), which was instituted in November 2001 and terminated on 8 June 2008 with an order to formalized the withdrawal of Ireland's claim against the United Kingdom; *Malaysia v. Singapore*, which was instituted in July 2003 and terminated by an award on agreed terms rendered on 1 September 2005; *Barbados v. Trinidad and Tobago*, which was instituted in February 2004 with a final award rendered on 11 April 2006; and *Guyana v. Suriname*, which was instituted in February 2004 with a final award rendered on 17 September 2007.[5] The LOS Convention also allows states parties the option to use special arbitration for disputes concerning: fisheries; protection and preservation of the marine environment; marine scientific research; or navigation, including pollution from vessels and by dumping.[6]

While there are various institutions that can serve as a venue to solve law of the sea disputes, the ITLOS is the specialized judicial organ designed specifically to handle them. This article will limit itself mainly to the procedure and practices of the ITLOS, although some comparisons will be made between the ITLOS and other judicial institutions.

Law of the Sea Disputes and the ITLOS

The ITLOS was established in October 1996 in Hamburg, Germany, under the general framework of the LOS Convention, which provides a set of comprehensive compulsory procedures for dispute settlement.[7] The ITLOS is one of the forum options that states parties can select to resolve a dispute involving the interpretation or application of the LOS Convention. The other options are the ICJ, an arbitral tribunal, or a special arbitral tribunal. When they sign, ratify, or accede to the LOS Convention, states parties can indicate their option.[8] If a state does not make a choice, it is deemed to have accepted the compulsory procedure of arbitration.[9] This deemed acceptance does not affect a state's option to choose other procedures when a dispute arises.

The ITLOS has jurisdiction over any law of the sea dispute that is submitted to it concerning the interpretation or application of the LOS Convention and the 1994 Agreement Relating to the Implementation of Part XI of the Convention.[10] In addition, the ITLOS can adjudicate cases submitted by parties to other international treaties if such treaties allow it to do so.[11] The ITLOS has, pursuant to the LOS Convention, established the Seabed Disputes Chamber that consists of 11 judges selected from the ITLOS and, under this chamber, ad hoc chambers can be established when they are necessary.[12] In addition, the Tribunal has established four special chambers including: the Chamber of Summary Procedure, which consists five judges and two alternates; the Chamber for Fisheries Disputes, which consists of seven judges and is available to deal with disputes concerning the conservation and management of marine living resources; the Chamber for Marine Environment Disputes, which also consists of seven judges and is available to deal with disputes relating to the protection and preservation of the marine environment.[13] Another important special chamber is the Chamber for Maritime Delimitation Disputes, which was created in March 2007 and consists of eight judges.[14] Finally, the Tribunal can create chambers under Article 15, paragraph 2, of its statute to deal with a particular dispute if the parties so request. Such a special chamber was established in December 2000 to deal with the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Community).[15]

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Table 1
List of cases at the International Tribunal for the Law of the Sea (1996–2009)

Case No. 1
M/V Saiga No. 1 Case (*St. Vincent and the Grenadines v. Guinea*), prompt release
Case No. 2
M/V Saiga No. 2 Case (*St. Vincent and the Grenadines v. Guinea*)
Case Nos. 3 and 4
Southern Bluefin Tuna Cases (*New Zealand v. Japan*; *Australia* v. *Japan*), provisional measures
Case No. 5
Camouco Case (*Panama v. France*), prompt release
Case No. 6
Monte Confurco Case (*Seychelles v. France*), prompt release
Case No. 7
Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)
Case No. 8
Grand Prince Case (*Belize v. France*), prompt release
Case No. 9
Chaisiri Reefer 2 Case (*Panama v. Yemen*), prompt release
Case No. 10
MOX Plant Case (*Ireland v. United Kingdom*), provisional measures
Case No. 11
Volga Case (*Russian Federation v. Australia*), prompt release
Case No. 12
Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (*Malaysia v. Singapore*), provisional measures
Case No. 13
Juno Trader Case (St. Vincent and the Grenadines v. Guinea-Bissau), prompt release
Case No. 14
Hoshinmaru Case (*Japan v. Russian Federation*), prompt release
Case No. 15
Tomimaru Case (*Japan v. Russian Federation*), prompt release

Source: Adapted from the web site of the International Tribunal for the Law of the Sea, available at www.itlos.org/start2_en.html (accessed on 2 July 2009).

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Since its establishment in 1996 up to July 2009, the ITLOS had received and dealt with 15 cases (with 1 still pending). Among them, nine cases concern the prompt release of vessels and crews while four cases are concerning the request by states parties for provisional measures from the Tribunal. (See Table 1.) These two areas have constituted the majority of the judicial activities of the Tribunal.

Prompt Release of Vessels and Crews

According to Article 292 of the LOS Convention, where the authorities of a state party have detained a vessel flying the flag of another state party and it is alleged that the detaining state has not complied with the provisions of the Convention for the prompt release of the

vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to the ITLOS if, within 10 days from the time of detention, the parties have not agreed to submit it to another court or tribunal. Article 292(2) provides that the application for release may be made only by or on behalf of the flag state of the vessel. The wording "on behalf" indicates that not only the flag state, but also other entities authorized by that state, can submit the application. There are three prerequisites for the ITLOS to exercise its jurisdiction in a prompt release case: (1) both flag and detaining states must be states parties to the LOS Convention, (2) the parties concerned must not have agreed to submit the question of release to another court or tribunal, and (3) an application for the prompt release must be submitted by the flag state or by a person or entity duly authorized to do so on behalf of the flag state.[16] Regarding the last requirement, Rule 110 of the Rules of the Tribunal[17] provides additional requirements that there must be a clear authorization by the flag state to a named person or entity and the authorization must be issued by an authority of the state that the Tribunal recognizes as able to act in the name of the state.[18] In the *M/V Saiga No. 1 Case*,[19] the application of St. Vincent and the Grenadines was submitted by a private attorney who was given the authorization by the commissioner of maritime affairs who had been empowered to issue the authorization by the attorney general of St. Vincent and the Grenadines.[20]

Usually there are two circumstances where prompt release may be invoked: (1) charges relating to illegal fishing in waters under the jurisdiction of the coastal (detaining) state, and (2) charges or claims by public authorities with respect to pollution of waters under their jurisdiction by reason of unauthorized dumping or irregular discharges.[21] The prompt release cases before the ITLOS thus far have involved vessels detained for alleged illegal fishing or other commercial activities related to fishing in the exclusive economic zone (EEZ) of the coastal (detaining) states.

The general purpose of the prompt release provisions, according to Rainer Lagoni, is "to balance the interests of the detaining state in its measures against the flag state with the interests of the flag state in preventing an excessive detention of vessels flying its flag."[22] The more detailed rationale behind the prompt release stipulations in the LOS Convention involves the interests of shipping companies to minimize their economic loss, for the crews to avoid physical suffering due to the vessel detention, and for the detaining states to avoid a serious safety and environmental hazard. Thus, the provisions contained in the LOS Convention "accommodate economic and humanitarian as well as safety and environmental concerns."[23] Another consideration is the possible delay of releasing a vessel or crew if the parties to a dispute prefer the use of arbitration, but it takes a considerable amount of time to establish an arbitral tribunal for that purpose.[24] In a prompt release case, the competence of the ITLOS is confined to deciding on the question of release "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew."[25]

It has been noted that the provision concerning prompt release does not contain the word "dispute" which, according to Bernie Oxman, suggests that the nature of the prompt release procedure in Article 292 of the LOS Convention is different from other provisions in Part XV, the dispute settlement part of the Convention.[26] On the other hand, because Article 292 is together with Article 290 regarding provisional measures in the same section, it can be read as creating "a special procedure of a somewhat analogous character."[27]

The primary issue that the Tribunal has to decide in a prompt release case is the reasonableness of the bond posted or to be posted.[28] Former ITLOS president Judge Thomas Mensah identified general principles arising from the existing judicial practice of the Tribunal regarding prompt release:[29]

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1. respect for the objective of the provisions of the LOS Convention for prompt release which, as stated by the Tribunal, is "to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties;"[30]
2. assessment of what is a reasonable bond must be objective and take into account all the information provided by the parties in the case; and
3. the criterion of reasonableness encompasses the amount, the nature, and the form of the bond.

Based on these principles, the Tribunal in determining a reasonable bond to be posted considers a list of factors such as the gravity of the alleged offenses, the penalties to be imposed or imposable under the laws of the detaining state, the value of the detained vessel or cargo seized, and the amount and form of the bond imposed by the detaining state.[31]

The recent cases of prompt release demonstrate that the Tribunal has established a consistent and uniform judicial practice in dealing with such cases. Evidence of this is shown in the latest three cases between 2004 and 2007 in which judgments were unanimously adopted.[32] As noted by Judge Mensah, since the *Camouco Case* in 2000, the finding that an allegation of noncompliance with the LOS Convention by a detained vessel is "well-founded" has been a feature of all the judgments where the Tribunal has ordered the release of a vessel or crew.[33] It is arguable whether, in prompt release cases, the Tribunal needs its whole bench to hear the cases. Prompt release cases could be dealt with by a special chamber of summary procedure and, thus, reduce costs and enhance the efficiency of the Tribunal.

Provisional Measures

According to Article 290 of the LOS Convention and relevant provisions of the ITLOS Statute, if a dispute has been submitted to the Tribunal and it considers that prima facie it has jurisdiction under Part XV or Part XI, Section 5, of the LOS Convention, the Tribunal may prescribe any provisional measures that it considers appropriate to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. Moreover, pursuant to Article 290(5) pending the establishment of an arbitral tribunal to which a dispute is being submitted and if, within 2 weeks from the date of a request for provisional measures, the parties do not agree to submit the request to another court or tribunal, the Tribunal may prescribe provisional measures if it considers that prima facie the arbitral tribunal to be constituted would have jurisdiction and that the urgency of the situation so requires. The cases requesting provisional measures thus far submitted to the ITLOS have been under the second scenario.

The ICJ also has the power to decide provisional measures. The ICJ Statute uses the word "indicate."[34] The word used in the LOS Convention for the ITLOS is "prescribe."[35] The difference between the ICJ Statute and the LOS Convention has been noticed. It has been commented that the different wording was used "to improve the powers of courts and tribunals having jurisdiction over law of the sea disputes" and to make their provisional measures "have a binding effect upon the parties to the dispute."[36] Another difference from the ICJ Statute is that the LOS Convention allows the ITLOS to prescribe, modify, or revoke provisional measures "only" when it is requested by a party to the dispute.[37] The third difference is that the ITLOS can prescribe provisional measures, not only for the preservation of the respective rights of the dispute, but also for the prevention of serious harm to the marine environment.[38] While the ITLOS's competence in prescribing

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provisional measures is triggered by a request from a state, it has, on the other hand, expanded competence in doing so regarding the protection of the marine environment.

As has been noted, "there is a close relationship between the *prima facie* decision concerning provisional measures and the jurisdictional choice relating to the merits to be made at a later stage as the judges are in some way expressing their intimate conviction in this respect."[39] This relationship is particularly relevant where the Tribunal itself hears the merits of the dispute.

In practice, the ITLOS has prescribed provisional measures in: the *Southern Bluefin Tuna Cases* (*New Zealand v. Japan*; *Australia v. Japan*); the *MOX Plant Case* (*Ireland v. United Kingdom*); and the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (*Malaysia v. Singapore*).[40] In addition, the Tribunal also prescribed provisional measures in the *M/V Saiga No. 2 Case* (*St. Vincent and the Grenadines v. Guinea*) in March 1998 before dealing with the merits. Different views have been expressed about the performance of the Tribunal.[41] One measure adopted by the Tribunal in the *Southern Bluefin Tuna Case* appeared to exceed the scope of the request made and was regarded as *extra petita* (but not *ultra petita*).[42] The provisional measures prescribed by the ITLOS in the *Southern Bluefin Tuna Case* were later revoked by the arbitral tribunal, which in turn found that it had no jurisdiction over the dispute.[43] In the case, questions arose as to how the ITLOS prescribed measures based on its funding of "*prima facie* jurisdiction"[44] of a court or tribunal to deal with the merits of the dispute as required by the LOS Convention. Had the merits of the case been submitted to the ITLOS rather than an arbitral tribunal, the outcome regarding the competence to hear the merits of the dispute might have been different. Some jurists have seen this as a deficiency in the LOS Convention, commenting that "this case shows how anomalous it is for the Law of the Sea Convention to have given the Hamburg Tribunal injunctive powers in respect of cases always intended by the parties to go elsewhere for their merits to be determined."[45]

Provisional measures can play a positive role in facilitating the final resolution of a dispute. In the jurisprudence of the ITLOS, some of the provisional measures prescribed by the ITLOS contain recommendations. "Recommendations may provide useful guidance for the conduct of the parties without creating the burden of sanctions under international law should any conduct be viewed askance."[46] In the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*, the Tribunal recommended that the disputant parties set up a group of independent experts to study and prepare an interim report on the subject matter. The two sides formulated such a group and, based on the report of the group of experts, solved their dispute through negotiations. In this respect, the Tribunal can be facilitative of the dispute settlement.[47]

Limits of the ITLOS

Although the ITLOS is the only specialized international court for law of the sea disputes, there are constraints and limitations that impinge on the competence of the Tribunal and, to some extent, make its function awkward.

Competition for Jurisdiction

The first such constraint comes from the LOS Convention itself which, in establishing the compulsory dispute settlement mechanism for law of the sea disputes, identified the ITLOS as one of a number of mechanisms that can be utilized. Thus, the ITLOS does not have exclusive jurisdiction over all the law of the sea disputes, but has to share such jurisdiction

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with other international bodies such as the ICJ or arbitral tribunals. Competition between or among existing international courts and arbitral tribunals is inevitable. The ITLOS is a new judicial institution and, thus, it is in a relatively disadvantageous position in this competition.

Competition also arises from regional courts or tribunals. The most salient example is the judicial organs formulated under the European Union (EU) legal framework. According to the Treaty on European Union,[48] EU members have agreed to render some of their sovereign rights to the EU and let the organization exercise them on their behalf. This arrangement also affects the settlement of certain kinds of law of the sea disputes. When an EU member made a declaration under the LOS Convention, it usually also inserted a paragraph regarding the EU competence. For example, the French declaration made in April 1996 contains the following statement:

> France recalls that, as a State member of the European Community, it has transferred competence to the Community in certain matters covered under the Convention. A detailed statement of the nature and scope of the areas of competence transferred to the European Community will be made in due course in accordance with the provisions of Annex IX of the Convention.[49]

When the European Community (EC) acceded to the LOS Convention, it made a declaration stating that certain competences have been transferred from its member states to the organization, including those in the protection and preservation of the marine environment, commercial and customs policy, conservation, and management of sea fishing resources.[50] Because of this special arrangement, courts established within the EU may have exclusive competence in dealing with certain kinds of law of the sea disputes between EU member states.

This situation is illustrated by the *MOX Plant Case* (*Ireland v. United Kingdom*), which involved the ITLOS, an Annex VII arbitral tribunal and the European Court of Justice (ECJ). The case was first submitted by Ireland to the ITLOS requesting provisional measures to stop a plant from processing mixed oxide fuel (MOX) at Sellafield on the Irish Sea coast in Cumbria, United Kingdom, and thus stopping the plant and vessels from potentially polluting the marine environment of the Irish Sea. The request to the ITLOS came while Ireland instituted proceedings against the United Kingdom before an arbitral tribunal to be established in accordance with Annex VII of the LOS Convention. In December 2001, the ITLOS issued an order of provisional measures requesting both parties to exchange information, monitor environmental risks, devise measures to prevent pollution, and prepare initial reports. The Commission of the European Communities instituted proceedings against Ireland under the EC Treaty before the ECJ in October 2003, alleging that Ireland had breached relevant provisions of the EC Treaty by instituting arbitration against the United Kingdom. The ECJ ruled that Ireland had breached Article 292 of the EC Treaty that requires EU members not to submit disputes concerning EC law to any judicial body other than the ECJ.[51] The arbitral tribunal proceeding was terminated in June 2008 at the request of Ireland.[52] It has been pointed out that:

> the European Court's judgment would seem to make it very unlikely that any EC Member State would in the future risk breaching EC law by instituting proceedings against another Member State before a court or tribunal other than the European Court concerning a dispute relating to the Law of the Sea Convention or any other agreement to which both the EC and its Member States were parties, [and that EU member states would be] more cautious about using

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> the dispute settlement procedures of the Law of the Sea Convention against non-Member States for fear of intruding on matters of EC competence.[53]

This may be a discouraging fact that will affect the judicial operations of the ITLOS.

Choice of Procedures

Regarding the choice of procedures (ITLOS, ICJ, arbitration) to be made by states parties in accordance with Article 287 of the LOS Convention, as of July 2009, 47 states had made statements on the choice of procedures. From the list prepared by the U.N. Office for Ocean Affairs and the Law of the Sea, only 13 states (Argentina, Austria, Cape Verde, Chile, Croatia, Germany, Greece, Hungary, Trinidad and Tobago, Tunisia, the United Republic of Tanzania, and Uruguay) had selected the ITLOS as their first choice for the settlement of law of the sea disputes. Others had selected the ICJ (including Denmark, Honduras, Nicaragua, Norway, Sweden, and the United Kingdom), or arbitration as the first choice. Some states (Australia, Belgium, Canada, Estonia, Finland, Italy, Latvia, Lithuania, Mexico, Oman, Portugal, and Spain) listed the ITLOS and the ICJ in parallel without order of preference.[54] This indicates that, despite the fact that the ITLOS is designated as the first dispute settlement mechanism under the LOS Convention, there are only a few countries that favor its jurisdiction. None of the East Asian states have declared an option, with the result (in accordance with Article 287(3) of the LOS Convention) that they have therefore accepted arbitration. (See Table 2.)

Jurisdiction Exclusion

The third constraint on the ITLOS is also in the LOS Convention, which allows states parties to exclude certain disputes from the compulsory dispute settlement mechanisms established under the Convention. Article 298(1) provides that a state may declare nonacceptance of compulsory dispute settlement for the following categories of disputes: (1) disputes concerning the interpretation or application of Articles 5, 74, and 83 relating to sea boundary delimitations, or those involving historic bays or titles; (2) disputes concerning military activities, including military activities by government vessels and aircraft engaged in noncommercial service, and disputes concerning law enforcement activities with regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297(2) or (3); and (3) disputes with respect to which the U.N. Security Council is exercising the functions assigned to it, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.

As of July 2009, there were 26 states parties that had made such declarations. (See Table 3.) Among them, some states had excluded all of the above listed areas (e.g., China and the Republic of Korea) and some had excluded one or two of them (e.g., the United Kingdom and Italy). The effect of such an exclusion is clear: The disputes concerning those matters are to be resolved by political means such as bilateral negotiation and consultation. The significant use of the exemption provisions may discourage other states from using compulsory dispute settlement.

Dispute Settlement for Deep Seabed Mining

The fourth constraint arises from the fact that deep seabed mining has not yet begun. According to the LOS Convention, all disputes relating to Part XI and its annexes concerning

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Table 2
Declarations in accordance with Article 298 of the 1982 Law of the Sea Convention

State	Date (day/mon./yr.)	Exclusion Article 298(1)(a), (b), (c)
Argentina	01/12/1995	All three
Australia	22/03/2002	First
Belarus*	27/07/2001	All three
Canada	07/11/2003	All three
Cape Verde	10/08/1987	Second
Chile	25/08/1997	All three
China	25/08/2006	All three
Equatorial Guinea	20/02/2002	First
Denmark**	16/11/2004	All three
France	11/04/1996	All three
Gabon	23/01/2009	First
Iceland***	21/06/1985	First
Italy	13/01/1995	First
Mexico	06/01/2003	First and second
Norway**	24/06/1996	All three
Philippines****	08/05/1984	Unclear
Portugal	03/11/1997	All three
Republic of Korea	18/04/2006	All three
Republic of Palau	27/04/2006	Maritime boundaries
Russia	12/03/1997	All three
Slovenia**	11/10/2001	All three
Spain	19/07/2002	First
Tunisia	24/04/1985	All three
Ukraine	26/07/1999	First and second
United Kingdom	07/04/2003	Second and third
Uruguay	10/12/1982	Law enforcement activities

*The declaration made upon its ratification on 30 August 2006 does not mention maritime boundary delimitation.

**For those countries, they do not accept an arbitral tribunal. It is assumed that they could accept the jurisdiction of international adjudicative bodies.

***Conciliation should be used for any interpretation of Article 83 of the Convention.

****The Philippine declaration states that "the agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty."

Source: Adapted from UN Office for Ocean Affairs and the Law of the Sea, available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm (accessed on 3 July 2009).

deep seabed mining beyond the limits of national jurisdiction are within the competence of the Seabed Disputes Chamber, which is a special chamber of the ITLOS.[55] The Seabed Disputes Chamber has broad competences in dealing with disputes relating to deep seabed mining between states parties, between a state party and the International Seabed Authority (ISA), between parties to a contract, between the ISA and a prospective contractor, or between the ISA and a state enterprise, or even a natural or juridical person sponsored

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Table 3
Law of the sea cases before the International Court of Justice since the entry into force of the 1982 Law of the Sea Convention in 1994

2008	Maritime dispute *(Peru v. Chile*)
2006	Pulp mills on the River Uruguay (*Argentina v. Uruguay*)*
2005	Dispute regarding navigational and related rights (*Costa Rica v. Nicaragua*)*
2004	Maritime delimitation in the Black Sea (*Romania v. Ukraine*)
2003	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore)
2002	Application for Revision of the Judgment of 11 September 1992 in the *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) (*El Salvador v. Honduras*)
	Frontier dispute (Benin/Niger)*
2001	Territorial and maritime dispute (*Nicaragua v. Colombia*)
1999	Territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*)
1998	Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)
	Request for Interpretation of the Judgment of 11 June 1998 in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), preliminary objections (*Nigeria v. Cameroon*)
1996	Kasikili/Sedudu Island (Botswana/Namibia)*
1995	Fisheries jurisdiction (*Spain v. Canada*)
1994	Land and maritime boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*: Equatorial Guinea intervening)

*These cases are disputes concerning rivers, but relevant to law of the sea disputes.
Source: Prepared by the author based on the information from the web site of the International Court of Justice, available at http://www.itlos.org/start2_en.html (accessed on 3 July 2009).

by a state party.[56] In comparison with the ICJ, which is only open to nation-states, the Seabed Disputes Chamber can accept disputes submitted by natural or juridical persons. The jurisdiction of the chamber is compulsory and no declaration relating to the choice of procedure is required.[57] The jurisdiction of the chamber is not subject to any exclusion by states parties under Article 298 of the LOS Convention. It is predicted that, when deep seabed mining commences, there will be a considerable number of disputes that involve the Seabed Disputes Chamber of the ITLOS. Unfortunately, there is no prospect that deep seabed mining is commencing in the near future with the commercial exploitation of deep seabed polymetallic nodules seen as a "remote possibility."[58]

Other Constraints

While the ICJ can establish jurisdiction over all legal disputes concerning any question of international law,[59] the jurisdiction of the ITLOS is limited to law of the sea disputes. In practice, the ICJ has dealt with more cases on law of the sea disputes than the ITLOS since the establishment of the latter. (See Tables 1 and 3.) In addition, it is generally understood that territorial disputes over offshore or mid-ocean islands are not within the jurisdiction of the ITLOS, although a different opinion has been expressed recently.[60] This is one of the reasons why some law of the sea disputes have been submitted to the ICJ rather than to the ITLOS; for example, the case between Malaysia and Singapore concerning the sovereignty

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over tiny islets named Pedra Branca and Middle Rocks located at the north entrance of the Straits of Malacca and Singapore.[61]

Looking back at the Third United Nations Conference on the Law of the Sea (UNCLOS III) (1973–1982), there were divergent views regarding the creation of a new international court for law of the sea disputes. Most developing countries supported a new court based on the perspective that the ICJ largely represented the Western jurisprudence and lacked universal representation for the world community.[62] Nevertheless, developing countries have been reluctant to use the Tribunal that they supported. Except for prompt release cases, developing countries have relied on either the ICJ or arbitration for substantive cases such as maritime boundary delimitation or island disputes.

It has been generally recognized in the first decade of its existence that the ITLOS has failed to become the preeminent forum for the adjudication of maritime delimitations, despite the fact that there is a special chamber of maritime boundary disputes.[63] To date, the ITLOS has played only a supporting or supplementary role in law of the sea dispute settlement. With its competence in prompt release, the ITLOS provides legal facilitation to the domestic courts where vessels have been detained. With regard to provisional measures, the Tribunal provides assistance to arbitral tribunals that hear the merits of the disputes, even though it is designated as a major—if not a most important—judicial organ to deal with law of the sea disputes. Thus, the ITLOS has handled only one case on its merits, *M/V Saiga No. 2* (*St. Vincent and the Grenadines v. Guinea*), which accidentally fell within the jurisdiction of the Tribunal because, based on the intention of the disputant parties, it was to be submitted for arbitration and only later was transferred to the Tribunal.[64] Some states may view the ITLOS as "only a court of first instance, useful for an initial hearing of the facts and for seeking provisional measures or prompt release, but not for a final determination of the dispute."[65] In a word, for the first 12 years since its establishment in 1996, the contribution of the ITLOS to the settlement of law of the sea disputes has not been very significant and has not yet met the expectations of the international community. Thus, questions have been raised as to whether the ITLOS is in need of reform to respond to emerging challenges.[66]

This does not mean that there has been no contribution from the ITLOS to the development of international law. As former president of the ITLOS, Judge Rüdiger Wolfrum has stated:

> the Tribunal has been successful in helping States of both developed and developing nations to reach a peaceful solution with respect to cases involving, *inter alia*, the freedom of navigation, prompt release of vessels and their crews, protection and preservation of the marine environment, the commissioning of a nuclear facility and the movement of radioactive materials, land reclamation activities, fisheries, nationality of claims, use of force in law enforcement activities, hot pursuit and the question of the genuine link between the vessel and its flag State.[67]

It has been pointed out that the Tribunal's examination of the right of the flag state to act on behalf of foreigners on board, particularly relating to a ship's crew, was influential in the work of the International Law Commission on Diplomatic Protection.[68] Yet, Sir Robert Jennings wrote that: "the primary task of a court of justice is not to 'develop' the law, but to dispose, in accordance with the law, of that particular dispute between the particular parties before it."[69] If there are no cases for international court so as to fulfill its primary task, that court may lose its legitimacy of existence.

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Recent Efforts

Having realized that it might be marginalized among international courts and arbitral tribunals, the ITLOS has made several efforts to market itself. One was the establishment of the ITLOS Trust Fund available for law of the sea disputes. A resolution adopted by the U.N. General Assembly approved the establishment of a voluntary trust fund to assist states in the settlement of disputes through the ITLOS.[70] As of the end of 2007, the balance in the fund was US$104,412.[71] In comparison, the trust fund for the ICJ established in 1989 contained US$2,402,864 as of 30 June 2007. It is doubtful how the Tribunal, with this small amount of money, can actually help or even encourage disputant states to bring cases to it.

Another marketing effort was the initiation of regional workshops to highlight the existence and availability of the Tribunal. Since 2006 workshops, with the support of the Korean International Cooperation Agency (KOICA), have been held in Dakar, Libreville, Kingston, Singapore, Bahrain, and Buenos Aires, with the intention "to provide government experts working in the maritime field with insight into the Convention's dispute settlement system" and special attention given to the jurisdiction of the Tribunal and its procedures.[72]

One more endeavor from the ITLOS was its recent call on states parties to request it to give advisory opinions. According to Wolfrum, these opinions "can be of great benefit in the solution of international disputes" and the "Tribunal's advisory function may guide parties to a mutually satisfactory result."[73] The legal basis of the advisory competence, according to Wolfrum, is Article 21 of the ITLOS Statute, which vests the Tribunal with jurisdiction with respect to "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal" and such agreement may vest competence to issue an advisory opinion in the Tribunal.[74] The Tribunal has raised an innovative, but controversial, point regarding its jurisdictional competence. According to the LOS Convention, only the Seabed Disputes Chamber of the ITLOS has the competence to give advisory opinions at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities,[75] but the ITLOS itself has no jurisdiction to give such opinions. It is doubtful whether the Tribunal has the competence as explained by Wolfrum, who was its president at the time. It is understandable that any court or tribunal may be tempted to try to extend its jurisdiction as far as possible,[76] and the ITLOS is no exception. However, if the ITLOS had such competence, there would be an express provision in the LOS Convention or the ITLOS Statute similar to those provisions in the ICJ Statute for the ICJ and in the LOS Convention for the Seabed Disputes Chamber.

Finally, it is worthwhile to look briefly at the question related to the fragmentation of international law that could be caused by the proliferation of international judicial organs. The issue of the fragmentation of international law caught the attention of the International Law Commission in 2002, which established a study group to examine the issue. The study group issued some draft conclusions in 2006.[77] Proliferation of international courts and tribunals has triggered a doubt as to the necessity and efficiency of their establishment; for example, the International Criminal Tribunal for Rwanda (ICTR) completed only eight trials in its first eight years of operation. Second, such proliferation may bring inconsistency in international jurisprudence as well as overlapping jurisdiction. The judicial practices concerning the *Southern Bluefin Tuna Case* indicate there is suspicion of conflicting international jurisprudence between the ITLOS and the Annex VII Arbitral Tribunal that revoked the provisional measures granted by the former. Judge Gilbert Guillaume, former president of the ICJ, once criticized such proliferation and brought his concerns to the United Nations.[78] A Chinese delegate to the Sixth Committee of the UN General Assembly stated: "with the ever increase of international judicial organs, how to ensure uniform

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application of international law so as to reduce the negative impact of the fragmentation of international law while these organs properly fulfill their judicial functions is a question that deserves the attention of the international community."[79] The argument is that it would be most efficient to maximize the use of existing international courts, instead of establishing more such courts. On the other hand, there is a need to reform the existing courts so as to meet the expectations of the world community.

East Asian Attitudes and Practices

The attitudes of East Asian countries toward international judiciary vary due to different cultural and societal backgrounds. Only three countries (Cambodia, Japan, and the Philippines) in East Asia have accepted the ICJ's compulsory jurisdiction. East Asian resort to international courts is generally rare. (See Table 4.) The reluctance of most East Asian countries to use international adjudication for dispute settlement may be rooted in Asian cultures and legal traditions. In China legalism was long replaced by Confucianism, which emphasized rule by virtue rather than rule by law. For ordinary people in the past, the use of the law court for dispute settlement was regarded as unfriendly and confrontational.

Table 4
Cases submitted by Asian countries to the International Court of Justice

State	Case
Cambodia	*Temple of Preah Vihear (with Thailand)* (1959–1962)
India	*Right of Passage over Its Territory (with Portugal)* (1955–1960)
	Appeal Relating to the Jurisdiction of the ICAO Council (with Pakistan) (1971–1972)
	Trial of Pakistani Prisoners of War (with Pakistan) (1973)
	Aerial Incident of 10 August 1999 (with Pakistan) (1999–2000)
Indonesia	*Sovereignty over Pulau Litigan and Pulau Sipadan (with Malaysia)* (1998–2002)
Iran	*Anglo-Iranian Oil Co. (with United Kingdom)* (1951–1952)
	United States Diplomatic and Consular Staff in Tehran (with United States) (1979–1981)
	Aerial Incident of 3 July 1988 (with United States) (1989–1996)
	Oil Platforms (with United States) (1992–2003)
Malaysia	*Sovereignty over Pulau Litigan and Pulau Sipadan (with Indonesia)* (1998–2002)
	Sovereignty over Pedra Branca, Middle Rocks and South Ledge (with Singapore) (2003–2008)
Pakistan	*Appeal Relating to the Jurisdiction of the ICAO Council (with India)* (1971–1972)
	Trial of Pakistani Prisoners of War (with India) (1973)
	Aerial Incident of 10 August 1999 (with India) (1999–2000)
Singapore	*Sovereignty over Pedra Branca, Middle Rocks and South Ledge (with Malaysia)* (2003–2008)
Thailand	*Temple of Preah Vihear (with Cambodia)* (1959–1962)

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They tended to seek a solution by negotiations, or third-party mediation. Although things have changed dramatically over time, the unfavorable mentality surrounding courts of law still exists and has been reflected in China's attitude toward international adjudication. This reluctance is also reflected in the attitudes of East Asian countries toward the dispute settlement mechanisms under the LOS Convention. (See Table 5.)

Table 5
East Asian acceptance of the compulsory mechanisms under the 1982 Law of the Sea Convention (LOS Convention)

State	Date of LOS Convention ratification (day/mon./yr.)	Compulsory mechanism accepted
Brunei Darussalam	05/11/1996	Arbitration (deemed)
Cambodia		
China	07/06/1996	Arbitration (deemed)
Indonesia	03/02/1986	Arbitration (deemed)
Japan	20/06/1996	Arbitration (deemed)
Korea (North)		
Korea (South)	29/01/1996	Arbitration (deemed)
Laos	05/06/1998	Arbitration (deemed)
Malaysia	14/10/1996	Arbitration (deemed)
Mongolia	13/08/1996	Arbitration (deemed)
Myanmar	21/05/1996	Arbitration (deemed)
Philippines	08/05/1984	Not specified*
Russia	12/03/1997	Various choices**
Singapore	17/11/1994	Arbitration (deemed)
Thailand		
Vietnam	25/07/1994	Arbitration (deemed)

*Upon signature (10 December 1982), the Philippines made the following declaration regarding the acceptance of the settlement mechanisms:

> The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under article 298 shall not be considered as a derogation of Philippines sovereignty.

**Upon signature (10 December 1982), the government of the former Soviet Union made the following declaration regarding the acceptance of the settlement mechanisms:

> 1. The Union of Soviet Socialist Republics declares that, under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention. It opts for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping. It recognizes the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews.

Source: Based on UN Office for Ocean Affairs and the Law of the Sea, "Settlement of Disputes Mechanisms," available at www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (accessed on 29 May 2009).

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In recent years, East Asia states have used international courts. There have been two significant law of the sea cases submitted to the ICJ: the *Case of Sovereignty over Pulau Litigan and Pulau Sipadan* (*Malaysia/Indonesia*) (1998–2002),[80] and the *Case on Sovereignty over Pedra Branca, Middle Rocks and South Ledge* (*Malaysia/Singapore*) (2003–2008).[81] Both cases concerned territorial disputes over small islands in the adjacent seas to the countries concerned. In the first case, the ICJ found that the disputed islands belonged to Malaysia. In the second, the Court found that Middle Rocks belonged to Malaysia and Petra Branca to Singapore while South Ledge, a low-tide elevation, belonged to the country where this feature is located within the territorial sea of that country.

Concerning the ITLOS, there have been four recent cases involving East Asian states: two concerning prompt release and two requesting provisional measures. The two prompt release cases both involved Japan whose vessels were detained by Russia in its EEZ for alleged illegal fishing. In the *Hoshinmaru Case*, the two disputant parties were not in agreement regarding the amount of the security bond imposed by the Russian authorities. The Tribunal's judgment in August 2007 adjusted the amount.[82] In the *Tomimaru Case*, submitted to the ITLOS by Japan in 2007, the Tribunal ruled that no decision was called for because the targeted Japanese vessel had been confiscated by the Russian authorities.[83] The implications of these two cases for East Asian states lie in the fact that, although the states do not accept the compulsory jurisdiction of the ITLOS for the settlement of their law of the sea disputes, it is possible that they may use the Tribunal to seek prompt release of their vessels and crews once detained.

In comparison with the cases of prompt release, the ITLOS has played a more significant role in the cases concerning provisional measures. In the *Southern Bluefin Tuna Case* (*New Zealand/Australia v. Japan*),[84] Japan was forced to respond to the case submitted by Australia and New Zealand in July 1999. The two Southern Ocean countries requested the Tribunal to adopt provisional measures (an interim injunction) to stop Japan's unilateral experimental fishing of southern bluefin tuna in 1999. They alleged that Japan had breached its obligations under Articles 64 and 116–119 of the LOS Convention in relation to the conservation and management of the southern bluefin tuna stock by: failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore the stock to levels that could produce the maximum sustainable yield; carrying out unilateral experimental fishing in 1998 and 1999 that had, or would, result in southern bluefin tuna being taken by Japan over and above agreed national allocations; and taking unilateral action contrary to the rights and interests of Australia and New Zealand.

In its response, Japan asked the Tribunal to deny the provisional measures requested by Australia and New Zealand. In Japan's view, the two countries had not met the conditions set in international law:

> First, the Annex VII tribunal must have *prima facie* jurisdiction. This means among other things that the dispute must concern the interpretation or application of UNCLOS and not some other international agreement. Second, Australia and New Zealand must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1.[85]

Japan had no objection to the jurisdiction of ITLOS if the Tribunal was of the view that it possessed the jurisdiction over the case. Japan requested that

> the Tribunal grant Japan provisional relief in the form of prescribing that Australia and New Zealand urgently and in good faith recommence negotiations

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> with Japan for a period of six months to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP (experimental fishing program) and the determination of a TAC (total allowable catch) and national allocations for the year 2000.[86]

In addition, Japan asked the Tribunal to "require Australia and New Zealand to fulfill their obligations to continue negotiations over this scientific dispute."[87]

In August 1999, the Tribunal delivered an order containing several decisions. First, the three countries concerned were not to aggravate or extend the dispute and their annual catches should not exceed the annual national allocations last agreed by the parties. Japan should refrain from conducting an experimental fishing program except with the agreement of the other parties or unless the experimental catch was counted against its annual national allocation. The parties were to resume negotiations without delay with a view toward reaching agreement on measures for the conservation and management of southern bluefin tuna. Second, each party was to submit an initial progress report to the ITLOS as well as further reports and information upon request. Third, the provisional measures prescribed in the order were to be notified to all states participating in the southern bluefin tuna fishery.

Following the ITLOS order provisional measures, an arbitral tribunal was established to deal with the substance of the dispute over southern bluefin tuna. In August 2000 the tribunal issued its award, ruling that it had no jurisdiction over the matter.[88] Though the tribunal declined its jurisdiction to deal with the merits of the dispute, the significance of the case lies in the fact that this arbitral tribunal was the first one established in accordance with Annex VII to the LOS Convention. With its award, the provisional measures ordered by the ITLOS were no longer in force.

The other case concerning provisional measures was the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (*Malaysia v. Singapore*).[89] The case was submitted to the ITLOS in September 2003 by Malaysia, which requested the Tribunal to prescribe provisional measures to stop Singapore's land reclamation activities in the vicinity of the maritime boundary between the two states or in areas claimed as territorial waters by Malaysia pending the decision of an arbitral tribunal.[90] The Tribunal reiterated its statement from the *MOX Plant Case* that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law."[91] The Tribunal issued an order in October 2003 prescribing that Malaysia and Singapore should cooperate by establishing a group of independent experts to study and prepare an interim report on the subject matter. The order also directed that Singapore should not "conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts" and decided that "Malaysia and Singapore shall each submit the initial report referred to in article 95, paragraph 1, of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise."[92] Following the order, the two sides established a group of experts that submitted its final report on 5 November 2004. Based on the report, an agreement was reached on 26 April 2005. According to it, the two sides agreed to terminate the case with Singapore modifying the final design of the shoreline of its land reclamation, Singapore compensating affected Malaysia fishermen, and a discussion and monitoring of the environmental impacts in the Straits of Johor by the Malaysia-Singapore Joint Committee on the Environment (MSJCE).[93] It should be noted that the jurisdiction of the ITLOS in the above two cases was limited to the prescription of

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provisional measures without touching on the merits of the disputes. However, in the second case, the order issued by the ITLOS played a role in promoting the bilateral agreement resolving the dispute.

Three critical factors will influence whether the East Asian states gradually accept international adjudication. First, domestic changes in each country will affect this. In the case of China, during the Mao Tse-tung's era (1949–1976), China refused to engage with such a mechanism, whether judicial or arbitral. During Deng Xiaoping's era (1978–1997), China began to consider the practicality and necessity of international judicial means and accepted international arbitration through the ratification of many international treaties; in particular, those relating to economic cooperation and international trade. In the post-Deng era (after 1997), China has become even more receptive, particularly after joining the World Trade Organization and adopting a market economy policy. Communist ideology is no longer a guiding principle. Though still reluctant to accept international adjudication, China seems quite ready and comfortable with international arbitration.

A recent example is the China-ASEAN Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations (ASEAN) and the People's Republic of China (the Dispute Settlement Mechanism Agreement) signed on 29 November 2004.[94] It designates three means of dispute settlement consultation, conciliation or mediation, and arbitration. If consultations cannot solve a dispute within the prescribed time limit, the complaining party may make a written request to the party complained against to appoint an arbitral tribunal. The signing of this agreement has been hailed as having "far-reaching significance" even beyond China-ASEAN relations as it is "a sign of the changing attitude of the Chinese government towards international dispute settlement methods" and the first time that China "had signed such a special and detailed agreement with other states or international organizations."[95]

Second, the mushrooming of international and regional organizations and institutions will push East Asian countries toward further global integration and interdependence. Potential and existing disputes will be curbed or resolved via these arrangements. For example, the EU mediation of the Gabčíkovo-Nagymaros Project dispute played a key role in persuading the parties to submit the dispute to the ICJ.[96] Regional organizations such as ASEAN may play a similar role in facilitating the settlement of law of the sea disputes in East Asia. Within ASEAN, there are a number of legal instruments concerning dispute settlement among member states and between member states and other states. The establishment of a regional court for ASEAN has been put forward.[97] It is expected that the recent adoption of the ASEAN Charter will further facilitate the dispute settlement mechanisms in the region.[98]

Finally, the globalization process brings to East Asian countries new challenges and opportunities. The concept of sovereignty has changed from self-protection to modern interdependence. Interdependence, integration, and globalization will enhance the establishment of a concerted and firm East Asian conviction that the rule of law must be applied at the bilateral, multilateral, regional, and global levels. In this context, law of the sea disputes can be effectively controlled via cooperative channels and third-party intervention mechanisms so as to realize the goal of their avoidance, prevention, and settlement.

Conclusion

The 2005 World Summit—High-Level Plenary Meeting of the 60th Session of the General Assembly called for universal adherence to and implementation of the rule of law at both

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the national and international levels.[99] Resort to international adjudication is an essential component of the rule of law at the global level. An increase of legal awareness can widen the window of opportunity for disputant states to submit their maritime disputes to international adjudicative or arbitral bodies for settlement when bilateral negotiations have failed. The lack of substantive cases at the ITLOS poses a serious problem for this judicial body and, should the situation linger, its legitimacy and competence may be further questioned. The Conference of the Parties to the LOS Convention may consider it necessary to reform the ITLOS so as to revitalize it to meet the expectations of the world community.

Notes

1. See "Contentious Jurisdiction," available at www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1 (accessed on 7 August 2008).
2. Article 33(1) of the U.N. Charter.
3. The International Tribunal for the Law of the Sea was created pursuant to Annex VI, "Statute of the International Tribunal for the Law of the Sea," of the 1982 U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397.
4. See *ibid.*, Annex VI, "Arbitration."
5. All of these cases are available at the Web site of the Permanent Court of Arbitration at www.pca-cpa.org.
6. See LOS Convention, supra note 3, Annex VIII, "Special Arbitration."
7. See *ibid.*, Part XV, "Settlement of Disputes."
8. See *ibid.*, art. 287.
9. *Ibid.*, art. 298.
10. Agreement Relating to the Implementation of Part XI of the U.N. Convention on the Law of the Sea, *International Legal Materials* 33 (1994): 1309.
11. Statute of the ITLOS, supra note 3, arts. 21–22.
12. LOS Convention, supra note 3, arts. 186–191; and Statute of the ITLOS, supra note 3, arts. 35–40.
13. See the ITLOS Web site at www.itlos.org.
14. *Ibid.*
15. See "Chambers," available at www.itlos.org/start2_en.html (accessed on 6 August 2008).
16. See Thomas A. Mensah, "The Tribunal and the Prompt Release of Vessels," *International Journal of Marine and Coastal Law* 22 (2007): 429–430.
17. Rules of the Tribunal, available at the ITLOS Web site, supra note 13.
18. Mensah, supra note 16, at 431.
19. Available at the ITLOS Web site, supra note 13.
20. Mensah, supra note 16, at 432.
21. See David H. Anderson, "Investigation, Detention and Release of Foreign Vessels Under the UN Convention on the Law of the Sea of 1982 and Other International Agreements," *International Journal of Marine and Coastal Law* 11 (1996): 177. According to Anderson, Article 292 may also be invoked in the following situations: (1) fishing for straddling or highly migratory stocks beyond the limits of national jurisdiction; and (2) irregularities or deficiencies onboard a vessel, giving rise to reasonable fears of unreasonable threats of future pollution of the sea, with the result that release on bail or bonding is not suited to the needs of the situation facing the port's authorities.
22. Rainer Lagoni, "The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report," *International Journal of Marine and Coastal Law* 11 (1996): 148.
23. See Bernard H. Oxman, "Observations on Vessel Release Under the United Nations Convention on the Law of the Sea," *International Journal of Marine and Coastal Law* 10 (1995): 208.
24. See Louis B. Sohn, "Settlement of Law of the Sea Disputes," *International Journal of Marine and Coastal Law* 11 (1996): 203–204.

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25. LOS Convention, supra note 3, art. 292(3).

26. Oxman, supra note 23, at 208.

27. Anderson, supra note 21, at 167.

28. For general discussions on this respect, see Erik Franckx, "'Reasonable Bond' in the Practice of the International Tribunal for the Law of the Sea," *California Western International Law Journal* 32 (2001–2002): 303–342; and Gao Jianjun, "Reasonableness of the Bond Under Article 292 of the LOS Convention: Practice of the ITLOS," *Chinese Journal of International Law* 7 (2008): 115–142.

29. See Mensah, supra note 16, at 440.

30. See *Monte Confurco* (*Seychelles v. France*), 18 December 2000, para. 71, available at the ITLOS Web site, supra note 13.

31. Mensah, supra note 16, at 440–441.

32. The cases are the *Juno Trader Case* (*Saint Vincent and the Grenadines v. Guinea-Bissau*), the *Hoshinmaru Case* (*Japan v. Russian Federation*), and the *Tomimaru Case* (*Japan v. Russian Federation*), available at the ITLOS Web site, supra note 13.

33. Mensah, supra note 16, at 436, n. 40.

34. Statute of the International Court of Justice, art. 41.

35. LOS Convention, supra note 3, art. 290 (1); and Statute of the ITLOS, supra note 3, art. 25(1).

36. Rüdiger Wolfrum, "Provisional Measures of the International Tribunal for the Law of the Sea," *Indian Journal of International Law* 37 (1997): 433; and LOS Convention, supra note 3, art. 290(6).

37. See LOS Convention, supra note 3, art. 290 (3); and ICJ Statute, supra note 34, art. 41.

38. LOS Convention, supra note 3, art. 290(1).

39. Francisco Orrego Vicuña, "The International Tribunal for the Law of the Sea and Provisional Measures: Settled Issues and Pending Problems," *International Journal of Marine and Coastal Law* 22 (2007): 454.

40. Available at the ITLOS Web site, supra note 13.

41. *Ibid*.

42. Miguel Garcia Garcia-Revillo, *El Tribunal International del Derecho del Mar* (Biblioteca Diplomatica Española, 2005), at 492, cited in Orrego Vicuña, supra note 39, at 456.

43. The text of the award is available at untreaty.un.org/cod/riaa/cases/vol_XXIII/1–57.pdf (accessed on 11 August 2008). For a comprehensive survey of the case, see Barbara Kwiatkowska, "The Australia and New Zealand v. Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal," *International Journal of Marine and Coastal Law* 16 (2001): 239–293.

44. Regarding prima facie jurisdiction, the ICJ has stated that "the dispute appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded." *LaGrand* (*Germany v. United States*), 2001, available at www.icj-cij.org/docket/files/104/7736.pdf (accessed on 12 August 2008). In the *Interhandle Case*, Judge Lauterpacht commented that "the Court may properly act under the terms of article 41 provided that there is in existence an instrument . . . which *prima facie* confers jurisdiction upon the Court and which incorporate no reservations obviously excluding its jurisdiction." *Interhandle Case (Switzerland v. United States)* [1957] *I.C.J. Reports* 118–119.

45. Rosalyn Higgins, "The ICJ, the ECJ, and the Integrity of International Law," *International and Comparative Law Quarterly* 52 (2003): 19

46. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005), at 85.

47. Robin Churchill has commented, "the establishment of the group was due to an imaginative use of provisional measures by the ITLOS." See Robin Churchill, "Dispute Settlement Under the UN Convention on the Law of the Sea: Survey for 2005," *International Journal of Marine and Coastal Law* 21 (2006): 385.

48. Text is available at eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html (accessed on 3 November 2009).

49. The full text of the French declaration is available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm (accessed on 14 August 2008).

50. See EC Declarations, available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm (accessed on 14 August 2008).

51. See the Consolidated Version of the Treaty Establishing the European Community, available at eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html **(**accessed on 3 November 2009).

52. See Permanent Court of Arbitration, Press Release, "MOX Plant Arbitral Tribunal Issues Order No. 6: Terminating Proceedings," available at www.pca-cpa.org/upload/files/MOX%20Plant%20Press%20Release%20Order%20No.%206.pdf (accessed on 9 November 2009).

53. Robin Churchill, "Dispute Settlement Under the UN Convention on the Law of the Sea: Survey for 2006," *International Journal of Marine and Coastal Law* 22 (2007): 470.

54. For details, see "Settlement of Disputes Mechanism: Recapitulative Tables," available at www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (accessed on 3 July 2009).

55. LOS Convention, supra note 3, arts. 186–191; and Statute of the ITLOS, supra note 3, arts. 35–40.

56. LOS Convention, supra note 3, art. 187.

57. *Ibid.*, art. 287(2).

58. See Michael W. Lodge, "International Seabed Authority's Regulation on Prospecting and Exploration for Polymetallic Nodules in the Area," *Journal of Energy and Natural Resources Law* 20 (2002): 294.

59. ICJ Statute, supra note 34, art. 36.

60. In the view of Judge Wolfrum, in a case of maritime boundary delimitation, the ITLOS has competence not only with respect to such delimitation, but also with respect to associated issues of delimitation over land or islands and sovereignty over territory. "Statement by Mr. Rudiger Wolfrum, President of the International Tribunal for the Law of the Sea on Agenda Item 71(a) at the Plenary of the 61st Session of the United Nations General Assembly," 8 December 2006, para. 7, available at www.itlos.org/start2_en.html (accessed on 15 August 2008).

61. For details about this case, see www.icj-cij.org/docket/index.php?p1=3&p2=3&code=masi&case=130&k=2b (accessed on 9 November 2009).

62. See Zhao Lihai, *Studies on Law of the Sea Issues* (in Chinese) (Beijing: Peking University Press, 1996), at 121–122.

63. Charles Claypoole, "Access to International Justice: A Review of the Trust Funds Available for Law of the Sea-Related Disputes," *International Journal of Marine and Coastal Law* 23 (2008): 93.

64. For a detailed survey of the case, see Louise de La Fayette, "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute," *International Journal of Marine and Coastal Law* 15 (2000): 355–392.

65. Donald R. Rothwell, "Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions," *Ocean Development and International Law* 35 (2004): 148.

66. *Ibid*., at 149.

67. See "Statement of Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, on the Occasion of the Ceremony to Commemorate the Tenth Anniversary of the Tribunal," 29 September 2006, at 5, available at www.itlos.org/start2_en.html (accessed on 13 August 2008).

68. See Michael Wood, "The International Tribunal for the Law of the Sea and General International Law," *International Journal of Marine and Coastal Law* 22 (2007): 363–364.

69. Robert Jennings, "Role of the International Court of Justice," *British Yearbook of International Law* 68 (1997): 41.

70. U.N. Doc A/RES/55/7, 27 February 2001, particularly Annex 1, available at daccess-dds.un.org/doc/UNDOC/GEN/N00/559/81/PDF/N0055981.pdf?OpenElemen (accessed on 8 August 2008).

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71. See "Statement by Rüdiger Wolfrum, President of the ITLOS on the Report of the Tribunal at the 18th Meeting of States Parties to the Convention on the Law of the Sea," 16 June 2008, at 6, available at www.itlos.org/start2_en.html (accessed on 8 August 2008).

72. *Ibid.*, at 6–7.

73. *Ibid*., at 5.

74. *Ibid*.

75. LOS Convention, supra note 3, art.191.

76. See Ki-Jun You, "Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal Revisited," *Ocean Development and International Law* 39 (2008): 368.

77. See "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," Report of the Study Group of the International Law Commission, U.N. Doc A/CN.4/L.682/Add.1, 2 May 2006.

78. See "Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly," 26 October 2000, available at www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_GA55_20001026.htm (accessed on 19 December 2003).

79. See Duan Jielong, "Statement on the Rule of Law at the National and International Levels," *Chinese Journal of International Law 6* (2007): 187.

80. The judgment of the Court is available at www.icj-cij.org/docket/files/102/7698.pdf (accessed on 9 November 2009).

81. *Malaysia/Singapore Case*, supra note 61.

82. *Hoshinmaru Case* (*Japan v. Russia*), available at the ITLOS Web site, supra note 32.

83. *Tomimaru Case* (*Japan v. Russia*), available at the ITLOS Web site, supra note 32.

84. *Southern Bluefin Tuna Cases*, supra note 42.

85. *Ibid*., at para. 33.

86. *Ibid.*

87. *Ibid.*

88. *Southern Bluefin Tuna Arbitration*, supra note 43.

89. *Malaysia/Singapore Land Reclamation Case*, supra note 40.

90. Due to its land scarcity, Singapore actively carries out land reclamation. Singapore's land area has increased from 581 km^2 in 1966 to 695 km^2 in 2003. See Kog Yue-Choong, "Environmental Management and Conflict in Southeast Asia: Land Reclamation and Its Political Impact," IDSS Working Paper No. 101 (Singapore: Institute for Defence and Strategic Studies, Nanyang Technological University, January 2006), at 7.

91. *Malaysia v. Singapore Land Reclamation Case*, supra note 40, at para. 92.

92. *Ibid*., at para. 102.

93. See *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore): Settlement Agreement*, on file with the author.

94. Text is available at www.aseansec.org/16636.htm (accessed on 21 April 2008). It came into force on 1 January 2005.

95. Zeng Lingliang, "ASEAN-China Relations: An International Law Perspective," in *China-ASEAN Relations: Economic and Legal Dimensions*, ed. John Wong, Zou Keyuan, and Zeng Huaqun (Singapore: World Scientific, 2006), at 54–55.

96. See Paul R. William, *International Law and the Resolution of Central and East European Transboundary Environmental Disputes* (London: Macmillan Press, 2000), at 223.

97. See Jusuf Wanandi, "ASEAN Future Challenges and the Importance of an ASEAN Charter," *ASIEN: Deutsche Zeitschrift für Politik, Wirtschaft und Kultur* 100 (2006): 87.

98. The ASEAN Charter was adopted on 20 November 2007 and came into force on 15 December 2008. Text is available at www.aseansec.org/21861.htm (accessed on 3 November 2009).

99. "2005 World Summit Outcome," U.N. Doc. A/RES/60/1, 24 October 2005, available at daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement (accessed on 9 February 2007).

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Annex 150

Extract from Sohn, L.B., Noyes, J.E., Gustafson Juras, K., Franckx, E., “Law of the Sea in a Nutshell”(2nd ed. West, 2010)

4. *Conciliation*

States may choose to resolve their maritime boundary disputes through a nonbinding process of conciliation. After establishing by agreement the EEZ boundary between the Norwegian island of Jan Mayen and Iceland, Iceland and Norway agreed to establish a conciliation commission to formulate a nonbinding recommendation regarding the continental shelf boundary between the two countries. 1980 Iceland–Norway Fishery Agreement, Article 9. In its 1981 report to the governments of Iceland and Norway, the conciliation commission recommended that the continental shelf boundary be coterminous with the previously established EEZ boundary, and that Iceland and Norway enter a joint development agreement for the exploration and exploitation of an area straddling the proposed boundary with potential hydrocarbon production. Conciliation Commission on the Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, 20 Intl. Leg. Materials 797 (1981). The governments of Iceland and Norway accepted and adopted the conciliation commission's recommendations, as reflected in the 1981 Iceland–Norway Continental Shelf Agreement. This was the first instance that a conciliation commission was used to establish a maritime boundary. See generally R.R. Churchill, Maritime Delimitation in the Jan Mayen Area, 9 Marine Policy 16 (1985).

Articles 279–296 of the LOS Convention provide general procedures for third-party settlement of dis-

putes arising among parties to the Convention, but Article 298 contains special provisions for boundary disputes. It permits a party to the Convention to file a declaration to exempt boundary disputes arising prior to the entry into force of the Convention from the mandatory dispute settlement procedures. However, if such a declaration is made, a boundary dispute arising subsequent to the entry into force of the Convention must be submitted to a conciliation commission. Although the report of the conciliation commission is not binding on the parties, the Convention requires that they negotiate an agreement on the basis of the report, and if they cannot agree, that they shall, by mutual consent, submit the dispute to a third-party procedure entailing a binding decision.

As of July 15, 2009, only twenty-two of the 159 parties to the LOS Convention had invoked the Article 298 opt-out provisions with regard to boundary disputes. As a result, international tribunals, rather than conciliation commissions, may hear most boundary disputes between states that are parties to the LOS Convention when just one state initiates a proceeding. Arbitral tribunals constituted under Annex VII of the LOS Convention—which are, as explained further in Chapter 15, Section C, the "default" forum authorized to hear cases under the LOS Convention when two states do not agree on the same forum—have decided several recent maritime boundary delimitation disputes. See the 2006 Arbitration between Barbados and Trinidad and Tobago and the 2007 Arbitration between Gu-

Second, while the disputes relating to the EEZ discussed above are automatically exempt from third-party dispute settlement procedures, another group of disputes may be excluded from such procedures if a party to the LOS Convention files a special optional declaration. The most complicated provisions relate to disputes concerning boundary delimitation or involving historic bays. Id. at Article 298(1)(a). Old boundary delimitation or historic bay disputes, i.e., those that arose before the entry into force of the LOS Convention, may be declared totally exempt from the LOS Convention's third-party dispute settlement procedures. Disputes arising after the entry into force of the LOS Convention will, however, at least be subject to compulsory conciliation similar to that used for fishery and scientific research disputes, although "mixed" disputes that necessarily involve the concurrent consideration of sea boundaries and of any unsettled dispute concerning sovereignty over a part of the mainland or over an island or group of islands are excluded from submission to compulsory conciliation. In addition, sea boundary disputes that have been finally settled by an arrangement between the parties, or that are to be settled in accordance with an agreement between them, also can be declared exempt from the LOS Convention's third-party dispute settlement procedures. Article 298 also establishes the possibility of a total exemption of disputes relating to two parallel activities: military activities (including military activities by government vessels and aircraft engaged in noncommercial service) and law enforce-

Annex 151

National Assembly of Mauritius, 18 January 2010, Reply to Private Notice Question

EXTRACT

No. 1 of 2010

REPUBLIC OF MAURITIUS

FOURTH NATIONAL ASSEMBLY

PARLIAMENTARY

DEBATES

(HANSARD)

FIRST SESSION

MONDAY 18 JANUARY 2010

ANNOUNCEMENT

HON. SMT. MEIRA KUMAR – SPEAKER OF LOK SABHA – VISIT

Mr Speaker: Hon. Members, before we start with the business of the House this afternoon, I have a short announcement to make. Hon. Members, we are deeply honoured and privileged to have in our midst in our VIP gallery hon. Smt. Meira Kumar, Speaker of the Lok Sabha who, as you are aware, is on official visit in Mauritius since yesterday. Hon. Smt. Meira Kumar is heading a delegation of hon. Members from both the Lok Sabha and the Rajya Sabha. Allow me, on behalf of all the Members of this august Assembly, to extend a warm and cordial welcome to our eminent guest and the members of her delegation. Thank you.

ADMINISTRATION OF OATH - HON. LOUIS HERVE AIMEE

Hon. Louis Hervé Aimée made and subscribed before the Assembly the Oath of Allegiance to Affirmation prescribed in Schedule 3 of the Constitution, and signed the Roll of Membership.

ORAL ANSWER TO QUESTION

CHAGOS ARCHIPELAGO AND TROMELIN ISLAND – MAURITIUS SOVEREIGNTY

The Leader of the Opposition (Mr P. Bérenger) *(By Private Notice)* asked the Prime Minister, Minister of Defence and Home Affairs whether, in regard to the sovereignty of Mauritius over the Chagos Archipelago and Tromelin Island, he will state –

(a) if he has had discussions thereon at the recent Commonwealth and Copenhagen Summits with British Prime Minister, Mr Gordon Brown, and French President, Mr Nicolas Sarkozy;

(b) the progress, if any, that has been achieved at the United Kingdom-Mauritius Senior Officials meetings;

(c) if he has raised the Chagos issue with United States President, Mr Barack Obama, the Secretary of State, Mrs Hillary Clinton, and the Secretary of Defence, Michael Gates, and

(d) where matters stand concerning the *cogestion* of Tromelin island.

The Prime Minister: Mr Speaker, Sir, ever since I assumed office, I have spared no effort to assert our legitimate sovereignty over the Chagos Archipelago and Tromelin in the international fora.

As the House is aware, Heads of State and Government attending the two-day Copenhagen Summit focused on clinching an Accord to address the adverse effects of climate change. There was, therefore, no scope for any bilateral meetings with either the British Prime Minister or the French President. However, I did have a brief meeting with the US President, Mr Barack Obama, and evoked with him the issue of the Chagos Archipelago, and I have requested for a meeting to discuss the future use of Diego Garcia as a military base and the whole question of resettlement on the other islands of the Archipelago. I also reiterated the same request to the Secretary of State, Mrs Hillary Clinton.

Mr Speaker, Sir, at the Commonwealth Heads of Government Meeting held in Trinidad and Tobago in November last, I had a meeting with the British Prime Minister and raised with him the following issues -

(a) the sovereignty of Mauritius over the Chagos Archipelago, and

(b) the UK proposal for a Marine Protected Area around the Archipelago.

I stressed that, over and above ongoing bilateral talks, it was imperative that the issue of sovereignty continues to be addressed, including, especially in the context of any proposed Marine Protected Area, the issue of resettlement of the islands and the Mauritian fishing rights. It was my clear understanding, Mr Speaker, Sir, that, at the end of the meeting with the British

Prime Minister, the British Government would do nothing to undermine the resettlement and the sovereignty of Mauritius over the Chagos Archipelago, and that the Marine Protected Area project would be put on hold and would only be discussed during the bilateral talks between Mauritius and the UK. I should also point out that, in a subsequent meeting which he had with the British Foreign Minister, Mr David Miliband, our Minister of Foreign Affairs, hon. Dr. Boolell, reiterated the same position vigorously.

With regard to talks with President Sarkozy, I wish to state that no discussions were held with him at the Commonwealth Heads of Government Meeting, as the purpose of his presence there was to sensitise delegations present regarding the climate change issues that were to be raised at the Copenhagen Summit, and he left shortly afterwards.

With regard to part (b) of the question, two rounds of talks at Senior Officials' level were held in January 2009 in London and 21 July 2009 in Mauritius. Late Sir Ian Brownlie, Q.C. participated in the London talks. During the first round of talks, both UK and Mauritius expressed their views on sovereignty. There were 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 two 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.

The second round of talks focused on the issues of sovereignty, resettlement, EEZ delimitation and extended continental shelf, fishing rights, as well as the UK proposal for a Marine Protected Area.

I am laying on the table of the National Assembly a copy of the Joint Communiqué released at each of these meetings.

The third round of talks that had been tentatively scheduled to be held in January 2010 has been postponed at our request as, contrary to our understanding, the consultations on the issue of the Marine Protected Area have been initiated and are being pursued by the UK Government outside the bilateral platform, which the rounds of talks between Senior Officials of the two Governments provide.

Mr Speaker, Sir, while we are hopeful that meaningful and purposeful bilateral talks would soon resume, we are not losing sight of the other options that may be open to us.

As regards part (c) of the question, I wish to inform the House that, in the margins of the 64th Session of the UN General Assembly in New York last September, I drew the attention of US President, Barack Obama, to the issue of sovereignty over the Chagos Archipelago. I also raised the issue with US Secretary of State, Hillary Clinton.

I have not yet had the opportunity to meet US Secretary of Defence, Robert Michael Gates.

In my statement to the 64th Session of the UN General Assembly, as I have consistently done on former occasions before the Assembly, I reaffirmed the sovereignty of Mauritius over the Chagos Archipelago, including Diego Garcia. I recalled what President Obama had said in his opening statement at that Session, and I strongly supported the view that there was a need to demonstrate that international law is not an empty promise.

Mr Speaker, Sir, regarding Tromelin, the House will recall that the co-management of the island was first mooted at the IOC Summit in 1999, which was chaired by former French President, Jacques Chirac, and which I attended. This issue gathered a new momentum only after my meeting with President Chirac in 2006. Subsequently, following a second official visit to France in June 2008 and the working session I had with President Sarkozy, high-level officials from the Governments of Mauritius and France have, since December 2008, been engaged in discussions on co-management of Tromelin, following a suggestion which I made to President Sarkozy in Paris in June 2008.

Two rounds of discussions have since taken place. During the first round, which took place in December 2008 in Mauritius, the Mauritian side had proposed that, without prejudice to the respective positions of the two Governments on the issue of sovereignty, a high level *"Comité de Cogestion"* for the management of Tromelin Island and its surrounding waters be established, and that a *"Comité de Cogestion"* be formally set up by way of a Memorandum of Understanding between Mauritius and France. The French side studied the proposal and then subscribed to this proposal. The Mauritian delegation at that meeting was chaired by the Secretary to Cabinet and Head of the Civil Service, and assisted by late Sir Ian Brownlie, Q.C., who was also present in Mauritius.

The second round of discussions was held on 27 and 28 October 2009 in Reunion Island. A draft Agreement, which had initially been prepared by and was subsequently cleared with the

late Sir Ian Brownlie, Q.C., was discussed at the meeting and finalised for consideration by the two Governments.

I am tabling a copy of the Joint Communiqué issued at the end of the meeting.

The draft Agreement provides for the establishment of a regime of economic, scientific and environmental co-management relating to Tromelin Island as well as its territorial sea and exclusive economic zone (defined in the draft Agreement as its "surrounding maritime areas" or *"espaces maritimes environnants"*). The co-management regime will initially cover –

(i) protection of the marine environment, conservation and promotion of terrestrial and marine biodiversity;

(ii) fisheries;

(iii) monitoring of natural phenomena in the region, and

(iv) archaeological research.

The draft Agreement provides for the establishment of a co-management committee, composed of an equal number of members from Mauritius and France that will meet, at least, once a year, alternately in Mauritius and in France. The responsibilities of the Committee will, *inter alia*, be to work out the modalities for the implementation of the co-management regime.

The draft Agreement further stipulates that Mauritius and France will jointly come up with a blueprint to define measures for the management of the ecosystem of the surrounding maritime areas of Tromelin, in line with Part XII of the United Nations Convention on the Law of the Sea. Cooperation between Mauritius and France in the field of monitoring, control and surveillance of illegal fishing will be strengthened, and the parties will cause scientific assessments of the fish stocks in the surrounding maritime areas of Tromelin to be undertaken for that purpose.

Article 2 of the draft Agreement aims at ensuring that the conclusion of an Agreement on co-management of Tromelin will not be prejudicial to the sovereignty of Mauritius over Tromelin. It is to be noted that during the second meeting, the Mauritius delegation reiterated the sovereignty of Mauritius over Tromelin and impressed on the need for the sovereignty issue to be resolved in the near future. I wish to inform the House that the proposed Agreement is

meant for an initial period of five years, and can be terminated by giving six months notice within that period. It is renewable for one further term of five years.

The French side proposed draft implementing agreements on the following areas for consideration by the relevant Mauritian authorities –

(a) sustainable management of fisheries;

(b) protection of the environment, and

(c) archaeological research.

It was agreed that another meeting would be held in Mauritius, to examine and finalise the draft implementing agreements proposed by the French side.

The third round of discussions is scheduled to be held in Mauritius at the beginning of February of this year. We are in the process of finalising our views and counter-proposals on the draft implementing agreements proposed at the last round. These will be forwarded to the French side prior to the next round. I wish to inform the House that I have, very recently, had exchanges of correspondences with President Sarkozy on many bilateral issues, including Tromelin, and I am pleased to announce to the House that I intend to visit Tromelin this year.

Mr Speaker, Sir, let me seize this opportunity to pay tribute to late Sir Ian Brownlie, Q.C., who, as the House is aware, died following a car accident in Egypt earlier this year. Sir Ian Brownlie, Q.C., has been acting as Legal Consultant to the Government of Mauritius since my first term, and has always tendered sound, objective legal advice to the Government as and when required. Over the years, I had developed a close personal relationship with him. In fact, my last meeting with him took place shortly before the CHOGM Summit. I understand the hon. Leader of the Opposition, in his capacity as Prime Minister, also had the opportunity of consulting Sir Ian Brownlie, Q.C., and I have no doubt that he will join me in this public tribute which Sir Ian Brownlie, Q.C., so richly deserves.

Mr Bérenger: Mr Speaker, Sir, allow me to express our sorrow as well at the departure of Sir Brownlie who was a fantastic legal expert, who was appointed by the present Prime Minister when he was Prime Minister, confirmed by me as Prime Minister, and reconfirmed by the Prime Minister. He has done a lot to Mauritius. I think we should express our solidarity and sympathy to his family.

(Interruptions)

His daughter has also died, and his wife is still in hospital.

Mr Speaker, Sir, can I start with the Marine Protected Area issue? I heard the hon. Prime Minister say that he understood from Prime Minister Gordon Brown that it would be put on hold - frozen - and that our Minister of Foreign Affairs had taken the issue with the UK Foreign Secretary, Mr Miliband. Can I know whether Mr Miliband confirmed that the project would be put on hold, or refrained from doing so?

The Prime Minister: Mr Speaker, Sir, the Foreign Secretary, Mr Miliband, also replaced the Prime Minister, Gordon Brown, when he had to leave the Summit after some time, and he apologised to me. He said to me that it was not an idea of offending anyone in Mauritius. All he was interested in was the protection of the marine park; that's what he said to me. In fact, he was a bit resentful by the way he was addressed, in the sense that our Foreign Minister was very forceful to him, stating that we will not accept what is happening. After the hon. Minister of Foreign Affairs had talked to him, he knew perfectly well what was going on, and I presume, Mr Speaker, Sir, that the Rt. hon. Gordon Brown must have spoken to him afterwards, after our meeting. Later on, when I met him, he apologised for having done this, but he said: 'you know the idea was just for the protection of the marine park and nothing else'.

Mr Bérenger: Can I ask the hon. Prime Minister what is our stand exactly? We asked for a freeze, that it be put on hold; but until when, until what happens? Since this so-called consultative process is ending, what do we do if London goes ahead with the project?

The Prime Minister: First of all, let me say, Mr Speaker, Sir, that I told the Rt. hon. Prime Minister - and I believe the hon. Minister of Foreign Affairs also told his counterpart - that, first of all, the consultation document itself did not accurately reflect the position of Mauritius. As everybody knows, who would be against environmental protection? As Sir Ian Brownlie said to me, Mr Speaker, Sir: who would be against motherhood? Everybody is for environmental protection.

But we did stress in that consultation document - if we look at the whole document itself - that we need to examine the implications through the mechanism already set up for the bilateral talks because they were meant to discuss all issues concerning the Chagos, and that it is the

forum where it should be discussed; not through a different forum and certainly not though the BIOT, because we do not recognise BIOT, Mr Speaker, Sir. I said to the hon. Prime Minister that it is like putting the cart before the ox, because the marine protection area starts with the presumption that there is no prospect for development since there are no people there, and that is exactly what should not have been done. We know how shamefully the people from the Chagos have been removed from their homes illegally and, therefore, I said that we need a framework based on law and human rights, and that we must re-establish the *status quo* which we would have had if the decolonisation process had been carried out properly. In fact, I did not have to go further, but I said that all this was done in contradiction to two resolutions of the UN. One in 1960 and one in 1965; the one in 1960 prohibits these colonial powers from dismembering colonial territories prior to independence, and the one in 1965 specifically mentioned that the territory of Mauritius was for the use of a base. And that is what I said to him. In fact, it is a completely incredible reversal of values that starts with a marine park and forgets the people who were there in the first place. We do not talk about resettlement, about development and all this. This is what basically we said. I don't know what is going to happen next, because London knows our views on the matter.

Mr Bérenger: The hon. Prime Minister has just said that we do not recognise the British Ocean Indian Territory (BIOT). Has he had the opportunity - I raised that with him last Thursday - to check whether it is not the case that, at those UK-Mauritius Senior Officials meetings, the UK delegation is headed by the Commissioner for the BIOT? This is my information. Is this the case? If it is the case, it is totally wrong!

The Prime Minister: In fact, the BIOT Commissioner was there, and we did object. We sent a letter to say that we do not recognise BIOT. We then took legal advice from Sir Ian Brownlie as to what we should do. He was of the view that, if he is part of the delegation, there is not much we can do. And then, London said afterwards that he is part of the delegation as an official of the Foreign and Commonwealth Office in charge of overseas territories and not as BIOT. The Leader of the Opposition will see in the documents that I will lay on the Table of the Assembly that, in the first annex, they mentioned him as the BIOT Commissioner and, in the second one, they removed BIOT.

Mr Bérenger: Since the hon. Prime Minister has mentioned documents that will be laid, can I request that copies of the two *notes verbales* which have been exchanged, which we have sent to London, as well as the Minutes of Proceedings of those UK-Mauritius Senior Officials meetings be placed in the Library?

The Prime Minister: It can either be placed in the Library or I can let the hon. Leader of the Opposition have it. My only worry is that if people know what are our strategies and our views, then it gets leaked out, with the consequences. But I will certainly let the hon. Leader of the Opposition know about it.

Mr Bérenger: Has the hon. Prime Minister looked into reports that London is also envisaging to ask that the Chagos Archipelago be placed on the UNESCO World Heritage Sites list?

The Prime Minister: I am not aware that they are asking it, but I did say to them that they cannot treat the Chagosians as a separate entity; they are part of Mauritius. Chagos is part of the Mauritian territory and, therefore, we will not accept a limitation of our sovereignty title of Mauritius.

Mr Bérenger: Can I move on to the sovereignty issue itself, Mr Speaker, Sir? In 2002, as the Prime Minister is aware, we managed to get London to agree to give us back all the islands except Diego Garcia, on which status we would agree to disagree. We would keep on claiming sovereignty, whether they would return all the islands, the so-called outer islands. The British tried to convince Washington, and the then Prime Minister, Sir Anerood Jugnauth, after Jack Straw had agreed to our proposal, wrote to President Bush. We got a very positive response from Mrs Condoleezza Rice. I took up the issue as Prime Minister with President Bush. I heard the hon. Prime Minister say that we are keeping other options open. Does not the hon. Prime Minister believe that we should, without losing more time, get that initiative going again, work with London, with President Obama and his top officials on this proposal that they should return back all the islands - the so-called outer islands - and that we would agree to disagree on Diego Garcia?

The Prime Minister: Our view, Mr Speaker, Sir, is that we should ask for the integral return of the whole territory of Mauritius, that is, the other islands, including Diego Garcia - both the previous Government and the actual Government are of that view. Even before, in my first

term, I did say that we understand the issue of the base, with what is happening in Afghanistan, in Iraq and now in Yemen. But the important thing for us is that they return our territories to us, and then we will discuss about whether they will have a base. We understand the position about the base, and we also understand the position on war, on terrorism, and that there is a need for a base.

Mr Bérenger: On this very delicate issue of our sovereignty over the Chagos Archipelago, can I ask the hon. Prime Minister whether he is aware that the National Economic and Social Council of Mauritius prepared a document recently, which was submitted to the African Peer Review Mechanism? They have prepared a Peer Review Mechanism on Mauritius, and our own National Economic and Social Council, according to my information, produced a so-called self-assessment report to the African Peer Review Mechanism and, in that, the Chagos Archipelago is excluded from the territory of Mauritius and placed under UK sovereignty. This National Economic and Social Council is funded by the Government. The Prime Minister's Office and the Ministry of Foreign Affairs are represented on its Board. Is the Prime Minister aware of that? If yes, what has been done and, if not, what is going to be done?

The Prime Minister: In fact, very often, that is the problem, Mr Speaker, Sir, when other people get involved in things they do not understand. Let me put it bluntly as it should be put! There are so many pseudo-experts in this country that I wonder sometimes! The Minister of Foreign Affairs has drawn their attention to the fact that they are funded by Government but they do not represent the voice of Government. We have drawn their attention to that.

Mr Bérenger: Mr Speaker, Sir, since 2002, it is clear that we must convince Washington to return those islands. Of course, to return the whole of the Chagos Archipelago *mais, en attendant*, as a step forward, to return all the so-called outer islands. UK had already said yes under Tony Blair. Now, under Mr Gordon Brown, I am sure the attitude is even more positive. Will not the Prime Minister agree with me, therefore, that we should concentrate on Washington, President Obama, his Secretary of State for Foreign Affairs and his Defence Secretary? We should convince them, now that the hawks of President Bush's days are gone.

The Prime Minister: In fact, that is why I had a brief meeting with President Obama and a bit of a longer meeting with the Secretary of State, Hillary Clinton, whom I know personally.

This is exactly what we have proposed, that is, that we need to have a meeting and to settle the issue. The response has been that they will look at it and tell us.

Mr Bérenger: The hon. Prime Minister mentioned the base issue earlier on. I understand that we do not have a quarrel with the existence of a base. We claim sovereignty, but we do not have a quarrel with the existence of a base at Diego Garcia. But I also heard the hon. Prime Minister say that he had a meeting with President Obama to discuss about the military use of the base. And here the press has reported that the Foreign Minister, on hearing that submarines carrying nuclear missiles would be stationed at Diego Garcia, was going to summon the US chargé d'affaires and the UK High Commissioner. Can I know what is the exact stand that we have on the base, and whether the chargé d'affaires and the High Commissioner have been summoned?

The Prime Minister: Mr Speaker, Sir, I believe the Foreign Minister did speak to both the British High Commissioner and the US chargé d'affaires. A *note verbale* was addressed by the Ministry of Foreign Affairs to both the US Embassy and the British High Commission on 06 January of this year, if I am not mistaken. I understand the point that hon. Leader of the Opposition is making, but we did take legal advice before issuing the *note verbale*. We are a signatory of what is called the Pelindaba Treaty, which is an African nuclear weapon free zone treaty, and we have to comply with this treaty, Mr Speaker, Sir.

Mr Bérenger: I would never have thought I would hear a thing like that. Let me move on to Tromelin. The hon. Prime Minister repeatedly mentioned a draft Agreement on *cogestion* of Tromelin Island. Is it still a draft? And what next? When will it stop being a draft?

The Prime Minister: No. We have had discussions, and we have drafts being looked at by both sides, and now we are in the process of finalising the final draft, so to speak, and this is what we are looking at. If we have other views on it, we will send it to Paris and they will respond.

Mr Bérenger: I take it that, in the final draft that is being prepared, there will be a rider, a strong rider making it clear that Mauritius maintains its sovereignty over Tromelin Island, although agreeing to the *régime de cogestion*.

The Prime Minister: In all our discussions, that is the first thing that we say, Mr Speaker, Sir.

Mr Bérenger: Am I right in saying also that the *cogestion* applies not only to the small island of Tromelin, but to the Exclusive Economic Zone that it generates?

The Prime Minister: I think I mentioned, Mr Speaker, Sir, that they defined the EEZ as the areas around the islands.

Mr Bérenger: On 31 March of last year, the hon. Prime Minister informed the House that Paris had agreed to Mauritius issuing fishing licences in the Exclusive Economic Zone of Tromelin. Has this been confirmed, and is it being exercised?

The Prime Minister: I am not aware whether it is actually being exercised now, Mr Speaker, Sir, but that is part of the agreement that will be signed.

Mr Bérenger: The hon. Prime Minister, when talking of Chagos, said that we are keeping other options open. In the case of Tromelin also, there are other options like the proposal made by Sir Harold Walter a good number of years back, namely that we should submit this issue to an international arbitration. Are we keeping that option open also?

The Prime Minister: I would rather not say what options we are keeping open, Mr Speaker, Sir. The hon. Leader of the Opposition knows himself, when we mentioned the options last time, what the British Government did after that. I think it is better that we don't mention the options, and we work towards it.

Mr Speaker: Time is over! Next item!

(4.09 p.m.)

PRIVATE MEMBERS' MOTION

ASIAN LANGUAGES – EXTENSION SCHOOLS – EXAMINATIONS

Order read for resuming adjourned debate on the following motion of the Second Member for Quartier Militaire & Moka (Mr S. Dayal):

> *"This House is of the opinion that the Mauritius Examinations Syndicate should collaborate with the existing recognised institutions in conducting all examinations concerning Asian languages taught in extension schools".*

Annex 152

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

Foreign & Commonwealth Office

Overseas Territories Directorate
[illegible]
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~~RESTRICTED~~ Submission

To Colin Roberts (agreed in draft)

PS/Chris Bryant)

PS/Foreign Secretary) submitting in parallel

From Joanne Yeadon
Date 30 March 2010
Pages 5

BRITISH INDIAN OCEAN TERRITORY (BIOT): PROPOSED MARINE PROTECTED AREA (MPA): NEXT STEPS

Issue

1 How to progress the proposal for the establishment of a Marine Protected Area (MPA) in the British Indian Ocean Territory.

Timing

2. Immediate The consultation report is widely anticipated and we should put it into the public domain as soon as we can

Preferred options

3. That the Foreign Secretary announces the publication of the report on the responses to the FCO public consultation into whether to create an MPA in the Territory; commenting on the level of interest in the consultation and general support for environmental protection and for a no take fishing zone; noting that the consultation has thrown up a range of views which need to be explored further; stating that he believes that the establishment of an MPA is the way ahead for the protection of the environment of the Territory and that he will ask officials to work towards this. But he should stop short of announcing that he is going to ask the BIOT Commissioner to declare an MPA in the Territory at this stage. I attach a draft statement which could be used as both as a press statement and as a Written Ministerial Statement

Agreed by

4 Legal Advisers, Parliaments, [illegible] and Press Office

Parliamentary and Media

5 Media

6 Parliamentary

The public consultation has stimulated a great deal of interest in Government policy on the Territory and has resulted in the tabling of some 28 PQs on BIOT since the beginning of the year (compared with around 20 in the whole of 2009). The consultation has led the All Party Parliamentary Group on the Chagos to increase their efforts to secure the right of return for the Chagossians. Baroness Whitaker and Jeremy Corbyn MP have written to the Prime Minister and followed the letters up with meetings with No.10. Mr Corbyn led a Westminster Hall Debate on BIOT on Wednesday 10 March. Lord Luce has been actively lobbying the US Embassy and plans to call on the Department of Defense and State Department when he visits Washington at Easter. The Mauritian High Commissioner in London has also been active and has met with the Foreign Affairs Committee handing over a paper detailing Mauritian views on sovereignty and the MPA to which the Foreign Secretary responded on 23 February.

A vocal minority led by Labour backbenchers and the Liberal Democrats continue to press the case for resettlement. A number of their MPs attended the Westminster Hall debate. But even among these there is a diversity of views and Mr Corbyn was unsuccessful in his efforts to claim that there were only two views: for and against the Government. We judge that there are many more MPs who support the environmental protection objectives of a BIOT MPA, but who have no wish to get involved in the wider politics.

Argument

7. Given the amount of heat created by the public consultation it is worth recalling that:

(a) The consultation was (only) about how to strengthen protection of the marine environment in BIOT;
(b) It was expressly without prejudice to the sovereignty claim of Mauritius;
(c) It was expressly on the basis of current government policy against resettlement, but without prejudice to any outcome from the case in progress at Strasbourg.

8. I attach the Consultation facilitator's report on the consultation and summarise the outcome in the background below. If you take the petitions out of the equation, the majority of responses support the establishment of a full no-take MPA, although a large number of responses point out the need to resolve the Chagossian issue. The largest single response was a petition which supports an MPA but refers to working with Chagossians to protect the reef which attracted over 200,000 signatures. But a consultation is not a vote but a qualitative exercise to collect views and evidence.

9. It is clear from the consultation exercise that establishing an MPA in BIOT would be a significant environmental move. Many in the environmental and scientific community would welcome it. But recent conferences have shown there would be strong opposition to it unless a Chagossian involvement. It is also clear that [illegible] resettlement and resource issues to work [illegible] Mauritius [illegible]

10. [redacted] that they see as the [redacted] consultation [redacted] no impact on the UK's [redacted] that is no longer needed for defence purposes. [redacted] opportunity of a joint statement [redacted] work on the MPA. The Mauritians continue to insist that any MPA [redacted] of their sovereignty claim and includes the resettlement of the Chagossian community – both red lines for UK Government policy on the Territory as the Mauritians know.

11. Mauritius' position hardened notably following the tete-a-tete between Gordon Brown and PM Ramgoolam at CHOGM. PM Ramgoolam has, historically, been moderate on BIOT. But he insists that Gordon Brown promised to halt the MPA consultation at CHOGM and he briefed the Mauritian press accordingly following his return from Port of Spain. The fact that we did not then cancel the consultation has caused him great Parliamentary embarrassment. He believes the FCO has ignored Gordon Brown's promise and this causes him greatly to distrust our position, especially in an election year.

12. Mauritian delegations at international meetings subsequently appear to have been briefed to raise their claim of sovereignty when they can. So far this has been done at the Commonwealth Meeting in London on 25 February, the Biodiversity Meeting in Bali attended by Hillary Benn on 25 February, and at the Indian Ocean Tuna Commission 1-4 March. Mauritius also complained to the Human Rights Council on 1 March over the Secret Detentions Report. They had no complaints over the substance of the report but did not like the fact that the study had used the terminology "British Indian Ocean Territory" rather than "Chagos Archipelago" and made their standard claim to sovereignty over the territory which we rebuffed. They have also approached the IMO.

13. The Mauritians have also since declined to take up our offer of a third round of bilateral talks, demanding that the MPA consultation be cancelled before a third round of talks could take place. There is little prospect of Mauritius changing tack before their own general elections (due in May or July/August). But, assuming Ramgoolam wins the elections, they may be willing to come back to the table thereafter.

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

Parliamentary Reaction

15. The All Party Parliamentary Group [redacted] to lobby on behalf of the Chagossian community and [redacted] right to return to the Territory. They view the creation of an MPA as a [redacted] such a course. Without resettlement, the APPG would [redacted] MPA.

Chagossians

16. [redacted] in favour of [redacted] better media

17 Questions in connection with an MPA's compliance with the UN Convention on the Law of the Sea have been raised by a number of lawyers responding to the consultation and by one of the Japanese fishing boats. While our initial view is that nothing proposed so far would be in conflict with UNCLOS, we need to be absolutely sure. Legal Advisers have been tasked to work though some of the issues raised

Costs

18 There are also budgetary questions to be sorted out. Options 2 and 3 in the consultation document (MPAs with a degree of residual pelagic fishing) can probably be managed within our existing budget. But if we move immediately to a full no-take MPA we will need a satisfactory funding arrangement to replace the income from the sale of fishing licences. Developments in other Overseas Territories have removed any flexibility from the Overseas Territories Programme Fund. The Pew Trust Group is seeking funding from charitable trusts/organisations and they say they are close to putting a funding proposal to us. [redacted] We believe we can progress this issue, but it will take more time and there is little prospect of a contribution from other interested Government departments (Defra, DfiD, MoD) in the current resource climate. Without full funding for increased fisheries protection, and without the presence of licensed fishing vessels to report on unlicensed fishers, there is a risk that the declaration of a no-take zone would result in a "paper park" and lead to reduced rather than enhanced environmental protection.

Conclusion

19. None of the above is insurmountable and we must recognise that the majority of respondents to the consultation support an MPA (albeit with caveats relating to the Chagossians). We could make a decision now. But, for the reasons set out above, we are likely to be able to do so more securely and with less hostility if we take more time to work through the various issues. We, therefore, recommend a positive, but not definitive, announcement.

Background

20 The Foreign Secretary launched the public consultation on 10 November 2009. The consultation closed on 5 March following a short extension to allow us to consult with Chagossian communities in Mauritius. The facilitator has now completed her report [illegible]

21 [illegible]

22. As expected support for options 2 & 3 (fishing allowed at certain times of the year and full protection for the reef's only respectively) came from the Indian Ocean commercial tuna fishing community as well as fleets from Europe and Japan who fish in the area. The Indian Ocean Tuna Commission and officials and representatives in the Seychelles shared this view.

23. Opposition to any of the proposals came mainly from members of the Chagossian community and signatories to the Marine Education Trust petition.

24. Support for a zoned use or an Indian Ocean Network approach came from MRAG, the Seychelles Environment Ministry and the Joint Nature Conservation Committee.

Resource implications

25. As mentioned above, we have not managed to secure funding to replace the revenue brought into BIOTA by the sale of fishing licences. We would, therefore, face a shortfall of around £1 million a year for patrols on top of the £1.5 million OTD already provides from the OTPF.

Joanne Yeadon

Joanne Yeadon
Head of BIOT & Pitcairn Section

Number of attachments: 2

cc: PS/Baroness Kinnock
Colin Roberts, OTD
Andrew Allen, OTD
Katharine Shepherd, Legal Advisers
Judith Gough, Sec Pol
Louise Newby, PRT
Lisa Glover, Press Office
Sarah Riley, Africa Directorate
John Murton, Port Louis
Ian Collard, Washington
Matthew Forbes, Victoria
Ashley Smith, MoD
Richard Parsons, Defra
Anna Balance, DfID
Steven Gurrell, Cabinet Office

DRAFT WMS/PRESS STATEMENT

I am pleased today to publish the report on the consultation that I announced on 10 November 2009 into whether to create a Marine Protected Area in the British Indian Ocean Territory.

The response to the consultation has been impressive both in terms of quality and quantity. There is clearly a great deal of interest in the idea of a Marine Protected Area and, more generally, in ensuring the on-going protection of the environment in BIOT.

I am absolutely clear that the UK should do all it can to protect the unique environment of BIOT and I believe that the way ahead should include the establishment of an MPA.

But the consultation has raised a range of issues which demonstrate that further work needs to be done to ensure that this is achieved in a realistic, sustainable and affordable way as part of a strategic approach. I have, therefore, instructed officials to take work forward to that end.

Annex 153

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

Bowyer [redacted]

From: Sarah Clayton [redacted]
Sent: 30 March 2010 18:06
To: Joanne Yeadon [redacted]; SOSFA Action [redacted]; PS Bryant - Action [redacted]
Cc: Catherine Brooker [redacted]
Subject: RE: [redacted] MARINE PROTECTED AREA: NEXT STEPS

** REGISTERED **

Dear Joanne,

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

st wishes,
Sarah

Sarah Clayton ! Assistant Private Secretary to Chris Bryant MP ! Parliamentary Under Secretary of State ! Foreign & Commonwealth Office ! King Charles Street ! London SW1A 2AH
☎Tel: [redacted] ☎FTN [redacted] Fax: [redacted] sarah.clayton@fco.gov.uk !
www.fco.gov.uk ! Visit our blogs at http://blogs.fco.gov.uk

Help save paper - do you need to print this email?

From: Joanne Yeadon (Restricted)
Sent: 30 March 2010 14:48
To: SOSFA Action (Restricted); PS Bryant - Action (Restricted)
Cc: Catherine Brooker (Restricted); Sarah Clayton (Restricted)
Subject: RESTRICTED: MARINE PROTECTED AREA: NEXT STEPS
Importance: High

Catherine
Sarah

Following our telecons this afternoon, I know attach the MPA submission, plus consultation document plus possible draft statement.

I'll get hard copies walked down.

Joanne

Joanne Yeadon
Head of BIOT and Pitcairn Section
Overseas Territories Directorate
K2.218
Tel: [redacted]
Fax: [redacted]
www.fco.gov.uk

Annex 154

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

Jo Bowyer [redacted]

From:	John Murton [redacted]
Sent:	31 March 2010 08:30
To:	Ewan Ormiston [redacted]
Cc:	Joanne Yeadon [redacted]
Subject:	FW: [redacted]: MARINE PROTECTED AREA: NEXT STEPS
Attachments:	MPA NEXT STEPS.doc; mpa statement by fs.doc; MPA FACILITATOR REPORT.docx
Importance:	High

** REGISTERED **

Dear Ewan

To be aware of the latest position on BIOT. Most/all of our recommended changes to the submission got made which is good - thank you Joanne. I think Miliband will be seeing a balanced view of where we stand. I've no idea if he'll follow the recommendation or not. If he DOES then we'll be in a position of 'looking favourably' upon an MPA but having to work through 'issues' relating to Chagossians/Mauritius. I think this would be good and would provide the basis for a resumption of talks following both elections. If he goes for the Park straight away, we'll face problems. For you to carry forward with Joanne.

Nevertheless, the recommended path potentially dovetails well with the GoM position iterated by Boolell during our meeting last week and reported by e-gram. If Miliband follows the recommendation you'll need to get straight into Boolell's office with Kunjul (and then see Seeballuck too) to stress something along the lines of:

- no final decision on MPA taken;
- UK recognises are issues that require further work e.g. with GoM/Chagossians;
- this means you are being listened to even if we don't always agree;
- putting off a final decision on the MPA means that the time is now right for resumption of bilateral talks to work through issues.

We'll need to do this before it goes public in London if at all we can. This will help fore-stall any possible negative reaction here to potentially-inaccurate-press stories from London. Far better we explain the decision to the Mauritians directly than they read about it in the papers first. This courtesy alone will help improve links. Joanne, I'd be really grateful if you could help ensure Ewan does have this 24-jump on the news cycle.

I've already alerted Koonjul to the fact that we can't keep the facilitators report secret.

Ewan, Joanne will of course brief you more fully going forward.

John

John Murton
☎T: [redacted] FTN [redacted] ☎F: [redacted] ✉ john.murton@fco.gov.uk 🖳 www.fco.gov.uk
Visit the FCO blogs at <http://blogs.fco.gov.uk/>

From: Joanne Yeadon [redacted]
Sent: 30 March 2010 18:26
To: PS Kinnock - Info [redacted]; Colin Roberts [redacted]; Andrew Allen [redacted]; Katharine Shepherd [redacted]; Judith Gough [redacted]; Louise Newby [redacted]; Lisa Glover [redacted]; Sarah Riley [redacted]; John Murton [redacted]; Ian Collard * [redacted]; Matthew Forbes [redacted]; Parsons, Richard (Marine - MR); anna.balance@dfid.gsi.gov.uk

1

Subject: FW: [redacted] MARINE PROTECTED AREA: NEXT STEPS
Importance: High

From: Joanne Yeadon [redacted]
Sent: 30 March 2010 14:48
To: SOSFA Action [redacted] PS Bryant - Action [redacted]
Cc: Catherine Brooker [redacted] Sarah Clayton [redacted]
Subject: [redacted] MARINE PROTECTED AREA: NEXT STEPS
Importance: High

Catherine
Sarah

Following our telecons this afternoon, I know attach the MPA submission, plus consultation document plus possible draft statement.

I'll get hard copies walked down.

anne

Joanne Yeadon
Head of BIOT and Pitcairn Section
Overseas Territories Directorate
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(PW) MPA

Joanne Yeadon [redacted]

From: Catherine Brooker [redacted]
Sent: 31 March 2010 17:55
To: Joanne Yeadon [redacted] SOSFA Action [redacted] PS Bryant - Action [redacted]
Cc: [redacted] Colin Roberts [redacted]
Subject: RE: [redacted] MARINE PROTECTED AREA: NEXT STEPS
Registered: Yes
Security Label: RESTRICTED

** REGISTERED **

Joanne,

The Foreign Secretary was grateful for your submission and the copy of the report on the consultations. He has carefully considered the arguments in the submission and the views expressed during the consultation. He was grateful for your further note today. He has considered the submission in light of the High Commissioner's views and has given serious thought to the different possible options for announcing an MPA.

The Foreign Secretary has decided to instruct Colin Roberts to declare the full MPA (option one) on 1 April. There will then need to be an announcement to this effect.

I would be grateful if you could take forward both.

The Foreign Secretary will then inform the House of Commons at FCO Oral questions on Tuesday 6 April. I would be grateful for a brief (50 words) statement.

Catherine

Catherine Brooker | Private Secretary to the Foreign Secretary |
Foreign and Commonwealth Office | King Charles Street | London SW1A 2AH |
✉ email: [redacted] url: www.fco.gov.uk

From: Joanne Yeadon [redacted]
Sent: 30 March 2010 14:48
To: SOSFA Action [redacted] PS Bryant - Action [redacted]
Cc: Catherine Brooker [redacted]
Subject: HCR - [redacted] MARINE PROTECTED AREA: NEXT STEPS
Importance: High

Catherine
[redacted]

Following our telecons this afternoon, I know attach the MPA submission, plus consultation document plus possible draft statement.

I'll get hard copies walked down.

Joanne

Joanne Yeadon
Head of BIOT and Pitcairn Section
Overseas Territories Directorate
K2.218
Tel: [redacted]
Fax:
www.fco.gov.uk

Annex 155

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

(PW) MPA

Joanne Yeadon [redacted]

From: Catherine Brooker [redacted]
Sent: 31 March 2010 17:55
To: Joanne Yeadon [redacted] SOSFA Action [redacted] PS Bryant - Action [redacted]
Cc: [redacted] Colin Roberts [redacted]
Subject: RE: [redacted] MARINE PROTECTED AREA: NEXT STEPS
Registered: Yes
Security Label: RESTRICTED

** REGISTERED **

Joanne,

The Foreign Secretary was grateful for your submission and the copy of the report on the consultations. He has carefully considered the arguments in the submission and the views expressed during the consultation. He was grateful for your further note today. He has considered the submission in light of the High Commissioner's views and has given serious thought to the different possible options for announcing an MPA.

The Foreign Secretary has decided to instruct Colin Roberts to declare the full MPA (option one) on 1 April. There will then need to be an announcement to this effect.

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The Foreign Secretary will then inform the House of Commons at FCO Oral questions on Tuesday 6 April. I would be grateful for a brief (50 words) statement.

Catherine

Catherine Brooker| Private Secretary to the Foreign Secretary |
Foreign and Commonwealth Office | King Charles Street | London SW1A 2AH |
email: [redacted] url: www.fco.gov.uk

From: Joanne Yeadon [redacted]
Sent: 30 March 2010 14:48
To: SOSFA Action [redacted] PS Bryant - Action [redacted]
Cc: Catherine Brooker [redacted]
Subject: HCR - [redacted] MARINE PROTECTED AREA: NEXT STEPS
Importance: High

Catherine
[redacted]

Following our telecons this afternoon, I know attach the MPA submission, plus consultation document plus possible draft statement.

I'll get hard copies walked down.

Joanne

Joanne Yeadon
Head of BIOT and Pitcairn Section
Overseas Territories Directorate
K2.218
Tel: [redacted]
Fax: [redacted]
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Annex 156

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

[redacted]

From: John Murton [redacted]
Sent: 31 March 2010 12:45
To: Joanne Yeadon [redacted] Ewan Ormiston [redacted]
Cc: Colin Roberts [redacted]; Andrew Allen [redacted]

Subject: [redacted] BIOT: ANNOUNCEMENT OF A MARINE PROTECTED AREA/ANNOUNCEMENT OF A MAURITIAN GENERAL ELECTION
Attachments: RE: [redacted] BIOT: MARINE PROTECTED AREA

** REGISTERED **

Dear Joanne, Colin,

We've discussed here. We agree with the analysis of Andrew Allens e-mail of 15:31. (attached).

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

The Parliamentary Labour Party of Mauritius is currently in a closed door meeting. A meeting of the Labour Party executive is set to follow immediately thereafter. A press conference was scheduled for 1400 but has currently been delayed. We expect an announcement of elections - or at least the anticipated MSM-Labour electoral alliance - during the course of today. A Minister indicated to me this morning that today's events would lead to elections on 9 May. We have also heard 2 May as a possible date. All Ministers are currently uncontactable and will remain so throughout the day. We therefore have zero capacity to manage political reactions here.

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

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

The Government will compare today's timing to the situation in November when FS had said he would phone Ramgoolam in advance but only managed to call on the day that the MPA was announced. We cannot rule out Ramgoolam seeking to go over the FS's head and contact PM Brown through friends in the UK Labour Party or through Baroness Ashton (with whom Ramgoolam he is close friends) with the aim of buying time on the decision. If FS announces an MPA today without even a courtesy call to Ramgoolam or Bodell then this will further poison the atmosphere.

What might fly here would be the announcement put forward in yesterday's submission to the FS. We think that there <u>might</u> be a market for a proposal to work with Mauritius as a priviledged partner on management issues etc prior to a final decision on an MPA. But the talks would have to precede any formal announcement of an MPA.

If an MPA is announced today or tomorrow it will undoubtedly undermine our bilateral work with Mauritius in other areas including Zimbabwe, Madagascar and Piracy. During Purdah here, and in the absence of Minister Boolell, our chief Foreign Affairs interlocutor will be Secretary Neewoor - with all the negatives that entails.

In short, to follow the course of action that you are both proposing risks a political reaction that will significantly increase the eventual chance of a legal challenge to the MPA (and sovereignty itself) from the next Government of Mauritius.

The impending election here has less bearing on the dynamics of the Chagossian issue *per se*, but will continue to push the Chagossians into the arms of politicians wishing to challenge UK sovereignty over BIOT. Future FOI requests may then be used to cast doubt on the basis for the recommendations leading to the FS's decision: Richard Gifford will be sharpening his pencil as we speak.

To add to our joys, I am set to go on leave this evening until 27 April. We are anticipating a demonstration by Lalit - a local left wing group - next Wednesday. Minister Boolell had previously indicated a willingness to demonstrate outside the High Commission himself in the event of an MPA being declared.

John

John Murton
T: [redacted] FTN [redacted] F: [redacted] [redacted] www.fco.gov.uk
Visit the FCO blogs at <http://blogs.fco.gov.uk/>

From: Joanne Yeadon (Restricted)
Sent: 31 March 2010 11:47
To: Ewan Ormiston (Restricted)
Cc: Colin Roberts (Restricted); Andrew Allen (Restricted); John Murton (Restricted); Jennifer Townson (Restricted)
Subject: RESTRICTED: BIOT: MARINE PROTECTED AREA
Importance: High

Ewan,

The Private Office have just telephoned. The Foreign Secretary is minded to ask Colin to declare an MPA and go for option 1 (full no-take zone). BUT FINAL DECISION NOT YET TAKEN.

The FS has said that in an ideal world, he would like to go for declaring an MPA and spend the next 3 months reaching some sort of agreement with the Mauritian Government on the governance (management) of the area but making it clear that we will have 3 months to consult them. But if they won't come to any agreement, we will go ahead anyway. **He has asked for ideas, whether the above is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction.** We need to get something to him this afternoon.

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

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

Joanne

2

Joanne Yeadon

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Annex 157

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

Liam Abrams (Restricted)

From: Andrew Allen (Restricted)
Sent: 31 March 2010 12:31
To: Colin Roberts (Restricted)
Cc: John Murton (Restricted); Jennifer Townson (Restricted); Ewan Ormiston (Restricted); Zoe Townsley (Restricted); Joanne Yeadon (Restricted)
Subject: RE: RESTRICTED: BIOT: MARINE PROTECTED AREA

Security Label: RESTRICTED

** REGISTERED **

Colin

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

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

Andrew

From: Colin Roberts (Restricted)
Sent: 31 March 2010 12:07
To: Joanne Yeadon (Restricted)
Cc: Andrew Allen (Restricted); John Murton (Restricted); Jennifer Townson (Restricted); Ewan Ormiston (Restricted); Zoe Townsley (Restricted)
Subject: RE: RESTRICTED: BIOT: MARINE PROTECTED AREA

Joanne,

I think we need to give a clearer steer to the FS. I suggest the following:

i) FS decides now that BIOTA should establish a full no-take MPA in BIOT's EEZ

ii) FS notes that there are a number of issues to resolve, some of which have come up in the consultation process, and that therefore there should be a staged approach and transitional arrangements leading to a full no-take MPA in three years time

iii) He instructs BIOT Commissioner within the next 12 months to bring an end to the reef fishery and to introduce restrictions to the pelagic fishery.

iv) that Diego Garcia and its territorial waters be excluded from any MPA, but that BIOT Commissioner begin talks with the US with a view to bringing an end to recreational fishing within 2 years.

v) that BIOTA establish a governance structure for the MPA which ensures that the views of key regional stakeholders and in particular the Government of Mauritius can be taken into account.

vi) that BIOTA/FCO ensures through the programme of facilitated visits to the territory that representatives of the Chagossian community have opportunities to engage in activities in support of the MPA and other environmental protection measures in BIOT.

From: Joanne Yeadon (Restricted)
Sent: 31 March 2010 11:47
To: Ewan Ormiston (Restricted)
Cc: Colin Roberts (Restricted); Andrew Allen (Restricted); John Murton (Restricted); Jennifer Townson (Restricted)
Subject: RESTRICTED: BIOT: MARINE PROTECTED AREA
Importance: High

Ewan,

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The FS has said that in an ideal world, he would like to go for declaring an MPA and spend the next 3 months reaching some sort of agreement with the Mauritian Government on the governance (management) of the area but making it clear that we will have 3 months to consult them. But if they won't come to any agreement, we will go ahead anyway. **He has asked for ideas, whether the above is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction.** We need to get something to him this afternoon.

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

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

Joanne

Joanne Yeadon
Head of BIOT and Pitcairn Section
Overseas Territories Directorate
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Fax: 020 7008 1589
www.fco.gov.uk

Annex 158

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

REGISTERED - iRecords OTI260/004/2010

Foreign & Commonwealth Office

Overseas Territories Directorate
King Charles Street
London
SW1A 2AH

Tel: 020 7008 2890
Fax: 020 7008 1589
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RESTRICTED Minute

To Colin Roberts (agreed in draft)

PS/Foreign Secretary

Organisation

From Joanne Yeadon

Date 31 March 2010

Pages 2

BRITISH INDIAN OCEAN TERRITORY: MPA: NEXT STEPS: MAURITIUS

1. The FS has said that, in an ideal world, he would like to declare an MPA in BIOT and spend 3 months reaching some sort of agreement with the Mauritian government on the governance of the area but making it clear that we will have 3 months to consult them but if they won't come to an agreement, we will go ahead without them. You have asked for options, whether this is feasible and possible implications. We have discussed this with our High Commissioner in Port Louis.

2. The "3 months", or any defined period, to hammer out details of some sort of management structure will not fly in Mauritius. Ramgoolam would not be able to commit to negotiating in this framework if an MPA had already been declared. Any such offer would be seen as forcing them into a position and would only antagonise them further.

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

4. The High Commissioner has asked that the Foreign Secretary be made aware that the timing could not be worse locally than to declare a full no-take MPA today. The Parliamentary Labour Party of Mauritius is currently in a closed door meeting and it is expected that they will announce their own elections during the course of today. All Ministers are uncontactable and so the High Commission have no capacity to

manage political reactions. He also wanted to point out that declaring an MPA today could have very significant negative consequences for the bilateral relationship. It would be seen, especially by Ramgoolam, as exceedingly damaging timing and pressure would be on for him to commit to taking legal action to challenge the establishment of an MPA. The Foreign Secretary will recall the atmospherics of his telephone conversation with Ramgoolam on the day the consultation was launched.

Other issues

5. As I mentioned in my submission of 30 March, Mauritius are not the only problem. We will face a negative reaction from Parliament. At the Westminster Hall Debate on BIOT achieved by Jeremy Corbyn on Wednesday 10 March, Ivan Lewis stated: *"Members feel that there was not sufficient consultation with parliamentarians on the Chagossians in the past before apparently unilateral decisions were made. I therefore put on record a commitment to make sure, wherever possible, that interested hon. Members are briefed before we make final decisions on the marine protected area".*

6. The Chagossians will also react negatively.

7. Our best defence against the legal challenges which are likely to be forthcoming whenever we establish an MPA is to demonstrate a conscientious and careful decision-making process. A rapid decision now would undermine that.

8. I also should stress the point that we have not secured funding and will have no means of enforcing a full no-take MPA. Although we have not yet completed our analysis, we would expect to recommend a phased introduction of a no-take MPA which would give time to put a sustainable funding package in place.

Joanne

Joanne Yeadon

Cc: PS/Chris Bryant; PS/Baroness Kinnock; PS/PUS; Andrew Allen, OTD, Jennifer Townson, Africa Directorate; John Murton, Port Louis

Annex 159

Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Hon. Edward Davey MP

REPUBLIC OF MAURITIUS

Minister of Foreign Affairs, Regional Integration and International Trade

Ref: 1197/28/10 **8 April 2010**

Dear Hon. Davey,

You will certainly appreciate that Mauritius and the United Kingdom enjoy close and friendly relations based on shared values such as democracy, respect for human rights, the rule of law and good governance. The ties between our two countries have been consolidated over the years through meaningful cooperation not only at the bilateral level, but also within the Commonwealth.

In turn, I would also wish to place on record our appreciation for your support to Mauritius on the issue of the Chagos Archipelago and to the cause of Mauritians of Chagossian origin.

There is now an issue of serious concern to the Government of Mauritius to which I should draw your attention.

Mauritius was shocked and dismayed to learn that UK Foreign Secretary David Miliband has decided to create a marine protected area in the waters of the Chagos Archipelago which forms an integral part of the territory of Mauritius under both international law and our national law.

The Chagos Archipelago was illegally excised by the British Government from the territory of Mauritius prior to grant of independence in violation of UN General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965. Since our independence, we have consistently protested against this illegal excision and pressed for the early and unconditional return of the Chagos Archipelago to Mauritius.

Successive British Governments have assured the Mauritian authorities that the Chagos Archipelago will be returned to Mauritius when it will no longer be needed for defence purposes. However, these assurances have always stopped short of providing a specific date for the effective return of the Chagos Archipelago to Mauritius.

Following the launch by the British Government last November of global public consultations on their proposal for the creation of a marine protected area in

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Tel. : (230) 405-2512 - *Fax* : (230) 208 9215 - *Email* : aboolell@mail.gov.mu

the waters of the Chagos Archipelago, we have on several occasions conveyed our strong opposition to such a project being undertaken without consultation with and the consent of the Government of Mauritius.

The Government of Mauritius considers that the unilateral establishment of a marine protected area around the Chagos Archipelago infringes the sovereignty of Mauritius over the Archipelago. The creation of such a marine protected area also runs counter to the assurances given by the British Government that the Chagos Archipelago will be returned to Mauritius. It is also noted that the Anglo-US Lease Agreement in respect of the Chagos Archipelago, concluded in breach of the sovereignty of Mauritius over the Chagos Archipelago, is due to expire in 2016.

The Government of Mauritius further believes that the creation of a marine protected area around the Chagos Archipelago at this stage is an impediment to 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.

The Government of Mauritius has therefore decided not to recognize the existence of the marine protected area and is considering legal and all other options that may exist.

As the unilateral creation of a marine protected area around the Chagos Archipelago is totally unacceptable to the Government of Mauritius, I hope that this decision can be reviewed in due course. I have no doubt that Mauritius can continue to rely on your invaluable support for the early return of the Chagos Archipelago to Mauritius.

Please accept, Hon. Davey, the assurances of my highest consideration.

Dr the Hon. Arvin Boolell
Minister

Hon. Edward Davey MP
House of Commons
London SW1A OAA
United Kingdom

Annex 160

Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Rt. Hon. William Hague MP

REPUBLIC OF MAURITIUS

Minister of Foreign Affairs, Regional Integration and International Trade

Ref: 1197/28/10 **8 April 2010**

Dear Hon. Hague,

You will certainly appreciate that Mauritius and the United Kingdom enjoy close and friendly relations based on shared values such as democracy, respect for human rights, the rule of law and good governance. The ties between our two countries have been consolidated over the years through meaningful cooperation not only at the bilateral level, but also within the Commonwealth.

Nonetheless, there is an issue of serious concern to the Government of Mauritius to which I would wish to draw your attention.

Mauritius was shocked and dismayed to learn that UK Foreign Secretary David Miliband has decided to create a marine protected area in the waters of the Chagos Archipelago which forms an integral part of the territory of Mauritius under both international law and our national law. I understand that our High Commissioner in London, H.E. Mr. A. Kundasamy, has had the opportunity to brief you on the illegal excision of the Chagos Archipelago by the British Government from the territory of Mauritius 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.

Since our independence, we have consistently protested against this illegal excision and pressed for the early and unconditional return of the Chagos Archipelago to Mauritius. Successive British Governments have assured the Mauritian authorities that the Chagos Archipelago will be returned to Mauritius when it will no longer be needed for defence purposes. However, these assurances have always stopped short of providing a specific date for the effective return of the Chagos Archipelago to Mauritius.

Following the launch by the British Government last November of global public consultations on their proposal for the creation of a marine protected area in the waters of the Chagos Archipelago, we have on several occasions conveyed our strong opposition to such a project being undertaken without consultation with and the consent of the Government of Mauritius.

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The Government of Mauritius further believes that the creation of a marine protected area around the Chagos Archipelago at this stage is an impediment to 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.

The Government of Mauritius has therefore decided not to recognize the existence of the marine protected area and is looking into legal and all other options that may exist.

As the unilateral creation of a marine protected area around the Chagos Archipelago is totally unacceptable to the Government of Mauritius, I hope that this decision can be reviewed in due course. Indeed, my earnest hope is that the whole issue of the Chagos Archipelago be revisited with an open mind, in line with the commitment taken by the Shadow Minister for Africa, Hon. Keith Simpson, on 10 March last in Westminster Hall during the debate on the Chagos Archipelago.

Please accept, Hon. Hague, the assurances of my highest consideration.

Dr the Hon. Arvin Boolell
Minister

The Rt. Hon. William Hague MP
House of Commons
London SW1A OAA
United Kingdom

Annex 161

Extract of Information Paper CAB (2010) 295 – Official Mission to France and the United Kingdom, 9 June 2010

Extract of Information Paper CAB (2010)295 – Official Mission to France and the United Kingdom of 9 June 2010

Meeting with Mr William Hague, British Foreign Secretary

36. The highlight of my visit to the UK was my meeting with Mr William Hague, the new British Foreign Secretary. This meeting was held at the latter's request and at very short notice. Mr William Hague indicated to me that I was the first African Head of State/Government that he was meeting at Carlton House, his private residence, since he assumed Office.

37. Mr Hague gave me an insight into the functioning of the new Coalition Government and expressed his delight to work together with Mauritius on several issues. He also spoke about piracy in the Indian Ocean and requested Mauritius to set up the appropriate mechanism to judge pirates. I reiterated the undertaking given to Baroness Ashton earlier and assured him that Mauritius would lend its full support to combat piracy in the Indian Ocean.

38. Referring to the Africa-France Summit, Mr Hague acknowledged that, so far, UK had focused its attention to matters relating to Europe, the US and the Middle East. He promised that UK foreign policy would now be geared towards Africa and other emerging nations.

39. I expressed concern over the decision of the former UK Government to proceed with the establishment of a Marine Protected Area around the Chagos Archipelago despite the undertaking given by the then British Prime Minister that the project would be put on hold and brought up for consideration under the bilateral talks between UK and Mauritius on the Chagos issue. I pointed out that, according to legal advice obtained, the decision of the UK Government to proceed with the creation of the Marine Protected Area could be tinted with illegality.

40. On the sovereignty issue, I stated that on several occasions, Mauritius has indicated that it is fully conscious of the importance of Diego Garcia as a strategic military installation for the United States and that it does not propose any change with regard to the continued use of the island as such. We need to settle the sovereignty issue and that the Chagossians be allowed to resettle on the other islands. I also made it clear that the Chagossians are Mauritian citizens and they should not be dealt with separately.

41. Mr Hague conceded that he was not fully conversant with all the issues concerning the Chagos Archipelago. He stated that he would revert to me on this matter in due course.

42. I congratulated the British Foreign Secretary for having had the courage to institute a judicial enquiry on rendition and torture which was carried out in recent years, which also includes the possible use of Diego Garcia for these purposes. His predecessor, Hon David Miliband, had flatly refused to initiate such an enquiry.

43. Mr Henry Bellingham, Minister for Africa and Overseas Territories and Mr Andrew Pocock were also in attendance. It was proposed that Mr Bellingham would meet our colleague, the Minister of Foreign Affairs, Regional Integration and International Trade to discuss the way forward on the Chagos issue.

Annex 162

Submission dated 19 July 2010 from Joanne Yeadon, Head of "BIOT"& Pitcairn Section, UK Foreign and Commonwealth Office, to the Private Secretary to Henry Bellingham, "British Indian Ocean territory: BIOT Policy"

Foreign &
Commonwealth
Office

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RESTRICTED Submission

To PS/Henry Bellingham
PS

From Joanne Yeadon (Agreed in draft with Andrew Allen)
Date 19 July 2010
Pages

BRITISH INDIAN OCEAN TERRITORY: BIOT POLICY

Issue

1. Following OTD's submission of 28 May on BIOT policy, the Foreign Secretary agreed that the decision to establish the Marine Protected Area should be implemented without any slowing down of the process; that the FCO should continue to contest the Chagos Islanders' application to the European Court of Human Rights (ECtHR) in Strasbourg; that we should maintain existing policy towards Mauritius on BIOT ie., that the UK will cede sovereignty to Mauritius when the Territory is no longer needed for defence purposes.
2. Now that overarching Government policy has been determined, there are a number of specific issues we need to look at. These, along with recommendations, are set out in the attached paper.

Timing

3. Immediate. We need to inform key players including Parliament, the leader of the Chagos Refugees Group (Olivier Bancoult) and the Chagossians' legal advisers about Government policy.

Preferred options

4. That Ministers agree the further recommendations as set out in the attached paper.

5. If agreed, we recommend that as a first step Mr Bellingham replies to Lord Luce's note of 29 June (Flag A) and Olivier Bancoult's letter to the Prime Minister of 21 May (Flag B). These replies will set out the Government's policy to Parliament and to the Chagossians (and their legal representatives) and also put the Government policy in the public domain. I attach draft replies.

Agreed by

6. Legal Advisers, Africa Directorate, Port Louis.

Parliamentary and Media

7. Parliament takes a keen interest in BIOT. Attention is focussed around an All-Party Parliamentary Group (Chaired by Jeremy Corby MP) which reformed at the beginning of the new Parliamentary session. It continues to be active as evidenced by Lord Luce's recent call on the Minister. Members of the APPG (which include Lord Luce, Lord Avebury, Baroness Walker and Baroness Whitaker) also took an active part in the debate in the Lords on 29 June following Viscount Montgomery of Alamein's oral question on the environmental and scientific awareness of BIOT. We can expect the APPG to continue to lobby Ministers and table PQs (we have received 9 so far this Parliamentary session) and seek debates
8. Media reporting on BIOT is sporadic and generally negative. There will be interest in the eventual ruling at the ECtHR and in any decisions on the MPA where we should expect some positive reporting by environment correspondents but also a revival of the normal negative coverage.

Risks

9. Whatever we offer the Chagossians will fall far short of their, and their supporters', ultimate aim that the Chagossians are allowed to return and settle in the Territory with Government help and that they are granted further compensation. And whatever we offer Mauritius will fall short of their desire for sovereignty over BIOT.

Background & Resource Implications

10. As set out in my submission of 28 May (Flag C).

Joanne Yeadon

Joanne Yeadon
Head of BIOT & Pitcairn Section

cc:
PS/Lord Howell
PS/PUS
Colin Roberts
Andrew Allen
Derek Walton, Legal Advisers

Theo Rycroft, Legal Advisers
Hayley Stebbing, Africa Directorate
Louise Newby, PRT
Matt Thoume, Press Office
Ashley Smith, MoD
John Murton, Port Louis
Matthew Forbes, Victoria
Ian Collard, Washington

BRITISH INDIAN OCEAN TERRITORY (BIOT): SECONDARY ISSUES AND NEXT STEPS

ISSUES

Chagos Islanders v the United Kingdom at the European Court of Human Rights (ECtHR)

- The Foreign Secretary has agreed that we should continue to contest this case.

- We have just been informed by the Court Registrar that the application by the Chagos Islanders to the European Court of Human Rights (ECtHR) has been adjourned in order that the Chamber can take into account the eventual judgment or decision in Al-Skeini and Others v the UK which is pending before the Grand Chamber. They will assess the jurisdictional issues in the Chagos Islanders case in light of its guidance. The Chagos Islanders case is not likely to resume until next year and we are now looking at a considerably longer wait for a judgment than had previously been expected.

- We have made clear that the declaration of a Marine Protected Area (MPA) is without prejudice to these proceedings. The delay should not therefore mean a need to slow work on the MPA down.

A new Feasibility Study?

- The 2002 Feasibility Study into possible resettlement of the outer islands of the Territory was carried out by a group of independent experts who won an open tender for the project. It is an independent study. The report came down heavily against the feasibility of resettlement. While the report concluded that short-term habitation for limited numbers on a subsistence basis is possible, it also emphasised that any long-term resettlement would be precarious and costly. It is important to remember that the outer islands, which have been uninhabited for thirty years, lack all basic facilities and infrastructure, are tiny and very low-lying;

- We do not see a need for a new study. Although certain conditions will have changed for the worse (for example, the vulnerability of low lying atolls to the effects of climate change flagged up in the feasibility study has only been reinforced by subsequent experience), this does not call into question the basic conclusions of the study nor does it justify a new study.

- [redacted]

[redacted]

Chagossians Working on Diego Garcia

- Any Mauritian/Chagossian can apply for the jobs on Diego Garcia which are advertised locally in Mauritius provided they can demonstrate the required skills for the post. Selection is based on the best candidate being identified. We have sought and have obtained assurances from the US Government that there is no discrimination against the Chagossians when recruiting employees to work on Diego Garcia. The two Chagossian leaders in Mauritius, Olivier Bancoult and Fernand Mandarin, have been briefed regularly on the job opportunities available on Diego Garcia. At the moment, there are only three Chagossians working at the Base. The lack of take-up of jobs is likely to be the low-level wages offered by DG21 (the US Defence contractor). Chagossians could probably earn more for doing the same jobs in Mauritius.
- We should therefore make clear that Chagossians can and do work on Diego Garcia; and encourage the US to continue to advertise opportunities to Chagossians.

Fishing Rights

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

Mauritius/Maldives and the Marine Protected Area

- Mauritius is not opposed to the idea of increased environmental protection in the area. But they had two concerns over the declaration of the MPA. Firstly, they claim sovereignty over BIOT and see the MPA proposal as a challenge to this claim. Secondly, and related, they were unhappy about the public consultation exercise. The result was a worsening of the bilateral relationship. While policy on sovereignty

and the MPA has not changed, we hope that Mauritius will feel able to return to the discussion table on BIOT issues including the MPA. In the House of Lords on 29 June, Baroness Kinnock asked Lord Howell if he would respond positively to the expressed desire of the Mauritius government for the dialogue initiated by PM Ramgoolam and Gordon Brown to be continued as soon as possible. Lord Howell said that the Government remained happy to talk to the Mauritian Government at any time. We should make this offer to the Mauritians clear.

- The Maldives are not opposed to the Marine Protected Area. They support the idea in principle. However, they have alerted us to a possible overlap between BIOT's Environmental Preservation and Protection Zone and their own Exclusive Economic Zone and also have concerns about any impact that a no-take zone might have on their own fishery. We have offered to talk to them about this. The ball is in their court.

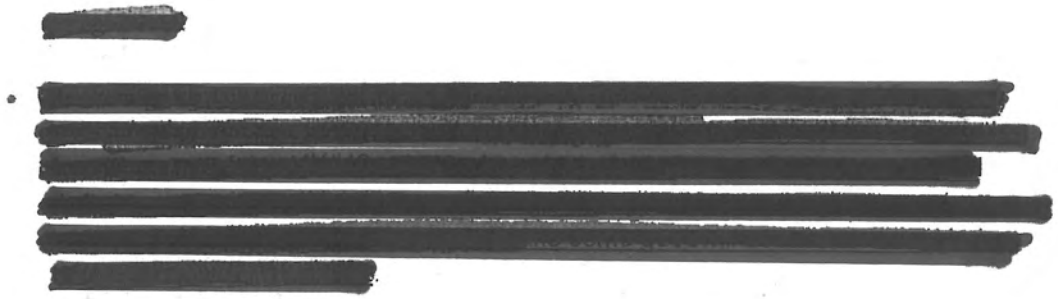
[redacted]

- [redacted]

- [redacted]

UK/US and the British Indian Ocean Territory

- The use of the British Indian Ocean Territory (including Diego Garcia) is regulated by a series of bilateral agreements (Exchange of Notes) between the UK and US within the context of broader US-UK defence arrangements. The 1966 Exchange of Notes provides that the islands of the British Indian Ocean Territory, including Diego Garcia, shall be available for an initial period of 50 years ie, until 2016 and continuing thereafter for a further period of 20 years unless terminated by either Government at the end of the initial period [redacted]



Dialogue with the Chagossians, Mauritius and others

The Chagossians and their supporters (including the All Party Parliamentary Group on the Chagos Islands) will be disappointed by the decision of the Government not to change the fundamental policy on resettlement, compensation and on the MPA. While any sort of resettlement or further compensation is not possible in this policy, there are other ways in which we could help to soften the blow and we recommend that we look into the following:

(a) Trying to involve the Chagossians in environmental projects taking place in the Territory. In the short term, there are opportunities on Diego Garcia (eg., the Barton Point restoration project (getting rid of invasive coconut trees and planting indigenous hardwood trees). Allen Vincatassin of the Crawley-based Diego Garcia Society has proposed some small craft activities associated with this. It is not clear how feasible these are, but we can be open-minded. As the MPA is established, there should be further opportunities for Chagossians to contribute to the Territory, especially if some acquire some relevant professional skills (eg., in Marine Biology). We would want to keep the framework for this kind of activity to permissive and short-term visits.

(b) Continuing to look into further general community or heritage visits to the Territory including repairing the graveyards on Diego Garcia, Peros Banhos and Salomon. But noting that;

(c) In the past, Chagossian visits have been funded by the Overseas Territories Programme Fund. Following the recent cuts and other budgetary pressures, the FCO no longer has any funding for this. We will need to look into alternative sources. We could raise with DfID who are a prime beneficiary of the Government's policy against resettlement. We could, as suggested above invite a small-scale goodwill contribution from the US. We could also encourage the Chagossians, NGOs and their supporters to contribute. While it is unlikely that the Chagossians themselves would be able to meet such costs, if their supporters or interested NGOs are willing to meet the cost of flights to the Territory (and this is the most expensive bit) then the BIOT Administration could seek to offset the other costs eg., accommodation, travelling to the outer islands etc).

(d) Continuing to be ready to meet the Chagossian communities to explain our policy. Our High Commissions in Victoria and Port Louis regularly meet the Chagossian communities there. Allen Vincatassin of the Crawley-based Diego Garcia Society is in frequent touch with the BIOT Administration. Ministerial contacts would no doubt be welcomed and we recommend that the Minister offers to meet Olivier Bancoult when he is next in the UK.

However, the Minister should be aware that whatever we offer the Chagossians will fall far short of their and their supporters' ultimate aim that the 2004 BIOT Orders in Council are repealed and the Chagossians allowed to return and settle in the Territory with Government help and that they are granted further compensation.

(e) The Mauritians may also be disappointed that the decision is to continue with the MPA. We recommend that we offer to resume the bilateral talks with Mauritius and also suggest talks with other regional players eg., Maldives and the Seychelles.

Next Steps: Implementation of the Marine Protected Area

The most immediate problem is funding. If we are to continue with a full no-take fishing zone then we need to replace the £800,000 - £1 million income which we used to receive from the sale of fishing licences. Otherwise we will not be able to continue to patrol the MPA. As mentioned in my submission of 28 May, OTD have been in discussion with a number of foundations and charities who have offered to meet the funding requirement for the MPA for a five year period. Now that we have the Foreign Secretary's decision, we are pursuing this and will submit to the Minister in due course.

We will establish a management framework for the MPA which will rest with the BIOT Administration with an advisory board. We will keep Ministers informed as this develops.

We will also aim to continue dialogue with the Chagossian communities, Mauritius and other regional players eg., Seychelles and the Maldives on implementation of the Marine Protected Area.

Making the Policy Public

Now that Government policy on BIOT has been agreed, we recommend that the Minister informs Parliament and the Chagossians as a priority by:

(a) Responding to Lord Luce's memo of 29 June; and

(b) Responding to Olivier Bancoult's (leader of the Chagos Refugees Group) letter to the Prime Minister of 21 May asking him to review policy towards the Chagossians. His letter asks us to consider a similar range of issues to those raised by Lord Luce.

At the same time as informing Parliament and the Chagossians, we also need to reply to two letters from the Chagossian legal representatives as follows:

We recommend

(c) [redacted]

(d) [redacted]

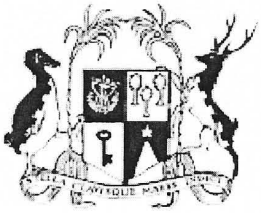
Overseas Territories Directorate
19 July 2010

Annex 163

National Assembly of Mauritius, 27 July 2010, Reply to PQ No. 1B/324

EXTRACT

No. 9 of 2010



REPUBLIC OF MAURITIUS

FIFTH NATIONAL ASSEMBLY

PARLIAMENTARY
DEBATES
(HANSARD)

FIRST SESSION

TUESDAY 27 JULY 2010

In accordance with the provisions of the Public Procurement Act, the unsuccessful bidders were given seven days from the date of the notification to challenge the award. On 16 July 2010, one of the unsuccessful bidders challenged the award. On 21 July 2010, the unsuccessful bidder was informed that the bid of that company did not comply with the bidding requirements, and was therefore considered non-responsive.

I am informed that once the challenge is resolved, the Commissioner of Prisons will issue the letter of award to the successful bidder.

In regard to part (b) of the question, I am informed that, initially, decision was taken to construct three prisons for some 250 detainees each. In that regard, two plots of land situated at Rose Belle were vested in the then parent Ministry in 2001 and 2004 with a view to accommodating the first of these prisons. However, in September 2004, the site at Rose Belle was found to be unsuitable. A new site was subsequently identified at Melrose in 2005 and in 2006, it was decided that only one prison would be constructed to accommodate about 750 detainees. A plot of land of 37 arpents was vested in the Prime Minister's Office in September 2007 to that effect.

I am informed that, in the absence of detailed design and drawings of the new prisons, an estimated project value of Rs400m appeared in the Capital Budget for the construction of those prisons for budgetary purposes from Financial Year 1999-2000 to Financial Year 2008/09. The cost estimate of the New High Security Prison at Melrose was worked out only after completion of the detailed design of the buildings and facilities in February 2009. Accordingly, in the Programme-Based Budget for the period July to December 2009, the estimated project value for the construction of the prison at Melrose stands at Rs1,350m.

I am informed that there has been no increase in the project value for the construction of the new prison at Melrose.

CHAGOS ARCHIPELAGO - MARINE PROTECTED AREA - SETTING UP

(No. 1B/324) Mrs J. Radegonde (Fourth Member for Savanne & Black River) asked the Prime Minister, Minister of Defence, Home Affairs and External Communications whether, in regard to the project by the British Government for the setting up of a marine park at the Chagos Archipelago, he will state where matters stand.

Reply: In reply to PQ B/1247 on 01 December last, I informed the House that the British Government launched on 10 November 2009 a public consultation on the proposal for the creation of a Marine Protected Area around the Chagos Achipelago unilaterally and in total disregard of the discussions at the second round of bilateral talks between Mauritius and the UK on the Chagos Archipelago held on 21 July 2009.

On several occasions, the Government of Mauritius conveyed its opposition to the UK proposal for the establishment of a Marine Protected Area around the Chagos Archipelago. It also requested the British Government to stop the public consultation it had launched on the proposed Marine Protected Area and to withdraw the Consultation Document of the UK Foreign and Commonwealth Office which was unilateral and prejudicial to the interests of Mauritius. The British Government did not halt the public consultation but instead extended its deadline.

On 01 April 2010, the British Government again, unilaterally decided to create a Marine Protected Area around the Chagos Archipelago. The Marine Protected Area would include a "no-take" marine reserve where commercial fishing will be banned, but exclude Diego Garcia from its coverage.

On 02 April 2010, the Government of Mauritius informed the British Government, by way of a note of protest, of its strong objection to the unilateral creation by the UK of a Marine Protected Area around the Chagos Archipelago and of our decision not to recognize the existence of the Marine Protected Area.

On 13 April 2010, the British High Commission responded to the note of protest by way of a Note Verbale. While taking note of the objection of the Government of Mauritius to the creation of a Marine Protected Area around the Chagos Archipelago, the UK emphasized that the establishment of a Marine Protected Area does not change its commitment to cede the territory to Mauritius when it is no longer needed for defence purposes. It also pointed out that this decision is without prejudice to the outcome of the case brought by Mr Bancoult before the European Court of Human Rights. The UK added that it intends to continue working closely with all

interested stakeholders, both in the UK and internationally, towards implementing the Marine Protected Area.

The creation of a Marine Protected Area around the Chagos Archipelago in disregard of the sovereignty of Mauritius over the territory is totally unacceptable to the Government of Mauritius as it impedes the use by Mauritius of the fisheries and other marine resources of the ocean around the Chagos Archipelago in the exercise of its sovereignty rights. It also prevents the eventual resettlement of the Chagossians who were forcibly evicted from the Chagos Archipelago to pave the way for the establishment of a military base in Diego Garcia.

Following the change in Government in the UK on 06 May last, the hon. Prime Minister had a meeting in London with the Rt. Hon. William Hague, UK Foreign Secretary, on 03 June 2010.

The hon. Prime Minister expressed concern over the decision of the former UK Government to establish a Marine Protected Area around the Chagos Archipelago despite the undertaking given by the former British Prime Minister that the project would be put on hold and discussed within the framework of the bilateral talks between Mauritius and the UK. He further pointed out that the decision is tainted with illegality.

The UK Foreign Secretary informed the Hon. Prime Minister that he would revert to him as he was not fully conversant with all issues regarding the Chagos Archipelago.

It was also proposed that a meeting be held between Mr Henry Bellingham, Minister for Africa and Overseas Territories at the UK Foreign and Commonwealth Office, and the Hon. Minister of Foreign Affairs, Regional Integration and International Trade to discuss the way forward on the Chagos issue.

In the course of a debate in the House of Lords on 29 June last, on the establishment of a Marine Protected Area around the Chagos Archipelago, it was revealed that the new British Government may not necessarily hold a different view from the previous Government on this issue.

In the circumstances, the Government of Mauritius is already discussing with our new legal adviser on the Chagos question, Mr Philippe Sands, Q.C., on the way forward.

The hon. Prime Minister on his recent trip to the UK, has had two meetings with Mr Philippe Sands to discuss this issue.

Annex 164

Submission dated 1 September 2010 from Joanne Yeadon, Head of "BIOT"& Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, UK Foreign and Commonwealth Office, the Private Secretary to Henry Bellingham and the Private Secretary to the Foreign Secretary, "British Indian Ocean Territory (BIOT): Marine Protected Area (MPA): Implementation and Financing"

Foreign &
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RESTRICTED Submission

To	(i) Colin Roberts (ii) PS/Mr Bellingham (iii) PS/Foreign Secretary
From	Joanne Yeadon
Date	1 September 2010
Pages	5

BRITISH INDIAN OCEAN TERRITORY (BIOT): MARINE PROTECTED AREA (MPA): IMPLEMENTATION AND FINANCING

Issue

1. How to take forward the Marine Protected Area (MPA) proposal. In particular, whether to go ahead with a full "no-take" approach and, if so, how to make up the loss of licence revenue to the BIOT Administration budget.

Timing

2. Pressing. We need to move ahead on financing issues. Ministers may wish to consider these issues at the meeting to discuss BIOT on 6 September.

Preferred options

3. That Minister's agree to a full "no-take" MPA (only excluding Diego Garcia and its Territorial waters (3 nautical miles)); and agree that the BIOT Administration finalise arrangements for funding the running of the BIOT Patrol Vessel through private funding and through arrangements with the US Government for fuel.

Agreed by

4. Legal Advisers, Press Office, PRT, Africa Directorate, Washington, Port Louis.

Parliamentary and Media

5. A number of Parliamentarians take a keen interest in BIOT. Attention is focussed primarily around the All-Party Parliamentary Group on Chagos which was reformed following the General Election. This is chaired by Jeremy Corbyn, and other active members include Lord Avebury, Lord Luce, Baroness Whitaker and Baroness Kinnock. It continues to be active, lobbying the US, as well as writing letters, seeking meetings with Ministers and tabling PQs here. Lord Howell answered an oral question on 29 June. We can expect interest to continue with calls for debates in both Houses very likely.

6. Media reporting on BIOT is sporadic and generally negative. The MPA proposal stimulated a much broader and more positive interest among the environmental and scientific writers. There will be continuing interest in future decisions on the MPA

including the idea of private funding.

7. Charles Clover of the Sunday Times has shown interest in running a positive story on the MPA and the potential for NGO/private-sector support to the tune of £3.5 million over 5 years. He has held off writing but with Government policy on BIOT now being made known, a positive Sunday Times article could help in the face of other opposition. The potential for collaboration with NGOs and private benefactors could be a good "Big Society" story. If Ministers agree to bring in private funding we will need to prepare a ministerial quote welcoming the contribution.

Risks

[redacted]

8. [redacted]

Political Risks

Mauritius

9. At his meeting with Prime Minister Ramgoolam on 3 June, the Foreign Secretary advised that he would familiarise himself with the issues surrounding the MPA but would not raise Ramgoolam's hopes. He stressed that he could not give Ramgoolam any reason to hope for a change in policy but that he and Mr Bellingham did want to work closely with Ramgoolam and his government. Mr Bellingham repeated these messaged when he met Foreign Minister Boolell at the AU Summit on 22 July 2010. The Acting High Commissioner in Port Louis has also recently informed Foreign Minister Boolell of the Minister for Africa's letters to Lord Luce and Olivier Bancoult. However, the Mauritians are likely still to be disappointed: they had high hopes for the new Government. This issue is likely to continue to cause tension in our otherwise good bilateral relations with Mauritius, and could impact on our wider bilateral objectives, including working with Mauritius on counter piracy in the Indian Ocean.

10. The decision to continue with the MPA of itself is unlikely to push Mauritius to seek an Advisory Opinion at the International Court of Justice. But Boolell warned the Acting High Commissioner in Port Louis on 23 August that they would be prepared to do so if there were no progress on sovereignty. They would also seek compensation for income accrued over the period of time which the "UK had denied them their rights over the

Territory". While we are confident in the strength of our legal case, a decision by Mauritius to challenge our position on sovereignty would be awkward. We will need to develop an active approach to Mauritius, therefore, being clear about our red lines, but being positive about bilateral talks and options for an advisory role in the implementation of the MPA. This might include options, such as offering Mauritius a "privileged partnership" where Mauritius could play an advisory role in the management of the MPA, which does not impact on the sovereignty position. While we are not obliged to offer Mauritius this, it might help to bring them along with us on the issue. We expect the new High Commissioner to have opportunities to take stock of Mauritian thinking in his introductory meetings.

11. There is a slim chance that Mauritius may raise the issue of their historical fishing rights in the Territory. During negotiations over the excision of the Chagos Archipelago between Mauritius and the UK in 1965, the UK gave an undertaking that HMG would use their good offices with the US government to ensure that certain facilities including fishing rights in Chagos would remain available "as far as was practicable". Over the years, these rights have come to mean free fishing licences to Mauritian-flagged vessels upon application. In our exchanges on the MPA to date the Mauritians have never raised the question of fishing rights. This may be because they see it as inconsistent with their sovereignty claim. Mauritius has shown interest only in trying to secure a percentage of the fishing licence money generated by the Territory's fisheries. They do not accept our figures which show that the fishery operates at a substantial loss. Very few Mauritian-flagged vessels have fished in the Territory's Fishing (Conservation and Management) Zone. Only a couple of Mauritian-flagged vessels are run by Chagossians and their "rights" are being taken up in the Judicial Review into the MPA case being brought by Clifford Chance against the Secretary of State.

Other Regional Interests

12. The BIOT MPA will be the most significant marine conservation move in the Indian Ocean. To realise its value to the full we will need to engage with neighbouring states besides Mauritius, in particular Seychelles and the Maldives, to discuss issues such as research, policing, and IUU countermeasures. We also need to keep the EU Commission informed and retain our involvement with the Indian Ocean Tuna Comission. We will aim to present this as a positive and constructive attempt to build regional cooperation.

International Fishing Community (particularly Spain)

13. Following the decision to establish a Marine Protected Area, we informed the EU Commission and the Indian Ocean Tuna Commission of decision and also that the MPA would include a no-take marine reserve. This appears to have fended off any negative comments so far but the Spanish fishing fleet are not happy with the decision and have been lobbying the BIOT Administration to change their minds over a full no-take MPA through their Embassy in London. Pressure is likely to continue.

DEFRA's Interests

14. Defra have been supportive of the proposal to create an MPA in BIOT. It contributes to the international MPA targets for which Defra is responsible within the UK Government. There is however some sensitivity over the relatively light scientific evidence base for the BIOT MPA. Defra is under pressure from the fishing industry over the need for extensive scientific evidence for the establishment of MPAs in the UK waters. We need to be alert to this and make sure the special circumstances of BIOT (for example the very low level of historical exploitation) are well presented in any public statements.

Argument

15. The FCO public consultation into whether to create a Marine Protected Area in BIOT suggested three possible options for a marine reserve:

    (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); or

    (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 consultation document noted the views of the scientific community that there was sufficient scientific information to make a convincing case for designating most of the Territory as a marine protected area (MPA), to include not only protection for fish-stocks but also to strengthen conservation of the reefs and land areas. It noted also that there was growing scientific support for establishing large scale marine reserves to protect fish stocks (which has already led the United States of America to create two Marine National Monuments) and there is growing scientific evidence of the global significance of BIOT as a pelagic/archipelagic eco system.

The response to the FCO public consultation into whether to create a Marine Protected Area in BIOT was high with over a quarter of a million people registering a view (although the vast majority of these were in response to petitions both for and against an MPA). The great majority of respondents – well over 90% - made clear that they supported greater marine protection of some sort in the Chagos Archipelago in principle.

16. The public consultation document also noted that it might be necessary to exclude Diego Garcia and its 3 mile territorial waters from any marine protected area. The use of the US military base on Diego Garcia is governed by a series of Exchanges of Notes between the UK and US which impose Treaty obligations on both parties. Because of our Treaty obligations, we discussed the possible creation of a marine protected area with the US. We have reassured the US that the primary purpose of BIOT will continue to be the defence purposes of the UK and US; and that creation of a Marine Protected Area to will not impact on the operational capability of the base on Diego Garcia. For this reason, we believe we should exclude Diego Garcia and its 3 mile territorial waters from any marine protected area. This would be a total of 470 km sq out of the total

proposed MPA area of 544,000 sq km. The existing environmental protection on Diego Garcia which includes a large Ramsar site and several Strict Nature Reserves and other conservation regulations such as those that affect turtles will not be affected by this exclusion. A practical consequence of this is that for the time being there will be some sport fishing within the 3-mile limit by US service personnel; and defence contractors fish to supplement their diet of imported food. BIOT's environmental adviser assesses this to be of no environmental significance, but it may well be quoted against us.

17. There will also be an exception for the small number of small private yachts that stage through the Outer Islands. In practice we cannot prevent yachties from fishing for subsistence and there is no other food supply. We propose to reduce the maximum yacht permitted stay from 6 to 1 month. With the numbers of permits issued this will continue to have very little environmental impact.

18. If Ministers agree to a "no-take" MPA where all commercial fishing is banned, the BIOT Administration will need to make alternative arrangements for funding the hire and running of the Territory's patrol vessel, the Pacific Marlin. At present, the Patrol Vessel is financed partly through the sale of commercial fishing licences (which used to bring in between £700k and £1 million per annum) and a subsidy from the FCO's Overseas Territories Programme Fund of approximately £1.5 million. It is the money from the fishing licences that must be replaced.

19. We have maintained contact with a range of NGO and private sector organisations as we have developed proposals for the MPA. A key interlocutor has been the US Pew Environment Group. Pew were the driving force behind the US decision to create two large scale MPAs in their waters. They have been working with a group of UK journalists and film makers responsible for the highly influential film "End of the Line", a documentary advocating the creation of "no-take" Areas. The UK group has formed a registered charity "Blue" of which a key objective is to find funds to replace the licence fee in BIOT. Blue have identified and secured a firm offer of funding from the Swiss-based Bertarelli Foundation (£600k/year for 5 years). The Pew Foundation have also proposed lobbying of the US Navy by their associate Senator (retired) Warner to secure a US Navy commitment of fuel for the Pacific Marlin (worth about £350k/year). Warner has been in frequent contact with our Embassy in Washington. He believes he can persuade the US Secretary of the Navy to contribute the fuel. Before taking this further Warner needs confirmation from the UK Government that we would welcome a contribution in this form. We recommend that Ministers agree that officials should try to tie down both these offers and the public lines that will be needed to greet any deal.

20. There are two alternatives to this. First, Ministers can agree to fund from within the FCO vote. On current figures this would require an uplift of about £1m/year to the OT Programme Fund. We cannot meet this cost through reprioritization.

21. Second, Ministers could decide to establish only a partial no-take zone in BIOT (effectively option 2 in the consultation document). We would continue to permit tuna fishing in parts of BIOT at certain times of year. There would probably be little difference in the take and therefore the licence fee, but the fishery protection operation would become more complex. Technically this would still be within the terms of the

Government's announcement of 1 April. However, the creation of a full no-take MPA has largely been assumed by all stakeholders and pursuing this middle path at this stage could expose the Government to criticism from all interested parties without satisfying any except the commercial fishers (ie the Spanish).

Background

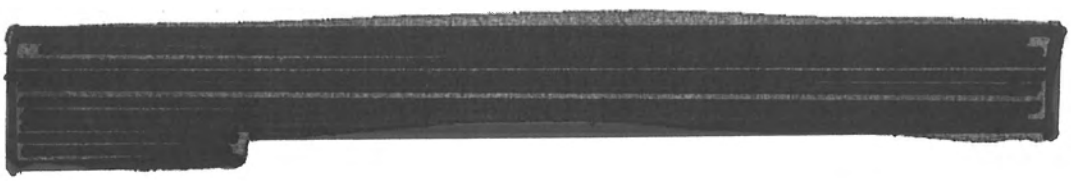
22. Background to the decision to establish an MPA and Mauritian reactions are contained in my submission of 28 May 2010.

23. During the consultation process, the Blue Marine Foundation (BLUE) took note that the establishment of an MPA would cost the BIOT Administration around £1 million per annum from the loss of licence income. In recognition of this, they sought with the Pew Environment Group to put together a funding structure using public-private partnerships to cover the loss of revenue for the first five years in order to facilitate the UK Government's protection of the area in the immediate future. Mr Ernesto Bertarelli of the Bertarelli Foundation has agreed to give the BIOT Administration £3.5 million over the next five years to help finance the hire and running of the Territory's Patrol Vessel. While administration arrangements have not yet been finalised, it is expected that the money will be paid by Bertarelli to Blue (now a UK-registered charity) and then onto the BIOT Administration.

24. Our Embassy in Berne have advised us that the Bertarelli Foundation is registered in Saanen / Gstaad Canton of Bern and was set up by Ernesto Bertarelli, a Swiss national, ex-pharmaceutical industry and former member of the UBS board of directors. The Bertarelli Foundation is a charitable trust that supports a range of good causes, including the environment. Mr Bertarelli has a particular interest in the sea; he financed the Swiss sailing yacht Alinghi which was designed at the technical college EPFL in Lausanne and won the Americas Cup 2007. He also supports training for sailing in Switzerland. There appear to be no negative references that would cause us concern with him supporting the MPA. We have checked that Mr Bertarelli's advisers are aware of the Government's policy towards the Chagossians.

Resource implications

25. If Ministers agree to the financial arrangements suggested above, this will give BIOT about £1m/year over the next five years to help finance the continuing hire and running costs of the Patrol Vessel. This will give officials time to evaluate the MPA and put in place longer term funding arrangements.

26 

Joanne Yeadon
Head of BIOT & Pitcairn Section

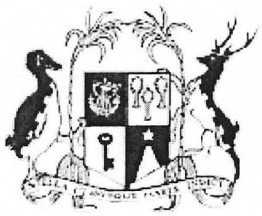
Number of attachments : 1
cc: PS/Lord Howell
PS/PUS
Robert Hannigan
Andrew Allen, OTD
Theo Rycroft, Legal Advisers
Derek Walton, Legal Advisers
Tim Hitchens, Africa Director
John Dennis, Head AD (SCAW)
Hayley Stebbing, Africa Directorate
Matt Thoume, Press Office
Louise Newby, PRT
Nick Leake/Ewan Ormiston, Port Louis
Ian Collard, Washington

Annex 165

National Assembly of Mauritius, 9 November 2010, Reply to PQ No. 1B/540

EXTRACT

No. 13 of 2010



FIFTH NATIONAL ASSEMBLY

PARLIAMENTARY DEBATES (HANSARD)

FIRST SESSION
TUESDAY 09 November 2010

Both the Police and the Independent Broadcasting Authority are enquiring into the matter.

SERGEANT – PROMOTION TO INSPECTOR

(No. 1B/539) Mr A. Ganoo (First Member for Savanne & Black River) asked the Prime Minister, Minister of Defence, Home Affairs and External Communications whether, in regard to the promotion exercise of Police Officers in the grade of Sergeant to that of Inspector, he will, for the benefit of the House, obtain from the Commissioner of Police, information as to if it has now been completed and if not, why not.

Reply: I am informed by the Commissioner of Police that the administrative procedure to enable the implementation of the promotion exercise has not been completed. Promotion from the rank of Sergeant to Inspector will follow shortly.

CHAGOS ARCHIPELAGO – MARINE PROTECTED AREA

(No. 1B/540) Mrs A. Navarre-Marie (First Member for GRNW & Port Louis West) asked the Prime Minister, Minister of Defence, Home Affairs and External Communications whether, in regard to the Marine Protected Area in the Chagos Archipelago, he will state when the Mauritian Government last raised the issue with the Government of the United Kingdom, indicating the outcome thereof.

Reply: Since the launching by the British Government on 10 November 2009 of a public consultation on the proposal for the creation of a marine protected area around the Chagos Archipelago, the Government of Mauritius has conveyed on several occasions its opposition to the project. It had also requested the British Government to stop the public consultation it had launched and to withdraw the Consultation Document of the UK Foreign and Commonwealth Office which was unilateral and prejudicial to the interests of Mauritius. The British Government did not halt the public consultation but instead extended its deadline despite the assurances given to me by the Former British Prime Minister at the last Commonwealth Heads of Government Meeting that the creation of the marine protected area would be put on hold and discussed within the framework of the bilateral talks between Mauritius and UK.

On 01 April 2010, the British Government unilaterally decided to create a marine protected area around the Chagos Archipelago allegedly to protect the marine environment. The marine protected area includes a "no-take" marine reserve where commercial fishing is banned, but excludes Diego Garcia from its coverage.

On 02 April 2010, the Government of Mauritius informed the British Government, by way of a note of protest, of its strong objection to the unilateral creation by the UK of a marine protected area around the Chagos Archipelago and its decision not to recognise the existence of the marine protected area.

On 13 April 2010, the British High Commission responded to the note of protest by way of a Note Verbale. While taking note of the objection of the Government of Mauritius to the creation of a marine protected area around the Chagos Archipelago, the UK emphasized that the establishment of a marine protected area does not change its commitment to cede the territory to Mauritius when it is no longer needed for defence purposes. It also pointed out that this decision is without prejudice to the outcome of the case brought by Mr BANCOULT before the European Court of Human Rights. The UK added that it intends to continue working closely with all interested stakeholders, both in the UK and internationally, towards implementing the marine protected area.

The creation of a marine protected area around the Chagos Archipelago in disregard of the sovereignty of Mauritius over the territory is totally unacceptable to the Government of Mauritius as it prevents the use by Mauritius of the fisheries and other marine resources of the ocean around the Chagos Archipelago in the exercise of its sovereignty rights. It also constitutes a serious impediment to the eventual resettlement of the Mauritians of Chagossian origin who were forcibly evicted from the Chagos Archipelago to pave the way for the establishment of a military base in Diego Garcia.

Following the change in Government in the UK last May, I had a meeting in London with the Rt. hon. William Hague, the UK Foreign Secretary on 03 June 2010. I expressed concern about the decision of the former UK Government to establish a marine protected area around the Chagos Archipelago and added that the decision of the former UK Government is tainted with illegality.

The UK Foreign Secretary informed me that he would revert to me as he was not fully conversant with all issues regarding the Chagos Archipelago.

It was also proposed that a meeting be held between hon. Henry Bellingham, Minister for Africa and Overseas Territories at the UK Foreign and Commonwealth Office, and the Hon. Minister of Foreign Affairs, Regional Integration and International Trade to discuss the way forward on the Chagos Archipelago issue.

The hon. Minister of Foreign Affairs, Regional Integration and International Trade had a meeting with hon. Bellingham on 22 July 2010 in Kampala, Uganda in the margins of the AU Executive Council meeting. During the meeting, Minister Boolell reiterated the sovereignty of Mauritius over the Chagos Archipelago as well as our objection to the unilateral establishment by the UK of a marine protected area around the Chagos Archipelago. In response, Minister Bellingham indicated that the new British Government would have handled the issue of the marine protected area differently.

It is now clear that the new British Government does not hold a different view from the previous Government on the issue of the marine protected area or on the sovereignty of the Chagos Archipelago.

In the circumstances, the Government of Mauritius is now considering other options to counter the unilateral establishment by the UK Government of a marine protected area around the Chagos Archipelago and for Mauritius to exercise its sovereignty over the Chagos Archipelago.

MINORS – SEXUAL ASSAULT – REPORTED CASES

(No. 1B/541) Mrs L. Ribot (Third Member for Stanley and Rose Hill) asked the Prime Minister, Minister of Defence, Home Affairs and External Communications whether, in regard to sexual assault on minors, he will, for the benefit of the House, obtain from the Commissioner of Police, information as to the -

(a) number of reported cases thereof, since July 2006 to-date, and

(b) actions taken to address same and the additional ones, if any, that are being envisaged.

Annex 166

Witness Statement of Sylvestre Sakir, 17 August 2011

Claim No. CO/85882010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

THE QUEEN ON THE APPLICATION OF
LOUIS OLIVIER BANCOULT

Claimant

- v -

SECRETARY OF STATE FOR
FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

WITNESS STATEMENT OF

SYLVESTRE SAKIR

I, SYLVESTRE SAKIR, of 5 Rue Tamarin, Roche Bois, Port Louis, Mauritius say as follows:-

1. I was born on 8 April 1958 in Peros Banhos in the Chagos Islands. I left my home in 1968 accompanying my family on a temporary visit to Mauritius. However we were prevented from returning to our home because there were no ships to take us back. Accordingly I have since that date lived in exile in Mauritius. I hope one day to return to the Chagos Islands.

2. For most of my adult life I have been a professional fisherman, working on licensed fishing boats operating in the rich fishing waters of the Chagos Archipelago. This has permitted me to retain my connection by birth with those Islands, and pursue my skill

as a fisherman, using the extensive knowledge of the waters of this complex marine environment to assist in the maximisation of our catch. In turn I have been able to earn a good living, considerably better than alternative jobs which I have been obliged to take in Mauritius when fishing is not possible.

3. The fishing vessels are owned and operated by the Talbot Fishing Company Limited of Mauritius who have for many years obtained licenses to fish the waters of Chagos. Because of the remoteness of the Chagos Archipelago, we were obliged to spend two months at a time at sea. The mother vessel would normally carry 54 fishermen, and these would normally be approximately 20 Chagossians fishermen who are native to the Archipelago, because of their profound knowledge of the waters there. The waters of the Archipelago are the subject of huge variations of depth, since the Archipelago consists of a range of extinct volcanoes. For this reason only experienced ships' captains venture to cross the great Chagos bank for example 'La Place Marine, Fouquet, Salomon etc where the best fishing is to be had, and they in turn rely on those with detailed knowledge of Chagos waters to locate and catch the fish.

4. Our practice was to set out in individual dory boats launched from the mother ship, and our method, specified in the fishing license issued by the Authorities of BIOT, was to catch fish exclusively by baited hooks on line. The individual fishermen were paid according to the catch which each person made. In a typical two month winter fishing trip I was able to catch approximately 3 tonnes of fish, for which I would be paid approximately Rs 30,000.00 - Rs 40,000 rupees depending on the season. I used to go fishing every winter near the Chagos Archipelagos as I not unable to fish elsewhere during that period.

5. There are many fishermen of Chagossian origin who are employed on licensed fishing boats from Mauritius. I know of 40 -50 Chagossians who have done so for the past decade. Although we are not allowed to set foot on the Islands, we are nonetheless at home in the waters of the Archipelago, and feel that we are entitled to the benefits of this rich fishing ground since it is, after all, the place of our birth and our ancestral home. Our traditional fishing rights have been continuously exercised by this means since our exile 40 years ago, and we regard it as an extremely valuable link.

6. Unfortunately, all fishing licences have been refused by the BIOT authorities since October 2010. We feel this to be a cruel blow and a serious disadvantage. Our standard of living has dropped considerably, and I can only earn a little over half the money that I made working as a fisherman in Chagos. I have a wife to feed, and fishing was my means of livelihood, and the only one for which I have skills.

7. I do not understand why, in protecting the marine environment of the Chagos Islands it is necessary to impose a total ban on fishing. I believe that the absence of licensed fishing vessels will only increase the amount of illegal fishing activity, since we will not be able to report illegal fishing vessels who enter this large stretch of ocean.

8. I have been informed by the Claimant that our fishing rights were strongly advocated in the process of consultation before the declaration of a marine protected area, and I am disappointed that our fishing rights have been totally ignored.

Statement of truth

9. I believe that the facts contained in this statement are true.

Signed: .....

Sylvestre Sakir

Dated: 17TH day of AUGUST 2011

SPEAK

HUMAN RIGHTS & ENVIRONMENTAL INITIATIVE

STATEMENT OF TRUTH

I, Pooja Bissoonauthsing, Legal Analyst of 128 A, Sir Celicourt Antelm Avenue, Quatre Bornes, Mauritius state as follows:

1. I am the person who attended to Sylvestre Sakir when he came to SPEAK Human Rights and Environmental Initiative office in Mauritius on 17th of August 2011. I am fluent in speaking and reading both the English language and Mauritian Creole which is understood by Chagossians such as Sylvestre Sakir.

2. He identified himself by producing his National Identity Card Number: S080458800012E, a photocopy of which I produce.

3. I duly read to him the contents of his Witness Statement, and translated its contents to him in the Creole language with which he is familiar. He appeared to understand all that was translated to him.

4. He then placed his thumbprint to the pages of his witness statement in my presence.

I believe that the facts contained in this Statement are true.

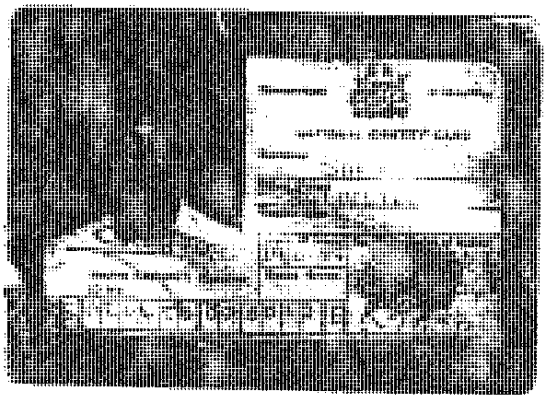
Pooja Bissoonauthsing

Dated: 17th of August 2011

Mauritius
4th floor, Astor Court,
Edith Geoffroy St, Port Louis
Tel: (+230) 213 4098

United States
1301 20th Street, NW, Suite 100B,
Washington DC, 20036
Tel: (+1)(+202) 277 4552

enquiries@speakhumanrights.org
www.speakhumanrights.org



P.B

Annex 167

Witness Statement of Louis Joseph Volly, 19 September 2011

Claimant; Louis Joseph Volly; September 2011

Claim No. CO/85882010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

THE QUEEN ON THE APPLICATION OF
LOUIS OLIVIER BANCOULT

Claimant

- v -

SECRETARY OF STATE FOR
FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

WITNESS STATEMENT OF

LOUIS JOSEPH VOLLY

I, JOSEPH LOUIS VOLLY of 4 Stella Lane, Debarcadaire, Pointe aux Sables, Mauritius, holder of Identity Card No L0708658000093 SAY as follows:

1. I was born on 7th August 1965 in Peros Banhos, an atoll group in the Chagos Islands which is now the British Indian Ocean Territory. I was forced to leave the Chagos islands in 1973 when my whole family was deported to Mauritius.

2. Since there were no jobs or homes for us on arrival in Mauritius, we suffered poverty and hardship for several years. This contrasted with the excellent living and working conditions which we experienced in Chagos. As a child of eight years old at the time of our deportation, I used to spend half-days at work in the open helping my mother to

shell coconuts. My father was an experienced fisherman. He taught me a lot about the waters of the Chagos Archipelago, which have the cleanest marine environment, and an abundance of fish.

3. From the age of 16, and after some schooling (which included training at a special school for fishermen in Port Louis) in Mauritius, I too became a fisherman. Together with my father I took part in fishing trips on boats which were licensed to travel from Mauritius to the Chagos Islands. My father continued to instruct me in the best waters where fish were to be found, and I came to develop the skills which my father possessed and which his father before him had also possessed.

4. My life as a fisherman in the Chagos Archipelago was rewarding, on account of the volume of fish which I could catch (for which I was better paid) and on account of the satisfaction of fishing in waters which generations of Chagossians have enjoyed as part of our traditional privilege and source of food. We have always fished using small boats and lines dropped over board with several baited hooks. This is the same method we use today. When we fish the banks of Chagos, small Dory boats are dropped from the mother vessels, with individual fishermen on board, and each person is responsible for and is paid according to his catch. When we fish the deeper slopes, longer lines with hydraulic reels are used. There is no fishing by nets or by trawling so the skills which we have learnt from our fathers are the same as those used following our exile.

5. Between 1981 and December 2009, I would whenever possible make an annual winter fishing trip which lasted approximately two months, fishing in the Great Chagos Bank. These waters are treacherous to visiting ships and only experienced ships' captains will cross this stretch of water, and only Chagossian fishermen really understand where the fish are to be found. Since fishing is done by line and not by nets, success depends on a precise knowledge of where the right species are to be found.

6. The last time I went to Chagos was in 2009. I was there from the 15th of October 2009 to the 23rd of November 2009. I returned there from the 3rd of December to the 28th of December. I went on the M.V. Etelis. In the Great Chagos Bank I would catch around 8 -10 tonnes of fish per trip.

7. For this heavy catch I would be paid approximately 61,000 Rupees (just over £1,500), so that on such winter trips I could earn enough to make up my earnings and to support my family which includes my wife, my father and my three sisters with whom I live in an extended family. Soon after these last trips to Chagos, I was informed that the Etelis and other vessesls had been refused the renewal of their licences, and all fishing in Chagos had been banned. I believed this to be both unnecessary and unreasonable, since there is no danger to fish stocks from our limited fishing methods. I was worried that my fishing activities would now be restricted to less fruitful waters. Now, since the ban, I experience financial difficulties, because I can no longer fish in the Chagos Archipelago, and my earnings have been much reduced.

8. Since licences were refused to the MV Etelis,[1] and to all other vessels, in the Autumn of 2010, I have been forced to try my luck in other waters for which I have no special skill. This has proved disastrous to me and the other fishermen in like case as me. The only alternative waters available to me are the Saya and Nazareth Banks (between St. Brandon and Seychelles), where the proceeds from the catch are less than what I could make in Chagos. Also, there are no winter fishing trips to Saya and Nazareth as the sea is too rough and venturing in these waters would be too dangerous So my income is reduced below the level at which I can manage. When I cannot fish I take work as a painter for which I earn Rs 300 per day (GBP 7) at the Mauritius Port Authority. This is approximately one-fifth of the earnings I can make as a fisherman and is not enough for me to sustain my family.

9. I understand that in a Consultation document published by the Defendant prior to the designation of the Chagos waters as a Marine Protected Area, it is stated that there would be no effect on the Chagossian Community of such a designation: I understand that page 13 of the Consultation document states as follows:

".....the creation of a marine protected area would have no direct immediate impact on the Chagossian community".

I know of at least twenty Chagossian Fishermen who were able to sustain themselves and their families by making fishing trips to the Chagos islands before this ban took

[1] See Amended Statement of facts and grounds, paragraph 52 and page 22 of Defendants' bundle, where the refusal to relicense the M.V.Etelis and other vessels is communicated to the vessels' owners' representatives.

effect, and who since then have experienced financial difficulties. I therefore believe that this statement, insofar as it refers both to a Marine Protected Area, and a total ban on fishing, to be untrue and to amount to a serious misrepresentation of the true position of our Community. Fishing in Chagos is an important part of our culture, and has been, over the years of our exile, the only way that any of our members have been able to sustain a real link to our homeland.

STATEMENT OF TRUTH

10. I believe that the facts contained in the witness statement are true.

Signed: _____
LOUIS JOSEPH

Dated: 19TH OF SEPTEMBER 2011

MPA

Municipality Parks Authority

000149

ZONE: Pelagic/Reefs

Surname: Louis

Name: Josephdally

Valid From: 01-09-11

To: 30-09-11

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Annex 168

Buga, I., “Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals” (2012) 27 The International Journal of Marine and Coastal Law 59

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The International Journal of Marine and Coastal Law 27 (2012) 59–95

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Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals

Irina Buga*
Faculty of Law, University of Oxford, United Kingdom

Received: 31 August 2011; accepted: 27 October 2011

Abstract
It is unclear whether Law of the Sea tribunals under the Law of the Sea Convention (LOSC, or the Convention) have jurisdiction to determine maritime boundary disputes involving concurrent land sovereignty issues. The text of the Convention and case law are silent in this respect. The only reference is in LOSC Article 298(1)(a)(i), which allows States to make declarations exempting maritime delimitations from compulsory dispute settlement, excluding concurrent territorial questions even from conciliation. However, it leaves unclear whether concurrent land sovereignty issues are also excluded in the *absence* of such declarations. There are indications that LOS tribunals may be able to decide ancillary land issues so long as these do not constitute the 'very subject-matter' of the dispute, or rely on an alternative jurisdictional basis. The question of competence over mixed disputes may be less extensive in effect than is often believed. States should not avoid *initiating* proceedings based on the view that LOS tribunals might not ultimately exercise jurisdiction.

Keywords
United Nations Convention on the Law of the Sea; jurisdiction of Law of the Sea tribunals under the LOSC; maritime boundary delimitation; mixed disputes; disputed areas in Southeast Asia; territorial sovereignty over islands; LOSC Article 298(1)(a); LOSC Article 300

> *La mer a toujours été battue par deux grands vents contraires: le vent du large, qui souffle vers la terre, est celui de la liberté; le vent de la terre vers le large est porteur des souverainetés. Le droit de la mer s'est toujours trouvé au cœur de leurs affrontements.*[1]

* L.L.M. (Utrecht), M.Jur. (Oxon.).

[1] R.-J. Dupuy, 'La mer sous compétence nationale' in R.-J. Dupuy and D. Vignes (eds), *Traité du Nouveau Droit de la Mer* (Económica, Paris 1985) 220, cited in B.H. Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law [AJIL]* 830.

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DOI: 10.1163/157180812X615113

Introduction

The United Nations Law of the Sea Convention (LOSC or the Convention) provides States with a comprehensive system for dispute settlement,[2] including the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) and the Annex VII arbitral tribunals—both hereinafter referred to as 'Law of the Sea' or 'LOS' tribunals. These tribunals have competence over a wide range of maritime disputes, including maritime boundary delimitations. Often, however, maritime disputes may involve concurrent questions of territorial sovereignty (such as disputed land termini or islands). It is as of yet unclear whether LOS tribunals have the jurisdiction to resolve territorial issues[3] in the process of effectuating maritime delimitations.

The lack of clarity may undermine the effectiveness of dispute settlement under the Convention, and impede the resolution of tension-ridden maritime conflicts, a surprising number of which still remain unresolved around the globe.[4] Conversely, it has been argued that if LOS tribunals *were* to assert competence over ancillary land sovereignty issues, they might preside over disputes that States themselves may not want resolved, thus exceeding their consensual basis of jurisdiction under the LOSC.

Although the Convention is silent in this respect, one of the 'optional exceptions' to compulsory procedures in Part XV of the LOSC, contained in Article 298(1)(a)(i), may be crucial to the discussion. This provision allows States to make advance declarations[5] excluding sea boundary disputes from the scope of compulsory binding procedures under the LOSC, and also provides 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 furthermore be barred from submission to conciliation under LOSC Annex V, section 2.

An investigation of the LOSC *travaux préparatoires* will attempt to discern the drafters' intention regarding maritime delimitations involving questions over disputed territory ('mixed disputes'). The previous literature does not seem to have dealt with the topic sufficiently, and the relevant case law of LOS

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[2] See discussion *infra* on the 'comprehensiveness' of LOSC dispute settlement procedures.

[3] The term 'territorial' in this context is used to refer solely to *land* territory (continental or insular).

[4] According to one estimate, 259 of the planet's 427 maritime boundaries remain undelimited—J.M. Van Dyke, 'Disputes over Islands and Maritime Boundaries in East Asia' in S.-Y. Hong and J.M. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff, Leiden 2009) 40.

[5] Declarations can be made at any time, but have no retroactive effect if proceedings have already commenced (Art. 298(3)).

tribunals is scarce. Thus, a further step will be to relate this jurisdictional dilemma to how other international judicial bodies, notably the International Court of Justice (ICJ or the Court), have handled (or managed to evade) jurisdictional issues analogous to those faced by LOS tribunals.

The analysis will focus only on cases in which the parties have *not* made an Article 298 declaration excluding maritime disputes from compulsory procedures.[6] Cases submitted by means of a special agreement, allowing the parties to bypass any existing Article 298 declarations,[7] are likewise excluded from the present study.[8] It is only with regard to the 'middle category' of mixed disputes *not* submitted by special agreement (or in which the special agreement only asks the tribunal to effectuate the maritime delimitation, without expressly asking it to resolve the concurrent territorial issues involved), *nor* covered by an Article 298 declaration, that the competence of the tribunals to tackle ancillary issues of title to land territory comes into question.

One pertinent enquiry is whether, based on international judicial practice, Law of the Sea tribunals could declare themselves competent to adjudicate mixed disputes, *notwithstanding* the lack of express basis under the LOSC, by employing the argument of 'implied powers'. Another central question is the extent to which, for theoretical and practical purposes, 'pure' maritime disputes can be distinguished and resolved separately from territorial sovereignty disputes. The overarching question is whether, and under what circumstances, LOS tribunals would—or *should*—have the jurisdiction to decide 'mixed' maritime disputes.

The Disputed Competence of Law of the Sea Tribunals to Decide Mixed Disputes: The Debate

For States, the question of whether LOS tribunals can decide both maritime boundaries and concurrent territorial issues is deep-seated and potentially divisive. Maritime boundary delimitations carry substantial distributional effects by allocating valuable resources to one State over another.[9] Thus, "the

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[6] The effect of an Art. 298(1)(a) declaration is to automatically exclude maritime boundary disputes from Part XV compulsory procedures.

[7] Art. 299(1) LOSC lays down the effect of a declaration. It states that parties may agree to submit even an *exempted* dispute to binding procedures under Part XV. See likewise Art. 298(2).

[8] The possibility of seeking an advisory opinion is also beyond the scope of this article.

[9] This is reflected also in the special protection accorded to boundary treaties under international law.—C. Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in Hong and Van Dyke (n 4) 22.

study of boundaries is dangerous for the scholar because it is charged with political passions and entirely trammelled by hindsight."[10] Disputes over *land* in particular often touch upon historically or culturally rooted sensitivities of great national significance (geopolitics), and even a small loss of claimed territory can be seen as a threat to State sovereignty[11] and security,[12] providing "fertile ground for nationalistic rhetoric and flag-waving."[13] Moreover, as a result of the development of the concept of the exclusive economic zone (EEZ) in recent decades, the value of coastal and insular ownership has risen dramatically.[14] Claims over territories capable of generating maritime zones often arise because States are eager to influence boundary delimitations and extend their control over maritime resources,[15] rather than due to the intrinsic value of the land itself.[16]

Mixed disputes are more likely to give rise to conflict than 'pure' maritime delimitations,[17] and are frequently a symptom of traditionally rooted antagonism between the disputing States. Addressing them can prevent exacerbation of political and economic tensions. These conflicts often affect not only the States directly concerned, but also the international community as a whole.

From the perspective of LOS tribunals, this problem could have an impact on the number of cases on their docket.[18] The perception among States that the tribunals cannot handle associated questions of delimitation of land and islands could be *one* potential reason why the ITLOS experiences a relatively

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[10] André Siegfried cited in J.R.V. Prescott, 'On the Resolution of Marine Boundary Conflicts' in J.P. Craven, J. Schneider and C. Stimson (eds), *The International Implications of Extended Maritime Jurisdiction in the Pacific* (1987) 21 *Proceedings of the Law of the Sea Institute Conference [L Sea Inst Proc]* 33.

[11] R.-J. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea*, vol. I (Martinus Nijhoff, Dordrecht 1991) 292.

[12] J. Guoxing, 'Sino-Japanese Jurisdictional Delimitation in East China Sea: Approaches to Dispute Settlement' in Hong and Van Dyke (n 4) 77.

[13] *Ibid.*, 23.

[14] R.W. Smith, 'The Effect of Extended Maritime Jurisdictions' in A.W. Koers and B.H. Oxman (eds.), *The 1982 Convention on the Law of the Sea* (1984) 17 *L Sea Inst Proc* 336, 351. See also Oxman (n 1) 842.

[15] P. Weil, 'Des Espaces Maritimes aux Territoires Maritimes: vers une Conception Territorialiste de la Délimitation Maritime' in D. Bardonnet and others, *Le Droit International au service de la Paix, de la Justice et du Développement: Mélanges Michel Virally* (Pedone, Paris 1991).

[16] Smith (n 14) 337; Prescott (n 10) 15.

[17] S.A. Kocs, 'Territorial Disputes and Interstate War, 1945–1987' (1995) 57 *The Journal of Politics* 159.

[18] See generally D.R. Rothwell, 'Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions' (2004) 35 *Ocean Development and International Law [ODIL]* 131.

low level of activity[19] (admittedly, its activity is concerned with a much wider range of disputes than solely maritime boundary delimitations). Conversely, the decision to allow for such competence could have a *negative* impact on the tribunals' effectiveness[20] if it enables them to rule upon disputes that States themselves do not want resolved—especially if the respondent State is correct in its jurisdictional claims. Due to the fundamental underlying requirement of consent, the question of competence to adjudicate mixed disputes must be approached with a certain degree of caution.

The Jurisdiction of Law of the Sea Tribunals under the LOSC

As the point of departure, LOSC Article 279 establishes the obligation for States to settle all disputes under the Convention by peaceful means. Article 287 provides the choice between a number of dispute resolution fora, including, notably, the ITLOS and arbitral tribunals under Annex VII. Pursuant to Article 288(1), these shall have "jurisdiction over any dispute concerning the interpretation or application of this Convention," including a general competence to decide disputes relating to maritime boundaries (the ITLOS even formed a standing Chamber for Maritime Delimitation Disputes in 2007). There is no explicit provision on whether the tribunals can deal with ancillary territorial sovereignty issues. However, in view of the fact that the law of the sea is an integral part of international law,[21] a LOS tribunal *could* address issues of customary international law and "other questions outside the four corners of the Convention and other agreements"[22] necessary to reach a decision on the matter before it, including, conceivably, questions of territorial sovereignty.[23]

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[19] E.A. Posner and J.C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1, 71–72.

[20] See E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge University Press [CUP], Cambridge 1991) 21–22; S. Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 *International & Comparative Law Quarterly [ICLQ]* 863, 864; A.E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: problems of fragmentation and jurisdiction' (1997) 46 *ICLQ* 37, 54. cf. J.I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 *AJIL* 69.

[21] A. Yankov, 'The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea' in P.C. Rao and R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law, The Hague 2001) 45.

[22] G. Eiriksson, *The International Tribunal for the Law of the Sea* (Martinus Nijhoff, The Hague 2000) 113.

[23] *Ibid.* See also Yankov (n 21).

Article 288(2) extends this jurisdiction to any dispute submitted by means of an international agreement, as long as it relates to "the purposes of the Convention,"[24] granting wide jurisdiction over all disputes related to the law of the sea.[25]

The subject-matter jurisdiction of the ITLOS is further addressed in Articles 21 and 22 of its Statute. Article 22 enables parties to any treaty "concerning the subject-matter" of the LOSC—notably, the word *'relating'* was deliberately changed to *'concerning'* during the Statute's drafting—to determine for themselves the scope of jurisdiction they are willing to grant[26] (this 'optional jurisdiction' is separate from Article 287 compulsory jurisdiction).

More importantly, the open-ended wording of Article 21 seems to confer a much broader competence, giving the ITLOS jurisdiction over "all matters specifically provided for in any other agreement," rather than related to the 'purposes' of the Convention.[27] Also, Article 21 appears not to be confined to 'international' agreements. This has prompted some scholars[28] to argue that the ITLOS can deal with any dispute submitted to it, irrespective of whether it concerns the law of the sea. This view has been contested by reference to the *travaux préparatoires* and relevant provisions of the LOSC.[29] One could argue that Article 21 is subordinate to Part XV of the Convention and, consequently, to Article 288, pursuant to Statute Article 1(4) (disputes referred to ITLOS "shall be governed by the provisions of Parts XI and XV"),[30] such that a dispute must at least *partly* relate to the law of the sea.

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[24] The provision leaves open how the agreement in question is to provide for such submission.—T. Treves, 'A System for Law of the Sea Dispute Settlement' in D. Freestone, R. Barnes and D. Ong, *The Law of the Sea: Progress and Prospects* (Oxford University Press [OUP], Oxford 2006) 417, 418; Eiriksson (n 22) 114.

[25] L.D.M. Nelson, 'The International Tribunal for the Law of the Sea: Some Issues' in Rao and Khan (n 21) 53.

[26] M.H. Nordquist, S Rosenne and LB Sohn (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol. V (Martinus Nijhoff, Dordrecht 1989) (hereinafter Virginia Commentary) 381.

[27] P.C. Rao, 'Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures' in TM Ndiaye and R Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff, Leiden 2007) 896.

[28] See, e.g., Boyle (n 20) 49.

[29] See, e.g., Nelson (n 25) ("the clear intention of the drafters . . . was to establish a Tribunal to deal only with law of the sea disputes . . . It is also of some significance that the members of the Tribunal are . . . 'persons . . . of *recognised competence in the field of the law of the sea*' "); Virginia Commentary 375. cf Treves (n 24) 77.

[30] See further Eiriksson (n 22) 113–14.

The Tribunals' Perceived Lack of Competence

States seem to consider that LOS tribunals, and the ITLOS in particular, cannot handle mixed disputes.[31] This perceived lack of competence—and its possible use as a pretext to avoid judicial proceedings—could lead to the submission of more maritime delimitation cases to the ICJ than to the ITLOS.[32] Treves[33] even argues that a respondent before the ITLOS could insist on utilising the ICJ *in lieu* of the ITLOS if all parties to the dispute have made 'optional clause' declarations to that effect. Given the ICJ's heavy caseload, this could be used as a delay-tactic, and, in extreme cases, be regarded as abusive.[34] Furthermore, it has been argued that a LOS tribunal's decision may be contested before the ICJ if it acted "in manifest breach of the competence conferred on it,"[35] although in practice the Court is reluctant to interfere.[36]

Former ITLOS President Rüdiger Wolfrum addressed the issue in a controversial speech in 2006.[37] He argued that territorial issues in maritime disputes fall *fully* within the jurisdiction of LOS tribunals, an interpretation likely influenced by the Guyana-Suriname arbitration ongoing at the time.[38] This accords with the principle of effectiveness, allowing the tribunals to fulfil their

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[31] See, e.g., Slovenia's rejection of Croatia's proposal to submit their mixed dispute to the ITLOS—D. Arnaut, 'Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation between Croatia and Slovenia' in D. Caron and H.N. Scheiber, *Bringing New Law to Ocean Waters* (Martinus Nijhoff, Leiden 2004) 439.

[32] B. Vukas, 'Main Features of Courts and Tribunals Dealing with Law of the Sea Cases' in M.H. Nordquist and J.M. Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Kluwer Law International, The Hague 2001) 219; Posner and Yoo (n 19); J. Seymour, 'The International Tribunal for the Law of the Sea: A Great Mistake?' (2006) 13 *Indiana Journal of Global Legal Studies* 1, 13 fn 73. There is also the doctrine of *forum non conveniens*, albeit difficult to import into international law—A.V. Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191, 201.

[33] T. Treves, 'The Jurisdiction of the International Tribunal for the Law of the Sea' (1997) 37 *Indian Journal of International Law* 396 and 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 *New York University Journal of Law & Politics* 809.

[34] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, Oxford 2003) 206–07.

[35] *Arbitral Award of 31 July 1989*, *Judgment, ICJ Reports 1991* 53, 69.

[36] Shany (n 34) 30–31.

[37] R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006 <http://www.itlos.org/news/statements/news_president.wolfrum.shtml>.

[38] A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and Commentary* (Martinus Nijhoff, Dordrecht 1987) 279, 284.

judicial function.[39] Emphasising the close *interrelation* between land and sea, he asserted that "[m]aritime boundaries cannot be determined in isolation without reference to territory."[40]

Furthermore, President Wolfrum emphasised that a reading of Article 298(1)(a)(i) *a contrario sensu* (in the absence of a declaration) indicates that mixed disputes *do* fall within the tribunals' compulsory jurisdiction. Certain other scholars also maintain this view.[41] Most strikingly, he seemingly implied that LOS tribunals have jurisdiction *notwithstanding* States' declarations exempting territorial issues.[42]

Some scholars assert that it lies outside the purview of the Convention to extend Article 287 jurisdiction *beyond* 'pure' maritime delimitations to disputes involving concurrent questions of land sovereignty.[43] Professor Oxman[44] argues that the fact that Article 298(1)(a)(i) does not *expressly* extend the exemption of land sovereignty issues to disputes *not* involving declarations 'is a mere drafting point.' Noting the provision's use of the words '*shall* be excluded', Irwin[45] argues that the proviso in Article 298(1)(a)(i) merely clarifies the otherwise generally applicable territorial exclusion, reinforced by the

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[39] Wolfrum (n 37).

[40] *Ibid.*

[41] T. Treves, 'What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?' in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (Martinus Nijhoff, Leiden 2006) 77; P. Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2005' (2006) 5 *Chinese Journal of International Law* 381, 389. cf. R.R. Churchill, 'Dispute Settlement Under the UN Convention on the Law of the Sea: Survey for 2007' (2008) *23 International Journal of Marine and Coastal Law [IJMCL]* 601, 616; Z. Keyuan, 'International Tribunal for the Law of the Sea: Procedures, Practices, and Asian States' (2001) 41 *ODIL* 131, 140.

[42] This part of Wolfrum's interpretation is hard to justify, although he may have meant only that *formally* the tribunals have power *proprio motu* to decide their own jurisdiction (LOSC Art. 288(4)). In practice, tribunals would never override a declaration and uphold jurisdiction in disregard of the parties' will—T.A. Mensah, 'The Place of the International Tribunal for the Law of the Sea in the International System for the Settlement of Disputes' in Rao and Khan (n 21) 26. This speech may have prompted a number of States to submit declarations under Art. 298—for the list of declarations, see <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

[43] Adede (n 38) 284–85; P.C. Irwin, 'Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations' (1980) 8 *ODIL* 105, 114–15, 138–39; R.W. Smith and B.L. Thomas, 'Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes' in M.H. Nordquist and J.M. Moore, *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation* (Martinus Nijhoff, The Hague 1998) 53.

[44] B.H. Oxman, 'The Third United Nations Conference on the Law of the Sea: The Ninth Session' (1981) 75 *AJIL* 211, 233 fn 109.

[45] Irwin (n 43) 138–39.

fact that relevant LOSC provisions, such as Article 121 on islands, never address matters of land territory *per se*.[46]

Admittedly, the Convention's silence on territorial issues does not make it easy to find ground (if any) for such jurisdiction. Nevertheless, two parties can always *agree* to submit to a tribunal territorial sovereignty questions together with maritime issues.[47] The 1983 Qatar-Bahrain agreement on submission to the ICJ stated:

> All issues of dispute… relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together.[48]

If compulsory procedures do not apply to mixed disputes, it may "denude the provisions of the Convention relating to sea boundary delimitations of their full effect."[49] The interpretative mechanism of the LOSC is not intended to tackle land territory disputes *as such*. However, it is unclear why it would not cover mixed disputes involving concurrent land territory issues, in view of the fact that the exclusionary clause in Article 298(1)(a)(i) was incorporated only with respect to *conciliation* and not also to *compulsory procedures*.[50] Moreover, since exceptions under the LOSC were intended to be kept to a minimum, Article 298 should be interpreted *restrictively*, and "may even be construed as permitting exceptions even narrower than those stated expressly therein"[51] (which implies that States could choose to exclude *specific*—rather than all—mixed disputes from compulsory procedures). This logic suggests that, where no exclusionary declaration is applicable, LOS tribunals could deal with mixed disputes.[52]

Treves adds that even if an '*a contrario*' analysis of Article 298(1)(a) applies, not *all* mixed disputes will fall within the Tribunal's competence in the absence of a declaration; this will depend rather on the circumstances of each case:

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[46] *Ibid.*, 114.

[47] LOSC Arts 299, 298(2).

[48] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994* 112, 116. See B. Kwiatkowska, 'The *Qatar* v. *Bahrain* Maritime Delimitation and Territorial Questions Case' (2002) 33 *ODIL* 227, 232.

[49] Rao (n 27) 891.

[50] *Ibid.*

[51] *Ibid.*, 881; Virginia Commentary 115.

[52] Rao (n 27) 892 (arguing that LOS tribunals could handle even land issues *per se* if the parties so agree).

> Whether such jurisdiction [exists] … may well depend on the way the case is presented by the plaintiff party, on which aspects are the prevailing ones, and on whether certain aspects can be separated from the others, on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention.[53]

In other words, it will depend on the respective tribunal's *characterisation* of the dispute (as predominantly related to either land or sea issues) and assessment of the *extent* to which sovereignty questions are linked to other substantive issues in the case.[54]

The Differing Methods and Prescriptions Involved in Deciding Maritime *versus* Territorial Issues

It is prudent to say that 'pure' territorial disputes do not fall within the jurisdiction of LOS tribunals. This seems logical from a practical as well as a legal perspective. Territorial delimitations and determinations of sovereignty are effected differently from maritime ones, and are of a fundamentally different nature:[55]

> Territorial disputes are questions left over by history, and maritime jurisdictional disputes have arisen because of the expansion of jurisdictional sea areas, along with the development of the modern law of the sea.[56]

For instance, the role of effective control and the exercise of sovereign acts are crucial to establishing title over land, but are *less* pertinent in maritime delimitations (which is why, for instance, Vietnam's attempt to claim 'historic title' over the sea boundary line in its South China Sea dispute with China is not valid under the LOSC or customary law, except with regard to bays).[57]

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[53] Treves (n 41).

[54] See Section 7 below on characterisation of disputes.

[55] P. Weil, *Perspectives du droit de la delimitation maritime* (Pedone, Paris 1988) 99–102; Prescott (n 10).

[56] Guoxing (n 12) 77.

[57] R.W. Smith, 'A Geographical Primer to Maritime Boundary-Making' in E.L. Miles and S. Allen (eds.), *The Law of the Sea and Ocean Development Issues in the Pacific Basin* (1981) 15 *L Sea Inst Proc* 526, 530; A.O. Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester University Press (MUP), Manchester 1967) 6.

Despite these differences in approach, land sovereignty and maritime issues are clearly related. The ICJ in the *Aegean Sea Continental Shelf* case[58] found that:

> Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and performance… [Since] continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State,… a dispute regarding those rights would, therefore, appear to be one which may be said to 'relate' to the territorial status of the coastal State.

Thus, land sovereignty and maritime delimitation are interrelated in that they both trigger the larger question of sovereignty, yet are of a very different nature: while the former involves modes of acquiring title, the latter raises issues of boundary-making that "generate the applicability of an altogether different set of prescriptions of international law."[59] A tribunal with the expertise and jurisdiction to handle primarily maritime questions may be exceeding the limits of its constitutive instrument in trying to settle ancillary questions of land sovereignty.

Assessing the Implications of Article 298(1)(a)(i)

Perspectives on the Travaux Préparatoires

Relatively few States have submitted declarations under Article 298(1)(a),[60] which is surprising, given that the provision was essential to securing the compulsory procedures under the LOSC.[61] Its arduous drafting history reflects the

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[58] *Judgment, ICJ Reports 1978* 3, 35–36.

[59] J. Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff, Leiden 2009) 1. See also S.P. Sharma, *Territorial Acquisition, Disputes and International Law* (Martinus Nijhoff, The Hague 1997) 23.

[60] At the time of writing, 22 States had made Art. 298 declarations as to sea boundary disputes: 12 generally exempted *all* Art. 298(1)(a), (b) and (c) disputes, while 10 *specifically* exempted Art. 298(1)(a) disputes. Additionally, six declarations exclude certain Art. 287 fora from adjudicating Art. 298 disputes (some *exclude* Annex VII arbitration or the ICJ, others *allow* only for the ICJ).

[61] Virginia Commentary 109–10; R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, MUP, Manchester 1999) 465; R.R. Churchill, 'Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade' in Freestone (n 24) 407; A Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes' (2005) 7 *University of Queensland Law Journal* 165.

extensive implications of maritime boundary delimitations,[62] especially when issues of territorial sovereignty arise (in this sense, the "political character of Article 298 is evident, and must be accorded serious weight in interpreting the Convention").[63]

During the drafting of the LOSC, Negotiating Group 7, charged with examining maritime delimitation disputes, formed the 'consultation group of 14', composed of the delegations that had submitted specific viewpoints on the topic. Based on these private consultations, the chairman, Professor Sohn, prepared several successive papers, spanning multiple Conference sessions, on approaches to questions of 'pure' and 'mixed' maritime delimitations. He finally presented four alternatives: *two* excluded mixed disputes from LOSC compulsory procedures altogether, whilst the other two did not even envisage substantive or binding obligations for resolving maritime delimitations generally. Unfortunately, Negotiating Group 7 never had the time to closely examine these alternatives.

It seems that proposals were made during informal plenary meetings in 1980[64] to transfer the exemption of mixed disputes from the *optional* exceptions in Article 298(1)(a) to the *automatic* exceptions in Article 297 (then Article 296).[65] These were rejected by the President of the Conference, apparently mainly for practical reasons: structural and substantive changes to Article 298(1)(a)(i) were to be avoided in light of time restraints and the laborious negotiations that had gone into achieving the delicate compromise, and, furthermore, because the current location of the exemption on mixed disputes appropriately reflects its close connection to delimitation.[66]

It is clear that the prevailing view was that 'pure' land territory disputes should not be dealt with directly in the Convention,[67] although it is interesting that some delegates actually proposed their *inclusion*, "arguing that there

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[62] Third United Nations Conference on the Law of the Sea, 1973–82 (hereinafter UNCLOS III), Official Records, vol. III, Second Session, 27 August 1974, UN Doc A/CONF.62/L.7 (Australia and others: working paper on the settlement of law of the sea disputes) 85, 92.

[63] B.H. Oxman, 'The Rule of Law and the United Nations Convention on the Law of the Sea' (1996) 7 *European Journal of International Law [EJIL]* 353, 368.

[64] UNCLOS III, Official Records, vol. XIV, Resumed Ninth Session, 23 August 1980, UN Doc A/CONF.62/L.59 (Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes) 130 para. 6.

[65] UNCLOS III, Official Records, vol. VIII, Ninth Session, 11 April 1980, UN Doc A/CONF.62/WP.10/Rev.2 (Informal Composite Negotiating Text (hereinafter ICNT), Revision 2).

[66] UNCLOS III (n 64) paras 5–7. See generally H. Lauterpacht, 'De l'interprétation des traités' (1950) 43 *Annuaire de l'Institut de Droit International* 426.

[67] K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP, New York 1987) 140.

was no difference between the two kinds of dispute [maritime or territorial] since both dealt with areas over which sovereignty or sovereign rights might be exercised."[68] Nevertheless, this leaves undecided the question of *concurrent* territorial issues[69] (although former chairman Professor Sohn argues in his book that "mixed disputes… will be totally exempt from dispute settlement under the Convention").[70]

The possibility of automatically excluding all 'mixed' maritime delimitation disputes from the Convention seems at least to have been discussed (the main aim being to prevent States from raising land sovereignty disputes under the guise of maritime delimitations under Part XV, section 2 procedures).[71] However, the extent of these discussions, conducted in mostly private, unofficial sessions, remains unclear.

By contrast, Rao[72] argues that nothing in the negotiations shows that fears were expressed as to mixed disputes being heard under *compulsory* procedures in the absence of Article 298 declarations. Rather, he argues that the *actual* concern was that a State making a declaration excluding maritime delimitations and concurrent territorial sovereignty issues from *compulsory* procedures should not subsequently be faced with those sovereignty issues, disguised as part of a maritime delimitation dispute, when submitting to *conciliation*. In other words, the proviso exempting mixed disputes from conciliation was inserted *ex abundanti cautela* for States seeking to avoid proceedings on specific territorial sovereignty issues. Thus, the drafting history does not seem to give reason to afford the exclusionary clause in Article 298(1)(a)(i) anything other than its 'most natural meaning':

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[68] *Ibid.* See also R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, vol. II (Oceana Publications 1982) 430.

[69] An initial draft article stating that disputed territories shall not generate maritime zones until concurrent sovereignty issues have been resolved was ultimately deleted out of concern that States would claim territory to prevent the generation of maritime zones (a strategy that could currently be used to impede the work of the CLCS in disputed areas)—Smith (n 14) 346.

[70] L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (West Publishing, St Paul, MN 1984) 244. See also L.B. Sohn, 'Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?' (1983) 46 *Law and Contemporary Problems* 195.

[71] UNCLOS III, Official Records, vol. VIII, Sixth Session, 22 July 1977, UN Doc A/CONF.62/WP.10/Add.1 (Memorandum by the President of the Conference on the ICNT, Revision 2) 65, 70. On the *other* hand, some States also expressed the fear that exclusion of any 'dispute concerning sovereignty' could be used as a pretext to exclude *legitimate* maritime disputes.

[72] Rao (n 27) 888. See also Virginia Commentary 113.

> [But] for its inclusion in the second proviso in article 298(1)(a)(i), the question of a mixed dispute would have remained within the competence of a conciliation commission [along with maritime delimitation disputes generally].[73]

Following this reasoning, a mixed dispute will, absent a declaration, fall under the scope of Part XV; otherwise, regardless of time constraints, this ought to have been made explicit in the drafting of the dispute settlement articles.[74]

The Intended Degree of Comprehensiveness of LOSC Dispute Settlement Procedures

During the negotiations, some States argued that the Convention should establish a 'substantive' legal framework with compulsory procedures as its cornerstone, whilst others favoured a 'procedural' framework with a *less* restrictive approach to dispute settlement, in order to leave room for flexible political arrangements.[75] The result was the system of automatic and optional exceptions in Articles 297 and 298.[76]

Thus, it has been argued that Part XV of the Convention was not intended as being comprehensive for all the substantive principles of the LOSC.[77] This could suggest that certain categories of dispute, albeit crucial ones such as mixed disputes, may be exempted from its scope by *implication*. In opposition, in his Separate Opinion in *Southern Bluefin Tuna*,[78] Justice Keith argues that dispute settlement procedures are an integral part of the LOSC, and points to statements made during the drafting of the Convention highlighting

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[73] Rao (n 27) 889.

[74] *Ibid.*, 890.

[75] B.H. Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 *AJIL* 277, 285ff.

[76] Yankov (n 21) 35. These "should not be seen as a fault but rather as an indication of the exceptional nature of the UNCLOS regime"—R. Rayfuse, 'The Future of Compulsory Dispute Settlement under the Law of the Sea Convention' (2005) 36 *Victoria University of Wellington Law Review* 1.

[77] *Southern Bluefin Tuna (Australia and New Zealand* v. *Japan)*, Jurisdiction and Admissibility (UNCLOS Annex VII Arbitration) (2000) 39 *International Legal Materials [ILM]* 1359 ['*SBT* case'] para. 62; A.L.C. De Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective' in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (N.P. Engel, Kehl 1984) 170; NS Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, Cambridge 2005) 42. cf Shany (n 34) 236.

[78] *SBT* case (n 77) *(Separate Opinion of Sir Kenneth Keith)* paras 23–28. See also D. Colson and P. Hoyle, 'Did the Southern Bluefin Tuna Tribunal Get It Right?' (2003) 34 *ODIL* 59.

their intended 'comprehensiveness'. In the same vein, Judge Wolfrum in *MOX Plant* argues that any exclusion of LOSC dispute settlement procedures must be *explicitly* expressed.[79] Furthermore, an important implication that can be read into the 'compromise solution' in Article 298 is that any exceptions should be precise and interpreted restrictively.[80] Thus:

> It is most unlikely that a dynamic court exercising its powers under the LOS Convention will have much difficulty both in finding that it possesses jurisdiction in a particular case, and in finding that the Convention contains rules appropriate for the resolution of virtually all disputes arising under it.[81]

Therefore, according to these views, the principle of compulsory and universal dispute settlement has not been lost.

A Closer Look at the Case Law of Law of the Sea Tribunals

The Guyana *v.* Suriname *Dispute*

The *Guyana* v. *Suriname* arbitration[82] is the only case in which jurisdiction over territorial sovereignty issues was *explicitly* contested before a LOS tribunal.[83] Guyana unilaterally submitted the long-standing maritime dispute to Annex VII arbitration.[84] Neither party had made a declaration under Article 298(1)(a). Guyana maintained that since the dispute concerned exclusively the maritime boundary, the tribunal was not required to reach a finding "of fact or law regarding land or riverine boundaries."[85] In opposition, Suriname claimed that it was required to determine the "unresolved status of the land boundary terminus in delimiting the maritime boundary."[86]

The coastlines of Guyana and Suriname meet at the mouth of the Corentyne River, which constitutes the land boundary between the two States. A

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[79] *MOX Plant* case *(Ireland* v. *UK), Provisional Measures, Order of 13 November 2001*, ITLOS Reports 2001, Separate Opinion of Judge Wolfrum.
[80] Yankov (n 21) 36; Virginia Commentary 87–106, 109.
[81] De Mestral (n 77) 171.
[82] *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits*, Award of 17 September 2007 (UNCLOS Annex VII Arbitration) (2008) 47 *ILM* 166.
[83] See further Churchill (n 41); S. Fietta, 'Guyana/Suriname Award' (2008) 102 *AJIL* 119.
[84] LOSC Art. 293(1) provides the 'applicable law' for a tribunal *already found competent* to decide the dispute; here, the Tribunal used it to establish that it had jurisdiction in the first place—*Maritime Delimitation* (n 82) para. 406.
[85] *Ibid.*, para. 168.
[86] *Maritime Delimitation* (n 82) para. 168.

Mixed Boundary Commission established in 1934 recommended a specific point for the northern end of their frontier near the river's mouth (the '1936 Point'), but no progress was made in delimiting the final boundary until Guyana's initiation of Annex VII proceedings in 2004.[87] Guyana argued, based on LOSC Article 9 on 'mouths of rivers' ("[if a] river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks") that the tribunal could establish the land boundary terminus as the '1936 point', or, if it found that no such point had been agreed, apply Article 9 to determine it.[88] At the very least, the tribunal should effect a *partial* delimitation of the boundary in accordance with Articles 74 and 83 LOSC,[89] as the ICJ had done in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*[90] (the parties here had agreed not to have the Court decide sovereignty over Machias Seal Island, although it *would* have had jurisdiction to do so, but simply to leave that part of the boundary undelimited by setting the starting point beyond the disputed area).[91]

Guyana did not address the issue of whether LOS tribunals have competence to deal with mixed disputes; rather, it referred to provisions like Article 9 to argue that this *particular* dispute only concerned maritime issues.

Suriname countered that, based on the *travaux préparatoires* of LOSC Part XV, Article 9, and Articles 15, 74 and 83, respectively,[92] the tribunal had no jurisdiction to deal with land sovereignty and establish the land boundary terminus (on which it alleged there was no agreement), without which no *maritime* boundary could be established.[93] Also, the tribunal would need to select another land terminus pursuant to LOSC Article 10 ('bays'),[94] not Article 9. Since the drawing of the closing line is for the coastal State to effectuate—tribunals can only assess whether the *method* used accords with

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[87] *Ibid.*, para. 156.
[88] *Ibid.*, para. 170.
[89] These deal with the delimitation of the EEZ and continental shelf for adjacent and opposite States.
[90] *Judgment, ICJ Reports 1984* 246.
[91] B. Kwiatkowska, 'The Landmark 2006 UNCLOS Annex VII *Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits)* Award' (2007) 39 *George Washington International Law Review* 573, 617. See generally D. Robinson, D. Colson and B. Rashkow, 'The *Gulf of Maine* Case' (1985) 79 AJIL 578.
[92] *Maritime Delimitation* (n 82) para. 175.
[93] Counter-Memorial of Suriname, vol. I, 1 November 2005, available at <http://www.pca-cpa.org/showpage.asp?pag_id=1268> para. 2.11.
[94] *Ibid.*, para. 2.10 (relying on the French translation of Art. 9 on rivers flowing directly into the sea *without forming an estuary*, unlike the Corantyne).

international law[95]—it lacked jurisdiction. Furthermore, Suriname argued that it lacked jurisdiction to effectuate even a *partial* delimitation: the starting point of the maritime boundary (which Guyana argued is the point at sea where two equidistance lines meet) cannot differ from the land terminus, since part of the baseline of one State would then extend beyond the maritime boundary of the other, contradicting the basic principle that 'land dominates the sea.'[96] The tribunal would be prevented from making a "full and balanced assessment of the maritime delimitation issue before it."[97] Thus, Suriname concluded that the absence of an agreed land terminus prevented the tribunal from effecting the delimitation.

Ultimately, the tribunal resolved this issue by upholding a starting point for the sea boundary coinciding with the '1936 Point'.[98] It concluded that there was an agreed starting point for the *maritime* boundary, rather than the *land* terminus focused on by the Mixed Boundary Commission, such that its findings "have no consequence for any land boundary… between the Parties, and therefore…this jurisdictional objection does not arise."[99] The tribunal thus upheld jurisdiction over the dispute.

The tribunal *might* otherwise have had to rule on the land boundary, and it was careful in its approach. Had it found the decisions of the Mixed Boundary Commission binding, it would have been implicitly deciding (or affirming) the terminus of the land, rather than the maritime, boundary. More importantly, had it not been able to rely on the '1936 Point', it would have had to clarify whether concurrent territorial issues fall within its competence. Considering the dispute had been submitted unilaterally rather than by special agreement, and in light of the potential significance of Article 298(1)(a)(i), the tribunal may not have upheld jurisdiction.[100] On the other hand, the fact that no explicit reference is made in the Convention to concurrent territorial issues does *no*t necessarily mean that such claims are inadmissible. The

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[95] *Maritime Delimitation* (n 82) para. 181.

[96] Counter-Memorial of Suriname (n 93) para. 2.9.

[97] *Ibid.*, para. 2.13.

[98] The Tribunal found the starting point of the maritime boundary to be located at the intersection of the low water line of the west bank of the river and the geodetic line of N10°E which passes through the 1936 Point—*Maritime Delimitation* (n 82) paras 280, 308. Suriname itself had previously conceded that if there were an agreed boundary, this terminus would be adequate (*ibid.*, para. 174).

[99] *Ibid.*, para. 308. cf the ICJ in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982* 18, 65–66 (carefully emphasising that the land frontier is permanent and undisputed).

[100] It may have been possible to use Art. 9 to establish the starting point for the delimitation.

relevant case law is, as of yet, scarce, leaving open-ended this 'jurisdictional dilemma'.

The Current Mauritius v. United Kingdom *Annex VII Arbitration*

Highly interesting is the new *Mauritius* v. *UK* case,[101] now before a LOSC Annex VII tribunal. It concerns the UK's creation of a 'Marine Protected Area' (MPA) around the disputed Chagos Islands in the Indian Ocean. The case, notified by Mauritius in December 2010,[102] clearly constitutes a 'mixed dispute' (although it does not concern maritime delimitation as such), and, furthermore, involves a claim under Article 300.[103] Neither party has made an Article 289(1)(a)(i) declaration.

The main concern is Mauritius's long-term struggle to reclaim sovereignty over the islands. The Chagos archipelago was divested from Mauritian territory under a 1965 Agreement (which Mauritius claims is invalid), and its islanders (the 'Chagossians') were evicted, by the then colonial power of Great Britain. The islands were then declared to be part of the 'British Indian Overseas Territory' and currently provide the site for a major US military base. Mauritius opposes the UK's declaration of an EEZ and MPA around the islands, and the consequent ban of fishing and extractive industries in the area. It challenges not only the MPA, but also the UK's underlying motivations: it contends that the UK's major objective in establishing the marine reserve, rather than the environment, was to legally block any attempts by the Chagossians to return to their homelands[104] (a potential Article 300 violation). Therefore, Mauritius claims title to the archipelago, arguing that it is the only one with a right to declare an EEZ there (and has made submissions to the Commission on the Limits of the Continental Shelf (CLCS) to this effect), asserting furthermore that Mauritians and Chagossians have traditional rights to the archipelago's fisheries and other resources. Thus, Mauritius disputes the legality of the UK's MPA under the LOSC, the UK's status as a 'coastal State' (which is really a challenge to title over the archipelago), and its right to declare an EEZ and MPA around the islands. The tribunal may first have to resolve the question of sovereignty over the Chagos archipelago to be

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[101] *Dispute Concerning the 'Marine Protected Area' Related to the Chagos Archipelago (Mauritius* v. *UK)*, Notification and Statement of Claim (UNCLOS Annex VII Arbitration), 20 December 2010.

[102] Note that Mauritius named Judge Rüdiger Wolfrum as its party-appointed arbitrator.

[103] See Section 6.3 on Art. 300 below.

[104] R. Norton-Taylor and R. Evans, 'WikiLeaks cables: Mauritius sues UK for control of Chagos islands' (*Guardian.co.uk*, 21 December 2010) <www.guardian.co.uk/world> accessed 2 May 2011.

able to address Mauritius's contentions; however, if the tribunal focuses its decision on the legality of the MPA *as such*, even if the UK is indeed the coastal State, it could conceivably avoid the question of land sovereignty altogether.

Thus, the tribunal may be faced with the issue of whether it can decide title to land. It will also have to decide whether it has jurisdiction over Mauritius's claim challenging the MPA: the UK may invoke the argument that Mauritius gave up fishing rights under the 1982 Settlement Agreement, or the UK's right under Article 297 not to accept compulsory procedures relating to fisheries in its EEZ, or its Article 298(1)(b) declaration concerning military activities. If the tribunal finds one of these objections applicable, it could avoid examining jurisdiction over mixed disputes altogether. Moreover, a bad faith breach under Article 300 could provide an independent basis for the tribunal's jurisdiction.[105] It remains to be seen how the tribunal will tackle this complex situation.

Jurisdictional Remits and the Question of 'Implied Powers' for International Tribunals in General

The Doctrine of 'Implied Powers'

The main question is whether a LOS tribunal may decide a mixed dispute submitted either *unilaterally*, where the respondent challenges its jurisdiction, or under a *special agreement* requesting the delimitation of the maritime boundary without explicitly referring to any concurrent land elements involved.

The notion of 'implied powers' dictating that international tribunals may exercise competences not *expressly* conferred under their constitutive instrument—albeit by interpreting the instrument in a 'somewhat *liberal* manner'[106]—finds wide support in the doctrine (though it is rarely referred to explicitly by tribunals).[107] However, a power may only be implied if it is

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[105] P. Prows, 'Mauritius Brings UNCLOS Arbitration Against the United Kingdom Over the Chagos Archipelago' (2011) 15(8) *American Society of International Law (ASIL) Insights* <http://www.asil.org/insights110405.cfm> accessed 2 May 2011.

[106] P. Gaeta, 'Inherent Powers of International Courts and Tribunals' in L.C. Vohrah and others (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, The Hague 2003) 355.

[107] *Ibid.*, 353; C.F. Amerasinghe, *Jurisdiction of International Tribunals* (Kluwer Law International, The Hague 2003) 394. See eg *LaGrand (Germany* v. *USA), Judgment, ICJ Reports 2001* 466, 503 (affirming the *implicitly* binding nature of provisional measures in light of the object and purpose of its Statute).

necessary for the exercise of the tribunal's jurisdiction in settling disputes, and if it is not inconsistent with the text and object and purpose of the constitutive treaty (the LOSC)—in other words, jurisdiction is fixed by the tribunal's constitutive instrument, but *interpreting* its scope is a matter of implied powers. This coincides with the *non ultra petita* principle, recognised by the ICJ as a general principle of law,[108] which dictates that a tribunal "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its fullest extent."[109] The ICJ, in this vein, has sometimes adopted a teleological interpretation of its title of jurisdiction.[110] This is closely linked to the principle of effectiveness[111] expressed in the maxim *ut res magis valeat quam pereat* (implying that a treaty should be construed so as to make sense of / give effect to its provisions),[112] which constitutes an important part of treaty law.[113]

Arguably, "by way of necessary intendment of the Convention"[114] mixed disputes involve the "interpretation or application of the Convention"[115] and

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[108] *Request for Interpretation of the Judgment of November 20th 1950 in the Asylum Case*, *Judgment, ICJ Reports 1950* 395, 402; S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, vols. I–III (3rd ed., Martinus Nijhoff, The Hague 1997) 173, 596.

[109] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, ICJ Reports 1985* 13, 23.

[110] *South West Africa, Second Phase, Judgment*, *ICJ Reports 1966* 6, 48: "[T]he Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect." See also *Corfu Channel (UK* v. *Albania), Merits, Judgment, ICJ Reports 1949* 4, 23–26; *Factory at Chorzów* (1927), Jurisdiction, Permanent Court of International Justice (PCIJ) Series A, No 9, 21–22; R Higgins, 'International Law and Avoidance, Containment and Resolution of Disputes' (1991-V) 230 *Recueil des cours de l'Académie de droit international* 9, 34.

[111] Rosenne (n 108) 1148; *Polish Postal Services in Danzig, Advisory Opinion of 16 May 1924* (1925), PCIJ Series B, No 11, 39; *Reparation for Injuries*, *Advisory Opinion, ICJ Reports 1949* 174.

[112] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 *British Year Book of International Law* 203, 211–12.

[113] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction, Judgment, ICJ Reports 1998 432, 455; Iron Rhine Railway Arbitration (Belgium/Netherlands), Award of 24 May 2005, 27 (United Nations) Reports of International Arbitral Awards [RIAA] 35, paras 49, 84.

[114] The ICJ has used this standard to assess implied powers of *international organisations*; the same rationale can be extended to international tribunals—E. Lauterpacht, ' "Partial Judgments" and the Inherent Jurisdiction of the International Court of Justice' in A.V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP, Cambridge 1996) 477. See, e.g., *Reparations for Injuries* (n 111); *Effect of Awards of Compensation*, *ICJ Reports 1954* 47, 56–57; *Certain Expenses of the United Nations*, *Advisory Opinion, ICJ Reports 1962* 151, 168. See also Gaeta (n 106) 355; Rao (n 27) 891; J.A. Carrillo-Salcedo, 'The Inherent Powers of the International Criminal Tribunal for the Former Yugoslavia to issue *subpoena duces tecum* to a Sovereign State' in R.-J. Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos. Droit et Justice* (Pedone, Paris 1999) 274.

[115] Rao (n 27) 896.

implicitly fall under its consensual jurisdictional basis.[116] Considering the natural and juridical interrelatedness between land and sea,[117] the ambit of a dispute may become wider based on the "close connection between what is expressly submitted…and what has to be decided as part of that submission."[118] It is notable that LOSC Article 293 includes as a source of applicable law "other rules of international law not incompatible with the Convention." Moreover, the LOSC Preamble declares that matters not regulated by the Convention are governed by general international law, and tribunals selected under Article 287 have in the past decided matters that are not strictly part of the law of the sea. In light of these considerations, one could argue that LOS tribunals face no inherent limitation in resolving territorial elements in mixed disputes.[119]

The Reasoning Underlying the 'Principle of the Essential Parties'

The 'indispensable third party' argument,[120] or 'principle of the essential parties'—rooted in the general requirement of consent and reflected in the ICJ's Statute[121]—dictates that a given case should not continue in the absence of a third party whose presence is indispensable to the proceedings. The Court must determine whether the case can be decided without examining the legal position of that third State.[122]

This argument was first accepted in *Monetary Gold*:[123] the ICJ refrained from exercising jurisdiction since the lawfulness of certain actions by Albania, who was not party to the proceedings, pertained to the *very subject-matter* of the dispute. In subsequent cases, the 'indispensable third party' argument was interpreted very narrowly and has rarely been successful.[124] In the *Continental Shelf* case,[125] the Court limited its determination of the maritime boundary to areas where there was *no* third-party interest by effectively reformulating the

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[116] "The principle that the jurisdiction of an international tribunal derives from the consent of the parties has long been subject to a process of refinement… [leading] to a presumption of consent on the part of the litigating States."—Rosenne (n 108) 571.

[117] See, e.g., *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment, ICJ Reports 1969* 3, 51; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Merits, Judgment, ICJ Reports 2001* 40, 97; *Aegean Sea* (n 58) 36.

[118] Rao (n 27) 886–87. See also Rosenne (n 108) 572.

[119] Rao, *ibid*., 891.

[120] C.M. Chinkin, 'East Timor Moves into the World Court' (1993) 4 *EJIL* 206, 218–22.

[121] Arts. 62, 63.

[122] Rosenne (n 108) 560.

[123] *Monetary Gold Removed from Rome (Preliminary Question), Judgment, ICJ Reports 1954* 19.

[124] M.D. Evans, 'International Court of Justice: Recent Cases' (1996) 45 ICLQ 712.

[125] *Continental Shelf* (n 109).

parties' claims. Likewise, in *Corfu Channel*,[126] the Court avoided complex third-party issues concerning Yugoslavia by reformulating the dispute in terms of Albania's liability alone, and in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *USA)*[127] and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*,[128] rejected the argument altogether since the interests in question did not constitute the *very subject-matter* of the case.[129]

The 'indispensible third party' argument was upheld again in *East Timor (Portugal* v. *Australia)*.[130] The Court here found it could not exercise jurisdiction over Portugal's claims since it would, as a prerequisite, have to rule on the lawfulness of Indonesia's position *vis-à-vis* East Timor in the absence of that State's consent. Although the Court emphasised that it generally *can* adjudicate even when the judgment might affect the interests of a third party, here the question of Indonesia's legal position, like Albania's in *Monetary Gold*, pertained to the *very subject-matter* of the dispute, so that proceeding without Indonesia would run counter to the general principle of State consent. Many scholars consider such a decision an exercise of discretionary authority, but it has also been regarded as "peremptory rather than involving the exercise of discretion."[131]

A certain theoretical parallel could be drawn between the reasoning underlying the 'indispensible third party' rule as a jurisdictional limitation, and the question of mixed disputes before LOS tribunals. Both scenarios entail that to decide a matter before it, a tribunal may have to resolve a concurrent issue (be it a third party's rights or sovereignty over land) that, if it forms the very subject-matter of the dispute, lies outside its jurisdiction. Where the circumstances of the case so allow, the concurrent issues can be avoided by limiting the relevant area under consideration.[132] Thus, if the comparison holds, perhaps the relevant question is whether the land element in a mixed dispute is found to constitute its *very subject-matter*, in which case the dispute would fall outside the jurisdiction of LOS tribunals.[133]

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[126] *Corfu Channel* (n 110).
[127] *Jurisdiction and Admissibility, ICJ Reports 1984* 392.
[128] *Preliminary Objections, Judgment, ICJ Reports 1992* 240.
[129] Chinkin (n 120) 222.
[130] *Judgment, ICJ Reports 1995* 90, 104–05.
[131] Amerasinghe (n 107) 238. cf WM Reisman, 'International Decisions: Award on Sovereignty over Disputed Islands in the Red Sea' (1999) 93 *AJIL* 671, 676.
[132] D. Colson, 'The Legal Regime of Maritime Boundary Agreements' in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, vol. I (Martinus Nijhoff, Dordrecht 1993) 63.
[133] Rao (n 27) 887.

Examples from the Case Law

It may be useful to give a few examples of cases in which international judicial bodies relied on implied powers.

To begin with a mixed dispute before the ICJ, the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* case[134] involved delimitation of a sea boundary and clarification of sovereignty over certain islands and cays. Nicaragua's Application requested the Court to "determine the course of the single maritime boundary between the areas… appertaining respectively to Nicaragua and Honduras." However, it did *not* refer to questions of sovereignty over islands. Nevertheless, the Court held that it would have to decide the sovereignty issues in order to delimit the boundary:

> The Nicaraguan claim relating to sovereignty over the islands in the maritime area in dispute is *admissible as it is inherent in the original claim relating to the maritime delimitation* between Nicaragua and Honduras in the Caribbean Sea.[135]

The title of the case was modified from its initial form ('Case Concerning the Maritime Delimitation between Nicaragua and Honduras') to reflect these wider issues. Another question raised here is whether the ICJ would have been able to settle the dispute had it been brought under the LOSC, which restricts jurisdiction to disputes "concerning the interpretation and application of this Convention"[136] (it would seem natural that the subject-matter of the dispute should not affect the choice of forum under Article 287 as such).[137]

By contrast, in the 2008 *Malaysia/Singapore* case,[138] the ICJ was asked to settle title over Pedra Branca, Middle Rocks and South Ledge. The Court upheld Singapore's sovereignty over Pedra Branca and Malaysia's over Middle Rocks. However, it did not settle the status of South Ledge—which it found "falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca and Middle Rocks"[139]—since it had not

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[134] *Judgment, ICJ Reports 2007* 659.
[135] *Ibid.*, 697.
[136] LOSC Art. 288(1).
[137] Klein (n 77) 58, 123; Shany (n 34) 205; Mensah (n 42) 25.
[138] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, ICJ Reports 2008* 12. See also R. Beckman and C. Schofield, 'Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait' (2009) 40 *ODIL* 1.
[139] *Malaysia/Singapore* (n 138) 101.

been explicitly mandated by the parties to delimit their territorial waters.[140] In other words, the Court considered that the concurrent maritime delimitation issue was beyond its jurisdiction in deciding sovereignty over South Ledge.

In the arbitral context, one relevant case is the *Barbados/Trinidad and Tobago* Annex VII arbitration.[141] The parties here disagreed over whether the maritime delimitation dispute included the continental shelf extending *beyond* 200 nautical miles. The tribunal found that the issue of the outer continental shelf was "sufficiently closely related' to the dispute submitted by Barbados, and was consequently *implicitly* included.[142] Similarly, in the *Eritrea/Yemen* arbitration,[143] each country had relied on different base-points in drawing straight baselines around a fringe of islands off the Eritrean coast. Despite the fact that the tribunal had not been called upon to decide the reality or validity of the straight baseline system,[144] it proceeded to determine the base-points itself, rather than rely on Eritrea and Yemen's submissions.[145] By contrast, in the *Minquiers and Ecrehos* case,[146] the ICJ limited itself to the terms of its remit as defined under the special agreement—which asked it to declare whether the sovereignty over the islets in question belonged to either the UK or France—by interpreting it to mean that its jurisdiction did *not* extend so far as to permit it to find a status of *res nullius* or condominium, but rather only to decide whether sovereignty could be attributed to one of the parties exclusively.[147]

One last point can be made regarding the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand* v. *France*) case.[148] The ICJ here was faced with a unique form of proceedings that was not formally recognised in its Statute or practice. The question was essentially whether the ICJ could, under the circumstances, be seised of the case before it based solely on a paragraph of its previous judgment in *Nuclear Tests*. The Court ultimately dismissed New Zealand's application; however, it arguably seemed to hint that,

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[140] *Ibid.*

[141] *Maritime Delimitation (Barbados/Trinidad and Tobago), Jurisdiction and Merits* (UNCLOS Annex VII Maritime Delimitation) (2006) 45 *ILM* 800.

[142] *Ibid.*, para. 213.

[143] Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 17 December 1999, 22 RIAA 335.

[144] *Ibid.*, para. 142.

[145] *Ibid.*, para. 146. See further NSM Antunes, 'The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law' (2001) 50 *ICLQ* 299.

[146] *Judgment, ICJ Reports 1953* 47, 59.

[147] Rosenne (n 108) 545.

[148] *ICJ Reports 1995* 288.

had the right circumstances been applicable, it *could* have proceeded to examine the case *despite* the fact that the 'derivative proceedings' were not based on any express provision in its Statute.[149] This relates to the question of implied powers and perhaps also, indirectly, to the LOS tribunals' lack of an overt basis under LOSC to handle mixed disputes.

Overall, although the review above is by no means exhaustive, the case law does not seem to be conclusive regarding the jurisdictional remits applicable to the relation between maritime and land sovereignty questions.

Territorial Issues in Context: The Role of Disputed Islands in Maritime Boundary Delimitations

The Limited Effect of Disputed Islands on Maritime Delimitations

Concurrent territorial sovereignty issues in mixed disputes most frequently involve islands.[150] Thus, a crucial provision here is LOSC Article 121 on 'Regime of Islands'[151]—although it is admittedly vague and poorly drafted in a number of respects.[152]

Despite their potential impact on maritime boundary delimitations, in practice arbitral tribunals and the ICJ have given islands reduced effect.[153] The majority of disputed islands are either located in semi-enclosed seas that inhibit extended maritime zones, or near non-disputed territories, "thereby lessening the impact of the disputed island on the generation of a maritime

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[149] *Ibid.*, 303; Declaration of Vice-President Schwebel, 309; Dissenting Opinion of Judge Weeramantry, 317, 320–21; Dissenting Opinion of Judge Palmer, 381, 399–400 (all suggesting that the Court is not creating a new basis for jurisdiction, but rather that it is impliedly within its power to allow for a 'special procedure'). See also M.C.R. Craven, 'New Zealand's Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* case *(New Zealand* v. *France)*, Order of 22 September 1995' (1996) 45 *ICLQ* 725.

[150] Klein (n 77) 273.

[151] Smith (n 14) 343.

[152] Churchill and Lowe (n 61) 50.

[153] C. Schofield (n 9) 36. See *North Sea Continental Shelf* cases (n 117) 36; *Gulf of Maine* (n 90) 329, 332; *Continental Shelf* (n 109) 50–51; *Qatar* v. *Bahrain* (n 117) 114–15; *Delimitation of the Continental Shelf (UK/France)*, Decision of 30 June 1977, 18 RIAA 3; *Beagle Channel Arbitration (Argentina/Chile)*, Award of 18 February 1977, 21 RIAA 53; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, *Judgment, ICJ Reports 2009* 61. See also UN Division of Ocean Affairs and Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries* (United Nations Office of Legal Affairs, New York 2001).

zone"[154] (according to international practice, islands do not have the same capacity as an opposing land mass to generate maritime zones).[155] If certain islands are so limited in size that they have little impact on the delimitation,[156] a tribunal does not have to resolve their sovereign status in order to effectuate the maritime boundary.

The reason for granting rights over maritime zones to coastal States in the first place is to protect the economic interests of coastal communities dependent on those sea resources,[157] a rationale that does not extend to uninhabited islands present in many mixed disputes.[158] This argument is further reinforced if the islands in question are also *unsuitable* for human habitation and hence (according to one interpretation of the terms 'human habitation' and 'economic life')[159] qualify as 'rocks' under Article 121(3) LOSC.[160] Nonetheless, this has not stopped countries like Japan and the US from making expansive claims to maritime space around small islets normally not entitled to extended maritime zones, due to their size and inhabitability.[161]

More generally, LOS tribunals do not necessarily have to *definitively* resolve sovereignty questions involved in maritime disputes; this would accord with the spirit of cooperation embodied in LOSC, and the call in its delimitation articles for "provisional arrangements of a practical nature."[162] Furthermore, there may be approaches to handling mixed disputes that do not involve determining territorial issues, or even the boundary, but that nonetheless help resolve the dispute, such as joint development zones. Schemes could conceivably be developed, by treating disputed islands in special ways, such that the "sovereignty issue could be *minimized* and mutually accepted resource development management *maximized*."[163]

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154 Smith (n 14) 345–46.
155 Van Dyke (n 4) 44.
156 J.I. Charney, 'Rocks that Cannot Sustain Human Habitation' (1999) 93 *AJIL* 876.
157 *The "Volga"* case *(Russian Federation* v. *Australia), Prompt Release, Judgment*, ITLOS Reports 2002, Declaration Judge Vukas, para. 7.
158 Van Dyke (n 4) 50.
159 E.D. Brown, 'Rockall and the Limits of National Jurisdiction of the UK' (1978) 2 *Marine Policy* 181, 205–08.
160 B. Kwiatkowska and A.H.A. Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *Netherlands Yearbook of International Law* 139.
161 Van Dyke (n 4) 51–52; J.M. Van Dyke and R.A. Brooks, 'Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources' (1983) 12 *ODIL* 265.
162 Smith (n 14) 351.
163 *Ibid.*, 349–51.

Examples from Southeast Asia—Potential for Resolution under the LOSC?

Examples from Southeast Asia are useful in investigating the extent to which mixed disputes could be resolved under the LOSC.

In the East China Sea, the long-running sea boundary conflict[164] between China and Japan, linked to the dispute over the Diaoyu/Senkaku Islands, has recently heated up and shows risk of serious confrontation.[165] Based on previous ICJ judgments and international practice, the 'Diaoyu/Senkakus' are unlikely to be entitled to extended maritime zones under Article 121(3)—considering their remoteness from the coasts, tiny size, uninhabited status and unsettled sovereignty—and, even as 'islands' under Article 121(1), would not affect the maritime boundary.[166] It is suggested that the maritime boundary could be delimited (or a joint resource scheme established)[167] without resolving sovereignty over the 'Diaoyu/Senkakus' for the time being,[168] given the imperative need to manage the area's maritime resources effectively.[169]

The situation in the South China Sea is more difficult still. The various claims over the Spratly and Paracel Islands—involving China, Taiwan, Vietnam, the Philippines, Malaysia and Brunei—heavily complicate the delimitation of maritime boundaries here.[170] There is a real risk that the situation "may soon escalate into conflict, if only because no prospect exists of settlement."[171] Notwithstanding the numerous sovereignty claims over the Spratlys, these small islets—with no independent economic life of their own, nor the capacity to sustain stable human populations[172]—and structures built on their

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[164] J. Pan, 'Way Out: The Possibility of a Third Party Settlement for the Sino-Japanese Maritime Boundary Dispute in the East China Sea' (2008) 6 *China: An International Journal* 187, 189.

[165] 'Carps among the Spratlys', *The Economist* (12 March 2011) 52 (China's 'bullying' and 'proclivity for muscle-flexing').

[166] Van Dyke (n 4) 62; C.R. Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff, The Hague 1979) 136.

[167] Smith (n 14) 351.

[168] See further S. Lee, *Boundary and Territory Briefing: Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands*, vol. 3(7) (International Boundaries Research Unit, Durham 2002).

[169] Pan (n 164) 203–04.

[170] M.J. Valencia, J.M. Van Dyke and N.A. Ludwig, *Sharing the Resources of the South China Sea* (Martinus Nijhoff, The Hague 1997) 17–76.

[171] *The Economist* (n 165); Kittichaisaree (n 67) 141, 145.

[172] Van Dyke (n 4) 68; G Valero, 'Spratly Archipelago Disputes' (1994) 18 Marine Policy 314, 315; M. Bennett, 'The People's Republic of China and the Use of International Law in the Spratly Islands Dispute' (1992) 28 *Stanford Journal of International Law* 425, 430.

reefs,[173] hardly seem entitled to extended maritime zones.[174] They may not even be entitled to a full territorial sea zone, which may constitute an 'abuse of right' imposing an "unacceptable burden on other nations" under LOSC Article 300.[175] Furthermore, it has been contended that under the equidistance principle the Spratlys would not have equal capacity *vis-à-vis* land masses to generate extended maritime zones.[176]

Resolving the status of the Spratlys would involve sovereignty considerations that LOS tribunals may lack the expertise to adjudge.[177] The notions relevant here, 'discovery' and 'effective occupation', do not require too much activity when an islet is uninhabitable, but demand certain formal acts and a sufficient presence to make others aware of it.[178] The fact that the disputing States realise the weakness of their individual claims in this respect reduces the likelihood of the matter being brought before a tribunal.[179] As a side-note, Article 121(3) refers to 'habitability' as a defining island feature. One *could* argue, following a 'liberal' interpretation of the Convention and of Article 121(3) in particular (especially in light of the latter's ambiguous drafting), that verifying 'habitability' may be conceptually similar, at least in methodological terms, to evaluating 'discovery' or 'occupation'. Could these notions fall under the expertise of LOS tribunals as an implied power to assess 'island' characteristics under Article 121(3)? A liberal interpretation of the LOSC text seems to leave this possibility open.

To avoid the sovereignty issue (and even the maritime delimitation) altogether, one possibility would be to allow the Spratlys to generate a shared 'regional' zone,[180] at least as a *provisional* solution. There is no explicit mention of such solution under the LOSC, but reference can be made to the precedent set by the ICJ in establishing a 'joint development zone' in the 1992 *Gulf of Fonseca* case.[181] This idea is one worth exploring[182]—and is seemingly reinforced by the duty of nations bordering 'semi-enclosed seas' to

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[173] LOSC Art. 60(8) on 'artificial islands'; Van Dyke (n 4) 70.
[174] H. Chiu, 'The 1982 United Nations Convention on the Law of the Sea and the Settlement of China's Maritime Boundary Dispute' in Buergenthal (n 77) 205.
[175] Van Dyke (n 4) 70–71.
[176] *Ibid.*, 72–73.
[177] See further S. Lee, 'Intertemporal Law, Recent Judgments and Territorial Disputes in Asia' in Hong and Van Dyke (n 4) 135 (note the argument that the law here still needs clarification, especially with regard to Asia).
[178] Van Dyke (n 4) 65.
[179] Cf. Guoxing (n 12) 95.
[180] Van Dyke (n 4) 66, 69.
[181] *Ibid.*, 74.
[182] See further Valencia (n 170) 183–87.

cooperate in managing resources and protecting the environment (LOSC Articles 122 and 123).[183]

Though some commentators argue otherwise,[184] these examples seem to indicate that LOS tribunals are likely to 'bypass' land sovereignty questions in maritime delimitations more often than not.[185] The main solution is to limit the relevance of disputed islands based on Article 121.[186] However, due to the multitude of States involved, even effectuating the maritime delimitation *per se* may prove problematic;[187] a tribunal may be unable to reach a decision between some of the States without affecting legal rights of others.[188] On the other hand, more 'creative' options, such as joint development zones, may be available to resolve, or at least indefinitely 'quell', such complex disputes.

Article 300 LOSC: An Independent Jurisdictional Basis?

Article 300 of the LOSC requires States to fulfil their LOSC obligations in good faith and exercise the rights and freedoms recognized therein in a manner that would not constitute an abuse of right.[189] This entails that a right cannot be exercised in a 'fictitious' way for a purpose completely different from that for which it was originally granted (one potential example is the UK's alleged 'MPA' pretext in *Mauritius* v. *UK*), or in a wholly unreasonable manner (such as, arguably, some of China's potentially historically and legally unfounded maritime jurisdictional claims). Moreover, one set of rights cannot

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183 Van Dyke (n 4) 75. See also B.H. Oxman, 'Political, Strategic, and Historical Considerations' in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, vol. I (Martinus Nijhoff, Dordrecht 1993) 3, 4.

184 Chiu (n 174) 196–97, 208.

185 Van Dyke (n 4) 67.

186 *Ibid.*, 73.

187 Contrary to one argument (Van Dyke (n 4) 72), it is unlikely the CLCS would take action in disputed areas, given its limited legal capacity and mandate. See LOSC Art. 76(10); CLCS Rules of Procedure, Rule 46 and Annex I; ILA, 'Report of the Committee: Legal Issues of the Outer Continental Shelf', Report of the Seventy-First Conference (2004) (hereinafter ILA First Report) 4; ILA, 'Second Report of the Committee: Legal Issues of the Outer Continental Shelf', Report of the Seventy-Second Conference (2006) (hereinafter ILA Second Report), Conclusion No 19, 23–24; *Barbados/Trinidad and Tobago* (n 141) paras 63–65; B. Baker, 'States Parties and the Commission on the Limits of the Continental Shelf' in Ndiaye and Wolfrum (n 27) 680–82; Dupuy and Vignes (n 11) 490. See also CLCS, 'Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission—Twenty-Fourth Session', 1 October 2009, UN Doc CLCS/64, 20, 22–23.

188 Smith (n 14) 351.

189 Klein (n 77) 43.

be exercised in disregard of another set of rights and obligations.[190] Last, "the abuse of right may operate to restrict unjustified claim-splitting tactics"[191] (such as perhaps between land and sea elements in mixed disputes).

The original intention during its drafting was to include Article 300 among the dispute settlement provisions to ensure recourse to adjudication in the event of misuse of power by a coastal State.[192] Since coastal States were averse to the idea, the provision was instead included in the general provisions rather than in Part XV of the LOSC. Nevertheless, as emphasised by the International Law Association (ILA), the importance of the broad commitment under Article 300 should not be underestimated.[193] In a different context, the Annex VII tribunal in *Southern Bluefin Tuna* stated:

> [The tribunal] does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction.[194]

In other words, if the situation is sufficiently serious (as could be the case with conflict-ridden disputes in Southeast Asia), States might be compelled to resort to Part XV procedures under the remit of Article 300. The Article relates to abuses of right and infringements of good faith *so severe* that it may provide a basis for deciding even concurrent sovereignty issues in mixed disputes. This would apply to the substantive rights in question, as well as to the manner in which a party *conducts* itself—not only as a party to a dispute, but, more generally, as a party to the Convention.[195] LOS tribunals could in this way supposedly override sovereignty-related jurisdictional objections,[196] and, in sufficiently serious circumstances, use Article 300 as an independent jurisdictional basis to resolve mixed disputes.

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[190] Shany (n 34) 257.
[191] *Ibid.*, 259.
[192] Dupuy and Vignes (n 11) 1348.
[193] ILA Second Report (n 187) 19–22; Baker (n 187) 685.
[194] *SBT* case (n 78) para. 64.
[195] A possible analogy is the ICJ's decision in *Nicaragua* v. *USA* (n 127) to exercise jurisdiction despite a US treaty reservation excluding the dispute by applying customary law *in lieu* of the relevant treaties.
[196] Klein (n 77) 43.

The Characterisation of a Dispute: The Contextual Approach and the Non-self-Judging Character of Article 298 Exceptions

A tribunal has the inherent power, rooted in its judicial function,[197] to interpret submissions and identify the main issues in dispute in order to determine whether it has competence to hear the matter.[198] In this sense, the optional exceptions in Article 298(1) are *not* self-judging and cannot serve as a simple bar to proceedings under Section 2 of Part XV: it is for a LOS tribunal itself to determine whether it has jurisdiction to decide (*compétence de la compétence*).[199] This idea is reinforced by the ICJ's distinction between '*seisin*,'[200] as the act instituting proceedings, which can be purely unilateral, and *jurisdiction*, which is subject to the consent, direct or indirect, of all parties to the case.[201] Though overlapping, the two notions are "best kept separate."[202] Accordingly, a tribunal may decide it has been validly seised[203] even if it subsequently decides to refrain from exercising jurisdiction.[204] Although the question of valid seisin seems until now to have arisen only before the ICJ, "there is no reason why the same basic principles… should not be applied by [other] tribunals."[205] Thus, States should not be able to use the fact that LOS tribunals might not eventually uphold jurisdiction over a mixed dispute as an excuse to avoid initiating proceedings under LOSC Part XV in the first place.

To the extent that a question of territorial sovereignty is subsumed or inherently linked to other substantive law of the sea questions, the tribunal must decide what characterisation is to take precedence in deciding jurisdiction.[206]

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197 *Nuclear Tests (Australia* v. *France)*, *Judgment, ICJ Reports 1974* 253, 259–60.

198 D. Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9 *Chicago Journal of International Law* 537, 541.

199 LOSC Art. 288(4); ITLOS Rules Art. 58. See G. Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *ICLQ* 849.

200 Rosenne (n 108) 1147.

201 *Ibid.*, 1145. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, ICJ Reports 1995* 6, 23–24; P. Weil, 'Compétence et saisine: un nouvel aspect du principe de la jurisdiction consensuelle' in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the Twenty-First Century* (Kluwer, The Hague 1996) 833.

202 Amerasinghe (n 107) 68.

203 The decision could, e.g., be taken by means of *pre-adjudicatory proceedings* under ICJ Statute Art. 48, an important innovation by the Court in *Request for an Examination* (n 147)—Rosenne (n 108) 872–75.

204 Amerasinghe (n 107) 67.

205 *Ibid.*, 68.

206 Klein (n 77) 269. Note also that Art. 298(1)(a)(i) only excludes *'concurrent'* territorial

The *characterisation* of a 'mixed dispute' requires that the tribunal adopt a 'contextual' analysis—the approach in *Southern Bluefin Tuna*—to assess the 'weight' of any territorial issues involved in light of the particular circumstances of each case:[207]

> The statement of claims, the relief requested, as well as the facts giving rise to the dispute may be indicative of what treaty rights and duties are at stake, and concomitantly what dispute settlement scheme is applicable.[208]

In practice, LOS tribunals are likely to find practical solutions to circumvent or portray the territorial issues in such a way so as to be able to adjudicate:

> It is most unlikely that a dynamic court exercising its powers under the LOS Convention will have much difficulty both in finding that it possesses jurisdiction in a particular case.[209]

Thus, a case that appears to be a 'mixed dispute' could still be submitted to compulsory procedures, leaving it to the tribunal to determine how it should be characterised and whether it can be resolved without having to tackle sovereignty questions.[210] The boundary could, for instance, be drawn up to a point where it would not be influenced by the disputed territory,[211] just as maritime boundaries in past cases have been drawn in such a way so as to avoid affecting third-party interests.[212] In other words, Article 298(1)(a)(i) does not *preclude* submission of mixed-competence disputes to LOS tribunals, but rather only limits their *scope*. Therefore, apart from the possibility of basing jurisdiction on Article 300, as discussed, LOS tribunals could tackle a 'mixed dispute' by limiting the relevant area under consideration to avoid questions of land sovereignty—a strategy often feasible in practice.

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issues, which could *stricto sensu* be interpreted as allowing the tribunals to assert competence over merely 'subsidiary' land issues.

[207] Rosenne (n 108) 521, 830.

[208] Klein (n 77) 41.

[209] De Mestral (n 77) 171.

[210] Rao (n 27) 884.

[211] B.H. Oxman, 'International Maritime Boundaries: Political, Strategic, and Historical Considerations' (1994) 26 *University of Miami Inter-American Law Review* 243.

[212] See, e.g., *Continental Shelf* (n 109) 56; *Eritrea/Yemen* (n 143) para. 164.

Conclusion

The jurisdictional dilemma of LOS tribunals concerning mixed disputes seems to adversely affect their effectiveness, potentially enabling some States to circumvent dispute resolution on the grounds that land sovereignty issues are involved.

Due to the sensitive nature of sea boundary delimitations, especially when interlinked with territorial issues, the assessment of the status of mixed disputes under the Convention is contentious and complex. The drafting history of pertinent LOSC provisions seems to suggest that, although they may have discussed the option, States did not necessarily intend to exclude mixed disputes from Part XV compulsory procedures *generally*, absent an Article 298(1)(a) declaration. Moreover, a textual interpretation of the relevant proviso in Article 298(1)(a)(i) indicates that declarations only exclude mixed disputes from *conciliation*, and not from compulsory procedures in the absence of such an exemption. However, the fundamental differences between territorial and maritime boundary determinations, and the absence of any express LOSC provision regarding land territory (it seems clear, at least, that 'pure' territorial issues lie beyond its realm), make it difficult to ascertain whether LOS tribunals could—or *should*—exercise jurisdiction over mixed disputes.

In practice, LOS tribunals are likely to find ways of tackling, or *avoiding*, concurrent territorial issues in predominantly maritime disputes (where the land element does not constitute the *very subject-matter* of the claims). Furthermore, Article 300 could conceivably provide a 'loophole' by granting an independent jurisdictional basis to adjudicate mixed disputes in cases of an egregious 'abuse of right'.

Finally, it is important to distinguish between *seisin* and jurisdiction, keeping in mind the tribunals' inherent power to rule on their own competence. States should not avoid *initiating* proceedings based on the view that LOS tribunals might not ultimately exercise jurisdiction.

It is undeniable that these issues are real and significant. Nevertheless, in practice, the question of competence over concurrent land sovereignty in mixed disputes is *less* of an impediment—and less extensive in its practical and juridical effects—than sometimes perceived. The consequences of not making full use of compulsory procedures under LOSC may outweigh the advantages of postponing the resolution of mixed disputes—a problem that affects not only the States directly concerned, but also, in view of the risk of confrontation in certain disputed areas and the countless sea boundaries still undelimited around the globe, the international community as a whole.

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Annex 169

International Union for Conservation of Nature, Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas (2012)

Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas

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A full set of guidelines is available at: www.iucn.org/pa_guidelines
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Contribute to developing capacity for a Protected Planet at: www.protectedplanet.net/

IUCN PROTECTED AREA DEFINITION, MANAGEMENT CATEGORIES AND GOVERNANCE TYPES

IUCN defines a protected area as:
A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.

The definition is expanded by six management categories (one with a sub-division), summarized below.
Ia Strict nature reserve: Strictly protected for biodiversity and also possibly geological/ geomorphological features, where human visitation, use and impacts are controlled and limited to ensure protection of the conservation values
Ib Wilderness area: Usually large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, protected and managed to preserve their natural condition
II National park: Large natural or near-natural areas protecting large-scale ecological processes with characteristic species and ecosystems, which also have environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities
III Natural monument or feature: Areas set aside to protect a specific natural monument, which can be a landform, sea mount, marine cavern, geological feature such as a cave, or a living feature such as an ancient grove
IV Habitat/species management area: Areas to protect particular species or habitats, where management reflects this priority. Many will need regular, active interventions to meet the needs of particular species or habitats, but this is not a requirement of the category
V Protected landscape or seascape: Where the interaction of people and nature over time has produced a distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values
VI Protected areas with sustainable use of natural resources: Areas which conserve ecosystems, together with associated cultural values and traditional natural resource management systems. Generally large, mainly in a natural condition, with a proportion under sustainable natural resource management and where low-level non-industrial natural resource use compatible with nature conservation is seen as one of the main aims

The category should be based around the primary management objective(s), which should apply to at least three-quarters of the protected area – the 75 per cent rule.

The management categories are applied with a typology of governance types – a description of who holds authority and responsibility for the protected area. IUCN defines four governance types.
Governance by government: Federal or national ministry/agency in charge; sub-national ministry/agency in charge; government-delegated management (e.g. to NGO)
Shared governance: Collaborative management (various degrees of influence); joint management (pluralist management board; transboundary management (various levels across international borders)
Private governance: By individual owner; by non-profit organisations (NGOs, universities, cooperatives); by for-profit organsations (individuals or corporate)
Governance by indigenous peoples and local communities: Indigenous peoples' conserved areas and territories; community conserved areas – declared and run by local communities

For more information on the IUCN definition, categories and governance type see the 2008 *Guidelines for applying protected area management categories* which can be downloaded at: www.iucn.org/pa_categories

Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas

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ABOUT IUCN

IUCN, International Union for Conservation of Nature, helps the world find pragmatic solutions to our most pressing environment and development challenges.

IUCN works on biodiversity, climate change, energy, human livelihoods and greening the world economy by supporting scientific research, managing field projects all over the world, and bringing governments, NGO's, the UN and companies together to develop policy, laws and best practice.

IUCN is the world's oldest and largest global environmental organization, with more than 1,000 government and NGO members and almost 11,000 volunteer experts in some 160 countries. IUCN's work is supported by over 1,000 staff in 45 offices and hundreds of partners in public, NGO and private sectors around the world.

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Preamble

In 1996 the World Conservation Congress in Montreal recommended (Resolution 1.37) *inter alia* that, as part of the IUCN Marine and Coastal Programme, World Commission on Protected Areas (WCPA) should "develop guidance on the application of the IUCN Guidelines for Protected Area Management Categories in the marine environment". This was followed by a recommendation by Kelleher and Recchia (1998)[1] that "… an elaboration of the classification scheme to indicate different types of zones occurring within MPAs ", was needed given the difficulty experienced in applying a single IUCN category to multiple use marine protected areas (MPAs). Wells and Day (2004)[2] subsequently reviewed the problems in applying the IUCN protected area management categories in the marine environment and highlighted issues that needed to be addressed.

In 2007, a discussion paper (Laffoley *et al.,* 2007)[3] was presented at the WCPA Marine Summit in Washington DC explaining the need for further guidance and outlining the main areas to be covered. Prior to the publication in 2008 of the revised IUCN-WCPA's ***Guidelines for Applying Protected Area Management Categories*** (referred to as the ***2008 Guidelines*** throughout the remainder of this document) (Dudley, 2008)[4], a meeting was held in Almeria, Spain, at which a paper was presented by WCPA Marine (Laffoley *et al.*, 2008)[5] re-iterating the need for explanation of how the guidelines should be applied to MPAs. The meeting participants agreed that supplementary guidelines should be prepared.

The development of the supplementary guidelines started in 2010 when members of WCPA Marine undertook an online survey to highlight issues where more guidance was needed. Subsequently, a small working group (Jon Day, Sue Stolton, Nigel Dudley, Aya Mizumura and Marc Hockings) met in Townsville, Australia, to develop a preliminary draft using the results of the survey.

This draft was commented on by Dan Laffoley (Marine Vice-Chair) and WCPA Marine members, and then a revised draft (October 2010) was circulated to WCPA members for wider input. In addition, the draft guidelines were field-tested in the Maldives[6] and South Korea[7]. Subsequent comments from reviewers, as well as the results of the field-testing, were then considered in producing this final version of the supplementary guidelines.

The primary purpose of these supplementary guidelines is to increase the accuracy and consistency of assignment and reporting of the IUCN categories when applied to marine and coastal protected areas.

To avoid unnecessary duplication of text, these supplemental guidelines therefore must be read in association with the 2008 Guidelines.

Where cross referencing is required to the *2008 Guidelines* this is identified in the text.

[1] Kelleher, G. and Recchia, C. (1998). 'Editorial – lessons from marine protected areas around the world'. *Parks* 8 (2), IUCN, Gland.

[2] Wells, S. and Day, J. (2004). Application of the IUCN protected area management categories in the marine environment.' *Parks* 14 (3) IUCN, Gland.

[3] Laffoley, D.,Day, J., Wood, L. and Barr, B. (2007). 'IUCN Categories – Their Application In Marine Protected Areas', Discussion paper presented at WCPA Marine Summit, Washington DC, April 2007.

[4] Dudley, N. (Editor) (2008). *Guidelines for Applying Protected Area Management Categories.* Gland, Switzerland, see: http://www.iucn.org/about/union/commissions/wcpa/wcpa_puball/wcpa_pubsubject/wcpa_categoriespub/?1662/Guidelines-for-applying-protected-area-management-categories

[5] Laffoley, D., Day, J., Wood, L. and Barr, B. (2008). 'Marine Protected Areas'. In: Dudley, N. and Stolton, S. (Eds.) (2008). *Defining protected areas: an international conference in Almeria, Spain.* Gland, Switzerland: IUCN. 220pp.

[6] MWSRP (2011). *Guidelines for applying the IUCN Marine Protected Area Management Categories to Marine Protected Areas: a field testing report by the Maldives Whale Shark Research Programme (MWSRP).* Unpublished Report, September 2011. 5pp.

[7] Stolton, S, Shadie, P. and Hag Young Heo (2011). *Case study South Korea – Marine Categories.* Unpublished Report. 5pp.

At a glance

IUCN has developed a set of guidelines which define a protected area and categorise a protected area through six management types and four governance types (Dudley, 2008)[8]. These supplementary guidelines provide additional advice on using the IUCN guidance in marine protected areas (MPAs).

To qualify for one or more of the IUCN categories, a site must meet the IUCN definition of a protected area, as given in the ***2008 Guidelines***:

> "***A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values***"

The appropriate IUCN category is assigned based on the primary stated management objective of the MPA (which must apply to at least 75% of the MPA – see section 5.1), or a zone within an MPA (the zone must be clearly mapped, recognised by legal or other effective means, and have distinct and unambiguous management aims that can be assigned to a particular protected area category – see section 5.4). The primary objectives of each IUCN category are listed in Table 1 as described in the ***2008 Guidelines***. A more detailed explanation is presented in section 4 of this document and in the *2008 Guidelines.*

Table 1: Definition and Primary Objectives of IUCN Protected Area Categories (Dudley, 2008).

IUCN Category	Definition	Primary Objective
Ia	*Category Ia are strictly protected areas set aside to protect biodiversity and also possibly geological/ geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. Such protected areas can serve as indispensable reference areas for scientific research and monitoring.*	To conserve regionally, nationally or globally outstanding ecosystems, species (occurrences or aggregations) and/ or geodiversity features: these attributes will have been formed mostly or entirely by non-human forces and will be degraded or destroyed when subjected to all but very light human impact.
Ib	*Category Ib protected areas are usually large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition.*	To protect the long-term ecological integrity of natural areas that are undisturbed by significant human activity, free of modern infrastructure and where natural forces and processes predominate, so that current and future generations have the opportunity to experience such areas.
II	*Category II protected areas are large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.*	To protect natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation.
III	*Category III protected areas are set aside to protect a specific natural monument, which can be a landform, sea mount, submarine caverns, geological feature such as a caves or even a living feature such as an ancient grove. They are generally quite small protected areas and often have high visitor value.*	To protect specific outstanding natural features and their associated biodiversity and habitats.

8 Dudley, N. (Editor) (2008). *Guidelines for Applying Protected Area Management Categories.* Gland, Switzerland.

IUCN Category	Definition	Primary Objective
IV	*Category IV protected areas aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category.*	To maintain, conserve and restore species and habitats.
V	*Category V protected areas are where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.*	To protect and sustain important landscapes/ seascapes and the associated nature conservation and other values created by interactions with humans through traditional management practices.
VI	*Category VI protected areas conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in natural condition, where a proportion is under sustainable natural resource management and where low-level non industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.*	To protect natural ecosystems and use natural resources sustainably, when conservation and sustainable use can be mutually beneficial.

Spatial areas which may incidentally appear to deliver nature conservation but **DO NOT HAVE STATED** nature conservation objectives should **NOT** automatically be classified as MPAs, as defined by IUCN. These include:

- Fishery management areas with no **wider stated conservation aims**.
- Community areas managed **primarily** for sustainable extraction of marine products (e.g. coral, fish, shells, etc).
- Marine and coastal management systems managed **primarily** for tourism, which also include areas of conservation interest.
- Wind farms and oil platforms that **incidentally** help to build up biodiversity around underwater structures and by excluding fishing and other vessels.
- Marine and coastal areas **set aside for other purposes** but which also have conservation benefit: military training areas or their buffer areas (e.g. exclusion zones); disaster mitigation (e.g. coastal defences that also harbour significant biodiversity); communications cable or pipeline protection areas; shipping lanes etc.
- Large areas (e.g., regions, provinces, countries) where certain species are protected by law **across the entire region.**

Any of the above management approaches could be classified as an MPA if instead they had a primary stated aim and are managed to deliver nature conservation.

1. Introduction

1.1 Why are supplementary guidelines needed for MPAs?

The IUCN categories are applicable to all types of protected areas, whether terrestrial or marine. The **2008** ***Guidelines for Applying Protected Area Management Categories*** (***2008 Guidelines***) provide considerable detail on the use and application of the categories, including for marine protected areas (MPAs). Specific sections of the *2008 Guidelines* are referred to throughout the document, and the section in these *2008 Guidelines* that deals with marine protected areas can be found on pages 55-58.

However, with the smaller number of MPAs compared with terrestrial protected areas, there is less experience and understanding of applying the categories to MPAs. Application of the categories to MPAs has often been inaccurate and inconsistent. For example, it is considered (Wood, pers. com, 2012) that, of those MPAs that have been categorised, about 50% have been wrongly allocated because the name of the MPA (e.g. National Park, Sanctuary, etc) has been used to determine the category, rather than the management objectives that the MPA was established to achieve. Confusion has also arisen when sites have been incorrectly assigned on the basis of activities that occur rather than using the stated management objectives. Furthermore, where protected areas include both land and sea, the objectives for the marine component of the protected area are often not considered when assigning the site's category.

These supplementary marine guidelines are thus aimed at ensuring that the IUCN categories can be effectively applied to all types of MPAs as well as to any marine components of adjoining terrestrial protected areas, provided a site meets the IUCN definition of a protected area. Inconsistencies in the application of, and reporting on, the categories reduce the efficacy and use of the system as a global classification scheme. These supplementary guidelines should increase the accuracy and consistency of both assignment and reporting. The categories are recognised by international bodies such as the United Nations and by many national governments as the global standard for defining and recording protected areas, and as such are increasingly being incorporated into legislation. Further information on these international conservation initiatives is given in Chapter 7 of the ***2008 Guidelines***.

1.2 Who are the supplementary guidelines aimed at?

These supplementary guidelines are intended primarily for policy makers, decision makers, senior managers, agencies and other institutions involved in the establishment and management of MPAs. The guidelines are less likely to be of direct relevance to MPA managers in their day-to-day work. However it is useful for MPA managers to understand the categories, as the category to which an MPA has been assigned can help a manager understand the management objectives and thus guide planning and implementation. The supplementary guidelines will also be useful to those involved in collecting, analysing and reporting data on MPAs.

Where MPAs are administered by fisheries agencies, the guidelines may be particularly useful as such departments do not always have a good knowledge of the IUCN categories system. They also do not necessarily have a close relationship with the main national agency responsible for terrestrial protected areas, which usually has responsibility for national reporting. In these cases, it is particularly important that fishery agency officials, policy makers, and those agencies and institutions involved in MPA management read the ***2008 Guidelines*** before using these supplementary guidelines to ensure that the basic principles of the categoriy system are understood.

1.3 How to use these guidelines

The primary guidance to assigning categories is the ***2008 Guidelines***, which provide more detail on the general principles than is given here. The *2008 Guidelines* must be consulted first, as it is essential that anyone responsible for assigning categories fully understands the categorisation system and how it is applied. These supplementary guidelines should thus be used in conjunction with the *2008 Guidelines* and must not be considered a stand-alone document. These supplementary guidelines however provide specific information that will help with the application of the categories to MPAs, and examples to explain this process more clearly. IUCN WCPA is also producing more detailed information about the process for assigning the IUCN definition, categories and governance types in the form of ***IUCN/WCPA standards on the process for recognising protected areas and assigning management categories and governance types***, due to be published in late 2012.

Both the ***2008 Guidelines*** and the supplementary guidelines are technical advice from IUCN and set out rules and advice to help countries, regions and the world to make consistent decisions. Decisions about what is or is not a protected area are normally the responsibility of national governments, or, in the case of designations such as Natura 2000 and World Heritage Sites, committees made up of more than one government established under international agreements. Countries and such international bodies are therefore asked to respect and follow this guidance, in order to improve our perspective of what are being achieved using protected areas around the world, and to maintain the value of the categories as a global categorisation system.

The supplementary guidelines provide specific advice and standards about using the ***2008 Guidelines*** in MPAs. They provide examples of MPAs from around the world to illustrate many of the points made, and where possible, hyperlinks have been provided to websites providing further information about each example (although we recognise that these may become out of date and inoperative over time). These supplementary guidelines also include a summary of the main elements of the full *2008 Guidelines*, including the primary objectives of each category (for each topic, references to relevant page numbers in the printed/PDF version of the *2008 Guidelines* are also provided).

2. What is a Marine Protected Area?

2.1 The Definition of a Marine Protected Area

In applying the categories system, the first step is to determine whether or not the site meets IUCN's definition of a protected area as given in the ***2008 Guidelines*** (Chapter 2, page 8) which states:

> ***A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.***

If a marine area does not meet this definition, then it cannot be considered to be an MPA.

A detailed explanation of the definition is provided in the ***2008 Guidelines*** (Chapter 2, pages 8-9). This is summarised in Table 2 below, with a discussion of issues to consider when applying the definition to the marine environment and some examples to illustrate the definition.

Table 2: Explanation of protected area definition.

Phrase	Explanation provided in the 2008 Guidelines	Discussion and example of application in the marine realm
Clearly defined	*Clearly defined implies a spatially defined area with agreed and demarcated borders. These borders can sometimes be defined by physical features that move over time (e.g., river banks) or by management actions (e.g., agreed no-take zones).*	This implies that MPAs must be mapped and have boundaries that are legally defined. However, while some MPAs can be clearly defined (e.g. an entire bay bounded by headlands), for others it may be difficult to mark the boundaries, especially if the MPA is offshore. Even boundaries on the landward side, where tide levels can be used (e.g. Low Water Mark), can be difficult to establish (see Box 1). Increasingly, MPA or zone boundaries are defined by high resolution latitude and longitude coordinates, as determined by modern GPS instruments. **Example:** • The US National Marine Sanctuary System identifies sanctuaries legislated under the National Marine Sanctuaries Act with boundaries defined in a series of associated maps.
Geographical space	*Includes land, inland water, marine and coastal areas or a combination of two or more of these. "Space" has three dimensions, e.g., as when the airspace above a protected area is protected from low-flying aircraft or in marine protected areas when a certain water depth is protected or the seabed is protected but water above is not: conversely subsurface areas sometimes are* not *protected (e.g., are open for mining).*	All protected areas exist in three dimensions, but the vertical dimension in MPAs is often a substantial management consideration. In MPAs, management may need to address the airspace above the sea surface, the actual water surface, the water column (or parts of it), the seabed and the sub-seabed, or just one or a combination of two or more of these elements. For example, some MPAs protect just the seabed/benthos and not the water column above. It is therefore important that an MPA has a clear description of the dimensions that are actually protected. **Examples:** • In Australia's Great Barrier Reef Marine Park, the boundary is clearly defined by legal proclamation. The zones in the GBRMP are legally defined in the statutory Zoning Plan. The MPA goes to a depth of 1000 metres below the seabed and a height of 915 metres (airspace) above the surface of the water. • In Australia's Huon Commonwealth Marine Reserve in the South-east Marine Reserve Network, zoning is stratified by depth. Within the benthic sanctuary zone, the seabed and adjacent waters are fully protected. Above this, commercial fishing activity is allowed in the water column from the sea surface down to 500 metres depth.

Phrase	Explanation provided in the 2008 Guidelines	Discussion and example of application in the marine realm
Recognised	*Implies that protection can include a range of governance types declared by people as well as those identified by the state, but that such sites should be recognised in some way (in particular through listing on the World Database on Protected Areas – WDPA).*	**Example:** • The Government of Canada and the Council of the Haida Nation co-manage Gwaii Haanas National Park Reserve and Haida Heritage Site, and the Gwaii Haanas National Marine Conservation Area Reserve off the Pacific coast of Canada.
Dedicated	*Implies specific binding commitment to conservation in the long term, through e.g.:* • *International conventions and agreements* • *National, provincial and local law* • *Customary law* • *Covenants of NGOs* • *Private trusts and company policies* • *Certification schemes*	**Examples:** • The Galápagos Marine Reserve is designated under national law and is also an integral part of the Galápagos Islands World Heritage Site. • Vueti Navakavu in Fiji is a locally managed marine area (LMMA) established by the community and declared through local cultural protocol systems.
Managed	*Assumes some active steps to conserve the natural (and possibly other) values for which the protected area was established; note that "managed" can include a decision to leave the area untouched if this is the best conservation strategy.*	The requirement that a site is managed applies to both marine and terrestrial situations. As on land, many types of MPA management are possible. **Example:** • Bonaire National Marine Park in the Netherlands Antilles has clearly defined regulations that apply to all users of the park.
Legal or other effective means	*Means that protected areas must either be gazetted (that is, recognised under statutory civil law), recognised through an international convention or agreement, or else managed through other effective but non-gazetted, means, such as through recognised traditional rules under which community-conserved areas operate or the policies of established non-governmental organisations.*	As for terrestrial protected areas, 'effective means' include agreements with indigenous groups; **Example:** • Dhimurru Indigenous Protected Area, an area of land and sea in the Northern Territory of Australia, on the Gulf of Carpentaria, is run by the Dhimurru Land Management Aboriginal Corporation which works with the Traditional Owners to manage the protected area.
… to achieve	*Implies some level of effectiveness – a new element that was not present in the 1994 definition but which has been strongly requested by many protected area managers and others. Although the category will still be determined by objective, management effectiveness will progressively be recorded on the WDPA and over time will become an important contributory criterion in identification and recognition of protected areas.*	As for terrestrial protected areas, this implies some level of effectiveness and therefore requires that the MPA is subject to monitoring, evaluation and reporting. **Example:** • The assessment of management effectiveness of the Aldabra World Heritage Site in the Seychelles, undertaken as part of the Enhancing our Heritage project with the UNESCO World Heritage Centre, provides information on the extent to which the objectives of this MPA are being achieved.
Long term	*Protected areas should be managed in perpetuity and not as short term or a temporary management strategy.*	As with terrestrial protected areas, long-term protection (over timescales of human generations) is necessary for effective marine conservation. Seasonal closures of an area for a specific purpose (such as fish spawning, whale breeding, etc), in the absence of any additional biodiversity protection and any primary nature conservation objective are not considered to be MPAs. Seasonal protection of certain species or habitats may be a useful component of management in an MPA. **Examples:** • The Cockle Bay Shellfish Seasonal Closure area in New Zealand is NOT an MPA as it is only in force for the months of October to April when collection of shellfish is banned. • In the Marine Mammal Protection Zone of the Great Australian Bight Marine Park (Commonwealth Waters) the use of vessels is prohibited 1 May - 31 October each year to protect an important calving and breeding area for Southern Right Whales.

Phrase	Explanation provided in the 2008 Guidelines	Discussion and example of application in the marine realm
Conservation	*In the context of this definition conservation refers to the* in situ *maintenance of ecosystems and natural and semi-natural habitats and of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties*	**Examples:** • Ecological Reserves in the Florida Keys National Marine Sanctuary in the United States are designed to provide natural spawning and nursery areas for the replenishment and genetic protection of marine life and aim to protect and preserve all habitats and species found throughout the Sanctuary. • The inclusion of a minimum of 20% of all 70 bioregions within Australia's Great Barrier Reef Marine Park is designed to provide in situ protection of representative examples of all species and ecosystem processes.
Nature	*In this context nature always refers to biodiversity, at genetic, species and ecosystem level, and often also refers to geodiversity, landform and broader natural values.*	All protected areas, whether terrestrial or marine should aim to protect all the features of conservation importance within their boundaries. **Example:** • The overall objective of the Great Barrier Reef Marine Park is to provide for the long term protection and conservation of the **environment, biodiversity and heritage values** of the Great Barrier Reef Region.
Associated ecosystem services	*Means here ecosystem services that are related to but do not interfere with the aim of nature conservation. These can include provisioning services such as food and water; regulating services such as regulation of floods, drought, land degradation, and disease; supporting services such as soil formation and nutrient cycling; and cultural services such as recreational, spiritual, religious and other nonmaterial benefits.*	MPAs provide a wide range of ecosystem services: **Examples:** • Ecosystem services: The MPA network in Belize has been estimated to contribute nearly US$20 million annually in reef-related visitor expenditure. • Regulating ecosystem services, for example seagrass meadows, mangroves and kelp forests as carbon sinks: The four MPAs designated by the Malta Environment and Planning Authority to protect Malta's *Posidonia* (seagrass) beds together protect over 80% of this habitat in Malta. Areas set up for wave/wind power are generally NOT MPAs (see section 2.3).
Cultural values	*Includes those that do not interfere with the conservation outcome (*all *cultural values in a protected area should meet this criterion), including in particular:* • *Those that contribute to conservation outcomes (e.g., traditional management practices on which key species have become reliant)* • *Those that are themselves under threat.*	Areas set aside for cultural values are only protected areas under the IUCN definition, if they have nature conservation as a primary aim. However, many MPAs contain sacred sites or have significant cultural and heritage value and understanding of this is important. **Examples:** • Nosy Ve, an island in southern Madagascar protected under a local 'dina' agreement is both a sacred site and an area important for corals and as a tropic bird nesting colony. • Papahanaumokuakea Marine National Monument in the North West Hawaiian Islands is important for Native Hawaiians at genealogical, cultural, and spiritual levels.

Box 1

Boundaries of MPAs

There are a number of issues to consider when determining the boundaries of an MPA. On the landward side, it is important to make it very clear as to exactly what boundary is being used and this must be explained; for example 'Mean Low Water' is a different boundary from that of 'Lowest Astronomical Tide'. Wherever possible highest astronomical tide or high water mark should be used (highest astronomical tide generally suits areas with large tidal ranges, whereas high water mark suits small tidal ranges). Both low water and high water marks can result in boundaries that are difficult in legal and administrative terms because:

- The low water mark is usually covered by water. It is thus difficult to inform the public of its precise location, and therefore to enforce; in addition, low water mark moves with erosion and accretion and is often not marked on charts or defined in any publically available way.
- Boundaries based on high water mark may cause problems as, for example, what may appear to be relatively stable 'lines' can also be influenced by erosion and accretion. Also established rights of use often reflect terrestrial ownership of the adjacent land.
- In rivers, estuaries or narrow bays, there are no clear principles for defining low or high water and it may be unclear as to which bays and channels are part of a MPA, and which may be regarded as 'internal waters'.

Box 2

Offshore waters within and beyond national jurisdiction

Offshore waters are generally considered to be those that lie beyond a country's territorial seas, i.e. beyond 12 nautical miles from shore in most cases. They include the major part of all Exclusive Economic Zones (EEZs - waters under national jurisdiction out to a maximum of 200 nautical mile), as well as the high seas and seabed beyond the limit of national jurisdiction. For MPAs in offshore waters, designation should follow the *2008 Guidelines* as for any protected area. Thus, a site may be considered as an MPA provided it: (a) has defined boundaries that can be mapped; (b) is recognised by legal or other effective means; and (c) has distinct and unambiguous management aims that can be assigned to a particular protected area category.

Example:

The South Orkney Islands Southern Shelf Marine Protected Area was the first fully high seas MPA to be designated under the Convention on the Conservation of Antarctic Living Marine Resources with specific management aims and a responsible body: the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR).

2.2 Principles associated with the use of the protected area definition and IUCN category

The *2008 Guidelines* (Chapter 2, page 10) include the following principles (emphasis has been added to the most fundamental points) to help decide whether an area meets the definition of a protected area and what category it should be assigned to:

- *For IUCN, only those areas where the main objective is conserving nature can be considered protected areas; this can include many areas with other goals as well, at the same level, but in the case of conflict,* ***nature conservation will be the priority.***
- *Protected areas must prevent, or eliminate where necessary, any exploitation or management practice that will be harmful to the objectives of designation.*
- ***The choice of category should be based on the primary objective(s) stated for each protected area or legally-defined zone within a protected area.***
- *The system is not intended to be hierarchical.*
- *All categories make a contribution to conservation but objectives must be chosen with respect to the particular situation; not all categories are equally useful in every situation.*
- *Any category can exist under any governance type and vice versa.*
- *A diversity of management approaches is desirable and should be encouraged, as it reflects the many ways in which communities around the world have expressed the universal value of the protected area concept.*
- *The category should be changed if assessment shows that the stated, long-term management objectives do not match those of the category assigned.*
- *However, the category is not a reflection of management effectiveness.*
- *Protected areas should usually aim to maintain or, ideally, increase the degree of naturalness of the ecosystem being protected.*
- *The definition and categories of protected areas should not be used as an excuse for dispossessing people of their land or sea territory.*

2.3 When is a marine area that may achieve conservation outcomes not an MPA?

A **protected area** as defined by IUCN describes a precise set of management approaches with limits, and must have nature conservation as a **primary** rather than a secondary aim, as explained above. There are however many managed areas that protect biodiversity, either indirectly, incidentally or fortuitously. Indeed, it is a principle of the Convention on Biological Diversity's "ecosystem approach" that all land and water management should contribute to conservation, and as a result the distinction between what is and what is not a protected area is sometimes unclear. However, such areas do not necessarily fulfil the IUCN definition of a protected area. This is particularly the case in the marine environment where

there is a long history of spatial fisheries management and a growing interest in spatial planning and spatial management of other activities that often have no stated aim or interest in nature conservation – it is just an incidental or apparent link. Understanding the IUCN protected area definition is thus critically important.

Areas subject to some form of management **could** be MPAs or parts of MPAs in some cases, but MPA status should not be assumed and decisions must be made on a case-by-case basis, the essential criterion being **whether nature conservation is the primary objective**.

The following types of management area are **not** necessarily MPAs:

- Fishery management areas with **no wider stated conservation aims** (see section 2.3.1 for more detailed discussion).
- Community areas managed **primarily** for sustainable extraction of marine products, e.g. coral, fish, shells (these are discussed below in section 2.3.2 Indigenous and community conserved areas).
- Marine and coastal management systems managed **primarily** for tourism, even where these also include areas of conservation interest.
- Wind farms and oil platforms that **incidentally** help to build up biodiversity around underwater structures by excluding fishing and other vessels.
- Marine and coastal areas **set aside for other purposes** but which have an indirect conservation benefit: military training areas or their buffer areas (e.g. exclusion zones); disaster mitigation (e.g. coastal defences that also harbour significant biodiversity); communications cable and pipeline protection areas; shipping lanes, etc.
- Large areas (e.g., regions, provinces, countries) where certain species are protected by law across the entire region.

2.3.1. Fishery management areas

Temporary or permanent fishing closures that are established primarily to help build up and maintain reserve stocks for fishing in the future, and have no wider conservation aims or achievements are not considered to be MPAs. For example, Norway, Iceland and the Faroe Islands close areas to fishing at short notice if the percentage of juveniles or by-catch goes above a certain number. These areas do **not** qualify as MPAs. IUCN's advice is that areas set aside purely to maintain fishing stocks, particularly on a temporary basis, should not be considered to be protected areas even though they may well reflect good fishery management. For such sites to meet IUCN's definition of a protected area, managers would need to address the overall health and diversity of the ecosystem and have a stated primary aim to this effect.

Such areas however may be important components of the management of an MPA. For example, seasonal closures of fish spawning aggregation areas or pelagic migratory routes, at specific and predictable times of year for certain species when they are extremely vulnerable, may be essential to the effective management of an MPA.

Examples of MPAs with seasonally closed zones:

- Within the Great Barrier Reef Marine Park, Australia, there are seasonal closures to all reef fish fishing for specific periods at certain times of the year.
- The Galapagos Marine Reserve has seasonal closures to fishing of, for example, sea cucumbers.

Examples where management of fishing is essential to nature protection throughout the site:

- Eastport Marine Protected Areas in Canada consists of two MPAs (Duck Island and Round Island, both of which are no-take areas) within the 400 km^2 Eastport Peninsula Lobster Management Area; the larger management area is open to commercial exploitation of lobsters according to the fisheries management regime in place and is not itself an MPA, and the two no-take areas, each of which meets the definition of a protected area, play a key role in the lobster's management.

- Belize has eleven multi-species fish spawning aggregation sites that are closed to fishing permanently through marine reserves that restrict all fishing.

2.3.2. Indigenous peoples and community conserved territories and areas (ICCAs)

Indigenous peoples and community conserved territories and areas (ICCA) are defined by IUCN as: 'natural and/or modified ecosystems containing significant biodiversity values, ecological functions and benefits, and cultural values voluntarily conserved by indigenous peoples and local communities both sedentary and mobile – through customary laws or other effective means'. Determining when an ICCA is also a protected area, and therefore eligible for listing on the WDPA, is more complex than for some other protected area governance types (see *2008 Guidelines*, Chapter 3, pages 28-31) and has two stages:

1. **Agreement by the indigenous people or community involved**: no community-managed site should be identified as a protected area or listed on the WDPA without express consent by the community. Recognition and listing can bring benefits but also costs, such as increased exposure.

2. **Alignment with the IUCN definition of a protected area**: the 2008 definition of a protected area stipulates that for a site to be a protected area, priority must be given to nature conservation; other values present may be of similar importance but in the event of conflict between values, nature conservation must be considered the most important. As is the case with other governance types, community areas managed primarily for sustainable extraction of marine products would not be considered protected areas according to the IUCN definition unless nature conservation is the primary stated objective of the management regime.

Many ICCAs have been established by coastal communities in marine ecosystems. The ICCA Registry website is an online information portal and secure database, developed by UNEP-WCMC with support by UNDP's GEF Small Grants

Programme, that documents indigenous and community conservation areas including in the marine environment. It aims to increase awareness of the biodiversity values of areas managed by communities, and provide a wide range of information. As part of this process, it is hoped that further guidance on implementing the IUCN categories in terrestrial and marine ICCAs will be developed. Additional information is available through the ICCA Consortium, and the primary reference for determining whether marine community conservation area is an MPA should be the *2008 Guidelines*.

2.4 Governance

The IUCN protected area definition and management categories are 'neutral' about type of ownership or management authority. With respect to who holds decision-making and management authority and responsibility about protected areas, IUCN distinguishes four broad protected area governance types (governance by governments, shared governance, private governance and governance by indigenous people and local communities), which are described in the *2008 Guidelines* is reproduced in Annex I. All combinations of protected area categories and governance types are possible in an MPA. IUCN suggests that the governance type of a protected area be identified and recorded at the same time as its category in national environmental statistics and accounting systems and in protected areas databases. Protected area governance is described in detail in a new manual (Borrini-Feyerabend *et al.*, 2012)[9].

9 Borrini-Feyerabend, G., Dudley, N., Lassen, B., Pathak, N. and Sandwith, T. (2012). *Governance of Protected Areas: From understanding to action.*, IUCN, GIZ and ICCA Consortium.

3. Characteristics of the marine environment that affect protected area designation and IUCN category application

The marine environment has particular characteristics that are often absent or relatively uncommon on land. As a result, MPAs present management challenges that may need different approaches to those used for protected areas in terrestrial environments. These are described in Table 3.

Table 3: Characteristics of the marine environment that affect protected areas.

Characteristic	How does this characteristic affect MPAs?
Multi-dimensional environment	MPAs are designated in a fluid multi-dimensional environment. As a result, in some cases different management may be needed at different depths. In some MPAs vertical zoning has been used to achieve this. In others, there may be no vertical zoning, but the management put in place may nevertheless vary with depth. There is a general presumption against the use of vertical zoning, as there is increasing evidence of strong ecological bentho-pelagic coupling (see Section 5.5 below), and the subsequent vertically tiered management is particularly difficult, if not impossible, to effectively police and enforce. The sub-seafloor may also need management, if there is a potential impact such as mining below the seabed. This is similar to the situation in terrestrial protected areas where activities such as mining might potentially impact on the protected area below ground.
Currents and tides causing flows/ impacts	MPAs are subject to surrounding and 'up-current' influences from tides and currents. These are generally outside the control of the manager or management agency and cannot be managed. Although similar to the situation of airborne or wind-borne impacts on terrestrial protected areas, MPAs are perhaps more consistently subject to such influences.
Lack of clear tenure or ownership	Tenure and ownership in the marine environment is often different from on land, where there is usually clear public or private ownership. Under the United Nations Convention on the Law of the Sea (UNCLOS), nations have the right to use their Exclusive Economic Zones (EEZs), which extend from shore out to 200 nautical miles, and to establish management regimes such as MPAs. However, within an EEZ, there is generally no individual ownership of either the seabed or water column and the EEZ may often be used and accessed by all those belonging to the nation concerned. There are some exceptions, generally in inshore areas: thus in the UK, the Crown Estate owns about 50% of the foreshore (tidal land between Mean High Water and Mean Low Water as well as most of the seabed from Mean Low Water out to 12 nautical miles (i.e. the territorial sea); and in many countries, coastal communities may own or have tenure and rights over of certain marine areas or resources, as in Fiji where local communities have customary rights over traditional fishing grounds known as 'qoliqoli'. Outside the EEZs, i.e. on the High Seas, the oceans are invariably considered to be 'commons' which may be used and accessed by all nations. MPAs can represent a legitimate restriction on such rights under the UNCLOS or Regional Sea Agreements, according to provisions of the Convention on Biological Diversity (CBD) or Regional Fisheries Agencies (see box 2, page 15).
Multiple jurisdictions	Often the water column, seabed, sea life and foreshore are managed by different jurisdictions or government agencies, which may create difficulties for designation and management.
Difficulties in enforcement and management	Restricting entry to, and activities in, an MPA is often more difficult than for terrestrial protected areas (and often impossible) as there are usually multiple access points, the site is often remote and thus difficult and expensive to patrol, and under international law, rights of 'innocent passage' are afforded to all vessels. While controlling activities in the marine environment is more difficult than on land, modern satellite technology is making it easier.
Lack of visibility of features being protected	Being unable to see sub-tidal features poses particular problems in terms of management and enforcement. Illegal or unregulated activities may damage features within an MPA without anyone knowing, unless appropriate monitoring or surveillance is undertaken (and this may be expensive, requiring SCUBA diving).
Boundary demarcation	It is often difficult to know where the boundary of an MPA is, both seawards (where electronic charts, a Global Positioning System (GPS) or similar technology are needed), and on the landward side where boundaries based on high and low water marks may be difficult to locate in the field or may be only loosely defined (see discussion in Section 2.1). In a few cases, vertical zoning has been attempted, and horizontal boundaries have been established at certain depths if an MPA does not extend to either the sea surface (such as a protected area for a seamounts) or to the seabed. However, such boundaries are difficult if not impossible to mark and thus effective and practical compliance is also extremely difficult, if not impossible (see section 5.5).
Connectivity between ecosystems and habitats	The scale over which marine connectivity occurs can be very large. Since the extent of connectivity may be critical to the health of an MPA, sufficiently large areas must be considered to ensure adequate protection of ecosystem values.

4. The IUCN Protected Area management categories as applied to MPAs

The ***2008 Guidelines*** give a full description of each of the six categories of protected area management (Chapter 2, pages 12-23) and Table 9 (Chapter 6, pages 57-58) provides notes on applying the categories to MPAs. This section expands on this information and provides additional notes and examples to improve understanding of how categories can be applied to MPAs.

As outlined in one of the key principles (section 2.2 above), the choice of category relates to the primary stated objective(s) of the protected area. Categories may be assigned to a whole MPA or a separate zone within a multiple-zone MPA (see section 5.3 below). One problem that is difficult for category assignment in both marine and terrestrial protected areas is the frequent lack of clarity in the wording of the objectives of a protected area. Many MPAs have multiple objectives, having been set up with tourism or fisheries benefits, as well as biodiversity protection, in mind, and thus a **primary** objective may not be clearly identified. Nevertheless, the examples of the application of the categories to the MPAs cited below, and the national initiatives in a number of countries (e.g. Australia, Belize) to assign categories to all components of the MPA system, demonstrate that the categories can apply in the marine environment once they are well understood.

As with terrestrial protected areas, IUCN categories **are independent of the names of an MPA** (see ***2008 Guidelines***, page 11). This is important to understand, given the wide variability in typology of MPAs both between countries and within a single country: e.g. marine park, marine reserve, closed area, marine sanctuary, MACPAs/MCPAs (marine and coastal protected areas), nature reserve, ecological reserve, replenishment reserve, marine management area, coastal preserve, area of conservation concern, sensitive sea area, biosphere reserve, 'no-take area', coastal park, national marine park, marine conservation area, marine wilderness area. In addition to the wide range of names, the same name or title for a MPA may mean different things in different countries. For example, in Kenya 'marine reserves' have a multiple use approach while in neighbouring Tanzania 'marine reserves' are strictly no-take.

Category Ia

Strictly protected areas set aside to protect biodiversity and also possibly geological/geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. Such protected areas can serve as indispensable reference areas for scientific research and monitoring.

Primary objective

- *To conserve regionally, nationally or globally outstanding ecosystems, species (occurrences or aggregations) and / or geodiversity features: these attributes will have been formed mostly or entirely by non-human forces and will be degraded or destroyed when subjected to all but very light human impact.*

Other objectives

- *To preserve ecosystems, species and geodiversity features in a state as undisturbed by recent human activity as possible;*
- *To secure examples of the natural environment for scientific studies, environmental monitoring and education, including baseline areas from which all avoidable access is excluded;*
- *To minimize disturbance through careful planning and implementation of research and other approved activities;*
- *To conserve cultural and spiritual values associated with nature.*

Notes relating to use of Category Ia

- Category Ia areas should usually be "cores" surrounded by other suitably protected zones or areas (i.e. the area surrounding the category Ia area should also be protected in such a way that it complements and ensures the protection of the biodiversity of the core category Ia area). Thus, for category Ia MPAs or zones, the use of the surrounding waters, marine connectivity and particularly "up-current" influences, should be assessed and appropriately managed.
- Although not specifically stated in the ***2008 Guidelines*** (since categories are assigned according to objective, not activity restrictions), removal of species or modification, extraction or collection of resources (e.g. through any form of fishing, harvesting, dredging, mining or drilling) is considered to be incompatible with this category (see section 5). However, there are limited exceptions: scientific research involving collection may be permitted if that collection cannot be conducted elsewhere and if the collection activity is minimized to that which is absolutely necessary to achieve the scientific goals of the study.

Examples:

MPAs

- South Orkney Islands Southern Shelf Marine Protected Area managed by the Commission for the Convention on Conservation of Antarctic Marine Living Resources

(CCAMLR) is a large (93,819 km^2) strictly protected marine area. It is assigned to category Ia (the entire CCAMLR area is considered to be category IV) – see Annex I for objectives.

- The eleven Marine Reserves within the Channel Islands National Marine Sanctuary, California are assigned to category Ia within the category IV National Park. The Marine Reserves are established for scientific purposes and to preserve biodiversity.

Zones within MPAs

- Macquarie Island Commonwealth Marine Reserve, Australia (See category IV). This MPA has a central Highly Protected Zone of 58,000 km^2 assigned to category Ia – see Annex 2 for objectives.

Category Ib

Usually large[10] unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition.

Primary objective

- *To protect the long-term ecological integrity of natural areas that are undisturbed by significant human activity, free of modern infrastructure and where natural forces and processes predominate, so that current and future generations have the opportunity to experience such areas.*

Other objectives

- *To provide for public access at levels and of a type which will maintain the wilderness qualities of the area for present and future generations;*
- *To enable indigenous communities to maintain their traditional wilderness-based lifestyle and customs, living at low density and using the available resources in ways compatible with the conservation objectives;*
- *To protect the relevant cultural and spiritual values and non-material benefits to indigenous or non-indigenous populations, such as solitude, respect for sacred sites, respect for ancestors etc.;*
- *To allow for low-impact minimally invasive educational and scientific research activities, when such activities cannot be conducted outside the wilderness area.*

Notes relating to use of Category Ib

- In the ***2008 Guidelines***, Category Ib is called 'wilderness area' but the concept of 'wilderness' is more difficult to apply to the marine environment than to land. Provided a marine area is relatively undisturbed and free from human influences, qualities such as 'solitude', 'quiet appreciation' or 'experiencing natural areas that retain wilderness qualities' can however be achieved by diving beneath the surface. Thus Category Ib areas in the marine environment should be sites of relatively undisturbed seascape, significantly free of human disturbance (e.g. direct or indirect impacts, underwater noise, light pollution etc), works or facilities and capable of remaining so through effective management.
- As with Category Ia, removal of species and modification, extraction or collection of resources (e.g., through any form of fishing, harvesting, dredging, mining or drilling) is not considered compatible with this category (see section 5). Exceptions are: (a) as with Category Ia, collection for scientific research if that collection cannot be conducted elsewhere and (b) unlike Category Ia, in some circumstances, sustainable resource use by indigenous people to conserve their traditional spiritual and cultural values, provided this is done in accordance with cultural tradition.

Examples:

MPAs

- The Chassahowitza Wilderness (category Ib) covers 95 km^2 or 77% of the Chassahowitzka National Wildlife Refuge (category IV) in the USA. It comprises saltwater bays, estuaries and brackish marshes at the mouth of the Chassahowitzka River, and provides critical habitat to a diversity of wildlife, including endangered species such as the West Indian manatee and whooping crane.

Zones within MPAs

- Glacier Bay National Park and Preserve comprises two official protected area unity in S.E. Alaska, jointly managed by the U.S. National Park Service; the entire area covers 13,300 km^2 of land and sea, of which 10,784 km^2 is designated wilderness, with a cap on annual visitor numbers – this area is assigned to category Ib.

Category II

Large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.

Primary objective

- *To protect natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation.*

Other objectives

- *To manage the area in order to perpetuate, in as natural a state as possible, representative examples of physiographic regions, biotic communities, genetic resources and unimpaired natural processes;*
- *To maintain viable and ecologically functional populations and assemblages of native species at densities sufficient to conserve ecosystem integrity and resilience in the long term;*
- *To contribute in particular to conservation of wide-ranging species, regional ecological processes and migration routes;*

10 Size is less often a useful guide for categories in the marine environment; MPAs of all categories may be large; and Category Ib MPAs may be smaller than Category Ia MPAs.

- *To manage visitor use for inspirational, educational, cultural and recreational purposes at a level which will not cause significant biological or ecological degradation to the natural resources;*
- *To take into account the needs of indigenous people and local communities, including subsistence resource use, in so far as these will not adversely affect the primary management objective;*
- *To contribute to local economies through tourism.*

Notes relating to use of Category II

- Category II areas should be managed for "ecosystem protection", but should also provide for visitation, **non-extractive** recreational activities and nature tourism (e.g. snorkelling, diving, swimming, boating, etc.) and research (including managed extractive forms of research).
- Extractive use (of living or dead material) is not considered consistent with the objectives of category II because such activities (particularly fishing), even if undertaken at low levels, are recognised as causing ecological draw-down on one of more components of the overall food web, which is incompatible with ecosystem protection. However, as with category Ib, in some circumstances, extraction for research, sustainable resource use by indigenous people to conserve their traditional spiritual and cultural values.

Examples:

MPAs

- In South Korea, Hallyeohaesang National Park (76% of which is marine) and most of Dadohaehaesang National Park (80% of which is marine) are assigned to category II. The National Parks were previously assigned to category V as their main purpose was scenery protection; however priorities under the National Parks Act have changed and national parks are now considered "regions worthy of representing the natural ecosystem, nature and cultural scenery" (Shadie *et al.*, 2012)[11]. The southernmost group of islands, Baekdo Islands, within Dadohaehaesang National Park are more strictly protected and are being assigned to category Ia.
- Victoria, Australia has a network of 13 marine parks and 11 smaller coastal marine sanctuaries, all of which are no take areas and have been assigned to category II, although the sites do not have stated objectives with reference to the categories.

Zones within MPAs

- The Marine National Park Zones (known as green zones) within the Great Barrier Reef Marine Park in Australia are assigned to Category II (see section 5.4).

11 Shadie, P., Young Heo, H., Stolton, S. and Dudley, N. (2012). *Protected Area Management Categories and Korea: Experience to date and future directions*, IUCN and KNPS, Gland, Switzerland and Seoul, Republic of Korea.

Category III

Set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living component such as a specific coralline feature. They are generally quite small protected areas and often have high visitor value.

Primary objective

- *To protect specific outstanding natural features and their associated biodiversity and habitats.*

Other objectives

- *To provide biodiversity protection in landscapes or seascapes that have otherwise undergone major changes*
- *To protect specific natural sites with spiritual and/or cultural values where these also have biodiversity values;*
- *To conserve traditional spiritual and cultural values of the site.*

Notes relating to use of Category III

- Category III applies to MPAs designed to protect specific features such as: sea mounts or shipwrecks which have become aggregation sites for biodiversity and have important conservation value; key aggregation areas for iconic species; or other marine features which may have cultural or recreational value to particular groups, including flooded historical/archaeological landscapes.
- Extractive use (of living or dead material) is not considered consistent with the objectives of categories III, other than extraction for research, and sustainable resource use by indigenous people to conserve their traditional spiritual and cultural values may be compatible, provided this is done in accordance with cultural tradition (see section 5).

Examples:

MPAs

- Truk (Chuuk) Lagoon Underwater Fleet, in Micronesia is a historic shipwreck site supporting outstanding biodiversity.
- Blue Hole Natural Monument, Belize; this is an almost perfectly circular, over 24m deep underwater sinkhole, and is a unique geological feature on the Belize Barrier Reef, managed with the goal of protecting and preserving natural resources and nationally significant natural features of special interest or unique characteristics to provide opportunities for interpretation, education, research and public appreciation for the benefit of current and future generations, within a functional conservation area.

Category IV

Aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category.

Primary objective

- *To maintain, conserve and restore species and habitats.*

Other objectives

- *To protect vegetation patterns or other biological features through traditional management approaches;*
- *To protect fragments of habitats as components of landscape or seascape-scale conservation strategies;*
- *To develop public education and appreciation of the species and/or habitats concerned;*
- *To provide a means by which the urban residents may obtain regular contact with nature.*

Notes relating to use of Category IV

- Category IV is aimed at protection of particular stated species or habitats, often with active management intervention (e.g., protection of key benthic habitats from trawling or dredging). MPAs or zones aimed at particular species or groups can be classified as category IV, e.g., seabird, turtle or shark sanctuaries. Zones within an MPA that have seasonal protection, such as turtle nesting beaches that are protected during the breeding season, might also qualify as category IV.

Examples:

MPAs

- The Vama Veche 2 Mai (Acvatoriul Litoral Marin) Scientific Reserve, Romania. This Natura 2000 site is aimed at achieving a good conservation status for a number of habitats listed on the EU Habitats Directive, as well as a number of marine mammal species listed in Annex II of the Habitats Directive (Nita, Pers. comm., 2012).
- South Ari Atoll MPA in the Maldives will be assigned to Category IV, following field testing of this supplementary guidance. The objectives of the MPA are: To protect and preserve important Maldivian aggregation areas for the whale shark *Rhincodon typus*; and to provide a means to promote and ensure the long term conservation and protection of the South Ari ecosystem are in line with the criteria for this Category (MWSRP, 2011)[12].
- South Water Caye Marine Reserve, Belize (see Annex 1 for objectives).

Zones of MPAs

- Montague Island Habitat Protection Zone is Category IV in Bateman's Marine Park in New South Wales, Australia is designed to protect Grey Nurse Shark (*Carcharias taurus*) critical habitat.

12 *MWSRP (2011). Guidelines for applying the IUCN Marine Protected Area Management Categories to Marine Protected Areas: a field testing report by the Maldives Whale Shark Research Programme (MWSRP). Unpublished Report, September 2011. 5pp.*

Category V

Areas where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.

Primary objective

- *To protect and sustain important landscapes/seascapes and the associated nature conservation and other values created by interactions with humans through traditional management practices.*

Other objectives

- *To maintain a balanced interaction of nature and culture through the protection of landscape and/or seascape and associated traditional management approaches, societies, cultures and spiritual values;*
- *To contribute to broad-scale conservation by maintaining species associated with cultural landscapes and/or by providing conservation opportunities in heavily used landscapes;*
- *To provide opportunities for enjoyment, well-being and socio-economic activity through recreation and tourism;*
- *To provide natural products and environmental services;*
- *To provide a framework to underpin active involvement by the community in the management of valued landscapes or seascapes and the natural and cultural heritage that they contain;*
- *To encourage the conservation of aquatic biodiversity;*
- *To act as models of sustainability so that lessons can be learnt for wider application.*

Notes relating to use of Category V

- In a marine situation category V would apply to areas where local communities live within and sustainably use the seascape (see section 5), but where the primary objectives of the areas are nevertheless nature conservation protection.
- Category V is aimed at protection of landscapes, a concept that is more difficult to apply in the marine environment although the idea of protecting seascapes is gaining currency.

Examples:

MPAs

- Iroise Parc Naturel Marin, France – see Annex II for Objectives
- Apo Island, in the Philippines, mixes traditional use of marine resources with ecotourism, generating revenue for communities.

Category VI

Areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under low-level non-industrial sustainable natural resource management and where such use of natural resources compatible with nature conservation is seen as one of the main aims of the area.

Primary objective

- *To protect natural ecosystems and use natural resources sustainably, when conservation and sustainable use can be mutually beneficial.*

Other objectives

- *To promote low-level and sustainable use of natural resources, considering ecological, economic and social dimensions;*
- *To promote social and economic benefits to local communities where relevant; whilst conserving biodiversity;*
- *To facilitate inter-generational security for local communities' livelihoods – therefore ensuring that such livelihoods are sustainable;*

Notes relating to use of Category V

- MPAs aimed at maintaining predominantly natural habitats but allowing **sustainable** collection of some species (e.g. food species, ornamental coral or shells), can be assigned to category VI.
- The point where an area managed for resource extraction (i.e. does not meet the definition of a protected area) becomes a category VI marine protected area may be hard to judge and will be determined by reference to whether the area has a stated primary conservation aim, meets the overall definition of a protected area and achieves verifiable ecologically sustainability as measured by appropriate metrics that reflect the objectives of nature conservation (as well as the 75% rule – see below Section 5.1). Careful consideration needs to be given as to whether activities such as seabed mining and some types of commercial fishing practices (e.g. dredge trawling) should be permitted in regard to their inherent unsustainability, and their consistence with the objectives of this category (see Section 5.4 below).

Examples:

MPAs

- Misali Island Marine Conservation Area, Zanzibar, Tanzania was set up to protect important marine corals and other biodiversity whilst allowing sustainable use.
- Australia's South-east Marine Reserves Network consists of 14 Commonwealth Marine Reserves designed to protect representative examples of seafloor features and associated habitats in this biogeographical region. These are assigned to different IUCN categories according their objectives and zoning. East Gippsland Commonwealth Marine Reserve is a Multiple Use Zone and is assigned to category VI.

Zones within MPAs

- The Habitat Protection Zone (dark blue zone) in the Great Barrier Reef Marine Park is Category VI (see section 5.4).

5. Applying the categories to different zones in an MPA

5.1. Applying a category to an entire MPA

In many cases, as with terrestrial protected areas, an MPA will have a primary stated aim of nature conservation with a set of objectives that will allow the site in its entirety to be assigned to an IUCN protected area management category. This is the preferred approach, particularly where a site is small. However, since many large MPAs have zones with different objectives, it is possible to assign individual zones to different categories as described in section 5.4 below.

In some exceptional cases, there may be small areas of a protected area allocated to uses that might not be compatible with the primary objective of the protected area, but which are clearly essential or unavoidable. Examples include tourist accommodation in large protected areas, where the revenue is essential for the maintenance of the protected area; or the habitation of people whose livelihoods depend on the area. Fishing cannot generally be considered, however, as one of these essential, unavoidable, or indeed appropriate activities.

In such cases, when assigning a category, the primary objective of the protected area should apply to at least three quarters of the protected area. Known as the '75% rule', as explained in the ***2008 Guidelines*** (chapter 4, page 35), this means that the remaining 25% of land or water within a protected area can be managed for other essential and unavoidable purposes so long as **these uses are compatible with the definition of a protected area and the management category it is being assigned to**.

Examples of MPAs where this applies include:

- Habitation by the Moken (Sea Gypsies) in the Mu Koh Surin Marine National Park, Thailand (category II) (Sudara and Yeemin, 2011)[13].
- The Kosi Bay Nature Reserve, a coastal/brackish protected area which is part of the much larger iSimangaliso Wetland Park in Kwazulu Natal, South Africa; within the Nature Reserve only the local Thonga people may harvest intertidal invertebrates and in the marine reserve of El Hierro Mar de Las Calmas, the Canary Islands, both of which are otherwise strictly protected.

The 75% rule is not an excuse, for example, to allow widespread low level artisanal fishing within the core category I – III area itself. All living parts are inter-related within a marine ecosystem, and closure of an area to extraction of all fish or living resources means just that – it is the core principle for category I-III MPAs as the no-take of mammals, birds and vegetation is for terrestrial category I-III protected areas.

5.2. Combined or adjoining terrestrial and marine projected areas

A separate determination of the relevant IUCN category may be appropriate where a predominantly terrestrial protected area includes a marine component. In such cases, the two components should not necessarily be reported as two separate protected areas (e.g. an MPA and a terrestrial protected area). The 75% rule may be appropriate in determining the appropriate category for reporting purposes, if the terrestrial component is at least 75% of the total area. If however, legislation is in place requiring distinct management arrangements for the marine area, it may be appropriate to consider it as an MPA in its own right.

5.3. 'Nested sites'

One or more protected areas are sometimes "nested" within another protected area with a different category. The most common model is a large, less strictly protected area (e.g. a category V or VI protected area) containing smaller, more strictly protected areas (e.g. category III or IV protected areas) which have different objectives. In such cases distinct **protected areas nested within larger protected areas** can have their own category. Essentially this situation is a variation on zoning, but in this case each "zone" meets the status of an MPA itself.

An example of this is the Channel Island National Marine Sanctuary, USA, with 11 Marine Reserves within it.

5.4. Applying the categories to zones within an MPA

As explained in the ***2008 Guidelines*** (Chapter 4, pages 36-38), categorisation of different zones within a protected area is allowed provided three specific requirements are met:

(a) the zones are clearly mapped;

(b) the zones are recognised by legal or other effective means; and

(c) each zone has distinct and unambiguous management aims that can be assigned to a particular protected area category.

Separate categorization of zones is thus possible when primary legislation allows or requires for the description and delineates zones within a protected area, but not when primary legislation

13 Sudara, S. and Yeemin, T. (2011). *Demonstration Site Baseline Assessment Report: Mu Koh Surin Marine National Park, Thailand.* Unpublished case study for ICRAN.

simply allows for the concept of zoning through, for example, a subsequent management planning process. Figure 2 in the ***2008 Guidelines*** (page 38) gives a decision tree for deciding if a zone is suitable for having its own category. IUCN considers that in most cases it is not necessary to assign different categories to zones in protected areas, but it may be appropriate in much larger protected areas where individual zones are almost protected areas in their own right.

Many MPAs are zoned because of their multiple use nature, with each zone type having different objectives and restrictions (some allowing greater use and removal of resources than others). Many Australian MPAs have been zoned. One of the first was the Great Barrier Reef (GBRMP) Marine Park, with zoning initially applied in various sections of the park in the 1980s-90s. The initial zoning has been periodically reviewed and updated, and since 2003 the entire GBR has been covered by a single amalgamated Zoning Plan. Zoning schemes subsequently implemented by other jurisdictions in Australia (e.g. for Queensland (State) Marine Parks and the federal marine reserve network) have used the broad zoning framework developed for the GBRMP, but have modified this to suit their own situations. In all cases, the zones have a statutory basis and meet the criteria of the various IUCN categories.

Table 4: Zone types within the Great Barrier Reef Marine Park[14].

Zone Name	Equivalent IUCN category	Objectives	Area (km²)	% of GBRMP
Preservation Zone	Ia	to provide for the preservation of the natural integrity and values of areas of the Marine Park, generally undisturbed by human activities.	710	<1
Scientific Research Zone	Ia	(a) to provide for the protection of the natural integrity and values of areas of the Marine Park, generally free from extractive activities; and (b) subject to the objective mentioned in paragraph (a), to provide opportunities for scientific research to be undertaken in relatively undisturbed areas.	155	<1
Commonwealth Islands	II	(a) to provide for the conservation of areas of the Marine Park above the low water mark; and (b) to provide for use of the zone by the Commonwealth; and (c) subject to the objective mentioned in paragraph (a), to provide for facilities and uses consistent with the values of the area.	185	<1
Marine National Park Zone	II	(a) to provide for the protection of the natural integrity and values of areas of the Marine Park, generally free from extractive activities; and (b) subject to the objective mentioned in paragraph (a), to provide opportunities for certain activities, including the presentation of the values of the Marine Park, to be undertaken in relatively undisturbed areas.	114530	33
Buffer Zone	IV	(a) to provide for the protection of the natural integrity and values of areas of the Marine Park, generally free from extractive activities; and (b) subject to the objective mentioned in paragraph (a), to provide opportunities for: (i) certain activities, including the presentation of the values of the Marine Park, to be undertaken in relatively undisturbed areas; and (ii) trolling for pelagic species.	9880	3
Conservation Park Zone	IV	(a) to provide for the conservation of areas of the Marine Park; and (b) subject to the objective mentioned in paragraph (a), to provide opportunities for reasonable use and enjoyment, including limited extractive use.	5160	2
Habitat Protection Zone	VI	(a) to provide for the conservation of areas of the Marine Park through the protection and management of sensitive habitats, generally free from potentially damaging activities; and (b) subject to the objective mentioned in paragraph (a), to provide opportunities for reasonable use.	97250	28
General Use Zone	VI	to provide for the conservation of areas of the Marine Park, while providing opportunities for reasonable use.	116530	34
Total			**344400**	**100**

14 The GBRMP does not include State islands, intertidal waters, Queensland internal waters, or port areas.

The GBRMP is a single very large MPA covering 344,400 km^2 on the north east coast of Australia, in which a wide range of commercial and recreational activities and uses are allowed, including extraction other than mining or drilling for oil. The zones are assigned to different categories as shown in Table 4.

The statutory Zoning Plan for the GBRMP provides details on what, and where, specific activities are allowed, and which activities require a permit. Within each zone type, certain activities are allowed 'as-of-right' (that is, no permit is required, but users must comply with any legislative requirements in force), some specified activities can only be carried out with a permit, and some activities are prohibited. All the zones are mapped, recognised in law, and have unambiguous objectives that mean they can each be assigned to an IUCN category.

5.5. Vertical zoning

In a very few cases, parts of MPAs have been formally vertically zoned, to take account of the three-dimensional nature of the marine environment. Thus a zone may be distinguished for part of the water column with a different management regime from that of the seafloor: benthic fishing is usually prohibited in the zone that includes the seabed, but pelagic fishing is usually still allowed in the water column.

IUCN's position is a strong presumption against vertical zoning. It often does not make ecological sense, as how benthic and pelagic systems and species interact is not yet fully known, and surface or mid-water fisheries may in fact impact on the benthic communities below. For example, exploitation and even preparation of the seabed for exploitation in the form of deep sea mining may have a major impact on the ecosystem components on and above the sea floor. We are only just beginning to develop a scientific understanding of the vertical ecological connections that exist in marine ecosystems. Furthermore, enforcing vertical zoning is extremely difficult if not legally impossible.

The three-dimensional nature of the marine environment can nevertheless be recognised by designating a single zone that clearly stipulates what can and cannot occur in each realm – pelagic and benthic. For example, the Habitat Protection Zone in the Great Barrier Reef Marine Park in Australia is designed to protect sensitive benthic habitats from any damaging activities such as trawling but allows other types of fishing (e.g. trolling, line fishing, netting) to occur in the overlying waters. However, the benthic and pelagic habitats are not categorised separately, even though the importance of managing different parts of the marine environment is recognised through an integrated approach. Similarly, the GBRMP Buffer Zone (category IV) allows for trolling of pelagic fish only, and prohibits all other fishing thus protecting the seafloor habitats and associated species, but there is also no vertical zoning.

An example where vertical zoning has been implemented is In the Huon Commonwealth Marine Reserve in Australia, a cluster of cone-shaped seamounts on the seabed are protected through a category Ia benthic sanctuary zone, while the remainder of the marine reserve (i.e. the seabed surrounding the seamounts, and the water column above) is designated as a category VI multiple use zone. Different commercial fishing methods are permitted at different depths, determined through a comprehensive fishing risk assessment.

6. Relationship between the categories and different activities

Fishing and extraction of wild living resources is still very widespread in the marine environment, and more so than on land (marine fisheries are the last wild commercial 'harvest' in the world), though hunting is obviously a significant issue for some terrestrial protected area. Many people thus still make their living from the exploitation of wild marine resources. As a result, the conflict between fishing and MPAs tends to be a much greater issue than that between extraction of living resources in terrestrial protected areas.

This has implications for assignment of the IUCN protected area management categories to MPAs. In the conservation community as a whole, there is a general understanding that the more highly protected areas (Categories I-III) should be closed to extraction, and as a result these categories have become associated with no-take areas. However, there are many who feel that limited extraction (whether for research or traditional use) carried out under appropriate management can still result in the objectives of a highly protected MPA being achieved. As a result, those MPAs that have been assigned to categories so far include no-take MPAs assigned to all six different categories, and conversely, open-access MPAs also assigned to all categories (Wood, pers. comm., 2012).

Table 5: Matrix of marine activities that may be appropriate for each IUCN management category.

Activities	Ia	Ib	II	III	IV	V	VI
Research: non-extractive	Y*	Y	Y	Y	Y	Y	Y
Non-extractive traditional use	Y*	Y	Y	Y	Y	Y	Y
Restoration/enhancement for conservation (e.g. invasive species control, coral reintroduction)	Y*	*	Y	Y	Y	Y	Y
Traditional fishing/collection in accordance with cultural tradition and use	N	Y*	Y	Y	Y	Y	Y
Non-extractive recreation (e.g. diving)	N	*	Y	Y	Y	Y	Y
Large scale low intensity tourism	N	N	Y	Y	Y	Y	Y
Shipping (except as may be unavoidable under international maritime law)	N	N	Y*	Y*	Y	Y	Y
Problem wildlife management (e.g. shark control programmes)	N	N	Y*	Y*	Y*	Y	Y
Research: extractive	N*	N*	N*	N*	Y	Y	Y
Renewable energy generation	N	N	N	N	Y	Y	Y
Restoration/enhancement for other reasons (e.g. beach replenishment, fish aggregation, artificial reefs)	N	N	N*	N*	Y	Y	Y
Fishing/collection: recreational	N	N	N	N	*	Y	Y
Fishing/collection: long term and sustainable local fishing practices	N	N	N	N	*	Y	Y
Aquaculture	N	N	N	N	*	Y	Y
Works (e.g. harbours, ports, dredging)	N	N	N	N	*	Y	Y
Untreated waste discharge	N	N	N	N	N	Y	Y
Mining (seafloor as well as sub-seafloor)	N	N	N	N	N	Y*	Y*
Habitation	N	N*	N*	N*	N*	Y	N*

Key:

No	N
Generally no, unless special circumstances apply	N*
Yes	Y
Yes because no alternative exists, but special approval is essential	Y*
* Variable; depends on whether this activity can be managed in such a way that it is compatible with the MPA's objectives	*

The extensive debate that has resulted (for example, Fitzsimons (2011) and Robb *et al.* (2011)[15]) has meant that people may forget that categories are not applied to protected areas according to management regimes (and therefore the activities being seen to occur), but rather according to the stated objectives. From IUCN's point of view, the key point is that all activities that are allowed to take place within a protected area must be compatible with its stated conservation management objectives regardless of the IUCN category. If categories are assigned according to the **management objective** of an MPA, the issue of whether it is no-take should not be a priority during the assignment process, as strict regulation of exploitation is a management action that then must follow on from this particular objective.

Nevertheless, because of the debate on this issue, some guidance is provided in this section on the types of activity that may be appropriate within different categories. Note that such an exercise has not been undertaken for terrestrial protected areas, and this issue is not addressed in detail in the ***2008 Guidelines***. Table 5 provides a summary of the various activities that may be appropriate in MPAs (and marine zones of predominately terrestrial protected areas) according to the different management categories. However, **this table should NOT be used as the basis for assigning categories, which MUST be based on the stated nature conservation objectives for the MPA.** The table provides some generic guidance to illustrate the broad relationship and acceptability or otherwise between activities and the different category types.

6.1 Commercial and recreational fishing and collection of living resources

Recreational and commercial fishing practices may be unsustainable and incompatible with the objectives of an MPA. Fisheries that are adequately managed to provide long-term exploitation do not necessarily comply with ecological standards for nature conservation, in that, for example, they may have indirect trophic impacts. For a fishery management area to meet the definition of an MPA, it would need to demonstrate that it contributes to the maintenance of ecologically appropriate metrics, such as population structures (for example, it would be necessary to show that the population is not distorted by harvesting a certain size class or large proportions of old or young fish). Many research studies have shown the significance of no-take reserves both for biodiversity conservation and fisheries management (McCook *et al.,* 2010)[16].

Since commercial and recreational fishing always has some level of ecological impact, these activities are considered inconsistent with the objectives of MPAs in categories Ia, Ib and II, and frequently III. However, use of MPAs in categories Ib and II by indigenous people for traditional spiritual and cultural values and for sustainable resource use, if carried out in accordance with cultural traditions may be acceptable if subject to a formal agreement guiding these activities.

Recreational fishing is usually considered inappropriate in categories Ia and Ib and II MPAs. Many recreational fishers use "catch and release" which is considered by some to be non-extractive. However there are ecological impacts from catch and release (e.g. post-catch mortality) and so this is also not considered to be an appropriate activity in category I to III MPAs. In general, recreational fishing in MPAs should be regarded in the same way as recreational hunting in terrestrial protected areas.

Category II protected areas are however established to 'protect natural biodiversity... and supporting environmental processes' and so some people maintain that all types of recreational activities including recreational fishing should be allowed. In terrestrial parks, aking freshwater fish from rivers and streams on a subsistence and low-level sporting basis in category II parks may be allowed provided this is not done throughout the entire protected area (the 75% rule is applied), as it has less overall impact. In MPAs, as explained above, extractive forms of recreation (e.g. fishing, souvenir collection etc) can have damaging consequences. Closure to recreational and commercial fishing should therefore be seen as critical to category II MPAs in the same way as closure to hunting of mammals and birds and harvesting of vegetation is for terrestrial category II protected areas, since fish, invertebrates, and algae are all inter-related components of the marine ecosystem

Category III MPAs should also be closed to commercial and recreational fishing. Whether or not sustainable fishing is allowed in a Category IV MPA or zone will depend on its objectives. In some circumstances, fishing/collecting may be permissible where the resource use does not compromise the ecological/species management objectives of the site.

MPAs or zones that allow sustainable commercial or recreational fishing/collecting should be categorised as V or VI (note: as stated throughout this document MPAs must first meet the definition of a protected area and thus be primarily managed for nature conservation). Thus, in MPAs where it may be necessary to allow extractive activities, consideration should be given to whether the objectives of the MPA (or zone) mean that Category V or VI is more applicable than categories I-IV. Table 6 summarises the general guidance on the relationship between fishing/collection of living resources and the categories.

6.2. Mining (including oil and gas and most sand and gravel extraction)

Mining is unsustainable because it involves extraction of a finite resource. In addition, as in the case of gravel extraction, it may have a long term adverse effect on the benthos, and so would not be appropriate in an MPA. In accordance with IUCN policy on mining in protected areas, these activities

15 Fitzsimons, J. (2011). 'Mislabelling marine protected areas and why it matters – a case study of Australia'. *Conservation Letters* 4: 340-345.
Robb, C.K., Bodtker K.M., Wright K., and Lash J. (2011) 'Commercial fisheries closures in marine protected areas on Canada's Pacific coast: the exception, not the rule'. *Marine Policy* 35, 309–316.

16 McCook, L., Ayling, T. and Cappo, M. (2010). *Adaptive management of the Great Barrier Reef: A globally significant demonstration of the benefits of networks of marine reserves.* PNAS Special Feature on Marine Reserves.

Table 6: Compatibility of fishing/collecting activities in different management categories – a preliminary assessment.

IUCN category	Long term and sustainable local fishing/ collecting practices	Recreational fishing/ collecting	Traditional fishing/ collecting	Collection for research
Ia	No	No	No	No*
Ib	No	No	Yes**	Yes
II	No	No	Yes**	Yes
III	No	No	Yes**	Yes
IV	Variable#	Variable#	Yes	Yes
V	Yes#	Yes	Yes	Yes
VI	Yes#	Yes	Yes	Yes

Key:

*	any extractive use of Category Ia MPAs should be prohibited with possible exceptions for scientific research which cannot be done anywhere else.
**	in Categories Ib, II and III MPAs traditional fishing/collecting should be limited to an agreed sustainable quota for traditional, ceremonial or subsistence purposes, but not for purposes of commercial sale or trade.
#	whether fishing or collecting is or is not permitted will depend on the specific objectives of the MPA.

should not be permitted in category I to IV MPAs. For example, the Great Barrier Reef Marine Park Act 1975 specifically prohibits all mining within the boundaries of the Great Barrier Reef Region.

Carefully managed mining that has been risk assessed as causing minimal impact in a small discreet part of an MPA may be permissible depending on national legislation relating to mining in protected areas generally or in a specific MPA but these areas should be assigned as category V or VI. In 2000, IUCN called for a moratorium on subsurface exploitation in categories I-IV, and in 2008 extended this to a call for a moratorium on categories V and VI as well (IUCN Resolution 4.136, Barcelona). However, as yet, no such agreement has been reached.

7. Reporting to the World Database on Protected Areas and the UN List of Protected Areas

Once an IUCN category is assigned and governance type allocated, the information should be reported to the UNEP World Conservation Monitoring Centre (UNEP-WCMC), so that information can be included in the World Database on Protected Areas (WDPA) and the UN List of Protected Areas. The WDPA is a joint product of UNEP and IUCN, prepared by UNEP-WCMC and IUCN WCPA working with governments, the Secretariats of MEAs (Multilateral Environmental Agreements) and collaborating NGOs. Reporting to the WDPA is described in the ***2008 Guidelines*** (Chapter 4, pages 40-41) and is the same for both terrestrial and marine protected areas. Since the process for reporting has expanded since 2008, it is summarised here.

There are two ways to report the assignment of a category onto the WDPA:

- **Official reporting:** The official UN reporting system for protected areas requires that the information held on protected areas be approved by governments. Reporting is voluntary, but is requested by a number of UN resolutions and policies, most recently in the CBD Programme of Work on Protected Areas. This form of reporting is government-led, and the process is managed by UNEP-WCMC. Further details are given in the ***2008 Guidelines*** (Chapter 4).
- **Individual site reporting via the internet:** It is now possible for anyone interested in protected areas to provide information and feedback to the WDPA. The public interface protectedplanet.net allows viewers to explore the world of protected areas through user friendly maps, pictures and information and, through a link with Wikipedia, to add information about individual sites. Core data on MPAs held on the WDPA is also available via the MPA-specific site protectplanetocean.net. MPA information can be accessed at this site via the interactive Marine Protected Area (iMPA) pages, which also allow MPA information to be edited and added. Full instructions concerning editing and adding information to the site (via the Google Groups application), and processes for checking this information, are provided on the iMPA site and updates to the core data are synchronised with the WDPA on a regular basis. Detailed ***Data Standards for the World Database on Protected Areas*** are available[17].

For areas in the high seas, and thus outside the extent of any national jurisdiction, the reporting mechanism has yet to be developed.

7.1 Reporting multiple categories within a protected area

The reporting of categories for protected areas where different zones have different categories (such as the Great Barrier Reef) is described in the ***2008 Guidelines*** (Chapter 4, pages 36-37) and in section 5.4 above. In the context of MPAs, two situations are worth further discussion:

- When reporting **"nested" protected areas** it is important to ensure spatial data is correct to avoid double counting, and so that databases do not overstate the amount of land or sea that has been designated. For example, the Great Barrier Reef Marine Park is sometimes reported as being category VI overall, but within this broad area several other categories are also recognised, i.e. Ia, II, IV and VI, (see examples given in previous sections). In the case of the Macquarie Island Commonwealth Marine Reserve (category IV), over one third of the reserve (58,000 km^2 out of a total of 162,000 km^2) is designated IUCN category Ia Highly Protected Zone.
- **Vertical zonation** can result in double counting when reporting on the IUCN categories. IUCN's current advice is that MPAs with vertical zoning should be reported according to the **least** restrictive category that has been applied within the site due to IUCN's serious concerns with compliance and enforcement. For example, if the benthic system is strictly protected and the pelagic area is open to managed resource use compatible with category VI, the whole area should be assigned a category VI. Thus Huon Commonwealth Marine Reserve (see section 5.5) should be **reported** as IV even though the seabed is **categorised** as Ia.

17 These can be downloaded from http://www.wdpa.org/

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Annex 1.
The IUCN protected area matrix: a classification system for protected areas comprising both management category and governance type

Governance types / Protected area categories	A. Governance by government			B. Shared governance			C. Private governance			D. Governance by indigenous peoples and local communities	
	Federal or national ministry or agency in charge	Sub-national ministry or agency in charge	Government-delegated management (e.g., to an NGO)	Transboundary management	Collaborative management (various forms of pluralist influence)	Joint management (pluralist management board)	Declared and run by individual land-owners	… by non-profit organizations (e.g., NGOs, universities)	… by for-profit organizations (e.g., corporate owners, cooperatives)	Indigenous peoples' protected areas and territories – established and run by indigenous peoples	Community conserved areas – declared and run by local communities
Ia. Strict Nature Reserve											
Ib. Wilderness Area											
II. National Park											
III. Natural Monument											
IV. Habitat/ Species Management											
V. Protected Landscape/ Seascape											
VI. Protected Area with Sustainable Use of Natural Resources											

Annex 2. Examples of MPA Objectives

Category Ia:

South Orkney Islands Southern Shelf MPA

- The protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term.
- The protection of key ecosystem processes, habitats and species, including populations and life-history stages.
- The establishment of scientific reference areas for monitoring natural variability and long-term change or for monitoring the effects of harvesting and other human activities on Antarctic marine living resources and on the ecosystems of which they form part.
- The protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features.
- The protection of features critical to the function of local ecosystems.
- The protection of areas to maintain resilience or the ability to adapt to the effects of climate change.

Category II:

Mu Koh Surin Marine National Park, Thailand

The main objectives of the park are:

- Preserve and conserve natural resource and the environment in a condition whereby they can provide sustainable benefits to society.
- Provide opportunities to the public for education, research and recreation that is within the park's carrying capacity.

Category IV:

Macquarie Island Commonwealth Marine Reserve18 (with a category Ia zone)

Strategic Objectives for the Marine Reserve as a whole:

1. To protect the conservation values of the south-eastern portion of the Macquarie Island Region including protecting:
- the migratory, feeding and breeding ranges of marine mammals and seabirds.
- threatened species that depend on the area; and
- the unique benthic habitat.

2. To provide an effective conservation framework, to contribute to the integrated and ecologically sustainable use and management of the Macquarie Island Region.
3. To provide a scientific reference area for the study of ecosystem function within the Macquarie Island Region.
4. To manage the area as part of the National Representative System of Marine Protected Areas.

Management goals for the Highly Protected Zone of 58,000 km² (Category Ia):

- Provide a scientific reference area for further studies of natural ecosystems, including baseline areas.
- Protect threatened species and migratory and foraging marine mammals and seabirds from direct human disturbance.
- Protect pelagic species and the benthic communities from direct human disturbance.

Management Goals for the two Habitat/Species Management Zones (IUCN category IV):

- Minimise human impacts on the habitats of threatened species, migratory and foraging marine mammals and seabirds, and benthic and pelagic fauna that depend on the area.
- Promote scientific research and environmental monitoring as primary activities associated with sustainable resource management and use.

Management strategies for the Highly Protected Category Ia zone are:

- No commercial or recreational fishing.
- No mining operations, including petroleum and/or mineral exploration or extraction.
- No commercial tourism activities.
- Passive transit of vessels through the zone allowed.
- Non-intrusive scientific research compatible with the strategic objectives of the Marine Park and management goals for this zone allowed.
- No dumping of waste or littering, in accordance with the EPBC Regulations.

18 This is called the Macquarie Island Marine Park in the 2001-2008 Management Plan

Management strategies for the Habitat/Species Management Zones (Category IV) are:

- No mining operations, including petroleum and/or mineral exploration or extraction.
- Commercial fishing in accordance with a fishing concession granted by AFMA will be allowed in the Marine Park, subject to determinations or permits made by the Director under EPBC Regulations.
- Limited commercial tourism will be allowed under a permit issued by the Director under the EPBC Regulations.
- Scientific research that is compatible with the strategic objectives of the Marine Park and management goals for this zone will be allowed.
- In accordance with the EPBC Regulations, no dumping of waste or littering.

Additional management goals and management strategies relate specifically to scientific research and monitoring in the Marine Park.

Category IV:

South Water Caye Marine Reserve, Belize (Wildtrack, 2009)[19]

Overall goal:

To provide for the protection, wise use, understanding, and enjoyment of the natural resources of South Water Caye Marine Reserve in perpetuity.

Objectives:

- Maintain and conserve the natural resources of South Water Caye Marine Reserve for the benefit of current and future generations.
- Engage fishermen in the management of sustainable fisheries.
- Provide opportunities for recreation, interpretation, education, and appreciation for all visitors.
- Strengthen education and understanding of users and potential users of the dynamics of coral reef systems within South Water Caye Marine Reserve and the human impacts affecting them.
- Identify, implement and strengthen priority research and monitoring through on-site activities, collaboration and partnerships.

Category V:

Iroise Parc Naturel Marin, France[20]

Objectives:

- To maintain, conserve, restore biodiversity, natural heritage of habitats, species, landscapes, under protection status.
- To maintain key ecological functions (spawning areas, nursery, feeding zone, rest areas, productivity areas, etc.).
- To protect, preserve and restore cultural heritage.
- To promote sustainable management / development of socio-economic activities.
- To manage natural resources exploitation.
- To improve governance on the MPA territory.
- To improve water quality.
- To educate on environmental issues and improve public awareness.
- To foster scientific research.
- To create socio economic added values.

19 Wildtracks (2009). South Water Caye Marine Reserve World Heritage Site Management Plan 2010-2015

20 http://www.maia-network.org/homepage/marine_protected_areas/mpa_data_sheets/an_mpa_datasheet?wdpaid=388659&gid=178.

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Annex 170

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

EXTRACT

NAM 2012/Doc.1/Rev.2

Original: English

16th Summit of Heads of State or Government of the Non-Aligned Movement

Tehran, Islamic Republic of Iran

26 - 31 August 2012

FINAL DOCUMENT

Tehran, Islamic Republic of Iran

31 August 2012

burden resulting from the human, social and economic tragedy, inflicted upon Lebanon as a result of the 2006 Israeli aggression, and in enhancing the Lebanese national economy.

285. The Heads of State or Government *declared* that they held Israel responsible for the loss of lives and suffering as well as the destruction of properties and infrastructure in Lebanon, and *demanded* Israel to compensate the Republic of Lebanon and its people for the losses sustained resulting from Israel's aggression in 2006.

286. The Heads of State or Government, pursuant to the failure of other means, *emphasized the necessity* of resolving the Arab-Israeli conflict based on relevant UN Resolutions leading to the establishment of a just, lasting and comprehensive peace in the Middle East as called for by the Arab Peace Initiative of Beirut in 2002.

287. The Heads of State or Government *supported* the efforts of the Lebanese Government to save Lebanon from all threats to its security and stability, and *expressed* their understanding of the policy the Government pursues vis-à-vis the developments in the Arab region.

Africa

288. The Heads of State or Government *acknowledged* the decisions by the 17th ordinary session of the Heads of State or Government of the Assembly of the African Union held from 30 June to 1 July 2011 in Malabo, Equatorial Guinea, and *expressed their support for* effective implementation of the decisions to promote peace, stability and socio-economic development in Africa. The Heads of State or Government also *acknowledged* the decisions by the Eighteenth ordinary session of the Heads of State or Government of the Assembly of the African Union held from 29 to 30 January 2012 in Addis Ababa, Ethiopia, on the theme "Boosting Intra-African Trade".

Chagos Archipelago

289. The Heads of State or Government *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.

290. The Heads of State or Government 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.

291. 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 Heads of State or Government *resolved* to fully support such measures including any action that may be taken in this regard at the United Nations General Assembly.

Libya

292. The Heads of State or Government *welcomed* the holding on 7 July 2012 of the first Libyan national elections in more than four decades. They *noted* that the elections were fair and free and took place in peaceful atmosphere. They *considered* the elections a milestone for Libya's democratic transition, through the adoption of a permanent constitution and the establishment of a democratically elected government. They

Annex 171

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

EXTRACT

THIRTY-SIXTH ANNUAL MEETING OF MINISTERS FOR FOREIGN AFFAIRS OF THE MEMBER STATES OF THE GROUP OF 77

New York, 28 September 2012

MINISTERIAL DECLARATION

114. The Ministers reaffirmed the need to find a peaceful solution to the sovereignty issues facing developing countries, including among others the dispute over Chagos Archipelago, including Diego Garcia, which was unlawfully excised from the territory of Mauritius in violation of international law and United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965. Failure to resolve these decolonization and sovereignty issues would seriously damage and undermine the development and economic capacities and prospects of developing countries.

EXTRACT

THIRTY-SEVENTH ANNUAL MEETING OF MINISTERS FOR FOREIGN AFFAIRS OF THE MEMBER STATES OF THE GROUP OF 77
New York, 26 September 2013

MINISTERIAL DECLARATION

141. The Ministers reaffirmed the need to find a peaceful solution to the sovereignty issues facing developing countries, including among others the dispute over the Chagos Archipelago, including Diego Garcia, which was unlawfully excised from the territory of Mauritius in violation of international law and United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965. Failure to resolve these decolonization and sovereignty issues would seriously damage and undermine the development and economic capacities and prospects of developing countries.

Annex 172

First Witness Statement of Richard Patrick Dunne, 8 October 2012

CO/8588/2010

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of a claim for Judicial Review

B E T W E E N

R (on the application of Louis Olivier Bancoult)

Claimant

-and-

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

FIRST WITNESS STATEMENT OF

RICHARD PATRICK DUNNE

I, Richard Patrick Dunne of West Briscoe, Baldersdale, Barnard Castle, Co Durham DL12 9UP, SAY as follows:

1. I graduated from Cambridge University (Queens' College) in 1975. In 1981 I was called to the Bar (Middle Temple). Between 1974 and 1991 I served as an Officer in the Royal Navy, latterly as a legal adviser and advocate in Courts Martial. Since 1991 I have conducted scientific research into coral reefs, mainly in the Indian Ocean and have published over 30 scientific papers in leading international journals.

2. I provide this statement on behalf of the Claimant in the context of a claim for Judicial Review brought by Louis Olivier Bancoult against the Secretary of State for Foreign and Commonwealth Affairs.

3. I make this Witness Statement from information acquired from the documents exhibited hereto, from the evidence filed in these proceedings and from my personal knowledge.

Information Sources

4. There is now produced to me, in a bundle marked RPD 1 the documents referred to in this Witness Statement. The source is predominantly Government files from the National Archives, Kew. The recent release, in April 2012, of the migrated colonial files from the Seychelles included the file series from the British Indian Ocean Territory Commissioner's Office (FCO 141 series) has revealed for the first time additional documents which assist in filling the gaps in what is already known about Mauritian and Chagossian fishing rights in the Chagos Archipelago. In particular, Exhibits at Tabs 4, 6, 35, 36, and 37 have not been found in files released at earlier dates. In order to aid the Court and at the same time avoid unnecessary diversion, this statement contains an abbreviated but nonetheless wholly accurate account of correspondence which is available.

The Detachment of the Chagos – agreements with Mauritius

5. In September 1965, at a meeting with the Colonial Secretary at Lancaster House in London, the Premier of Mauritius and Mauritian Ministers agreed to the detachment of the Chagos islands from the colony of Mauritius. Paragraphs 22 and 23 of the Record of the Meeting[1], record that the agreement was obtained on the understanding that the Colonial Secretary would recommend to his colleagues several conditions which the Ministers had made, amongst which:

"22 (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:

b. Fishing Rights;"

[1] RPD 1 Tab 1 - Extract from Record of Meeting held at Lancaster House on Thursday, 23 September, 1965, between the Colonial Secretary (Mr Greenwood) and Mauritian Ministers – supplied by Joanne Yeadon, BIOT Administrator, FCO on 25 November 2010.

6. This Record was sent to the Governor of Mauritius, Sir John Rennie, on 6 October 1965 under cover of a Colonial Office Despatch No 423[2] which asked for:

"early confirmation that the Mauritius Government is willing to agree that Britain should now take the necessary legal steps to detach the Chagos Archipelago from Mauritius on the conditions enumerated in (i)-(viii) in paragraph 22 of the enclosed record.", and:

"As regards points (iv), (v) and (vi) the British Government will make appropriate representations to the American Government as soon as possible. You will be kept informed of the progress of these representations."

7. The agreement of the Mauritian Council of Ministers was transmitted to the Colonial Secretary by the Governor in Telegram No 247[3] on 5 November 1965:

"Council of Ministers today confirmed agreement to the detachment of Chagos Archipelago on conditions enumerated ...

3. (Within this) Ministers said they were not opposed in principle to the establishment of facilities and detachment of Chagos but considered compensation inadequate, ... They were also dissatisfied with mere assurances about (v) and (vi)."

8. Although no direct record of the discussions with the Americans has been found to date, it is clear that the Americans gave their approval to the fishing rights from a letter[4] from Mr C.A. Seller at the Commonwealth Office to Sir John Rennie in Mauritius in June 1967: *"Our Embassy in Washington put our proposals to the Americans last year and they were discussed between the State Department and the Department of Defense; the outcome is that the Americans see no difficulty about our proposals.*". This is the first time that this document and its important record have been found as a result of the recent release of the FCO 141 series to the National Archives.

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[2] RPD 1 Tab 2 - Colonial Office Despatch No 423 dated 6 October 1965– supplied by Joanne Yeadon, BIOT Administrator, FCO on 25 November 2010.

[3] RPD 1 Tab 3 - Telegram No 247 from Mauritius to the Secretary of State for the Colonies sent 5 November 1965 – supplied by Joanne Yeadon, BIOT Administrator, FCO on 25 November 2010.

[4] RPD 1 Tab 4 - Seller to Rennie June 1967 [FCO 141/1437, folio 29/1]

9. Mr Seller then wrote[5] to Sir John Rennie on 12 July 1967, setting out the final proposals to be put to the Mauritian Ministers :

"Will you please refer to correspondence ending with your savingram No. 641 of the 16th November about fishing in the Chagos Archipelago.

2. The enquiry in our telegram no. 305 was related to the under-taking 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. It seems certain that there would have to be restrictions on the extent to which either our own or American defence authorities would agree to fishing rights being retained by the Mauritius Government once defence installations had been developed on any of the islands on the Chagos Archipelago but as we see it, these need not necessarily be such as to deny fishing rights altogether. ***The best way of dealing with the matter and at the same time fulfilling our Ministers' undertaking to Mauritian Ministers*** [emphasis added] *may well be that during the period before defence installations are introduced into any of the islands of the Chagos Archipelago, an attempt should be made to clarify the arrangements which would govern access by fishing vessels once any of the islands of the Archipelago are actually taken for defence use.*

3. As we see it a reasonable arrangement might contain the following elements:-

A. That there should be unrestricted access throughout the Archipelago during the period before any of the islands are taken over for defence uses and cleared of population.

B. Once one or more of the islands has been taken over and cleared of population, the following arrangements would apply –

(i) Mauritius fishing vessels would of course have unrestricted access to the high seas[6] within the Archipelago (of which it seems from such maps as we have there must be a considerable amount).

[5] RPD 1 Tab 5 - Seller to Rennie 12 July 1967[FCO 141/1437, folio 28] also contained in CAB 164/623

[6] At the time that this letter was written, the 'high seas' would have been everywhere seaward of the 3 nm limit of the territorial sea.

(ii) They would likewise have unrestricted access to islands not specifically excluded for defence reasons and also to the territorial waters surrounding them.

(iii) The possibility of limited access for fishing in the waters surrounding those islands excluded for defence use would be considered as and when the situation arises by the British and U.S. Governments, but would of course have to be subject to their overriding defence needs.

Would a proposition on these lines (and we should clearly have to fill in the details in consultation with the Americans) be likely to be acceptable to your Ministers?

10. It is apparent that Sir John Rennie replied on 5 September 1967 but a copy of that letter has not yet been found.

11. The existence of the undertaking has subsequently been recognised and confirmed, see for example, the letter from Mr L.J.P.J. Craig of the General and Migration Department of the Commonwealth Office, to John Todd, BIOT Administrator, dated 24 April 1968 explaining that since his department was responsible for 'law of the sea' which included fishery limits it had been agreed that he should reply[7]:

"... as you are aware, an undertaking was given to Mauritius Ministers to ensure that fishing rights remain available to Mauritius in the Chagos Archipelago as far as is practicable."

And in 1980, a FCO Researcher was tasked with investigating "*how the Commissioner for BIOT officially declared Mauritians as traditional fishermen in BIOT waters...*" (see paragraph 19 below).

BIOT Fishery Legislation

12. The first BIOT legislation governing fishing throughout the territory, the Fishery Limits Ordinance 1971[8], was published on 17 April 1971 and came into force on 1 July 1971[9]. It applied within a "*fisheries zone*" encompassing the 3 nm territorial sea,

[7] RPD 1 Tab 6 – Craig to Todd 24 Apr 1968 [FCO 141/1437, folio 38]
[8] RPD 1 Tab 7 - The Fishery Limits Ordinance 1971
[9] RPD 1 Tab 8 - Statutory Instrument No 3 of 1971 - Fishery Limits Ordinance 1971 Commencement Notice, 1971

and a further 9 nm contiguous zone as proclaimed two years earlier on 10 July 1969[10]. The Ordinance made it an offence for a person on board a foreign fishing boat to take any fish or marine product within the zone. A fishing boat was deemed to be "*foreign*" if the owner or one of the owners was not resident in the BIOT.

13. Section 4 of the Ordinance provided that:

Exemption for certain foreign fishing boats.	*4. (1) **For the purpose of enabling fishing traditionally carried on in any area within the contiguous zone by foreign boats to be continued**, the Commissioner may by Order designate any country outside the Territory and the manner in which and descriptions of fish or marine products and which fishing boats registered in that country may fish.* [emphasis supplied]

14. The Ordinance and this section appears to have been the first 'public' recognition of traditional fishing rights and indeed were specifically included to allow the Mauritian request in 1965 for fishing rights to be formalised at the time.

15. As regards the exercise of Section 4 of the 1971 Ordinance, Mr M. Elliott at the Marine and Transport Department (FCO) wrote to Mr F.R.J. Williams in the Seychelles on 3 June 1971[11] that: "*It 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..... can you confirm that the Commissioner will use his discretion in this way?*"

16. Mr Williams replied on 16 June 1971[12] that: "*... I confirm 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.*"

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[10] RPD1 Tab 9 - Proclamation No 1 of 1969 [FCO 141/1437, folio 60]
[11] RPD 1 Tab 10 – Elliott to Williams dated 3 June 1971 [FCO 141/1437, folio 80] also in FCO 31/2763
[12] RPD 1 Tab 11 – Elliott to Williams dated 16 June 1971 [FCO 141/1437, folio 82] also in FCO 31/2763

17. Mr Elliott then wrote to Mr R.G. Giddens in the British High Commission in Mauritius on 2 July 1971[13]: "2. *Included within the BIOT fishing zone are certain waters which have been traditionally fished by vessels from Mauritius. As you will be see from paragraph 2 of the letter (copy attached) dated 16 June from Williams in the Seychelles, the Commissioner of BIOT will use his powers under Section 4 of the 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 fishing rights reached between HMG and the Mauritius Government, at the time of the Lancaster House Conference in 1965, ... We would be most grateful if you would inform the Mauritius Government of the foregoing at whatever level you consider appropriate.*"

18. It is particularly noteworthy that this instruction to the British High Commission to inform the Mauritian Government in 1971 (3 years after independence) did not invoke any part of Section 4 which referred to: "*and the manner in which and descriptions of fish or marine products and which fishing boats registered in that country may fish.*" Thereby implying that no further restrictions were to be imposed upon Mauritian fishing vessels, nor is there later evidence of the imposition of restrictions under the 1971 Ordinance.

19. Some years later in 1980, the East African Department (EAD) of the FCO was unable to locate how this agreement had been promulgated. Mrs M. Walawalker in the Research Department was tasked with this, writing[14] to Mr Haswell in the EAD:

"You asked how the Commissioner for BIOT officially declared Mauritians as traditional fishermen in BIOT waters, as provided for by Section 4 of BIOT Ordinance No.2/1971[15]".

By reference to earlier correspondence [RPD 1 Tabs 10-12] Mrs Walawalker concluded that:

"I regret that I am unable to give a substantive answer. It appears that no Order to that effect was made and gazetted. Nor has an extensive search of the files succeeded

[13] RPD 1 tab 12 – Elliott to Giddens (British High Commission, Mauritius) dated 2 July 1971 [FCO 141/1437, folio 84] also in FCO 31/2763

[14] RPD 1 Tab 13 – Minute dated 7 August 1980 from Mrs Walawalker to Mr Haswell 'BIOT Fisheries: Mauritius Fishing Rights' [FCO 31/2763, folio 4a]

[15] RPD 1 Tab 7 - The Fishery Limits Ordinance 1971

in turning up a copy of any unpublished Order. .... The Mauritians were therefore informed, even if the Commissioner subsequently forgot to make an Order..."

20. In 1984, the 1971 Fishery Limits Ordinance was repealed and replaced by the Fishery Limits Ordinance 1984[16] which was brought into force on 12 August 1984 by a Gazette Notice[17]. The 1984 Ordinance now authorised fishing by "*British fishing boats*" and fishing vessels of foreign countries designated under Section 4 within the fishery limits (which now included both the territorial waters and the contiguous fisheries zone, as opposed to just the contiguous zone under the 1971 Ordinance) under a licensing system. Section 4 of the 1971 Ordinance was then repeated, retaining the words "*For the purpose of enabling fishing traditionally carried on in any area within the fishery limits..*" but with an addition explicitly requiring publication of any such designation in the BIOT Gazette and also the issue of licences to the designated foreign fishing vessels under the licensing provisions of Section 5.

21. The designation of Mauritius under Section 4 subsequently appeared 6 months later in Gazette Notice No 7 of 1985[18] dated February 1985:

DESIGNATION OF MAURITIUS UNDER SECTION 4 OF THE FISHERY LIMITS ORDINANCE, 1984

In exercise of the power vested in him by Section 4 of the Fishery Limits Ordinance, 1984, the Commissioner has been pleased to designate Mauritius for the purpose of enabling fishing traditionally carried out in areas within the fishery limits to be continued by fishing boats registered in Mauritius.

22. On 15 November 1984 there was also a new Proclamation by the BIOT Commissioner of a "*fisheries zone contiguous to the territorial sea of the British Indian Ocean Territory*"[19]. The Proclamation was identical to that in 1969, apart for the removal of the names of islands which had been returned to Seychelles in 1976. The extent of the fisheries zone remained unchanged with its outer limit at 12 nautical miles, and its inner boundary at the outer limit of the 3 nautical mile territorial sea.

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[16] RPD 1 Tab 14 – The Fishery Limits Ordinance 1984, Ordinance No 11 of 1984
[17] RPD 1 Tab 15 – Gazette Notice July 1984 – coming into force Fishery Limits Ordinance 1984 [FCO 4/3]
[18] RPD 1 Tab 16 – BIOT Gazette Notice No 7 of 1985 [FCO 4/4]
[19] RPD 1 Tab 17 – Proclamation No 8 of 1984 Fishery Zone [FCO 4/3]

23. In 1991, the 1984 Ordinance was repealed and replaced by the Fisheries (Conservation and Management) Ordinance 1991[20]. The new Ordinance applied to a new "*Fisheries Conservation and Management Zone*" (FCMZ) contiguous to the territorial seas and extending out to 200 nm which had been Proclaimed on 1 October 1991[21]. A new term "*fishing waters*" appeared in the Ordinance to encompass the internal waters, territorial sea and FCMZ. The new Ordinance retained the licence system for any fishing in the "*fishing waters*" but all mention of, or reference to, foreign fishing vessels had disappeared.

24. On 1 November 1998, the Fisheries (Conservation and Management) Ordinance 1998[22] had come into force, repealing the 1991 Ordinance. The licence system was maintained, and the definition of the "*fishing waters*" remained the same. There also remained no specific reference to foreign vessels.

25. In 2003 an "*Environment (Protection and Preservation) Zone*" was proclaimed in addition to, and with the same geographical extent as the existing Fisheries Conservation and Management Zone.

26. On 1 January 2008 the 1998 Ordinance was repealed and replaced by the Fisheries (Conservation and Management) Ordinance 2007[23], together with a new set of regulations. This is the regime which is currently in force and continues the licencing regime originally set up in 1991.

Enquiries to the Foreign and Commonwealth Office in 2010

27. Before the detailed correspondence in the files from the National Archives had been obtained, enquiries were addressed to the British Indian Ocean Territory Section of the FCO in London in 2010 concerning the issue of Mauritian traditional fishing rights. Joanne Yeadon, the Head of BIOT & Pitcairn Section, supplied copies of an extract form the Lancaster House Meeting in 1965, and copies of telegram despatches[24]. These documents are at exhibits RPD 1 Tabs 1-3 referred to earlier.

[20] RPD 1 Tab 18 – The Fisheries (Conservation and Management) Ordinance 1991
[21] RPD 1 Tab 19 – Proclamation No 1 of 1991
[22] RPD 1 Tab 20 – The Fisheries (Conservation and Management) Ordinance 1998
[23] RPD 1 Tab 21 – The Fisheries (Conservation and Management) Ordinance 2007
[24] RPD 1 Tab 22 – E-mail dated 25 Nov 2010 Yeadon to Dunne

28. Further enquiries were made, including a number of questions[25]. The first question was whether the FCO had details of any designation having been made under Section 4 of the 1971 and 1984 Ordinances to which Yeadon replied:

"The gazette copies of the legislation of the 1971 and 1984 Ordinances give no listing for designated countries other than "certain foreign fishing boats". It would make sense to assume that Mauritius was so-designated but I can't find anything setting this out."[26]

The second question concerned the later legislation and the understanding that free licences were issued to Mauritian registered vessels, with the reply:

"You are correct in that licences issued to Mauritian registered vessels were and are issued free of charge but again I have no details of the "agreement"."

29. In a further e-mail dated 25 January 2011[27], Yeadon confirmed that

"I am afraid I have not been able to find anything further re: 1971 and 1984.....On the 1991 FCMZ. I can find no "agreement" as such but it looks to me as if the "agreement" to issue free licences under the 1991 Ordinance was a continuation of previous arrangements when the original 12 mile fishing zone was in place."

It appears, therefore that the BIOT Section in the FCO in 2010/11 although aware of the undertaking which had been put to HM Government during the Lancaster House Meeting in 1965, were nonetheless ignorant of whether this had been carried into force or how this had been implemented within the fishery legislation of 1971 and 1984. Nonetheless, there is an implicit acceptance by Ms Yeadon that the practice of free licences for Mauritian registered fishing vessels post 1991 until the decision to stop issuing licences on 31 October 2010, could be traced back to this original undertaking to Mauritian Ministers. Furthermore, it is significant that on numerous occasions in FCO correspondence between 1965 and 1984, this agreement was to 'traditional' fishing rights, indeed the use of this word appears publicly in the 1971 and 1984 Ordinances and the 1985 Gazette Notice.

30. It is of significance that these enquiries of the FCO were conducted some 8 months after the Public Consultation on the Marine Protected Area (MPA) had closed and 7

[25] RPD 1 Tab 23 – E-mail dated 17 January 2011 Yeadon to Dunne

[26] Note that at para 21 above Gazette Notice No 7 of 1985 contained details of Mauritius as a designated country under the 1984 Ordinance.

[27] RPD 1Tab 24 – E-mail 25 January 2011 Yeadon to Dunne

months after the announcement of the MPA. The answers received imply that Ms Yeadon was aware that Mauritius was afforded certain historical fishing rights but had not thought it necessary to research these further. Had she done so, by reference to the existing Government files in the National Archives, then the full significance of the undertaking would have been obvious. Given the importance of this issue in the context of the proposed MPA this would appear to have been a serious oversight, and yet it was to be her who was to draft the Public Consultation document on behalf of the Foreign Secretary.

The Public Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory- 10 November 2009 to 12 February 2010 (extended to 5 March 2010)

31. On or around 10 November 2009, the FCO released its Consultation Document[28]. In respect of the fisheries it mentioned on page 10 that:

"In addition, the fisheries in the BIOT are currently a loss-making business for the British Indian Ocean Territory Administration. The average yearly income from the purse-sein/long [sic] *line fishery is usually between £700,000 to £1 million. Only one company presently fishes on the reefs (inshore fishery) and this brings in only a very small income to BIOT Administration."*

And it went on to ask for the public's view on "*a possible framework for the fisheries*" with 3 Options. On page 12 it addressed the "Impact" of the proposed Options:

"*As well as the international fishing community, there are some groups who will be directly or indirectly affected by the establishment of a marine protected area and any resulting restrictions or a ban on fishing.*"

And as regard Mauritius:

"*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 (see communiqué of the meeting held in Port Louis at Annex C). The Mauritian government has in principle welcomed the concept of environmental*

[28] RPD 1 Tab 25 – FCO Consultation Document – Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory

protection in the area..... We will continue to discuss the protection of the environment with the Mauritians."

For the "*Chagossian community*" the Consultation Document declared that "*the creation of a marine protected area would have no direct immediate impact on the Chagossian community*"[29].

At Annex C was reproduced the Joint Communiqué dated 21 July 2009:

"The British delegation proposed that consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region. The Mauritian side welcomed, in principle, the proposal for 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. ...."

"The Mauritian side 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/British Indian Ocean Territory. 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."

32. This was the sum total of the information concerning fisheries and how the MPA might impact either Mauritius or the Chagossians. Nowhere in the Consultation Document does the word 'historical' or 'traditional' appear in relation to fishing nor is there any mention of any agreement or rights. In addition to this omission, a consultee might conclude from this document that: (1) the inshore fishery was conducted under paid licences; (2) Mauritius welcomed the proposed MPA; (3) talks with Mauritius were still ongoing; and (4) the MPA would have no direct immediate impact on the Chagossian community.

33. Page 9 and 11 of the CD referred to an earlier meeting in August 2009 in Southampton and gave a link to a website where the report of the meeting could be accessed. This was a workshop by invitation, attended by 24 persons, including Joanne Yeadon and Scott Parnell from the FCO, and Chris Mees and John Pearce

[29] Ibid page 13

from the Marine Resources Assessment Group (MRAG) Ltd, the BIOT's adviser and agent for managing the fisheries since 1991.

34. "*Fishery issues*" is mentioned on page 8 & 9 of the Workshop Report[30] and includes reference to: "*Mauritian inshore fishing, through historical rights regulated through free licences, with the number of licences based on assessments of surplus allowable catch. Licence uptake and inshore catches have been very low in recent years, with no Mauritanian-flagged vessels fishing since 2006.*" The Workshop participants concluded that: "*The workshop also considered the issue of Mauritian fishing rights to be a political one, that could only be resolved by negotiation and international agreement*". This is the sole mention of the 'historical' or 'traditional' fishery although the latter word is not used.

35. Notwithstanding that this was 3 months before the release of the Consultation Document and that plainly the issue of Mauritian historical rights had been raised by the BIOT fisheries advisers in the presence of Joanne Yeadon, no mention of this was considered necessary or relevant to the subsequent public consultation based on its exclusion from the Consultation Document. Consultees would have to read the Workshop Report and even then might conclude that either the issue was of no significance or minor importance, or in the alternative that Mauritius was content with whatever was intended.

36. The release of further documents on 2 May 2012 in these proceedings also raises questions about the conduct of the FCO concerning the issue of fishing rights. In an e-mail[31] from Joanne Yeadon (Head BIOT & Pitcairn Section) to Andrew Allen (Acting BIOT Commissioner) dated 22 April 2008 the issue of Mauritian fishing rights was raised: "*Mauritius and inshore fishing: we explained* [to the Pew Charitable Trusts] *that Mauritius did have some rights but had not exercised them recently. But this was a loophole that would need looking at.*" This is evidence that Yeadon was well aware of the problem that Mauritian fishing rights posed to any potential MPA. She also produces a "*3rd Draft*" copy of the Southampton Workshop report at exhibit JY 1 Tab 22 which appears to be dated 7 September 2009. The draft contains manuscript annotations by her and appears intended for the report editor, Dr Phil Williamson.

[30] RPD 1 Tab 26 – SOFI Workshop Report 10 BIOT Brochure revised[1]
[31] JY 1 Tab 7

Under Section 4 "*Fishery issues*"[32] the original draft contains reference to "*Mauritian/ Chagossian historical fishing rights*" in two places. In both instances she has circled the word "*Chagossian*" and either crossed it out or written "*NO!*" The reference to Chagossian rights does not then appear in the final published report suggesting that her objections had been acted upon. It is not clear why Yeadon was given the opportunity to comment on the draft since it is stated that "*Apart from this initial short presentation, stating the current UK government position, FCO participants had an observer role at the meeting*"[33].

37. That MRAG Ltd obviously considered fishing rights to be a 'live issue' and of some importance at the time of the public consultation can be found in a document submitted on 2 February 2010 to the FCO as their contribution to the consultation: "*Inshore licences are granted to Mauritian flagged vessels free of charge under an agreement reached in 1965 that recognised historical fishing rights.*"[34],

and

"***4.4.1 Mauritian historical fishing rights***

In addition to UNCLOS article 62 which refers to States whose nationals have habitually fished in a zone, the right of Mauritians to fish in BIOT waters was enshrined in the agreements made between UK and Mauritius in 1965. The 1971 ordinance on fishing also left an exception for certain foreign vessels to fish. This "right to fish" has been put into practice since the declaration of the FCMZ in 1991 as 'free licences' although the BIOT Administration reserves the right to limit the number of licences issued relative to the surplus allowable catch. For the banks (inshore) fishery a limit of six eighty-day licences has been applied. There is documentary evidence of Mauritian fishing in the Chagos archipelago since at least 1977 (Ardill 1979). Whilst the number of vessels applying for licences in BIOT has decreased this right continues to be exercised and the most recent licences issued to Mauritian flagged vessels were during 2009 (see Section 3.1)".[35]

MRAG recommended how this and the Chagossian (formerly known as Ilois) rights might be accommodated: "*there is a strong environmental conservation (biological)*

[32] JY 1 Tab 22 page 217
[33] JY 1 Tab 22 at page 224 point 41
[34] RPD 1 Tab 27 - MRAG Ltd response to FCO BIOT MPA Consultation, 2 February 2010, pp 71, at page 29.
[35] Ibid at page 42

argument for a full no take closure, but to address the social dimension (returning Ilois, Mauritian historical fishing rights) zoned use allowing a range of different uses of inshore reefs (including fishing) may be appropriate".

38. The MRAG input went on to enumerate "*Political factors*"[36] associated with any MPA, highlighting for the inshore fishery, the Mauritian historical fishing rights and the question of Chagossian return to the islands:

"We do not fully explore the political factors which are outside our area of competence.

- *There are particular political sensitivities related to Mauritius and for fisheries, in relation to historical fishing rights exercised by Mauritius, particularly for reef based demersal fisheries. Mauritian vessels have in the past also fished for tuna and Mauritius would wish to benefit from any quota allocations once the islands are returned to them.*
- *Should it be agreed that the Ilois return to the Chagos, their commercial and artisanal fishing rights would need to be considered in the context of a strict no-take zone. It is the reef fish communities that are most vulnerable to exploitation that would likely be fished by any returning population."*

39. This input by MRAG Ltd was not publicly available until after the consultation closed when it could be found through an internet search. That it was submitted to the FCO on 2 February 2010 means that those conducting the consultation had ample time to correct their earlier omission and bring these issues to the notice of the public consultees. They did not do so.

40. The impact of this non-disclosure is illnstrated by my own (jointly with Professor Brown) written submission[37] to the consultation. Despite taking great care to consider all relevant issues, we were unaware at the time of the nature and extent of the undertakings and obligations with respect to Mauritian rights in BIOT waters. However, we had commented that in respect of the Environmental Impact Assessment: "*"it fails to identify the scale, size or identity of the international fishing community or the detailed consequences, financial and employment, of the imposition of a MPA on them.*" And "*it fails to adequately address the issues of the claimed right of abode by*

[36] Ibid at page ix
[37] RPD 1 Tab 28 – Dunne & Brown Response to FCO Consultation 5 Feb 2010

the Chagossians nor to indicate how this could affect the legal status or implementation of the proposed MPA sufficient to allow informed comment."

41. As to the Joint Communiqué we wrote:

"***7. Claims of Mauritian Sovereignty.***

Issues of Mauritian claims to sovereignty are barely alluded to in the CD. On page 12 it is stated that "We will continue to discuss the protection of the environment with the Mauritians". What does this mean? In the joint communiqué at Annex C of the CD it is mentioned that there is to be "a joint technical team... to look into the possibilities and modalities of such a coordinated approach..." for a submission to the UN on an extension of the continental shelf in the Chagos/BIOT. What are these issues? What limitations will this place on the proposed MPA? The communiqué also reports that there were further agreements to jointly examine the prospect of an MPA and questions of fishery. This communiqué dates from 21 July 2009 and yet no further information is supplied in the public consultation. Furthermore the public consultation does not indicate the disagreements that have subsequently arisen and which therefore leave the joint communiqué as a misleading statement of Mauritian intent."

42. The latter sentence was a reference to an article that had appeared in the Mauritius Times on 15 January 2010[38] entitled "*Mauritius boycotts UK meeting about 'marine protected area' in Chagos*", in which it had been reported that: "*Reports from Mauritius indicated that the government led by Dr Navin Ramgoolam was not happy with the way things were shaping up in discussions with Britain ... This was confirmed when the Mauritian Minister of External Affairs, Dr Arvin Boolell, said in an interview on Radio-Plus last week that his government had decided to postpone a third round of talks with the UK following the failure of the British Prime Minister, Gordon Brown, to follow through on his undertaking which, according to Dr Ramgoolam, had been made at November's Commonwealth summit. This was to discuss the proposed MPA at the bilateral talks in January*".

43. The author of this article had brought this to our notice but there was no move by the FCO to bring this to the attention of consultees notwithstanding that the consultation

[38] RPD 1 Tab 29 – Mauritius Times 15 Jan 2010

was still extant, and was subsequently extended to 5 March 2010. It must be presumed that the British High Commission in Mauritius would have known about the newspaper article and brought it to the attention of FCO officials in London given the high profile of the proposed MPA at the time.

44. The consequences of these failures were that (1) neither we nor other consultees were alerted to the true nature of Mauritian historical or traditional fishing rights, nor to any separate claim to rights by Chagossians, and (2) other consultees were also not made aware that the Joint Communiqué might no longer represent the true state of affairs vis-à-vis Mauritius.

45. We concluded out submission: "*Overall we consider the public consultation exercise to have been poorly prepared and to lack essential information to produce an informed and useful input to the proposal. On this basis we contest its validity. We recommend that the consultation exercise be recommenced after the decision in the ECtHR with the release of more adequate and comprehensive documentation, covering inter alia these issues*".

Correspondence with the Secretary of State August – August - October 2012

46. Pursuant to this application, the Claimant's solicitor Clifford Chance wrote to the Treasury Solicitor[39] on 13 August 2012 concerning traditional fishing rights in the waters of BIOT. Annexed to the letter were some of the documents that I had assembled and which are exhibited herein[40]. The letter included these documents in support of evidence already filed in the application, concerning Chagossian involvement in fishing in BIOT waters and the refusal of licences. It posed 6 questions in an attempt to narrow areas of disagreement to be put before the Court.

47. The Treasury Solicitor replied on 4 October 2012 on behalf of his client[41] stating that "*your proposed amendment appears to be misconceived in both fact and law*". It then went on to refute all 6 questions.

[39] RPD 1 Tab 30 – Clifford Chance to TSol dated 13 August 2012
[40] Annex 1 to 6 correspond to RPD 1 Tabs 1-6; Annex 7 to RPD 1 Tab 14, and Annex 8 to RPD 1 Tab 16
[41] RPD 1 Tab 31 – TSol to Clifford Chance 4 Oct 2012

48. In respect of the Secretary of State's disagreement concerning the nature of the fishing rights that apply in the BIOT (Questions 1 and 2 and answers thereto) I do not propose to draw the Court's attention to this aside from noting that the Secretary of State's position as regards the 1965 undertaking is that this referred solely to "*fishing rights and not to traditional fishing rights*". Whilst this may well be an issue which would need to be determined in a different forum, I observe that not only was the wording of the 1965 undertaking such that fishing rights "*would remain available*"[42] which implies pre-existing rights, but also it was UK Government practice subsequently to refer to this undertaking as involving 'traditional fishing rights' in both classified internal correspondence [43] and in BIOT public documents and legislation[44]. In such circumstances it would appear misguided and inappropriate for the Defendant now to attempt to change that course of history.

49. The Secretary of State's contention that "*Your letter refers to files released to the National Archives on 14 April 2012, specifically the FCO 141 series. However, the Secretary of State is of the view that other documents already available contained sufficient information to enable you to plead reliance on "traditional fishing rights" at the time of the 2009 MPA consultation*" is not contested, however as has already been shown (at para 4 above) the newly released archives, hitherto retained at Hanslope Park beyond the statutory period, have revealed additional documents which assist in filling the gaps. This however is not an issue in the present proceedings. It was not necessary or obligatory for the Claimant to "*plead reliance*" at the time of the 2009 MPA consultation, although he did indeed raise the issue in his letter of 23 December 2009 to the Secretary of State. Rather what is contended is that no mention of such rights was made in the FCO Consultation Document sufficient to inform consultees. Clearly the same knowledge available to the Claimant was also accessible to the Defendant, but seems to have been ignored by those officials responsible for drafting the Consultation Document thus further compounding the oversight of the advice given by MRAG Ltd.

50. Indeed, in answer to Question 5 which was: **"Is it accepted by the Secretary of State, when consulting on the possibility of declaring a no-take MPA that he failed to**

[42] RPD 1 Tab 1 para 22 vi
[43] See for example RPD 1 Tabs 5 and 6 "remain available"; Tabs 11-13 "traditional"
[44] See for example RPD 1 Tabs 7, 14 and 16 "traditional"

inform consultees of the existence of the said undertaking, its origins and nature?" the Defendant retorted that "*Consultees were properly informed about fishing and fishing licences*" and referred to the evidence contained in "*(a) Questions 1(i), (ii) and (iii) posed in the consultation document focused on fishing; (b) Pages 10, 11 and 12 of the consultation document referred to the fisheries in BIOT, fishing licences and the impact of the MPA on fishing and on fishermen; and (c) Annex C to the consultation document set out the 21 July 2009 joint communiqué issued by the United Kingdom and Mauritius, which expressly referred to fishing licences.*" In reply to this I would respectfully refer the Court to paragraphs 31-45 above where I discuss all these purported sources of information available to consultees. Whether or not this constituted consultees being "*properly informed*" can be determined on those facts. I would suggest that it fell well short of what was required.

Chagossians as 'beneficiaries' of traditional fishing rights in the Chagos

51. In their letter to the Treasury Solicitor[45], the Claimant's solicitor had also asked: **Q.3 Is it accepted by the Secretary of State that the beneficiaries of the undertaking and such other free fishing licensees includes Chagossians?** To which the Defendant replied[46]:

"*9. No. The use of the term "beneficiaries" serves only to confuse matters. The Chagossians were not the legal beneficiaries of any right that Mauritius may or may not have or have had in public international law. And it was the owners of the Mauritian flagged vessels who were the beneficiaries of the limited number of free annual licences issued under the 1991 and 2003 BIOT Fishery Ordinances.*

10. If and insofar as any Chagossian derived a financial benefit by being paid for crewing a Mauritian vessel that held a fishing licence, that benefit was no more than a commercial benefit derived from the crew member's contract of employment with the owners or operators of the vessel. Chagossians were not in any legal sense the beneficiaries of any undertaking such as that you allege.

11. The statements of Mr Sakir and Mr Volly were filed as part of your application to lift the stay ordered by Burnett J. The Secretary of State has never understood, or accepted, that they have any relevance to the substantive claim for judicial review."

[45] RPD 1 Tab 30 at Question 3
[46] RPD 1 Tab 31

52. This response ignores the question and relevance of citizenship of the Chagossians. All Ilois (as they were then known) were, or became citizens of Mauritius in 1968 by virtue of a clause added to the Mauritius Constitution by UK officials[47], indeed despite the fact that they were also 'citizens of the UK and colonies' under the British Nationality Act 1948, British officials went out of their way to conceal this fact from Mauritian Ministers at the time. Government papers reveal that it was intended that there should be: *"no such person as a citizen of BIOT"*[48]. Unequivocally therefore, Chagossians who were alive at the time of the creation of BIOT in 1965 and those born on the islands until 1973 were and remain citizens of Mauritius. The UK Government implicitly accepted in 1967 that this amounted to at least 1,483 persons[49]. As Mauritian citizens they were therefore entitled to benefit from any arrangement granted to Mauritius as evidenced by the special treatment afforded to Mauritius registered fishing vessels over the last 47 years.

53. The Defendant seeks to muddy the waters by referring, inappropriately to *"legal beneficiaries"*. What is in issue here for the purposes of information published in the Consultation Document is whether the Chagossians benefitted and were therefore 'beneficiaries' in the normal dictionary sense. The statements of Mr Sakir and Mr Volly[50] clearly indicate that they and others benefitted from that arrangements afforded Mauritian registered vessels fishing in BIOT at the very least between 1981 and 2009.

54. The Consultation Document stated unequivocally that as regards the *"Chagossian community"*, *"the creation of a marine protected area would have no direct immediate impact"*. If the statements of Mr Sakir and Mr Volly are accepted as true, then clearly this is not the case and it can be presumed that consultees were not therefore furnished with the full facts.

55. Furthermore, whether Chagossians are or are not entitled to benefit as Mauritian citizens, there is also the question as to whether they have traditional fishing rights in

[47] RPD 1 Tab 32 Telegram dated 21 December 1967 "Mauritius citizenship and inhabitants of BIOT" from Commonwealth Office to Governor Seychelles. [FCO 32/129 Folio 22]
[48] RPD 1 Tab 33 Minute dated 27 November 1967 from Mr C.A. Seller, Commonwealth Office to Mr K. R. Whitnall, Pacific & Indian Ocean Department, Commonwealth Office. [FCO 32/129 Folio 10]
[49] RPD 1 Tab 34 Gifford & Dunne 'A Dispossessed People: the depopulation of the Chagos Archipelago 1965-73' – paper in review Population Space & Place 24 Sept 2012
[50] Filed in these proceedings

the Chagos by virtue of their former status as inhabitants of those islands, whether or not those rights have subsequently been recognised by the UK Government. In 1965, attempts were made by the Colonial Office to ascertain the nature and extent of fishing that had historically taken place in the Chagos. Correspondence on this can be found in the former BIOT Administration files from the Seychelles.

56. On 10 November 1965, the Colonial Secretary despatched a Confidential Telegram[51] to the Governor of Mauritius (copied to Governor Seychelles who was now also the newly appointed BIOT Commissioner) requesting information on:

"(a) nature of the fishing practised by the people in Chagos Archipelago."

57. The reply dated 17 November 1965 from Mauritius (copied to Seychelles[52]) reported *inter alia* that:

"(a) nature of the fishing practised: mainly hand line with some basket and net fishing by local population for own consumption".

58. In addition, a report on medical aspects in the Chagos following a visit in November-December 1966 noted that the diet on the islands consisted of *"basically rice and fish"*[53]. It must be presumed therefore that as a source of protein, the traditional fishery enjoyed by the Ilois (Chagossians) was important.

59. In respect of these fishing rights, the FCO seems to have closed their mind to whether or not they may still subsist notwithstanding that the FCO has acknowledged that the Chagossians were unlawfully removed from the BIOT in the 1960s and 1970s[54]

What is known about the extent of the Mauritian Fishery in the Chagos Archipelago between 1965 and 2009?

60. The Mauritian fishery in the Chagos has been monitored in detail since 1991 with the collection of catch and location data. The fishery is described by Mees et al. (1999)[55]

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[51] RPD 1 Tab 35 - Cypher Telegram 10 Nov 1965 to Mauritius – File BIOT/54/61 "Fisheries and Territorial Waters" [FCO 141/1437, folio 1].

[52] RPD 1 – Tab 36 - Cypher Telegram 18 Nov 1965 SofS to Seychelles [FCO 141/1437, folio 2].

[53] RPD 1 – Tab 37 – Report by Dr MacGregor of a visit to the Chagos November- December 1966 [FCO 141/1419 Folio 1]

[54] R v Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult [2000] CO/3775/98 High Court of Justice (QBD)

with an update in 2010[56]. Prior to 1991, commencing in 1977, limited catch and where applicable, license data is also available and reproduced by Mees et al (1999). The Mees et al. data set runs from 1991 to 1997 and has been supplemented and brought up to date (to the end of 2009) by Freedom of Information requests to the FCO during 2011[57].

61. A brief summary of the fishery (from exhibit RPD 1 Tab 27) follows[58]:

"The inshore fishery in the British Indian Ocean Territory (BIOT, Chagos Archipelago) is targeted at demersal species, principally lutjanids (snappers), lethrinids (emperors) and serranids (groupers) occurring on the banks and around the five atolls of the Chagos Archipelago. Many of the species exploited are high value for export markets. Mauritian mother-ship dory ventures exploit the fishery, and operate in the Fisheries Conservation and Management Zone (FCMZ) under licence between 1 April and 31 October. In recent years, natural attrition of old vessels has seen the number of mother-vessels decline, but two smaller vessels fishing with hydraulic lifting gear have been introduced and licensed in the past. In 2008 and 2009 the season was extended to accommodate a shift in the fishing pattern of the licensed vessels. The 'season' is not defined on a biological basis but rather an operational basis to limit effort, and was established in the early 1990's when effort was greater. The extension of the season does not represent an increase in effort, which remains low.

Mauritian vessels have fished in the zone for a number of years, and historical data is reviewed annually in background papers prepared for the British Seychelles Fisheries Commission (1996- 2009) and the British Mauritian Fisheries Commission (1994-1999). A logbook system has operated since 1991, and, since 1994, information on the fishery has been supplemented through an observer programme, initially jointly with the Mauritians. Analyses of fishery data occur annually and in the light of these, the BIOT (Chagos Archipelago) inshore fisheries management strategy and operational management plan (Mees, 1999) are reviewed and updated as appropriate. Potential changes to the management plan were reviewed in 2005 (Mees and Moir Clark, 2005) but there was no fishing that year and fishing effort has been low since. If the outcome

[55] RPD 1 Tab 38 - Mees,C.C., Pilling,G.M., Barry,C.J. (1999) Commercial inshore fishing activity in the British Indian Ocean Territory. In Sheppard,C.R.C., & Seaward,M.R.D. Ecology of the Chagos Archipelago. Linnean Society Occasional Publications 2, London, pp327-346.
[56] RPD 1 Tab 27 – at pages 5-7
[57] FOI Requests number FCO 1057-11, 1085-11, and 1086-11 not included here
[58] RPD 1 Tab 27 – page 5

of the consultation is to maintain the fishery, it will be relevant to re-examine management in light of the recent changes in vessel characteristics. A summary of the fishery is provided by Mees et al. (1999) and an in depth study of similar fisheries in Mauritius, Seychelles and the Chagos is provided in Mees, 1995; 1996; and, MRAG 1996. Multispecies responses to fishing including in Chagos are reported in Mees, 1997. A limited entry licensing system operates in the BIOT inshore fishery. The decline in the Mauritian mothership-dory fishing fleet over time and intermittent fishing activity is reported in Mees 2008, and Mees et al 2009 (see also Figure 1). The BIOT inshore fishery is not heavily exploited and in the most recent year for which data are currently available (2007) the proportion of the sustainable yield exploited was 16.6% (Mees, 2008). The inshore fishery has been carefully monitored and proactively managed since declaration of the BIOT FCMZ in 1991 and as a result the fisheries are in good shape enabling other authors to suggest that BIOTs reefs are in near pristine shape (see Williamson, 2009). The greatest threat in inshore waters has been illegal fishing by vessels from Sri Lanka (see Section 4.2.3.1). These vessels do not target the demersal reef fish that are the target of the licensed fishery. Instead they target sharks (see Graham et al, in press) and in the past through fishers based in camps, they targeted holothurians (bêche de mer, see Section 4.2.3.1 and Price et al. 2009).

62. The overall catch from the fishery has been variable from year to year[59], depending on the number of vessels licensed and fishing. Between 1991 and 2009 the average annual catch was 220 tonnes, but in recent years there have been 3 years when there was no fishing (2005, 2007 and 2008).

63. The detailed catch data[60] also shows the areas fished and the catch for each location.

64. After 31 October 2010 no further licenses have been issued following the policy to end all commercial fishing in the newly proclaimed BIOT Marine Protected Area.

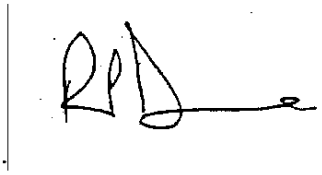
65. It should be also be noted that a separate pelagic tuna fishery also operated in the Chagos 200nm fishery zone prior to the cessation of commercial fishing licenses on 31 October 2010. This is also summarised in exhibit RPD 1 Tab 27. This fishery

[59] RPD 1 Tab 39 - Mauritian Inshore Fishery data 1977-2009 Overview
[60] RPD 1 Tab 40 – Mauritian Inshore Fishery data 1991-2009 detailed catch data

involved Japanese, Taiwanese, Spanish and French flagged vessels. Mauritian vessels are also known to have fished for tuna in the past, although details are vague[61].

Statement of truth

66. I believe that the facts contained in this witness statement are true.



Richard Patrick Dunne

Dated: 8 October 2012

[61] RPD 1 Tab 27 - at page ix.

CO/8588/2010

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of a claim for Judicial Review

B E T W E E N

(R) on the application of Louis Olivier Bancoult

Claimant

-and-

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

EXHIBITS "RPD 1 Tabs 1 to 40"

CO/8588/2010

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SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

FIRST WITNESS STATEMENT OF

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Annex 173

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

THIRD AFRICA-SOUTH AMERICA SUMMIT, MALABO, EQUATORIAL GUINEA, 20-22 FEBRUARY 2013

MALABO DECLARATION (EXTRACT)

28. ***We reaffirm*** that the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of the Republic of Mauritius in violation of international law and UN Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965, forms an integral part of the territory of the Republic of Mauritius. In this regard, ***we note with grave concern*** that despite the strong opposition of the Republic of Mauritius, the United Kingdom purported to establish a 'marine protected area' around the Chagos Archipelago which contravenes international law and further impedes the exercise by the Republic of Mauritius of its sovereignty over the Archipelago and of the right of return of Mauritian citizens who were forcibly removed from the Archipelago by the United Kingdom. ***We resolve*** to fully support all peaceful and legitimate measures already taken and which will be taken by the Government of Mauritius to effectively exercise its sovereignty over the Chagos Archipelago and, in this respect, ***call upon*** the United Kingdom to expeditiously end its unlawful occupation of the Chagos Archipelago. ***We recall***, in this regard, the Resolutions / Decisions adopted by the African Union at the highest political level including Decision Assembly/AU/Dec.331 (XV) of 27 July 2010 of the AU Assembly and Resolution Assembly/AU/Res.1(XVI) adopted by the 16th Ordinary Session of the AU Assembly held in Addis Ababa, Ethiopia, from 30-31 January 2011.

Annex 174

Extract of Transcript, R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs, Examination and Cross-Examination of Mr. Colin Roberts, 15-17 April 2013

MR PLEMING: My Lord, I'm going to put questions to him which will identify the statements.
MR KOVATS: My Lord, if we can clarify that at the outset. He has three statements. The first one is in core bundle 1 at tab 16.
LORD JUSTICE RICHARDS: Yes.
MR KOVATS: The second one, again in core bundle 1, 1023.
LORD JUSTICE RICHARDS: Yes.
MR KOVATS: The third one -- and I hope your Lordships have this -- is in core bundle 4, his third witness statement, at tab 125.
LORD JUSTICE RICHARDS: Yes, I think that probably explains why I had removed this material into a different file. Thank you.
MR KOVATS: My Lord, there's one small point of detail I would just like to clarify with Mr Roberts and then I am quite happy to tender him for cross-examination.
LORD JUSTICE RICHARDS: Good. Thank you. If Mr Roberts can come forward.

MR COLIN ROBERTS (sworn)

Examination-in-chief by MR KOVATS

MR KOVATS: Mr Roberts, if I could ask you to see if you can locate a file numbered core bundle 1 and turn to tab 23, please. I hope you find there a document headed "Second witness statement of Colin Roberts".

A. Yes.
Q. In the copy that the court has, it's not signed. Can I ask you to turn to paragraph 7 of that. That should be page 203, the numbering on the bottom right hand of the page. Is there a correction that you wish to make to paragraph 7?
A. Yes. There's a mistake in this in the second sentence, which says:
"Until August 2011, when the claimant served his amended grounds of claim ..."
Until that point the 12 May 2009 meeting was not one that I had any particular reason to remember. That is a mistake for, I think, fairly obvious reasons, that I first had cause to recall that meeting when the purported cables appeared in the newspaper in December 2010.
Q. Thank you. Subject to that -- I ask you this because it's unsigned in the court copy -- do you confirm what is set out in that statement?
A. I do.
MR KOVATS: Thank you, Mr Roberts. You will now be asked some questions by Mr Pleming.

Cross-examination by MR PLEMING

MR PLEMING: Mr Roberts, thank you for that correction. That's the only correction? You have read the witness statements again and you are happy with your evidence?

A. I have.
Q. Just some preliminary matters to deal with your career relevant to these questions. Is it right that you were appointed as Commissioner of the BIOT on 23 June 2008 or mid-June 2008 and you were also, at the same time, Director of the Overseas Territories; is that right?
A. I think my appointment began in July 2008 but the documents appointing me may have been prepared before I arrived in office.
Q. So from July 2008, and you occupied that position until October 2012; is that right?
A. That's right.
Q. As Commissioner, is it the position that when dealing with matters relating to the British Indian Ocean Territory -- I'll keep calling it BIOT because it's easier -- were you on a direct reporting line back to the Secretary of State?
A. No. It's a little bit more complicated than that. As Director and as Commissioner, I was, in the first instance, answerable to the Director General for Defence and Intelligence. On matters relating to resources and personnel I'm answerable to the Permanent Under-secretary, but broadly -- and in some cases directly and in some cases through senior officers in

the Foreign Office -- yes, all that I did as Director and as Commissioner for BIOT would have been accountable to the Secretary of State.
Q. Was there any other civil servant -- that is, not a politician or member of the diplomatic service -- more senior than yourself?
A. As I say, the Director General for Defence and Intelligence and the permanent under-secretary.
Q. In order to bring your career up-to-date, we know from public announcements that you will be the Governor of the Falkland islands from 2014; is that right?
A. That's correct.
Q. You are, I'm sure you will accept, an extremely experienced member of the diplomatic service. How long have you been in the service?
A. I joined the diplomatic service in 1989.
Q. You have served as governor in other jurisdictions?
A. No, I haven't.
Q. No similar qualification, such similar posting?
A. I have been the British ambassador to the Republic of Lithuania but although, as Director for the Overseas Territories, I was responsible for the recruitment and training and guidance of the network of British governors in the overseas territories, I have not served as a governor myself.

Q. As you know, Mr Roberts, what I want to do is to ask you questions that focus on the complaint made on behalf of the claimant that there was an ulterior motive for the no-take MPA and also to challenge your denial and your evidence -- it may help at this point just to have your evidence to hand. The same bundle, tab 23. In paragraph 10 -- that's internal page 4 -- you say this, just to remind you and let you know what I'm going to challenge. In the third sentence in paragraph 10:

"I would have had no reason to say at the 12 May meeting anything to the effect that the MPA was motivated by a desire to prevent resettlement."

Then you explain the UK position. So that's one topic I want to explore with you, "no reason".

Again, so you just have a framework for the questions, the Secretary of State, when resisting the complaint by the claimant, is inviting the court to look at the context, other documents, to support your denial of any ulterior motive. Did you know that?

A. Yes.

Q. So when I ask you questions about the history, just to let you know it's a prelude, a run-up to the meeting in May.

What I wanted to start with is to look at the weeks running up to the 12 May meeting so we can put that

meeting in its proper context. If you stay with core bundle 1, the one you have open, and turn to tab 33. This is a memorandum from you to others in which you attach a short paper. This is the paper that was going to be used for a meeting that was taking place on the next day, 6 May; is that right?

A. Yes.

Q. By this time -- that is, by 6 May 2009 -- had you made a decision as to the proposal?

A. No.

Q. But what you had decided is the proposal would bring an end to fishing, or had you not, as a proposal?

A. The background to this minute is that the Foreign Secretary, through his private office, was aware that this proposal was being considered and he asked me to present the proposal to him in a meeting and to prepare a note in advance of that meeting. That's how this -- that's how this minute was generated and at that stage, as far as I know, the Foreign Secretary had made no decision himself and I could not have made a decision on his behalf.

Q. I'm not asking you about the decision; I'm asking you about the proposal at this stage. We have it summarised in a nutshell on the second page, the first page of the note:

"In practical terms, the broad concept would be to declare the entirety of BIOT's EEZ..."

"EEZ" is an exclusive economic zone?

A. Yes.

Q. Do you have the passage:

"[It] would be to declare the entirety of BIOT's EEZ a no-take Marine Protected Area, bring an end to fishing and legislate for the protection of the seas and atolls. The military base arrangements on Diego Garcia would be unchanged."

That was the proposal?

A. This was essentially the proposal from the Chagos Environment Network, which was then, I believe, circulating in a pamphlet in writing which I had bought to the attention of the Foreign Secretary beforehand.

Q. Had you had meetings with the network?

A. I think I had but -- I can't remember exactly when that would have been but I believe they would have been before this.

Q. Had you had meetings with the Pew Foundation Trust?

A. I had.

Q. We'll look at those a little later to see the environmental stream. If we just stay with this note. I should have asked you: is this all your own work? Is this a note prepared by you or with the assistance of

others?

A. It would have been a note prepared with the assistance of others.

Q. Would that include with the assistance of Ms Yeadon, the administrator?

A. Probably, and quite a large number of other people would have been involved as well.

Q. We know that this was sent, as you indicated earlier, to the private secretary, but as far as you can recall -- we can't look behind the redactions -- would this have been copied to Ms Yeadon?

A. Yes.

Q. So going back over the page, I've just asked you about the nutshell reference. You then list the benefits of turning the territory into a marine reserve. You list the conservation benefits. Over the page, climate change benefits, scientific benefits, development benefits. Then reputation or political benefits. They're all listed. Then there's a reference to a net security benefit. What did you mean by the net security benefit?

A. At this relatively early stage, if I recall correctly, one of the issues that we were trying to address was illegal fishing and we -- as I say, it was an early stage of the process but we had some thoughts about how

the creation of a Marine Protected Area, as then being proposed by the Chagos Environment Network, might help put in place a more effective framework for dealing with illegal fishing.

Q. So when you refer to security, it has nothing to do with security in the sense of defence?

A. There is a slight complexity in this, in that there is an integration of the security protection of the British Indian Ocean Territory with the hard defence and -- with protecting the EEZ, the fishery as it then was, and protecting the military base on Diego Garcia. My Lord, I am not able to go into details about the operational arrangements for security, but I will if it's essential.

Q. Mr Roberts, it's just a rather strange phrase because the problem of illegal fishing had been around for years. That's fishing we know as IUU, illegal, unregulated and unreported fishing. What you were about to do was to remove the commercial benefit of existing licensed fishing to support patrols. You only had one patrol boat at the time. You say that this would involve greater control over access. What did you mean by "over access"? I'm not saying it's in any way wrong to take defence considerations into account. It just seems an odd explanation that this should be to stop illegal fishing.

A. I have said to stop illegal fishing. At the time we were beginning to become more concerned over piracy, as the instance of piracy in the north-west Indian Ocean was starting to move in the direction of the British Indian Ocean Territory and the kind of control that we were thinking about at the time was knowledge of the movement of shipping.

Q. Which you would have already?

A. We have some.

Q. Well, you deal with this, just for the record, in paragraph 13 of your first witness statement at tab 16. You then, Mr Roberts, deal with how to create a marine reserve and deal with declaration and legislation. You deal with the mechanism in the middle of the paragraph --

A. Sorry, where?

Q. This is still in page 280:

"The Foreign Secretary has full legislative powers in BIOT. We could declare BIOT a marine reserve today..."

LORD JUSTICE RICHARDS: Hang on, Mr Pleming. Just make sure Mr Roberts has the passage.

A. Yes, if counsel could direct me to the paragraph.

MR PLEMING: Yes, it's page 280 in tab 33. I am just showing you where you set out the mechanism by which you

can declare or legislate --

A. Yes.

Q. Then, over the page, you deal with monitoring and enforcement. This is where you deal with illegal fishing, which is already a problem, and I was struggling with how a no-take MPA helps you on preventing illegal fishing, which has been going on for years.

A. I think the answer to that is that through our discussions with the Pew Foundation we had begun to explore whether there might be technological means of helping us to protect BIOT waters and we were also discussing with them whether they might provide some financing which would help us to achieve the same purpose.

Q. Let's leave the mechanism and monitoring enforcement and now turn from the framework of the science to the risks. On the same page, page 281, here you are telling the Secretary of State that the big risks are political; is that right?

A. Yes.

Q. The first one you mention is Mauritius. On the page you have, the last two lines are redacted. Without taking you to them but for the court's note, the unredacted version is in volume 11, tab 20, page 219. Just so that

I can save you turning to that volume, it may help if we have the full picture. This is what you said, if I can just read this out so that you have it, Mr Roberts. Under the redaction, it reads:

"The position is complicated by a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free-of-charge."

That's what is underneath.

A. Right.

Q. Over the page, when dealing with Mauritius:

"We believe it would be possible, if very difficult, to convince the government of Mauritius that creation of a marine reserve would be in its interest. This would involve..."

Then you list the considerations, including the suggestion that the Foreign Secretary might engage in some heavy lifting. I didn't realise that you were saying that the heavy lifting might be lifting the Prime Minister but that's probably not what you meant.

The Chagossian movement is the next political risk. Is this a fair summary, taking your words -- it may help if you just read through the paragraph beginning "The people removed from the territory..." to the end of the word "Chagossian" before we get to "Assuming we win in Strasbourg..." I don't want to pick words out of

context, so if you can just read it to yourself.
(Pause)
A. Yes.
Q. All right. You start with listing or describing the people who were removed and their descendants. They now number several thousand. You describe where they live. There follows a number of references to "they" and "their" throughout this paragraph:
"They now live ... They have a number of representatives ... They have attracted a large measure of support ..."
Et cetera. So the "they" is the Chagossian movement. Is that a fair way of describing it?
A. It's a fairly elliptical paragraph, but the intention there was to describe in a very brief summary the position, as we saw it, of the Chagossian movement in general. What I didn't try and do in any detail in that paragraph was try to explain to the Foreign Secretary that there are several Chagossian movements, that they have different representatives and that they have some different objectives and a different relationship with the British government.
Q. You do say they have a number of representative organisations and diverse objectives, but what you're talking about is the Chagossian movement. I want to see

if we can unpick the content of this paragraph. What you say in the fourth line is:
"There is a large measure of support in the United Kingdom Parliament for resettlement."
Is that right?
A. Yes.
Q. Then there's reference to the House of Lords judgment. So this is notwithstanding the judgment in the House of Lords in October 2008. There is still a large measure of support in Parliament?
A. I believe that was the position at the time this document was produced and that's how we advised the Foreign Secretary.
Q. There is a very active cross-party, all-party Parliamentary resettlement group, all-party Parliamentary group on Chagos; is that right?
A. Yes.
Q. That group has, in your words, ratcheted up political pressure for the government, so the Chagossians together with this all-party group?
A. Yes.
Q. The next point you are making for the Secretary of State is a sentence beginning:
"The FAC ..."
That is the House of Commons Foreign Affairs

Committee:
"... has said that there is a moral responsibility to permit resettlement."
Is that right?
A. Yes.
Q. You refer to a meeting in the Westminster Hall on the OTEs, the overseas territories, only a few these earlier, 23 April. Was that a very lengthy three-hour debate in support of the Chagossian movement?
A. I don't recall the details of the debate.
Q. Do you recall that it was a lengthy debate?
A. Well, I wasn't there, but it may have been. It will be on the Hansard record anyway.
Q. You then continue that the plans that you are describing are based on the establishment of an economy based on fishing and tourism. Those were the two pillars upon which their resettlement was to be based; is that right?
A. That's what we set out for the Foreign Secretary.
Q. You then tell the Foreign Secretary that they are hostile to the proposal because the BIOT with a no-take MPA would be incompatible?
A. Yes.
Q. Then, finally, they have expressed unrealistic hopes that the reserve will create permanent resident employment based on the outer island for Chagossians.

So that's your summary of the position. An accurate summary at the time?
A. It is a summary, so there's a lot which is not said and a lot which is not spelt out in detail, but overall that was how we presented the picture to the Foreign Secretary.
Q. Would this be an even shorter encapsulation: Chagossian resettlement, notwithstanding the decision in the House of Lords, was very much on the agenda and you were closely involved with those claims; is that right?
A. I wasn't involved in the House of Lords case, but I was aware of the overall position, yes.
Q. You were aware also that there were two appeals, combined appeals, to the European Court of Human Rights from the earlier decision and the House of Lords decision?
A. Yes.
Q. What I am suggesting is that you were very well aware of the intensity of the debate and the claims, not just through your administrator or through other officials but you personally were well aware of these claims and had face-to-face meetings with Mr Bancoult and others; is that right?
A. Yes. I certainly had a face-to-face meeting with Mr Bancoult and some others. I can't remember all the

meetings I had.
Q. Let's just look at one to see that it's close to this meeting on 6 May because it's only a few weeks earlier. If you go to CB2. If you keep that file open and put it to one side and open core bundle 2 at tab 92. What I'm showing you at tab 92, Mr Roberts, is a letter to you, dated 14 April 2009 -- so that's three weeks before this memo -- from Mr Gifford, whose name you will see on the second page, a solicitor at Clifford Chance, writing on behalf of Mr Olivier Bancoult and referring to a meeting that you attended with Mr Bancoult, Chairman of the Chagos Refugee Group, and his delegation on 25 March.
Attached to this is a note of the meeting. Could you turn to the third page, which is the note of the meeting.
This was sent to you and to the minister by Mr Bancoult, so it was a meeting note that was in general circulation. Have you any reason to doubt its accuracy?
A. I believe we did question its accuracy at the time and I'm not sure that we -- I certainly don't recall responding in a way that confirmed its accuracy.
Q. Did you respond suggesting that it was inaccurate?
A. No, I think we handed the letter over to legal advisors because I believe litigation was already under way.

Q. Just so we know that this was also sent to the minister, the reference is core bundle 1, tab 13, sent by Mr Bancoult. I'll show you that in a moment. What I wanted to take you to then is paragraph 7, first of all. This is on page 649. I should, to familiarise you with the minute -- it's unfair if I don't -- take you to paragraph 1. That is Mr Gifford beginning by outlining the evolution of the feasibility study. The theme through this document is to pick up a running sore, a running complaint about the feasibility study; is that right?
A. If I may, I say this minute -- this record which you're referring to, quite a long minute, I do recall it being sent and I remember we discussed at the time that it didn't appear to bear much relationship to the exchange that actually took place. There were a great many points which Mr Gifford had included in this note which were not raised in the meeting and there were similarly points which Mr Gifford had raised which were not reflected in the note.
Q. Is this a meeting that you took a note of or is it one of the meetings when you didn't take a note?
A. I can't recall whether we had a note of this meeting or not.
Q. Would you normally take a note of such a meeting?

A. The procedure or the decision over whether or not to take a note of a meeting is one that turns on a number of issues and I think there may have been a record, but I wouldn't have taken it and I don't recall seeing it.
Q. Well, I only need to deal with one or two paragraphs. It's paragraph 7 I wanted to ask you about. This is the note of the meeting, as I said, dealing with the feasibility, with return, with cost, the new Commissioner, et cetera. Go to paragraph 6 for Mr Bancoult speaking and assisting on the right to return. At paragraph 7, we have your response as recorded. Just tell me whether this is accurate or not, whether you would have said something like this:
"The government did not have a new set of responses. Their point of view was clear. Resettlement was not possible. He stated the minister had huge sympathy for the difficulties encountered and that no one in the government would want to defend the actions taken in the 1960s. Mr Roberts also emphasised that the situation is reviewed regularly. However, he said that no response from the government could permit resettlement to the outer islands at the moment."
Is that the kind of terminology you would have used?
A. Yes, that is broadly the position of the government at

that time.
Q. So you couldn't permit settlement at the moment in part because of feasibility?
A. And security.
Q. And security:
"He emphasised the phase to be reported had been very important in founding the government's view. He asked what would be the response if a scientific study did report settlement was impossible. Would they still press their claim?"
Then the response from Mr Bancoult:
"That's ridiculous. Look at the 4,500 people living on Diego Garcia."
There's only one point I wanted to pick up. In 10 and 11, Mr Gifford again calls for an independent, transparent report and Mr Bancoult also responded to Mr Roberts, pointing out the reports were made without proper consultation with the Chagossian people and that there should have been a more thorough investigation, et cetera et cetera, et cetera. Does that ring a bell as well, as a kind of theme of the meeting?
A. Yes, I think that was discussed.
Q. In paragraph 11, Mr Gifford is talking to you about the licences. Then you go to over the page:
"Mr Roberts's response was that things had moved on

[this is since the phase 2B report] and the government would not base things on a report from 2002. Mr Gifford asked how, in that case, he could justify the withholding of a fresh study."

So does that ring a bell as well?

A. Yes.

Q. So what we have here is a meeting only of two or three weeks earlier when the theme of the meeting, as always, is resettlement but a very close focus on feasibility of settlement; is that right?

A. Well, I think, if I may, I'd characterise it slightly differently. From my recollection, Mr Gifford certainly did pursue the issue of feasibility of settlement and I believe that I set out the government's position at the time. This was six or seven months after the House of Lords decision, that matter was settled and it was settled on the basis that resettlement was neither feasible -- was not feasible and was contrary to the security interests. That was the position that the government held at the time and that's what I explained.

Q. In paragraph 8, across the page or back a page, there's a further part of the meeting which refers to you rejecting and resenting the suggestion that the government had interfered with the text of the experts' draft report. That's an interference which had been

a fairly repeated suggestion in events six years before you became Commissioner. Why were you so exercised to reject and resent the suggestion?

A. Well, one reason was that Mr Gifford put this accusation in an extremely offensive way which was designed to suggest that not only officials in 2002, or whenever it was, but all those officials who had subsequently worked on BIOT matters, including those who were currently responsible for them, were essentially dishonest and involved in some interference with -- language was used about doctoring, doctoring documents. This is so far from the reality of how the Foreign Office works -- or indeed can work because of the succession of posts -- that I did respond very firmly on behalf of myself, my staff and the Foreign Office.

Q. By this time, had you become angered by the suggestions that were being made?

A. No, I don't think I was angered.

Q. I have taken you to the end of paragraph 11. You have said, as recorded, that the government would no longer rely on an old study, a 2000 study. Was it government policy at that time that there would never be a new study or just not at that moment?

A. I don't think the government's ever in a position to take a view that's there's never going to be anything,

but it was certainly the view of that government at that time that they were not contemplating re-opening the question of resettlement. I think there was a specific discussion out of which this arose when I believe I presented some evidence that since the report had been carried out, the developments and the knowledge of the impact on these fragile atolls from climate change, from extreme weather events, had grown considerably and that that had only confirmed the government in its view that there were serious questions about the feasibility of settlement of the outer islands.

Q. I won't ask you to read through the minutes or the note completely, but your evidence to the court today is it was an inaccurate summary but it did accurately record that you rejected and resented certain allegations and everything I've shown you so far you have accepted as likely to have taken place. Would it be a fair summary to say that this was a difficult meeting for you?

A. It was not a very cordial meeting. Mr Gifford, with respect, behaved extremely badly and I think we were frustrated that we could not speak to Mr Bancoult, and certainly it was my first meeting with Mr Bancoult and I wanted to hear from him, rather than from Mr Gifford, what his position was. I think from that point of view it got off to a rather bad start. It is some of the

things that Mr Gifford said which were really highly regrettable that have been omitted from this report and it is also the case that the extensive setting out of all the detail about paragraph 2B was not presented in that meeting, and indeed, the meeting would not really have been a suitable situation in which to present all that material.

Q. The reference to Mr Bancoult is dealt with in the first two paragraphs of the note:

"Mr Gifford began by outlining the evolution of the feasibility study. He pointed out that the study was in fact limited and did not follow the terms of reference laid out in March 2000. Further, Mr Gifford felt that general conclusion of the phase 2B study was reflective of the views of the political masters and that it was not unguided. Mr Roberts asked Mr Bancoult if he would like to bring up any points."

So that's you getting Mr Bancoult to speak.

"Mr Bancoult expressed his disappointment that Mr Gifford had not been allowed to join him when he met with the minister."

That was an earlier meeting.

"He stated that the Chagossians' ultimate aim was to return to their homeland. Mr Bancoult then asked Mr Gifford to continue setting out the Chagossians'

perspective."
Your recollection of this meeting is you wanted Mr Bancoult to set out his concerns, Mr Gifford was badly behaved, aggressive, whatever the words you were using, but you do accept that it was a difficult meeting and two other things: that there was a repeated request for a new, updated and independent feasibility study -- is that right?
A. It was a difficult meeting. I certainly formally rejected the accusations made against the Foreign Office and yes, Mr Gifford did repeatedly ask -- well, there was a repeated series of allegations that the Foreign Office had doctored and then destroyed the draft of -- the first draft of the phase 2B feasibility study -- I think it was the executive summary -- which I also rejected.
Q. But the point I was putting to you is that there were repeated requests for a new, updated and independent feasibility study?
A. Yes, and I would have explained that the government, in the light of the House of Lords decision, was not prepared to undertake a new feasibility study at that point in 2009.
Q. You were also faced, at about the same time, attached to the minute, with a resolution of the European

Parliament. Do you have any recollection of that?
A. No, I'm afraid not.
Q. Can you turn in the same tab to page 652. This is a resolution of 25 March, so this is the same day as the meeting with Mr Bancoult. I think the letter that sends the minute refers to this. Yes, if you go to page 645, Mr Gifford is sending to you a summary of the discussion:
"My attention has been drawn to a recent resolution of the plenary session of the European Parliament on 25 March, dated the same day as our meeting. I enclose a copy, where you will see the decision of the European Parliament is that the European Union should report the right of the exiled Chagossians in Mauritius and Seychelles to return home to their islands. I understand from the MEP who moved the resolution that it was passed with a large majority."
We can see the resolution on page 652. It looks like you received it on or around the date of this letter, if not before:
"The European Parliament had the interim agreement establishing a framework for the economic partnership agreement between eastern and southern African states on the one part and the European Community and its members states on the other part. The European Parliament ..."

If you could then turn over the page until we get to almost the last page, 658:
"Resolution 41. The European Parliament recognises the plight of the people of the Chagos archipelago, who have been forcibly removed from their islands and are current living in a state of poverty in the islands of Mauritius and the Seychelles and considers that the Union should work towards trying to find a solution for the Chagossians to allow them to return to their rightful homeland islands."
Were you aware of that?
A. I don't recollect the details of this particular resolution, but it would have been part of a pattern of political pressure on the government at the time that generally we would have been aware of and indeed the Foreign Secretary would have been aware of.
Q. So what we have, a few days before this meeting with the minister, is increasing political pressure, including not only demands on behalf of Mr Bancoult, press demands, but also now the European Parliament passing resolutions referring to the rightful homeland islands that you, the Foreign Secretary, had only a few months earlier succeeded in litigation in the UK. So it's still continuing. Is that a fair summary?
A. I can't remember the exact trajectory but certainly it

was the position that even after the House of Lords decision the government was under pressure, both domestically and, in some respects, from -- in a case such as this, with the resolution of the European Parliament.
Q. So this is the meeting with Mr Bancoult and Mr Gifford and others. A few days earlier there had been a meeting with the minister. You can close that file. Put it back, if you could, and three files down should be a file which is the inter parte correspondence file.
My Lord, it should be the next one after the fourth core bundle.
I can deal with this fairly quickly, Mr Roberts. Again. So you understand why we're looking back at the events shortly before 6 May, it's just to see what the political landscape was like.
On 18 March, the then minister, Ms Merron, had a meeting with Mr Bancoult and members of the Chagos Refugee Group. If we turn to tab 13 of that bundle, you should see a letter dated 20 April which is, again, only a few days before your memorandum. This is a letter from Mr Bancoult to the minister, obliged for her letter of 30 March and the meeting on 18 March:
"I am also grateful to you for beginning to consider some of the policy issues which lie behind the shameful

exile of the Chagossian people from its homeland. I appreciate that ministers have to grasp the facts of the brief at short notice, whereas our suffering has endured now for a period in excess of 35 years. However, I hope to assist you in a better understanding of the urgent need for a change in policy."

As the responsible Commissioner for the BIOT, is this a piece of correspondence that would find its way to you by copy?

A. Not necessarily, but it would have gone to the -- it would have gone into the BIOT administration and there would probably have been someone from the BIOT administration with the minister at the meeting.

Q. But it would have somehow been drawn to your attention as a necessary part of the background?

A. No, not necessarily.

Q. Where would it stop?

A. It's difficult to say, but it could have stopped in the BIOT administration team or it could have gone to the deputy director responsible for BIOT.

Q. On the second page of this letter -- and Mr Bancoult is setting out an argument very similar to the argument that you were faced with at the earlier meeting -- there's reference again to the feasibility study. In the middle of the page, there is this sentence:

"As you will now appreciate from the analysis of the feasibility study process which was handed to you at the meeting, it is now clearly demonstrated that the FCO interfered with that conclusion and failed to follow the recommendations of its own consultants."

You were aware of the allegation which you strongly resented, you have told us, but this included a handing over of an analysis report. Have you seen that report?

A. No, I haven't.

Q. No recollection of it at all?

A. No.

Q. Let me just show you one copy to see if you are reminded and then we'll leave it. CB3. Leave this page open because I want to ask you one more question about it, but if you could open core bundle 3. Sorry, it's tab 99. Core bundle 3, tab 99. Sorry, Mr Roberts. It should be the second tab in.

This is a document "Chagos Islands analysis note on the resettlement studies". This, so as not to surprise you, is an updated version of a settlement note which was handed to the minister in 2009. I just want you to just cast an eye over the first two or three pages to see if this reminds you if it is a document you have seen before.

A. It's a document that I'm aware of in looking through the bundles in --

Q. Sorry, I have put my question very poorly. Is this a document that you were aware of in 2009?

A. No.

Q. In the same bundle, tab 117, is a document which should be headed "Returning Home: Proposal for the Resettlement of the Chagos Islands". This is a document which is also referred to in the letter my Mr Bancoult to the minister. If you can just take that from me without going back to the letter.

For your Lordships' note, the letter is at page 214, the first reference to "returning home".

Have you seen this document before?

A. I believe I was aware of the existence of this document, but I don't recall reading it and perhaps, without -- it's not my intention to try and overstate the importance of my role, but as Director for the Overseas Territories, the amount of time that I was able to spend on BIOT issues, being responsible for 14 other territories around the world and many other things, was a very small percentage. So in many cases I would not have had time and it would not have been normal for me, as director, to read documents of this kind.

Q. This is notwithstanding the fact that a copy is sent to the minister. It wouldn't get to you that way?

A. Well, it wouldn't come to me; it would come to the BIOT administration.

Q. All I wanted to ask you -- first of all, do you have any recollection of seeing this document before?

A. No, I don't. In fact, looking at photographs, I'm quite sure I haven't seen it before.

Q. So is this then the position: you were not aware of the commissioning of a proposal for resettlement of the Chagos Islands, supported by, in this case -- and we'll see the author -- in fact, it isn't the author I need to look at. If you look at the third or fourth page in, you'll see in your copy probably a dark page with "Returning Home" and a subheading, "A Proposal for the Resettlement of the Chagos Islands":

"Chagos Refugee Group, UK Chagos Support Association, March 2008."

What I want you to try and remember is: were you aware that there was a specific proposal which would base resettlement on fishing and tourism?

A. Yes, I was aware of that and that's why there is a reference in the summary note to the Foreign Secretary, although I wouldn't necessarily have been absolutely sure at that time exactly which report, but that would have been confirmed by the BIOT administration.

Q. What I'm finding a little extraordinary is that this document doesn't get into your possession.
One final question. If you can look still within the correspondence file. You can put away that file now, Mr Roberts.
LORD JUSTICE RICHARDS: We can put away core bundle 3?
MR PLEMING: Yes, you can, and just keep open for a moment IPC. It's tab 13. This is, again, Mr Bancoult writing to the minister. On page 215, there are two subheadings, "The attitude of international bodies to your unexplained policy" -- reference to the UN committees, the European Parliament -- and then "The need for a fresh, independent and transparent resettlement study". You are familiar with that demand in the letter.
It's the next page that I want to draw your attention to to see if it reminded you of what would happen. Dr Howell --
A. If I could be taken to the page.
Q. 216.
LORD JUSTICE RICHARDS: It's page 14 of the bundle pagination, 216 in the centre.
MR PLEMING: My Lord, I may just have different -- it's tab 13, the last but one page. It's a passage beginning "Dr Howell has now provided..." Dr Howell, earlier in

the letter, is the author of, "Returning Home". There's a request:
"Dr Howell has now provided the main elements for this recommended stage and it is open to the FCO to adopt his proposals and move forward to implementation of them. If, however, FCO believes that there are other issues to consider, then I would ask for a new, transparent and independent study to be established by agreement with Chagossians without further delay."
This is the paragraph I wanted you to see, to see if it triggers any memory:
"I was also grateful for the opportunity of pursuing some of these important policy issues with the BIOT Commissioner at our meeting on 25 March and I enclose a copy of the meeting note. One significant area where we were in agreement with the Commissioner was where we stated that he would not wish for FCO policy to be based on out-of-date science and he identified two areas where he believed that the scientific evidence had been overtaken by events."
So this is Mr Bancoult sending to the minister "Returning Home", the analysis note has been handed over and a reference to the meeting notes of the meeting with you, but it's still your evidence that that would not have found its way into your hands; is that right?

A. Yes. I don't recall reading this but, as I say, I was aware that there was a meeting with the minister and I was aware that there was a report which had been prepared on behalf of the Chagossians, proposing resettlement. Indeed, we were all, ministers and officials, aware that the -- there were requests both for resettlement and for a new feasibility study, but it was very clearly the government's position that it was opposed to resettlement and that it was opposed to a fresh feasibility study and that's where we were in 2009.
Q. What I wanted to do, really, in the question is draw this together. The department -- I am putting to you that you would know about it, but the department was receiving information during March 2009 that there was a detailed, critical analysis of the earlier feasibility study, that there was a proposal in "Returning Home" for a limited resettlement based on fishing and tourism, and that you and the minister had that meetings with Mr Bancoult and his representatives. A lot of pressure was building up in March 2009; is that right?
A. That's right.
Q. So that's the weeks leading up to the 5 May note. I just wanted to go back to some of the earlier history briefly. What you have is the clamour, claims for

resettlement, and alongside this, running parallel, is a suggestion -- which I'll put to you is an adventitious suggestion -- of a marine park. That came out during 2007 through 2008; is that right?
A. Yes.
Q. I will run through that history at speed. We can take this from documents produced by you and by Ms Yeadon. There had, for some time, been conservation plans for the BIOT. Leave to one side the particular MPA that was developed. When you took up your position you would have been aware, would you not, of the Chagos conservation management plan of 2003?
A. Not necessarily, but I would have had a broad awareness of the range of environmental conservation measures that were in force at the time because that would have been included in my initial briefing.
Q. If you can take from me for a moment that there was a Chagos conservation management plan of 2003. The Chagos islanders, were you aware, were fully supportive of conservation and protection measures?
A. I think we've always recognised that the Chagossians are supportive of conservation measures.
Q. As we see from Ms Yeadon's evidence, the first mention of no-take was before you came into office in mid-2007. I don't need to take you to the document -- I will put

it to Ms Yeadon -- but by the time you did take up office in July, were you aware of a proposal for a no-take MPA?

A. I can't remember the exact date at which the Chagos Environment Network made their proposal for a no-take MPA, but either on arrival or shortly after arrival, yes, I was made aware of it.

Q. There's two parts to it. I will start again. Was there any such proposal by your department?

A. No. I think the proposal, as far as I recollect, in general terms had been raised by the Pew Foundation and it had been turned into a more specific proposal -- again, I can't recollect exactly when -- by the Chagos Environment Network, which I recollect because it was in the form of a little pamphlet which I saw and I had conversations, as I have said before, with both the Pew Foundation and the Chagos Environment Network within the first six to 12 months of my tenure.

So the proposal for a no-take MPA was there, but we certainly weren't in a position to make a specific proposal until quite later on. Indeed, we formulated our proposal in the terms that we did in the run-up to the consultation process because I think throughout this period we had been referring to an MPA very loosely -- perhaps, in retrospect, much too loosely -- but I think

it meant slightly different things to different people and because an MPA does not have a specific definition, it went forward on that basis.

I think when the Pew Foundation were talking about an MPA, they tended specifically to be referring to a no-take MPA, but there was a huge amount of discussion with conservationists from many different organisations about what kind of MPA was appropriate generally in terms of conservation of the marine environment and specifically in the circumstances of BIOT. And although we were aware that the Pew Foundation proposal was for a full no-take, because that was their position of principle, we had not, in our own minds or in any other way, defined it. To be quite honest, we were still trying to work out what an MPA might be and we were looking for expertise, which we did not have at the time specifically in the BIOT administration, and we engaged in discussion with our colleagues at DEFRA, who are the experts in this field.

So I think there is a great deal of confusion, including in our own work and minuting at the time of exactly what an MPA was or wasn't, what it would mean, what it would not mean, what it would require us to do, and I believe that's reflected in the documents.

Q. If we can just check one or two of those documents to

remind you of the chronology. It's in the bundle of exhibits, number 3. I hope it's easy enough for you to read. It should say "Exhibits-bundle 3".

LORD JUSTICE RICHARDS: Can the existing bundle be closed?

MR PLEMING: Yes, if you can close that one.

I'm going to come back to your 5 May meeting minute but not for a little moment. I think -- Mr Roberts, did you find that document? It's volume 3 of the exhibits. The writing is very small but it's there.

LORD JUSTICE RICHARDS: That is to be distinguished from RPD3?

MR PLEMING: Yes. RPD3 is Mr Dunne's third witness statement exhibits. EB3 should be exhibits-bundle 3.

Mr Roberts, you will be pleased that I'm not going to take you through this in great detail but just to show you some of, really, the story that you have just been repeating. If you go, for example, to tab 2, which is the beginning of the no-take story, if I can put it like that. This is the reference to the Pew charitable trusts which you will see referred to on that page.

If you go straight, to cut the story short, to tab 11. In fact, to pick up what you have been saying -- it's tab 9, Mr Roberts. You are perfectly correct -- your recall is very impressive -- that in the middle of 2008, shortly before you took up your post --

it's tab 9, 4 June 2008. This is a letter to your predecessor, Mr Allen, to inform you of the recent creation of the Chagos Environment Network, with the aim of promoting the robust long-term conservation framework for the British Indian Ocean Territory.

There's reference to the participants. Mr Sheppard features now quite heavily. By the next tab, tab 10, the Pew Foundation is writing to you as the new Commissioner, September 4th. You haven't met but they'll be making your acquaintance. A few days later, tab 11, we have the opportunity to discuss the proposal for a large no-take marine reserve around the Chagos archipelago. That's the proposal that was going to be considered. By November, on the next tab, you were expressing some enthusiasm --

LORD JUSTICE RICHARDS: Sorry, the next tab?

MR PLEMING: 12. There was an Annual General Meeting of the Chagos Conservation Trust, which it would appear you attended, at the foot of page 179. I don't know whether you accept that this is an accurate note of a meeting? It's probably too long ago to recall, but in the middle of page 180 you personally found attractive the concept of a complete BIOT no-take area managed to high environmental standards but you acknowledged that it would not be easy to achieve this as there were

constraints. There's reference to security and resources, but you don't appear to mention the Mauritians or the Chagos islanders. That was in November 2008.

Then the formal proposal is the same bundle at tab 14. This is 12 February 2009. Just cast an eye over it. The proposal in the fourth paragraph is that the British Government, with the support of other organisations, should create in BIOT one of the world's greatest natural conservation areas and provide some -- it says here it would be compatible with security and financially sustainable and provide some good employment opportunities for Chagossian and others:

"Many of the elements of the project have already been agreed."

So this is the proposal, good employment prospects for the Chagossians. A no-take area, you would no doubt accept, has a range of options. It doesn't have to be a complete no-take. It can be some limited fishing; is that right?

A. Yes. As I say, I don't think any of these terms are precise in practice.

Q. The last document is tab 16 in this run of documents. So you have the announcement of 12 February, or the proposal. Almost the same day -- although you will see

it's dated as being put on the Pew Trust file on 9 March, the document is dated 13 February. This is Mr Bancoult supporting the establishment of protective areas but opposing any plan which would not "allow every Chagossian who wants to return to his homeland to have a fair chance to do so and have an active part in it". You will see that there's, again, reference to the "Returning Home" report and the emboldened words that I have just read out:

"We endorse conservation plans that allow every Chagossian who wants to return to his homeland to have a fair chance to do so and have an active part in it."

So that's up to March 2009, where we were a little earlier. So you have a proposal, no-take with variations. The specific proposal is contemplating employment opportunities for Chagossians. The Chagos Refugee Group is opposing any plan that didn't allow for some form of resettlement. At that point we can return to your paper of 5 May 2009.

A. I think if I just clarify a point. I don't know whether there is a significance in it, but I think there is a difference between employment and resettlement, or at least we understood there was at the time or that there could be, in that it would be possible to employ Chagossians without permitting resettlement. So they're

not necessarily linked.

Q. So the position of the British Government is that there would be no living on the islands by any Chagossians. Is that what you are saying?

A. If that question could be clarified. When?

Q. Sorry, what was being proposed was employment opportunities for Chagossians. Are you suggesting that they should do day return trips from Mauritius?

A. I'm not sure which or what proposal is being referred to.

Q. This is the proposal being put to government --

LORD JUSTICE RICHARDS: We are going back to tab 14, are we, the Chagos Conservation Trust document?

MR PLEMING: It's the document you were just looking at. This has been written to the minister by William Marsden CMG. Tab 14:

"The proposal is that the British Government, with the support of other organisations, should create in BIOT one of the world's greatest natural conservation areas..."

Read on:

"... be compatible with security and be financially sustainable and provide some good employment opportunities for Chagossians and others. Many of the elements of the projects are already agreed by the UK

government explained in the booklet."

In the booklet, you will recall there is reference to employment opportunities and also reference to a variation on no-take so that there would be some fishing.

You have just said to his Lordship that you wanted to differentiate employment from settlement. I was putting to you that were you suggesting that the employment opportunities would involve commuting from Mauritius?

A. No. I think if the British Government was supporting any proposal in February 2009 for employment opportunities for Chagossians, that would have been entirely separate from the question of resettlement and I don't believe any significant amount of work had been done in trying to identify what those employment opportunities might have been, but the only type of employment opportunities that I can recall being discussed is providing a form of wardenship.

Q. Where would the form of wardenship be run from? From Mauritius?

A. Not necessarily. It could have a been run from within the Chagos Islands.

Q. From living on one of the islands?

A. Well, there was a question which we didn't go into. We

didn't draw any conclusions. We would have been opposed to any form of employment that required living in the sense of settlement, since the government's policy was firmly opposed to resettlement.

Q. So --

A. If I may continue, there are -- it's quite possible for Chagossians in 2009 and, I believe, today to be employed in the Diego Garcia and indeed it's an area of discussion between the UK and the US where the US have made commitments to do all they can to recruit from within the Chagossian community in Mauritius and there is no fundamental incompatibility between the government's policy against resettlement -- they might not like it but there is that policy -- and having employment which doesn't infringe that policy.

Q. The policy of no resettlement, so far as you were concerned in 2009, was not one Chagossian should live their life on the island, although they may be allowed to be employed there; is that it?

A. That was firmly and clearly the government's view. The issue of resettlement in terms of anyone returning to the Chagos islands with a right of abode, to establish a permanent settlement there, was ruled out by the British Government as a policy option after the House of Lords decision in 2008. That remained the position of

the British Government pending the outcome of the reference to the European Court in Strasbourg. In practice, since that court decision didn't come until the end of that Labour administration in May 2010, there was no change at any point, even though the government was entirely aware of the pressure to change that policy.

Q. Right. So back to your paper to the minister in core bundle 1, tab 33. Just, again, to bring this back together. What you are doing in the paper is putting forward the proposal for a no-take MPA. When dealing with the political downside, the risks, you are recognising the current and continuing strength of the Chagossians' claims to resettle -- we have gone through those -- and also recognising the importance of fishing to a resettled or re-employed Chagossian population. That's without referring at all to the side deal with Mauritius. This is just fishing in the context of Chagossians.

There are the competing forces. What you have in May 2009, Mr Roberts, is an opportunity to put to the minister a way of harmonising these considerations so there would be some form of MPA. We're not disputing that there are environmental reasons to support regulation and control of the environment, but you don't

attempt in any way to engage with the pressure building from the Chagossians. It's to be ignored; is that right?

A. I think from the point of view of the government at the time, and as I saw the issues at the time, and, I believe, as our minister saw the position at the time, these were two entirely separate issues. The policy of preventing resettlement, however unpopular it was, had been endorsed after a long legal struggle by the House of Lords. The basis on which the government had taken its decision against resettlement has been frequently set out in public, primarily on the twin pillars of security and defence interests and feasibility. So the position was -- even though I entirely understand and we all entirely understood that that was not welcome to the advocates of resettlement, that was the position of the government and they did not envisage at that stage changing that policy.

That being so, the whole issue of resettlement in government terms was not up for grabs, yet we had, in the British Indian Ocean Territory, responsibility for the stewardship of a very significant marine resource and we saw, in the advocacy of those who wanted to develop the policy of Marine Protected Area, an opportunity of doing something good in BIOT, given the

exceptional limitations on what could be done within the territory.

So they were two totally different boxes, I believe, in the government's mind.

Q. You are clearly a very careful man, Mr Roberts, and choose your words carefully. At the time of the meeting with the minister we know took place either on 5 or 6 May, the only other legal cloud on the horizon was the decision of the European Court of Human Rights, which you were confident you would win because we know that that was said to the Americans at about the same time.

A. If I may, I don't accept that anything was said about that to the Americans at the same time. I don't know whether that was the case.

Q. But you were confident that you would win. Is that the advice you were receiving?

A. I think it would be entirely misleading to describe the reference to the European Court in Strasbourg as the only cloud on the horizon. It was a matter of significant concern to the British Government, and if you look at these papers, I believe it demonstrates that throughout it was very much in the forefront of the minds of the British Government. Officials and ministers were entirely clear that it could have a major impact on our policy of resettlement and the

government's position after the House of Lords, as I say, was not to contemplate resettlement of BIOT with these legal proceedings going ahead.

Q. I don't want to ask you anything more about the claim itself in Strasbourg, save as to the date. As at 5 May 2009, were you reasonably clear as to when a judgment should be expected?

A. I can't recollect exactly what the estimates were, but we thought that the judgment would come through within a year to two years but it was very uncertain and I can't recall the point at which it became put behind another set of cases.

Q. Let's now turn to your note to the minister, when you do pick up a reference to European Court of Human Rights. This is where you say:

"Assuming we win in Strasbourg [page 282] -- contingency for losing the case is dealt with in earlier submissions -- we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this but it could create a context for a raft of measures designed to weaken the movement."

That's your careful language, "designed to weaken the movement":

"This could include presenting new evidence about the precariousness of any settlement ..."

That's new evidence, notwithstanding all of the claims I've been showing you about the request for an independent feasibility study. You are intending to present new evidence on climate change, rising sea levels, known coastal defence costs on Diego Garcia, so deploying your argument, and then these words:

"... activating the environmental lobby."

That's the message you're giving to the minister.

There are five measures designed to weaken the movement on this page. One, two, three, contributing to the establishment of communing institutions, committing to an annual visit, inclusion of Chagossian representative in the reserve governance.

Then, over the page, we have four lines of excision, of redaction, as another of the raft of measures. Are you satisfied, Mr Roberts, having seen the original of that document, that this is a redaction that is not relevant to any of the questions I have been putting to you about motive?

A. I don't recall what is there. I haven't seen it because I believe it was redacted in the bundles which I received.

Q. I won't ask you to go underneath the redaction but I'm putting the question to you for those who sit to my right to have a look again at the words redacted,

because what you're listing there is a raft of measures to weaken the movement.

So even on 5 May 2009, notwithstanding Mr Bancoult's request, Mr Gifford's requests, Dr Holland's request in "Returning Home", you are intending to put the environmental issue on to the table against the Chagossians; is that right?

A. The intention of activating the environmental lobby had a range of elements to it. If I can take you to the initial paragraphs of my first witness statement, in which we set out the broader context in which we were trying to engage the environmental lobby in work activities in Britain's overseas territories. We wanted more recognition for their environmental value. We wanted their financial support and we wanted their scientific contribution.

Q. What has that got to do with Chagossians? The Chagossians, you accept, are supporters of the environment. It's their environment. They want to protect it. How were you activating the environmental lobby designed to weaken the Chagossian movement?

A. I go back to the -- one of the origins of our proposals in relation to strengthening environmental protection in the British Indian Ocean Territory. We recognised that the government was in a very difficult public position.

Not only was there a great deal of political pressure relating to the Chagossian movement but we also were dealing with a series of allegations relating to rendition and we were looking to see what we could do to try and improve the reputation of the government in relation to the British Indian Ocean Territory specifically but also other territories.

Q. Mr Roberts, you are a very careful, very experienced diplomat. You have now brought in the allegations of rendition in relation to Diego Garcia. So there's some bad news about the government co-operation with the United States -- rendition, torture, all of that that goes with Diego Garcia -- and there's environmental good news. The memo to the minister says the environmental lobby is to be activating with the design of weakening the Chagossians. They're your words. Let me stay with the first one:

"... presenting new evidence about the precariousness of any settlement."

LORD JUSTICE RICHARDS: Mr Pleming, I am sorry to interrupt this line of questioning but it has been drawn to my attention that we haven't given the LiveNote transcriber any break and I am anxious to check whether I should give her a break.

We'll just have a very short break.

(3.44 pm)
(Break taken)
(3.48 pm)
LORD JUSTICE RICHARDS: Mr Pleming, I am very sorry to have interrupted your cross-examination in that manner.
MR PLEMING: It had reminded me, my Lord, that I had put to Mr Roberts about the lifting of the redaction on page 281 and then I had just referred Mr Roberts to the redaction at 283. So far as I'm aware, this is still in place. It hasn't been lifted. I just wanted to check because I have seen the other version which is at volume 11, tab 20, page 219. It's the same document but without some redaction.
Mr Roberts, we had got to the raft of measures designed to weaken the movement. I was putting to you about activating the environmental lobby and, if you go back up a line, presenting new evidence. So what you were advising the minister or suggesting to the minister is that the raft of measures could include presenting new evidence about the precariousness of any settlement. What you list is climate change, rising sea levels and the known coastal defence costs of Diego Garcia.
Looking at the first two, you were considering presenting new evidence. That would have been met, would it not, by howls of outrage saying, "Present

evidence but it must be a truly independent study engaging with the Chagossians." That's what is being shouted at you for weeks and weeks, if not longer. So what were you intending to do on deploying this new evidence?
A. I think it's important to look at exactly what is said in this paragraph. First of all, it's assuming we win in Strasbourg. Therefore it's looking ahead to the situation where the government's position against resettlement has been now confirmed by the House of Lords and by the European Court. The government had not taken any view about what it would do at that stage, which was still at an undefined point in the future, and this minute recognises that creating a reserve will not calm down the resettlement debate -- so we're not suggesting to the minister that this is some solution to deal with this problem permanently -- but that, on a very initial glance, which is all that this minute is intended to do -- because, I think as the minute recognises, there is a great deal of work to do on all this to bottom out how we would do this, what we would do, what we would not do. There is a series of suggestions for things that we could do.
So it is suggesting that in a situation where the government has won its case in Strasbourg, we might want

to present some evidence to help convince the supporters of resettlement that there is still a major problem. As I say, it's quite important from the intention of this at the time that this was speculative and hypothetical. I am quite sure it was taken as such at the time, since --
Q. So when use the words "a raft of measures designed to weaken the movement", that was just a few words thrown into the debate; is that it?
A. Well, there are a number of conditionals in there. As I say, creating a reserve will not achieve this, was our advice, but it could create a context for doing other things that would help diminish the pressure on the government to resettle. There are some suggestions there which I don't pretend were worked through, and if one goes through them, I think you can see that the only ones which have been developed are around the work we've been doing on visits. We haven't yet reached the point, because of the legal activity, of formalising the governance of an MPA. We've come to this position in the subsequent government several years later.
Q. So what we have on 5 May is some advice from the Commissioner responsible for the BIOT to the minister that there could be a raft of measures but merely creating the reserve won't calm down the settlement

debate so we need a bit more. One of them we have looked at is activating the environmental lobby and the other is presenting new evidence. There is another way, Mr Roberts, and that's to create a reserve which has a no-take element to it and activating the environmental lobby, the two together.
A. Well, I think it's perhaps -- since that point is raised, there is a key distinction which I don't think we had entirely bottomed out. As I was saying earlier, we had not defined an MPA at this stage. There was clearly two different types of MPA at least and one of them was an MPA which was entrenched; in other words, which constrained what the government would do in future in relation to resettlement, and other forms of MPA which would have no kind of entrenchment and which would not do that. I think because it was a very important part of this discussion it perhaps is right for me to just highlight that.
Q. The reason for no entrenchment was the Americans wouldn't like it, because entrenchment would mean that when you had handed the territory back to Mauritius, Mauritius may point to the entrenchment -- or international environmentalists may point -- and say, "What on earth are you doing having an international or one of the biggest naval reserve forces, whatever it's

called, in the middle of your BIOT?" That was the problem about entrenchment, wasn't it?

A. There were many problems about entrenchment and our understanding of them didn't come suddenly at one go. One of the key problems of the entrenchment was that it was contrary to the United States' wish that there should be nothing done to constrain security and defence operations. They were concerned, from their own experience in establishing national marine monuments, that there were forms of entrenchment which could, over time, in particular, have the effect of drawing in new forms of regulation which would constrain their activity.

Secondly, the government was conscious that any form of entrenchment would be contrary to its duty toward the European Court.

Thirdly, the government was against entrenchment because it would be contrary to the undertakings we had given to the government in Mauritius and although --

Q. What undertakings had you given to Mauritius?

A. The undertaking to Mauritius is, as a matter of public record, that when the British Indian Ocean Territory is no longer needed for the defence purposes of the United Kingdom and the United States, sovereignty of the BIOT will be ceded to the government of Mauritius.

There are other reasons why, as it happened, entrenchment proved to be contrary to UK Government policy as a general proposition. Entrenchment of this kind is considered bad policy and, as we moved into this, we knew that we -- I can't remember the exact time, but we knew that there would be a general election and there is a general ban on any kind of entrenched policy move as a government approaches a general election, for the obvious reason that it binds the hands of a former government.

So there were many reasons, many reasons why we were not able to and did not wish to pursue entrenchment of an MPA.

Q. When you had your meeting with the Secretary of State the next day, was it a face-to-face meeting?

A. The Secretary of State came to a room which had been set up to give him a presentation.

Q. Was Ms Yeadon part of the presentation?

A. I think so, but I can't remember.

Q. Would there be any notes of that meeting?

A. The only note of that meeting, which did not significantly differ except it was much less detailed than this note, was in the form of the follow-up correspondence with the private secretary, who communicated to us after the event how the

Foreign Secretary wanted us to take this forward. I should say that nearly all the presentation to the Foreign Secretary was Professor Sheppard showing a PowerPoint presentation or a video -- I can't quite remember -- about the environmental value of BIOT. Although the Foreign Secretary had this note, there was no time in that meeting for any significant discussion of the content of the note. I think he had read it; I don't know whether he read it or not.

Q. So you have a reasonably clear recollection of the meeting with the minister on 6 May?

A. Yes.

Q. Roll the calendar forward just a few days to 12 May. The meeting you have just had with the minister is a meeting with your political master, for want of a better word. You are on home territory, but now you are going to meet representatives of the United States at their embassy. Have you been there before this meeting?

A. As far as I can recall, the meeting was in the Foreign Office.

Q. So the meeting in the Foreign Office where you had -- had you had meetings with the US representatives before?

A. Yes.

Q. Are you able to answer questions fully about that

meeting, the meeting on 12 May?

A. If I may, if it's necessary and helpful, could I refer to Mr Sterling's witness statement?

Q. Why do you want to refer to Mr Sterling's witness statement? Are you intending to rely on the government policy of neither confirm nor deny?

A. I am under instruction that I must follow the government policy on neither confirm nor deny in the terms set out in Mr Sterling's witness statement.

Q. Is that an instruction that extends to when you are giving evidence under oath in a court in England?

A. That is my understanding.

Q. That's very helpful, Mr Roberts. So we will see where we get. As far as you can recall, was this your first meeting with the United States officials about the proposed MPA for the Chagos Islands?

A. I can't recall exactly. I think there probably had been earlier meetings.

Q. So you would have been laying the ground for this policy initiative? Is that a fair way of describing it?

A. No, I don't think at this stage we knew exactly or knew even in general terms what we would or could do. We had presented a proposal which is set out -- a proposal which, at that stage, was the CEM proposal to the Foreign Secretary. He had expressed an interest in it.

We had set out for him just how complicated it would be and what a wide range of issues were at stake and he had asked us to take it forward and -- I can't remember the dates on which there were exchanges with the United States representatives in London, but this was -- there was one a week or so after the meeting with the Foreign Secretary.

Q. You were intending to have meetings with Mauritius and with the United States. Do you have a clear recollection of your meetings with Mauritian representatives?

A. I don't. I know we had -- I remember one meeting with the Mauritian High Commissioner. I remember that there was a meeting. I can't remember when it was, but I wouldn't necessarily have had myself all the contacts either with the United States or with the government of Mauritius to follow up the Foreign Secretary's instruction, but it was clear that I would have a responsibility for leading the key points of that engagement, which, as it transpired, were to pursue a second round of talks with the government of Mauritius by accepting their invitation to go to Port Louis in the following month, in July 2009, and although a date hadn't been set, every autumn there is a very substantial meeting, which is the main annual meeting

between the UK and US governments when all matters relating to the British Indian Ocean Territory are discussed, with all the -- basically the policy leads and principals present. It was clear from quite early on that I would need to have those meetings.

Q. The meeting with the United States representatives, whether at the Foreign Office or at the embassy, was an important meeting. Do you accept that?

A. No, not necessarily. If I recall correctly -- I think I've set it out in my witness statement -- the political officer in the embassy didn't know anything about the British Indian Ocean Territory and wanted to come in for a briefing, and the briefing covered discussion about the creation of an MPA.

Q. Would that be minuted in your diary for a Foreign Office meeting on 12 May 2009?

A. Well, the only diary I have is a computer diary and I have no -- I don't keep a diary myself.

Q. What you tell us in your second witness statement, paragraph 7 -- you don't need to turn it up yet -- is:

"The 12 May 2009 meeting was not one I had any particular reason to remember."

You give the impression in that answer that you don't have much recall of it. Is that fair?

A. I remember that the meeting happened. I remember

roughly where it was in the cycle of contacts with the United States' government. I seem to recall it was quite a long meeting which covered a lot of ground, including a lot of general background on BIOT for someone who was being introduced to the issues for the first time.

Q. Can we just see who was being introduced for the first time. Are you able to tell us who was attending this meeting on your side of the table?

A. I think that Ms Yeadon, the BIOT administrator, was there and I think that a representative from the Ministry of Defence was there and our legal advisors may have been there, but I can't remember.

Q. So Ashley Smith from the Ministry of Defence, Ms Yeadon and yourself, somebody from the legal advisors but nobody is taking a note. Is that your evidence to the court?

A. Yes.

Q. How long would the meeting last?

A. An hour.

Q. How do you know?

A. Because we very rarely had meetings that lasted more than an hour. It could have lasted a bit longer than an hour.

Q. Were there two meetings or one?

A. What would probably have happened is that the embassy delegation would come to the Foreign Office. They would be collected by a representative of the BIOT team. There may have been a pre-meeting there; I don't know. They would have been brought into my office. We would have had the meeting and then they would have gone back, probably to the BIOT team office, and they may have continued discussions there.

Q. So that would be the second meeting with Ms Yeadon without you being present?

A. Yes. As I say, I don't know that that happened but that --

Q. I will see if I can remind you in a moment. You say in paragraph 9 of your witness statement at tab 23 -- that is the second witness statement:

"The political counsellor was new to the subject."

That is what you have just been trying to explain, isn't it?

"The USI, in particular the first secretary, was already well informed of the issues."

Who was the political counsellor?

A. Could I please be directed to the statement?

Q. Tab 23 of volume 1, core bundle 1, paragraph 9. You were just telling the court that the reason for the meeting was the need to explain. Paragraph 9:

"The 12 May meeting was held at the request of the US Embassy, which wanted an update on the MPA so that they could report back to Washington. The political counsellor was new to the subject, although the USI, in particular the first secretary, was already well-informed of the issues."

I am just asking you who the political counsellor was?

A. I don't know.

Q. Was it Richard Mills? Does that ring a bell?

A. It could be, yes, but I --

Q. Had you had other dealings with Mr Richard Mills, political counsellor?

A. No, I had never met that political counsellor before and I don't believe I ever saw him again.

Q. Was he the person who you were telling the court was new to the subject?

A. Yes.

Q. So you would be surprised if his name appeared on a purported cable a year earlier dealing with BIOT matters?

A. Yes, although if I could just add to that, I had very limited contacts with the US Embassy.

Q. But according to you, the reason for the meeting is so that you can explain to this person who doesn't know,

but the first secretary does -- was there anybody called Tokola there? T-O-K-O-L-A. Does that ring a bell?

A. I've never heard the name Tokola.

Q. You've never heard of Mark Tokola, Minister Counsellor for Economic Affairs at the US Embassy in London?

A. Never.

Q. You describe the meeting as a long and open discussion. Is that what you mean by an hour or is that just diplomatic talk for anything over a few minutes?

A. No, I think the meeting lasted an hour, possibly a bit more than an hour.

Q. What do you understand or mean by the words "open discussion"?

A. What I intended from that phrase was that neither side was coming to the meeting with fixed policy positions or notes, that it was quite an open discussion, in other words it was not a strict exchange of policy positions. If I recall correctly, the Americans had -- I don't think they showed it to us -- a series of questions which they had received from Washington which they wanted to discuss with us.

Q. So they had a document which they were referring to?

A. They may have had it. It would probably have been in a document or an e-mail, yes.

Q. Some of the meeting is coming back to you. It often

happens with memory. You're now in the Foreign Office. You're having the meeting, if that's where it is. You can now remember that somebody had some questions to ask you. Do you remember anybody in the meeting taking notes?

A. I can't remember anyone taking notes, but it doesn't mean to say that nobody did take a note. I would expect the Americans to have taken a note.

Q. I will just repeat that. You would expect the Americans to take a note. Is that expectation based on your dealings as a diplomat with Americans?

A. It's based on my experience of how embassies tend to operate.

Q. With your diplomatic experience as ambassador, as diplomat, you are well aware of the use of cables, are you not?

A. Yes.

Q. You are well aware of the diplomatic need for accuracy in a cable from an embassy to home base?

A. I'm certainly aware of the desirability of it.

Q. Why would you ever fabricate?

A. I don't think it's a question of fabrication. In any diplomatic report, the quality of that report would depend on the knowledge, the experience of the officer concerned and the complexity of the subject matter.

Q. What we're going to look at is what purports to be a cable, which is signed off "Tokola", which is apparently being taken by a political counsellor as a note at a meeting you attended, where notes may have been taken. You recognise Americans do that kind of thing and also it's important for such cables to be accurate. Is that a fair summary so far?

LORD JUSTICE RICHARDS: "Desirable", I think was the word he said.

MR PLEMING: Desirable. I will put the question again. With your experience -- ambassadorial experience, diplomatic experience -- is it a requirement that communications from an embassy to the home country should be as accurate as possible?

A. I think the requirement for a cable or a diplomatic report is that they should serve the purpose for which they are intended.

Q. Let me try the question again. Is it your evidence then that they don't need to be accurate?

A. No.

Q. Let's try again. I am asking you as a very experienced diplomat, trying, I hope, to give full and honest evidence to the court: is it a requirement imposed on diplomatic staff when they are reporting from an embassy to their home country that any communication should be

as accurate as possible?
A. A requirement -- I don't believe it is formally set out in our system. It's an expectation that reporting of all kinds should be accurate.
Q. What you have told us is you have a recollection but you wouldn't be surprised if the Americans were taking notes because your experience is Americans take notes. But you don't. Why not?
A. I think there's a slight difference in the position of the embassy and the home government. By and large there's always a disparity of knowledge between the embassy, who are basically in a position of seeking information, and the home government, who by and large in diplomatic exchanges are holding that -- the home government holds the information. So for the home government, often meetings of this kind consist in a flow of information in one direction and there is more need, more interest for the embassy in those circumstances to take a note than for the home government to take a note.
Q. You have told the court that not taking a note was -- and this is from paragraph 3 of your second witness statement, tab 23 -- not unusual and in accordance with US practice. I'm not suggesting, Mr Roberts, that notes have been destroyed or any such allegation. I am just

curious, before I go to my next topic, as to why you don't take a note, because you refer us to a document which is at page 218, which is oral communication from the SCO net as your policy driver. What it's telling us, over the page, under "Meetings", is:
"There are a number of scenarios where a face-to-face meeting, rather than written communications, is a better and more effective method."
Then there are four subheadings: "One-to-one disclosure", "Group discussions", "Setting up a meeting", "Recording decisions":
"There is no need to produce verbatim records of meeting. If, as a result of your discussions, decisions are taken which need to be recorded, simply add a note to the relevant file. For more formal or large meetings you can produce a brief note confirming the purpose of the meeting, the attendees, including apologies received, and agreed actions."
So this is all to produce less paperwork, but advocating face-to-face meetings are not always necessary.
I didn't understand, and I wanted to ask you, what this had got to do with not making a note of the meeting with your US counterparts?
A. I believe this is the core document in terms of

Foreign Office guidance on the taking of notes at meetings and that's why it was attached to the -- referred to in my statement.
Q. So this is the basis for your decision that no notes should be taken of that meeting?
A. I think the position in relation to the taking of notes -- I may have already referred to it, but it's very much a case of a judgment to be taken in every particular case, taking into account the circumstances of the case.
Q. I just want to ask you one question more about the practice and then we'll look at the purported copy cable. Can you suggest to their Lordships any reason why the US Embassy officials reporting back to home base would inaccurately report what you or Ms Yeadon had said?
A. I have no idea.
Q. You have no suggestions yourself. No personal animosity against you so far as you were aware?
A. I can't speculate about --
Q. You don't know of any reason, is that the answer?
A. I don't know anything about their processes.
Q. Can we now turn to --
LORD JUSTICE RICHARDS: Mr Pleming, before we go to the content of the document, I think we need to take stock

of timing. Unless we can finish this cross-examination this afternoon, we need to find a convenient moment to break without my interrupting your cross-examination at an inconvenient moment.
MR PLEMING: My Lord, in terms of timing, it couldn't be better. My Lord, I am just about now to put the text of the cable. Could I ask one preparatory question because I am conscious that the witness has raised the no confirm no denial policy which we may need to grapple with. I just wanted to put one question first.
LORD JUSTICE RICHARDS: By all means.
MR PLEMING: Mr Roberts, no notes taken by you. You saw or remember notes being taken by the Americans or it's likely that they would have been taken and you were not expecting any note of that meeting ever to see the light of day, is that right?
A. I doubt whether that thought would have ever arisen.
Q. Well, I just wanted to ask you then: when you saw -- you kindly corrected your witness statement -- the purported copy of this cable in the Guardian, the Telegraph and elsewhere of your conversations with the US counterparts, did that come as a shock to you?
A. I'm not quite sure whether I can answer that question and maintain the NCND principle.
Q. I think the state of your mind is probably not covered

by NCND but your counsel may suggest otherwise. When you saw an article in the Telegraph or the Guardian which purports to be recording a conversation you had, did it come as a shock?

A. I think the answer is "no" because I didn't -- I knew about the impending publication of the article before it was published because journalists -- I can't recall where they were from -- called the Foreign Office and gave an oral summary of the purported cable and the news department in the Foreign Office called me about it. They asked me some questions about it on the basis of what they had heard from the journalist. I was indeed surprised to hear those questions because they made very little sense to me and the news department explained that they expected a report, a WikiLeaks cable linked to a meeting that I had had with US Embassy, to appear in the press in the next few days. So that was the sequence so, when it did appear, it wouldn't be right to say that I was shocked because I had had advance notice.

MR PLEMING: Thank you. That's all I wanted to ask.

LORD JUSTICE RICHARDS: Mr Roberts, we're going to have to ask you to come back tomorrow. Obviously because you're in the middle of your evidence and under oath we must ask you not to talk about case overnight.

The question arises what time we should start

tomorrow morning. We are falling behind already.

MR PLEMING: My Lord, I am conscious that that has happened. My Lord, I am content if your Lordships are to start earlier at 10.00.

LORD JUSTICE RICHARDS: Can everybody start at 10 o'clock?

MR PLEMING: Yes.

MR KOVATS: Yes.

LORD JUSTICE RICHARDS: In that case we will adjourn until 10 o'clock tomorrow morning.

MR PLEMING: When mentioning timing, I have tried this morning to cut down oral submissions. I will try and do that even more in the light of the time taken for questioning. As you will understand, it's very important this is followed through carefully.

LORD JUSTICE RICHARDS: Of course.

MR PLEMING: You have full written submissions and I will --

LORD JUSTICE RICHARDS: We have very full written submissions from both sides, for which of course we are very grateful, and we understand that that will enable you to cut back on the oral submissions. Thank you all very much.

(4.28 pm)

(The court adjourned until
Tuesday, 16 April 2013 at 10.00 am)

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Tuesday, 16 April 2013
PROCEEDINGS
(10.00 am)
LORD JUSTICE RICHARDS: Mr Pleming.
MR COLIN ROBERTS (continued)
Cross-Examination by MR PLEMING (continued)
MR PLEMING: My Lord Mr Roberts, two short questions from yesterday and then we can go back to the meeting of the 12th May. Would you take up volume core bundle 2, please, which will be the main bundle for the next few questions.

If you turn to tab 92 back to the notes of the meeting which you held with Mr Bancoult and Mr Gifford and others, this question or practice of your own of not taking notes. On page 647 is the note of the meeting as sent to you by Mr Gifford and you made some really quite serious allegations about those notes that they are not accurate and they don't include matters which were discussed and perhaps even more damaging you accuse Mr Gifford of inventing parts of the meeting that didn't take place. You also said that Mr Gifford behaved badly. Just so you are clear Mr Gifford who sits in front of me does not accept any of those allegations including the suggestion that he behaved badly.

I just want to test your recollection. At the top

of page 647 are the attendees at the meeting. I am aware you are a busy man and you have lots of meetings but this was attended not only by you and Miss Yeadon but also by Mr Ballantine, solicitor for the Government, Mr Bancoult, other representatives of the Chagos Refugees Group Mr Richard Gifford and also Oliver Taylor, Mr Gifford's assistant. Having seen those list of names, has it brought back any recollection of the meeting?

A. I think I said yesterday that I do remember this meeting, it was a very memorable meeting for the reasons that I gave yesterday.

Q. So you would then have remembered that Mr Taylor, the assistant to Mr Gifford the solicitor, was taking notes throughout the meeting?

A. I don't recall that in particular. As I say the reason why I remember that meeting was precisely because of the unusual behaviour of Mr Gifford.

Q. But you don't remember then that there was a note taken taking a record of this meeting as you would expect an assistant solicitor to do?

A. I would not particularly have taken note of that at the time.

Q. But what you do remember and told Their Lordships yesterday is that in the course of the meeting,

Mr Gifford said that the feasibility study had been doctored, that's the word you used?

A. I can't -- he used a range of phrases if I remember because he repeated the allegation several times in several ways and I believe that was one of the words that he had used. As I say -- sorry.

Q. Carry on?

A. It was in my experience, of some quite remarkable meetings, a very memorable meeting.

Q. So this was a very memorable meeting and you were upset by it?

A. No I don't think I was upset, I was surprised. As I say I wasn't expecting that kind of a meeting at all.

Q. If you turn to tab 95 the word doctored does appear. I am just wondering if this is what you are remembering almost a year later, on April 22, 2010, the London Times, under its world section, produced an article written by Catherine Philip and Dominic Kennedy including interviews with Stephen Akester, you see that in the third paragraph in the article, interviews with Mr Snocksill(?) who served as British High Commissioner for Mauritius and there is a description there of the remarks made by Mr Akester who was one of the consultants who considered that the phase 2b study was rather misrepresentative of what he had tried to say.

But the heading is paradise dossier was doctored to keep deported families from their homes. Is that what you are remembering by use of the word doctored?

A. I would be grateful if counsel could take me to that article.

Q. Tab 95, I am very sorry Mr Roberts, in the same bundle. Let me do that again, I don't want to be unfair to you. This is an article, The Times, April 22, 2010, in other words, three weeks after the announcement of the no-take MPA, it is an article which is headed, paradise dossier was doctored to keep deported families from their homes, and then the subheading, political pressure erased expert view that Islands could be repopulated, writes Catherine Philip and Dominic Kennedy. The third paragraph is an interview, effectively, with Steven Akester who was one of the consultants. At the foot of the page you will see reference to Mr Snocksill who was the British High Commissioner for Mauritius and then there is, on the third column, there is reference to the report by Mr Howell, he is the author of the returning home report, and he is reported as saying that the study was less independent than mine. But the heading, what I wanted to draw your attention to, whether you are misplacing memory - we all do it, it is not unusual - but you see a really vivid headline, paradise dossier

doctored. Is that what you remembered?
A. I think that's a very difficult question to answer. I don't know.
Q. Have you seen this before? It would be very unsurprising if you hadn't?
A. I have seen a great number of articles on these issues. I may have seen this.
Q. This was three weeks after this very controversial announcement. The London Times is really going to town on this article; do you remember it now?
A. No I don't. I can't say that I do particularly.
Q. And one final question, go back to 92, the meeting notes which you don't accept as being accurate as you have explained to the court has, at paragraph 1, an outline, this is when Mr Gifford first outlined the evolution of the feasibility study, early on in the meeting.
MR KOVATS: What page are we on?
MR PLEMING: Page 647 in tab 92:
Mr Gifford began by outlining the evolution ...(Reading to the words)... that the study was in fact limited and did not follow the terms of reference laid out in March 2000. Further, Mr Gifford felt that the general conclusion of the phase 2b study was reflective of the views of the political masters and that it was not unguided."

Do you remember that being said?
A. I don't think that is the kind of language that Mr Gifford used at that meeting.
Q. But you don't have any notes of the meeting?
A. I don't have any notes although there may be some papers which are -- I am not saying there are but there may be papers relating to this meeting which are covered by legal privilege.
Q. Is the true position that in the course of this meeting and indeed in other presentations your response is to reject and resent any criticisms of the phase 2b study and you decline or refuse to engage with any of the detail?
A. No, that's not the position at all. If I may explain. Because of the nature of the allegations I was genuinely concerned by what Mr Gifford was alleging against the Foreign Office which, despite the language of this minute which as I say I don't accept, was very explicitly that we had suppressed, destroyed, doctored, I can't remember the precise language a particular document which was the first draft of the phase 2b executive summary, I think. As a result of this, I asked my staff to make absolutely sure that we did not have this document. And they did and they carried out a search and they reported to me accurately as

subsequently transpired that the Foreign Office did not hold this document. That was confirmed to Mr Gifford in various ways including I believe by ministerial letter.
Around this as I say on that meeting and subsequently there were very serious allegations made by Mr Gifford about how the Foreign Office had dealt with this document. In due course, in the course of the proceedings, it transpired that this document was held in the archive of Treasury Solicitors. It was not held by the Foreign Office they did not have it.
Q. It was held by Government?
A. It was held in the archive of Treasury Solicitors which is not a place in which there is a practice of Foreign Office staff going to have a look for Foreign Office documents.
Q. Mr Gifford was expressing surprise that a document which was sourced from the Foreign and Commonwealth Office, it was your consultation, but it wasn't in your department, and kept expressing surprises. In the end we find it is in the Treasury Solicitors' department?
A. The fact was it was not in the Foreign Office and therefore the question that I asked staff, following this meeting to establish which was whether the Foreign Office had this document was correct. As I say, it was subsequently discovered in the archive of Treasury

Solicitors and, what I think is particularly significant about it is, when we had this document it was absolutely clear that there had been no change, no material change to that document which bore out the allegations and assertions made by Mr Gifford.
Q. As you know Mr Roberts, that is rather disagreed with by those who have taken a close analysis of the various documents but that could wait for later. Could I take you to cable, this is in the same bundle at tab 53. By the use of the word cable, so I make myself clear, I am referring to the text of what purports to be a printout copy cable of a document that appears on the WikiLeaks website purporting to be a cable passing between the Embassy in London of the United States Government and the headquarters in Washington or somewhere else in the United States. So if I use the word cable that's what I am describing.
What you have told us is you remember the meeting, you remember the reason for the meeting. Somebody who didn't know much and needed to have some explanation and somebody who we accept did know a lot more was there and you attended with Ms Yeadon and somebody from the Ministry of Defence. Anybody else, as far as you were aware?
A. I can't remember. I think I said yesterday there may

have been a Foreign Office legal adviser present.
Q. Paragraph 1 is a summary. I am just going to read out the summary, I am not asking you to comment on it because this the summary by the author of the note, but I just want you to see it as a preface to question, paragraph 2. I am using the Telegraph, it will be interesting to see if the text is different. It may be easier if you have the Guardian version. Do we have a copy for the witness? I have a spare copy here Mr Roberts. My Lords, I am now look at page 420a.
LORD JUSTICE RICHARDS: Yes.
MR PLEMING: That should have been inserted in your bundle. (Handed).
A. Thank you.
MR PLEMING: What it begins with is a summary:
"HMP would like to establish a marine park or reserve providing comprehensive ...(Reading to the words)... of the British Indian Ocean Territory.
A senior Foreign and Commonwealth Office FCO official informed Paul Counts a political councillor on May 12th. The official insisted that the establishment of the marine park would in no way impinge on the US Government use of BIOT including Diego Garcia for military purposes. He agreed that the UK and US should carefully negotiate the details of the marine reserve to ensure

that the ...(Reading to the words)... a marine reserve. End summary."
That's the summary. I don't yet want you to comment on it unless you would like to do so.
A. I think as I explained yesterday I am not able to comment on this document in line with the Government principle.
Q. What I am going to use it for to begin with is to see if it prompts your recollection and then we will get to a rather more difficult place. Let me just start with a prompt.
Paragraph 2, under a, heading protecting the BIOT's waters, it reads:
"Senior HM officials support the establishment of a marine park or reserve in the British Indian Ocean Territory which includes Diego Garcia. Colin Roberts, the Foreign and Commonwealth officers, FCO Director Overseas Territory..."
Can we pause there. Is that an accurate description of your name and your position?
A. Yes.
Q. It reads on:
"...Told the political council of May 12 [in other words the American way of putting the telling(?) at the end] noting that the uninhabited islands of the Chagos

Archipelago are already protected under British law ...(Reading to the words)... but the current British law does not provide protective status four either reefs or waters. Roberts affirmed that the bluted(?) [American word] intended proposal would only concern the exclusive zone around the Islands."
First of all, at the meeting, do you have any recollection of affirming that the proposal would only concern the exclusive zone around the Islands?
A. I can't remember the content or the detail in that sense of this meeting but it would have been part of that meeting to describe broadly the existing environmental protection for BIOT, yes.
Q. I should have sorry accurately described the word bluted, it is not intended, but rumoured or proposed. Is that a word you would have used?
A. No.
Q. "Roberts confirmed that the proposed or intended proposal or rumoured proposal would only concern the exclusive zone around the Islands."
That's something you could have said. It is the next sentence:
"The resulting protected area would constitute the 'largest marine reserve in the world'".
Is that again something you would have said?

A. Yes that was part of the presentation of the general idea for establishing an NPA.
Q. So is your evidence to the court that there is nothing inaccurate in paragraph 2 of this copy cable?
A. I think I can't comment on that. I can't answer that question.
Q. My Lord we have reached already the sharp point, but could I reserve it for a little later?
LORD JUSTICE RICHARDS: Yes.
MR PLEMING: The third paragraph is as follows:
"Roberts iterated strong UK 'political support for a marine park' (...) 'Ministers like the idea', he said. He expressed that Her Majesty's Government's timeline for establishing a park was before the next general election which, under British law, must occur no later than May 2010."
If we could pause there, there's reference to 'Ministers liking the idea'. If you go to CB1, core bundle 1, tab 32 is the e-mail traffic after your meeting with the Minister. It begins, being in reverse order, with your minute of 7 May to Matthew Gould:
"Many thanks for delivering the Foreign Secretary yesterday. On the basis of the Foreign Secretary of State's comments I proposed to continue ...(Reading to the words)... stakeholders."

That would include the United States, would it not?
A. Yes.
Q. "To develop and implement a communication strategy...(Reading to the words)... which takes account of the key legal and political risks identified, those are the political risks identified in your note, including the Chagossians"?
A. That is right.
Q. "But is not dependent on resolution of all issues. I would aim to launch a consultation process in the second half of the year."
You then get over the page:
"To develop an overall delivery plan we will keep the Ministers informed, et cetera, does this match your understanding of what the Foreign Secretary wants to happen."
Then the reply from Matthew Gould:
"This looks right and good. The Foreign Secretary was really fired up about this after the meeting and is enthusiastic we press ahead so do press ahead as you suggest."
Being reminded of that message on 7 May which is only four or five days before your meeting with your American counterparts, going back to paragraph 3 of the copy cable, you have recorded:

"Roberts iterated strong UK political support for a marine park. Ministers like the idea."
Is that an accurate description of what you were saying to the Americans?
A. I can't recall the words used at the time. The sense is in line with where we would have had been in our discussions with the Americans at that moment. But again I can't comment on the language that you are identifying there is accurate.
Q. Why not?
A. Because I cannot confirm or deny the accuracy of this report.
Q. No, you have jumped into NCND a little prematurely. I am asking you if those are the words that you would have used?
A. I think I answered the question. I said I don't know, I can't remember the what specific words I would have used at the time.
Q. That would be consistent with what I have just shown you. UK political support is strong and Ministers [that's the Foreign Secretary at least] likes the idea, is a fair summary of being fired up.
A. Well, I think the minute from the private secretary, which you have drawn my attention to could have been expressed, almost certainly was expressed, in a very

wide range of ways as we took this proposal forward.
Q. So one of them could be, your words, Ministers like the idea?
A. To be quite honest I am not sure that's the language that we would use but I accept that it's possible.
Q. Do be honest, Mr Roberts.
A. I accept that it's possible.
Q. "He suggested that the exact terms of the proposals could be defined and presented at the US/UK annual political military consultations held in late summer, early fall 2009, exact date to be decided."
Do you remember that there were such meetings to take place? Indeed, Ms Yeadon produced a note for the September meeting.
A. Yes these meetings take place every year.
Q. Without going through this every line, in fact it would help if you did. If you read through it may be easier if I read it through and you follow:
"He suggested that the exact terms of the proposals will be defined [as I have just described] and if the US Government would like to discuss the issue prior those talks Her Majesty's Government would be open for discussion through other channels. In any case the FCO would keep ...(Reading to the words)... of the next steps. The UK would like to move forward discussion

with key international stakeholders by the end of 2009."
You remember the e-mail exchange which refers to you dealing with or consulting with stakeholders. That sounds the kind of thing you would have said?
A. Yes.
Q. "He said [this is Mr Roberts] Her Majesty's Government ...(Reading to the words)... success of US marine sanctuaries in Hawaii and Marinas Trench(?)."
Did you say that?
A. I can't remember whether I said that.
Q. Is it unlikely that you would have said that?
A. No, it's not unlikely.
Q. And then a note, "Roberts was referring to the [unpronounceable marine national monument] and notes that he [Roberts] asserted that the Pew Charitable Trust, which has proposed a BIOT marine reserve is funding a public relations campaign in support of the idea."
First of all, what the Pew Charitable Trust funding a public relations campaign in support of the idea?
A. I can't remember the exact timing of this but at some point, yes they were doing that.
Q. If I can refresh your memory without taking you to the document, in November 2008 there is a document that shows that that is what you were understanding. The

reference for those who want to find it is exhibits bundle 3, tab 12, page 180.

Any public announcement before 12 May about the Pew Charitable Trust?

A. I missed the question.

Q. Had there been, I will put it another way, had there been any discussion between you and the United States Government about the Pew Charitable Trust funding the public relations campaign before the meeting of 12 May?

A. I can't remember the exact sequence of meetings and exchanges with the Americans. What was happening at this time, possibly in the run up to the meeting with the Foreign Secretary but certainly after he had indicated that he wanted to take this idea forward, including through talking to the Americans, was that we were in touch with the Americans through our Embassy in Washington and there would have been some exchanges in advance of the meeting with the US Embassy in the middle of May.

Q. I don't want to ask you whether what you have just read is a genuine US cable, but I do want to ask you if there is anything in paragraph 3 that you have just read which is inaccurate?

A. I don't see how I can answer that question without commenting on the accuracy of the document.

Q. Is it at this point that you refuse to answer that question?

A. I think you could probably formulate the answer in a different way that I could answer.

Q. How would you like to answer the question I have just formulated?

A. I can describe in general terms where -- which is what I can remember -- where we were in our dialogue with the United States at that period.

Q. That's not the question I am putting to you, Mr Roberts. I am putting to you a precise and I hope clear question. Is there anything in paragraph 3 of this article, this document, which is any way inaccurate?

A. I don't see how I can answer that without commenting on the accuracy of the document which is specifically in breach of the principle of not confirming or not denying --

LORD JUSTICE RICHARDS: Mr Pleming, you put it in terms of, which is inaccurate. Would it suffice for your present purposes to put it in terms of, which is inconsistent with the position as you understood it at the time or with your recollection of the meeting?

MR PLEMING: Not quite, my Lord. That's one step. I explained earlier as to why I am asking the question.

LORD JUSTICE RICHARDS: Right.

MR JUSTICE MITTING: Your purpose is to establish the general accuracy of this document by reference to relatively uncontroversial passages.

MR PLEMING: Exactly.

MR JUSTICE MITTING: Yes.

MR PLEMING: I can do that by submission to the court.

LORD JUSTICE RICHARDS: Is it open to question as to whether that would not be a sufficient way of dealing with of matter.

MR PLEMING: My Lord, can we just see how we get on with the next two or so paragraphs. I am sorry Mr Roberts to talk across you. When we left it yesterday is the position will have to be considered if there is any declining to answer questions.

LORD JUSTICE RICHARDS: But for present purposes is it possible to continue?

MR PLEMING: See how we do, my Lord.

I am not trying to be difficult. I am trying to ensure that your Lordships have a factual basis for my eventual submission.

Paragraph 4 is under a heading, three sine qua nons, and the first is US assent. What is being addressed, to remind you is, the three are: US assent, which is dealt with in paragraphs 4 and 5; Mauritius assent, dealt with in 6; and then Chagossian assent is addressed in 7 and

8. Then the next heading is je ne regret rien. First of all, a question: did you use the phrase, "there are three sine qua non, or any such language?

A. No I would not have used that kind of language.

Q. What would you have said about the need for assent or approval by these three categories?

A. I think I would probably have described it in much the same terms as I presented the issues to the Foreign Secretary, that there were three categories of political risk, or --

Q. Would a word that you would use, be a precondition, three preconditions must be met?

A. No I don't think we saw them as preconditions. As I said, the optic through which we saw it and through which I pretend these to the Foreign Secretary was categories of political risk challenges, risk difficulties. I am not saying that I didn't use the word precondition, I simply can't remember, but it's not a particular phrase that I can remember.

Q. That's exactly what you meant for the US position because if the United States says, you are not having a marine no-take area in our BIOT, the BIOT where we have our security base, that's the end of it isn't it? No way you were going to overrule the Americans?

A. No I think we have always been entirely clear that --

Q. So it was a precondition?
A. I am not saying it wasn't a precondition I am simply saying that I don't recall specifically whether I had used the phrase, precondition, in this meeting four years ago.
Q. Just going through paragraph 4, we can do this rather quickly. It begins, "according to Roberts" so somebody who was taking notes, it was you who said this, not Ms Yeadon and not Mr Smith:
"According to Roberts three preconditions must be met before HMG could establish a park. First we need to make sure that the US Government is comfortable with this idea. We would need to present this proposal very clearly to the American administration. All we do should enhance base security or leave it unchanged".
Is that the kind of comfort he would have given to the Americans?
A. Again I don't know whether it's the exact language but certainly that is the sense in which we would have spoken to them.
Q. So in terms of accuracy the first six lines or so are as accurate as you can recall considering you don't have any notes?
A. As I say I can't comment on the accuracy of the document.

Q. Can you comment on the accuracy of the language?
A. Well I have I think commented on the accuracy of the language.
Q. Which is that it is accurate?
A. No, that I can't remember the details of the language to the extent that I can say that it is accurate or not.
Q. Let me try a simpler way. Is there anything in the first few lines that is in any way surprising to you?
A. That takes me back to my fundamental problem that it involves comments on the document.
Q. "Political councillors expressed appreciation for this a priori commitment but stressed that the 1966 US/UK exchange of notes concerning the BIOT would in any event require US assent to any significant change of the BIOT status that could impact on the BIOT strategic use. Roberts stressed that the proposal would have no impact on how Diego Garcia is administered as a base. In response to a request for clarification on this point from political councillors, Roberts asserted that the proposal would have absolutely no impact on the right of the US or British military vessels to use the BIOT for passage, anchorage, prepositioning or other uses (...) designating the BIOT as a marine park could, years down the road, create public questioning about the suitability of the BIOT for military purposes. Roberts

responded, the terms of the reference for the establishment of a marine park would clearly state that the BIOT, including Diego Garcia, was reserved for military uses."
Did you say that?
A. I can confirm that the general content and sense of issues that you have just read out is consistent with the discussion we were having with the United States at the time.
Q. Did you say something along these lines, "the proposal would have absolutely no impact"?
A. I don't recall what language I would have used at the time but it would have been consistent with the general position that we were trying to set out to the United States.
Q. "When it comes to Diego Garcia the marine park would clearly state that it was reserved for military uses so therefore no BIOT would cover the Diego Garcia waters."
Is that what you were saying?
A. From what I can recollect as I have said in my witness statement I believe there were a series of questions which were being raised by the Americans and to some extent the language used may reflect the questions that they had raised.
Q. When they asked the question, "that would be the kind of

comfort you would have given?
A. Broadly speaking, yes. What I can't remember is exactly how we define this issue in exchanges in June 2009, although you can see how they developed and how they were finally established in the form of the specific assurances which we developed between June and September. Those assurances contain the language which was eventually agreed with the United States and it may be relevant to this particular issue that you are drawing to my attention that we agreed in the end that the whole of Diego Garcia and the 3-mile zone surrounding it would be excluded from the MPA.
Q. When did you reach that agreement with the United States, that the whole of the 3-mile limit around Diego Garcia would be excluded from the no-take MPA?
A. As I said earlier, when --
Q. Was it by the date of the September meeting, let me make it easier for you?
A. The September meeting and the note which is in the documents which was the paper that we submitted to the United States in advance of the UK/US (Inaudible) 2009 sets out the proposal as it then stood in the British Government and it includes a series of assurances which, broadly speaking, represented the basis on which we believe that the Americans would accept that we could go

ahead with this proposal.
Q. The only reason I am asking you a really simple question, before the consultation document, had the British Government agreed with the US Government that the 3-mile zone around Diego Garcia would definitely be excluded from the no-take MPA?
A. Yes I think we had agreed that.
Q. The reason I ask is, it is just a bit surprising that you then tell the public in the consultation document in November that it may be necessary to consider doing this, which is core bundle 1, tab 38, page 319?
A. It would perhaps be helpful if counsel could direct me to the document which sets out those assurances just so I can --
Q. I am dealing at the moment your recollection. I will show you the September document in a few moments. Your recollection is that before the consultation you, the UK and the US Government, had reached a firm agreement that the no-take MPA would exclude Diego Garcia and its 3-mile limit?
A. The exact term that we agreed is in those assurances and without looking at that document I find it difficult to answer your question.
Q. Then we will go to that later. The reason again I am asking you is to check that the document we are looking

at is accurate, that it does record accurately what you were telling the Americans, that's paragraph 4. Your answer is, you can't confirm because you are told by the Foreign Secretary you mustn't answer; is that it? Those are your instructions that you cannot answer a question that confirms the blindingly obvious that this is an accurate account of what you were telling the Americans?
A. That is precisely the case and if I can refer to Mr Sterling's witness statement it explains that why that apparently surprising proposition does matter and is a principle that needs to be protected.
Q. Paragraph 5. Is it right and you have confirmed already that whoever was taking those notes accurately described that a Mr Ashley Smith was attending the meeting?
MR KOVATS: Sorry, my learned friend has repeatedly referred to whoever was taking these notes. There is no evidence that anybody was taking notes.
MR PLEMING: Absolutely. Good evidence. I am sorry my Lord there is absolutely very good evidence from this witness that it is likely that notes were taken at this meeting by the Americans.
LORD JUSTICE RICHARDS: That's a different point. You don't need to put it in terms of whoever was taking these notes, just to avoid that particular issue of

contention.
MR PLEMING: All right, my Lord. Is paragraph 5 an accurate description of the name and position of the person who is attending the meeting on behalf of the MOD?
A. It is.
Q. If you could read through to the end of paragraph 5 you will see that, four or five lines down, there is a statement:
"Roberts agreed, stating that the primary purpose of the BIOT is security but HMG will also address environmental concerns in its administration of the point."
Then this:
"Mr Smith added that the establishment of a marine reserve had the potential to be a win-win situation in terms of establishing situational awareness of the BIOT. He stressed that HMG sought no constraints on military ...(Reading to the words)... marine park".
Is a phrase such a situational awareness the kind of phrase you have heard from the MOD or Mr Ashley Smith?
A. Yes.
Q. And no constraints on military operations would have been an important assurance?
A. Yes and I believe that is subsequently reflected in the language of the assurances.

Q. I am going to ask you the question again expecting a similar answer: is there anything inaccurate in paragraph 5?
A. I can't answer your question.
Q. Paragraph 6 is now under a heading of Mauritian assent:
"Roberts outlined [so, again, this is attributed to you] two other prerequisites for the establishment of a marine park. Her Majesty's Government would seek assent from the Government of Mauritius which disputes sovereignty over the Chagos Archipelago in order to avoid the Government of Mauritius raising complaints with the UN."
First of all, as at that date, early May 2009, was it the intention of Her Majesty's Government to seek assent from the Government of Mauritius?
A. I don't think we would have used the word assent, but as is clear from other documents, yes, and that was part of the instruction that I had received from the Foreign Secretary.
Q. "And he, Mr Roberts, asserted that the Government of Mauritius had expressed little interest in protecting the Archipelago's sensitive environment and was primarily interested in the Archipelago's economic potential as a fishery."
Is that something you remember saying?

A. We would probably have briefed the Americans in this and other meetings on our dialogue with Mauritius and we would have briefed them on the meeting in January 2009.
Q. So as far as you were concerned, based on the meetings you had had with Mauritius, the main interest was fishery; is that right? That's what you understood the position to be in May 2009?
A. No I don't believe that is accurate.
Q. What is inaccurate?
A. In May 2009 our understanding of the position of the Government of Mauritius is that it was primarily interested in sovereignty.
Q. He said that as well:
"He asserted that the Government of Mauritius had expressed little interest in protecting the sensitive environment primarily interested in fisheries..."
And then we go onto the meeting in January. You don't recall saying anything about interest in fisheries?
A. I probably would have said something about their interest in fisheries.
Q. You are bound to have said something because you had told the Minister only a few days earlier that there was an agreement, there was an understanding that Mauritius could continue to fish, the side deal that you had told

the Minister about?
A. Yes but the issue I am trying to make is that we would not have told the Americans that the Mauritian's primary interest was fish. We would have told them that the primary interest was sovereignty.
Q. Read on:
"Roberts noted that in January 2009 HMG held the first ever formal talks with Mauritius regarding the BIOT."
Is that accurate? Had there been a meeting in January 2009? We know there was, Mr Roberts, we have seen all the documents. Can you confirm that it's true?
A. Yes it's clear from other papers that we held formal talks with Mauritius in January 2009. It is not the case that these were the first ever formal talks with Mauritius regarding the BIOT.
Q. "The talks included the Mauritian Prime Minister"; is that correct?
A. No, that is not correct.
Q. He wasn't there?
A. No.
Q. Had you had any talks with the Mauritian Prime Minister?
A. No.
Q. "Roberts said that he cast a fly in the talks over how we could improve stewardship of the territory but the

Mauritian participants were not focused on environmental issues and expressed interest only in fishery control."
Did you say that?
A. That would have been a reasonable summary of an aspect of the talks with Mauritius; I could have said that.
Q. It continues:
"He said that one Mauritian participant in the talks complained that the Indian ocean is 'the only ocean in the world where the fish die of old age'".
That is a memorable remark; did you make it?
A. I didn't make the remark but it became a very well-known phrase after it had been used by the Mauritian delegation in January 2009.
Q. It was used at the January meeting and the reference is EB11, tab 15, page 2006, so it's a phrase that would have been well in your mind in May 2009?
A. Yes certainly.
Q. Did you say it to the Americans?
A. I can't remember whether I said it but it's quite likely that I would have said it.
Q. It's a very odd thing for the United States representatives to make up, do you accept that?
A. Well I think that draws me into commenting on the document.
Q. It doesn't yet, Mr Roberts, I am asking you, would it be

an odd thing for anybody at a meeting you attended to make that up?
A. I think this is asking the same question in a different form.
Q. I'm sorry?
LORD JUSTICE RICHARDS: He is saying, I think it's asking the different question in the same form.
MR PLEMING: Can you remember who said it in the Mauritius meeting?
A. I would have to go back to the record of the meeting.
Q. Is he in court?
A. I haven't my glasses on.
Q. Put your glasses on.
A. I don't have them with me.
Q. I will hand them to you later. This was a meeting in January. Somebody is recording, either in front of you or after the meeting, the very phrase that had come out of the January meeting; is that right?
A. I said that, yes, I recall because it is very memorable that a member of the Mauritian delegation at the meeting in January 2009 used a phrase that BIOT was the only place in the world where fish die of old age.
LORD JUSTICE RICHARDS: If I have understood your evidence correctly, you have agreed that it is very likely that you would have said that to the Americans at this

meeting?
A. Yes.
MR PLEMING: Then, again, the question I am going to ask you, now reminded by that little gem of recollection that they die of old age, reading again paragraph 6, is there anything in paragraph 6 which is inaccurate in any way apart from the lack of reference to sovereignty and the Prime Minister?
A. Again, I can't answer that question without breaching the principle.
Q. Paragraph 6 is the end of the neutral territory in the sense that is dealing with your conversations with the Americans and your conversations about Mauritius as summarised or recorded in this document. We come then to Chigossian assent:
"What is acknowledged is that we need to find a way to get through the various Chigossian lobbies. He admitted that Her Majesty's Government is under pressure from the Chigossians and that their advocates to permit resettlement of the outer Islands of the BIOT."
Did you tell the Americans that Her Majesty's Government was under pressure?
A. Yes I would have described to the Americans at that meeting broadly the same position that I had described to the Foreign Secretary a week before.

Q. So that would be an accurate summary of what you were telling the Americans?
A. I think that's the same question.
Q. "He noted without providing details that there are proposals for a marine park which could provide the Chigossian warden jobs within the BIOT."
Is that right, did you tell them that?
A. I can't recall all the detail that we went into but it would be consistent with the overall presentation.
Q. Then this:
"However, Roberts stated that according to 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."
In your evidence you have told us that the word footprint is a word you would use to deal with no human presence and no machinery or no buildings. Is that how you would use the word footprint?
A. I don't recall referring to machinery or buildings.
Q. What do you mean by footprint?
A. The footprint issue was a phrase that came out of discussion with the Chigossian Environment Network when we were looking through the various options for the way marine protected area could be managed. One of them was, alternatives included, a marine protected area with

human presence in a range of forms, whether a permanent established scientific office or a warden's office with temporary wardens or with no human footprint at all. We were naturally interested in that option because it was the one which was most consistent with the Government's policy against resettlement and the immigration regime in place in BIOT.
Q. So as at 12 May 2009, was it Government policy that there would be no human footprints on any island, apart from Diego Garcia in the Chigossian Archipelago?
A. Yes that is consistent with how the policy against resettlement and the Immigration Rules were seen at that time.
Q. When this says, you told the Americans there would be no human footprints, that is consistent with what you would have told us?
A. I believe it is and I believe it is consistent with the assurances which were subsequently developed.
Q. Or Man Fridays?
A. As I have said in my evidence, Man Fridays is a phrase that has a history in BIOT which BIOT staff were very well aware of.
Q. What is the history?
A. It is a quote from a colonial official from the 1960s.
Q. Considered to be highly offensive by Chigossians, is

that right?
A. It is considered to be highly regrettable in every sense and offensive to Chigossians, absolutely.
Q. Even a subject of a play in England last year or the year refers to, no more Man Fridays, or some such. It is a totemic phrase, it is a phrase that offends, is that right?
A. Absolutely.
Q. Did you say it on 12 May 2009?
A. I would never have used it in this context.
Q. You would never have used it. Is your evidence to the court that someone in the American Embassy made up these two words?
A. No, I can't help the court, I have no idea.
Q. But they are not words that you used?
A. They are absolutely words that, not only I, but nobody working on BIOT in the Foreign Office would use precisely because we understand their significance.
Q. If you did use it it could only be in circumstances where you would not expected them ever to be reported?
A. I don't accept the basic premise.
Q. Read on:
"He asserted [this is Mr Roberts asserted] that establishing a marine park would in effect put paid to resettlement claims of the Archipelago's former

residence."
Did you say that?
A. At about this time, yes, I think that is a proposition that we were discussing with the Americans. Just to make that absolutely clear, it was not a proposal for action, it was a recognition of a reality that the Chigossians themselves had originally raised which, as we explored the issue, we recognised too, that, as I gave in my evidence yesterday, if an MPA were established which were entrenched, and this was the core of the discussion with the Americans through June, July, up to September, it would indeed be a serious obstacle to resettlement. But of course as I explained yesterday, it would also be a major problem for other stakeholders and for the British Government. For that reason, it was never pursued and it was never a proposal that was developed.
Q. That's not what you are telling the Americans at all, Mr Roberts. What you are telling the Americans is that establishing a marine park would, in effect, put paid to resettlement claims of the Archipelago's former residence and continuing, responding to Paul Count's observation that:
"...The advocates of Chigossian resettlement continue to vigorously press their claims, Roberts

opined that UK's environmental lobby is far more powerful than the Chigossians advocates."
What you were telling the Americans is that this marine park would activate the environmental lobby and the park itself with the environmentalists would kill off the Chigossian claims; is that what you told the Americans?
A. No.
Q. So what's inaccurate about any of the words I have just read out to you?
A. I can't answer that question. But what I can say is at this stage of the discussion with the Americans the central issue which I recognise as quite complicated has many ramifications, I don't think everybody understood all the issues at the time, was that the American concern was about entrenchment and their concerns about entrenchment came from a number of issues.
Q. When?
A. Largely from their own experience in the establishment of national maritime monuments. One aspect was that it would create future inflexibilities which would create a situation where the British Government was not able to accommodate some of the security and defence operations which the Americans needed to carry out in BIOT. I think this was the big issue in the discussion. It

was also the case that, again, from their own experience, the Americans were concerned about how the environmental lobby would impact on their own operations through the creation of an MPA. They had seen and they referred, possibly in this meeting and in subsequent meetings, to a situation where, in creating a marine park, the legislative and regulatory framework in that park gets ratcheted up over time by pressure from the environmental lobby. So their question to us was, you tell us that a marine protected area would not impact on our military operations, how do you know that the environmental lobby over time won't create pressure for changes to that which will impact on our operations? So this actually was very much the central issue in the discussions and I think it was quite complicated.
Q. When did you think of this answer, Mr Roberts? When did this occur to you?
A. Sorry I don't follow your question.
Q. The answer we have had for the last minute or so is that what you said on the 12 May you said and you meant it, is that what you are telling us, that the Americans were talking about entrenchment and you only meant it if there's entrenchment. But there's not a hint of that at all, not a hint. When did you decide that that's your explanation for your words?

A. I'm subject -- I am in difficulty because of the position that I can't confirm or deny what is being attributed to me in this --
Q. I am putting it to you clearly as I can Mr Roberts. What you said to the Americans, there would be no more footprints, there would be no Man Fridays, and the marine park that you were putting forward as a proposal, which was a no-take marine park, would bring to an end severely damaged, whatever phrase you want, those troublesome Chigossians?
A. No that was not the nature of that conversation.
Q. Let me then ask you try and make this as easy as I can. You do accept that you said what is recorded here?
A. No.
Q. Is that because you have been instructed by the Foreign Secretary not to answer that question?
A. No that's because, based on my recollection of our policy, the way in which you are putting it to me is not the way in which the discussion took place.
Q. What is inaccurate in this record of the meeting?
A. That's what I can't answer.
Q. I am sorry, my Lord, I have reached a point. I am pressing it as gently as I can, but I have a witness now who, on one view, is in contempt of court. He either has a good reason that your Lordships approve for not

with Mr Roberts now. I am very sorry, Mr Roberts, that you have been kept sitting there while we have been having this legal debate but we will proceed as far as we can.

MR COLIN ROBERTS (continued)

Cross-examination by MR PLEMING (continued)

MR PLEMING: We have nearly got to the end, Mr Roberts. I was in paragraph 7 of the article and the copy cable and I had just been asking you about the phrase, "this will put pay to resettlement claims", but I had also asked you about the environmental lobby being more powerful than the Chagossians' advocates which is not inconsistent, I am sure you will accept, with what you were telling the Secretary of State two days earlier. Is that something you would have said to the Americans on 12 May?

A. I do not, I would not have said it in the isolated way that it appears here. There was quite an extensive discussion, if I recall correctly, about the various public diplomacy implications of establishing an MPA, some of which has already been flagged up, were raised for the Foreign Secretary on 5 May. They pulled in various different directions and it was a matter of speculation at that stage of exactly how the public diplomacy implications would play out, but I do accept

that, yes, there was a discussion about those implications.

Q. Did you say in paragraph 8 what is there set out? If you just read it I will read it out:

"Roberts observed that BIOTs had served its role very well."

First of all, did you say "je ne regret de rien"?

A. **No.**

Q. "Roberts observed that BIOTs had served its role very well, advancing share US, UK's ...(Reading to the words)... removal was necessary for the BIOT to fulfil its strategic he said."

Did you say that on 12 May?

A. I have never said that and it is contrary to government policy.

Q. It is contrary to government policy to say it?

A. No. There is a well-known phrase which has frequently been used by ministers which is that the government does sincerely regret the removal of the population in the 1960s and 70s.

Q. So if this was to be recorded at a meeting you attended on 12 May this would be an inaccurate record?

A. Well, you go back to the question, but I think I have given the answer to your question.

Q. But can you, again if you can assist the court, give any

explanation, any information that you hold which would explain why anybody would write down something you did not say with such clear words, we did not regret the removal of the population?

A. I do not think I can answer that without commenting on the document, but I can say that we have said to the Americans on occasions that, yes, we do deeply regret the removal of the population, but we do not regret the creation of the defence facility in BIOT.

Q. Right. So this is the policy you do not regret. You do regret removing the population but you will not let them back.

A. No. It is a formulation which is designed to recognise the tremendous security value that both counties have received from the creation of the defence facility in BIOT.

Q. I am sorry, Mr Roberts, you have been, if I might put it, slightly diplomatic. You have told us that you would not have told the Americans, would not have said to the Americans these words, we do not regret the removal of the population because it is government policy not to regret removal of the population. Is that what you were telling the court?

A. No. As I said, there is a well established line of government policy which has been used over many years by

successive governments to recognise that what was done in the 1960s and 70s was wrong and that is a phrase that I have used many times with the Americans and others, but in discussing with the Americans issues relating to the Diego Garcia as a base, we have also said that we do not regret the fact that we created the military base which has served the interests of the UK and US governments very well and I expect that is what I would have said at this meeting.

Q. Again insofar as you can, is this paragraph 8 an inaccurate summary of what you said or is it accurate?

A. Well, again, I think I have given you the answer to your question --

Q. Well you --

A. -- without going so far as to breach the principle of NCND.

Q. Let me see if I can summarise where we have got to on these paragraphs so far. Is this what you were telling the US representatives on 12 May that the no take MPA would not affect them at all? You were giving them assurances, is that right?

A. No, I do not believe we were saying that it would not affect them at all. I think we were trying to understand the particular concerns that they had and begin to work out what assurances that they would need

in order to be content for the British government to take the policy forward and those assurances were developed and were embodied in a document which is referred to in my witness statement.

Q. These became the articulated assurances in 7 September document, is that what you were trying to remember? It is volume EB2, tab 7.

A. So as I have said before this meeting was not a meeting at which decisions were taken. It is not a meeting of which formal proposals were made or any final decisions were taken about the nature of assurances or how the US would respond to the ideas that we were floating to them in some detail at a very early stage in the dialogue.

Q. The meeting that was anticipated, we know from the article, was going to be the military political meeting later in the year?

A. Yes.

Q. We have the note for that meeting in volume EB2, tab 7 and on page 128 are the assurances. This is a document being written by BIOT administration dated 7 September for that US meeting. You confirm that that is right?

A. Yes.

Q. "Assurances, the following propositions may help reassure the US. There will be no change ...(Reading to the words)... will be excluded from the MPA. There will

be no change et cetera, et cetera."

Those are the assurances, yes?

A. Yes.

Q. When it comes to international status, that is over the page, the first bullet:

"We will not seek any international status for the MPA which is inconsistent with the fundamental purpose of the territory."

That is what you meant by entrenchment, is that right?

A. There are two particular assurances which relate to entrenchment. One is the one that counsel refers to and the other is two bullet points below which restates the government policy against resettlement but makes it clear with the Americans, as well as we had made clear more widely, that the proposal will be without prejudice to the proceedings in the European Court of Human Rights and that was understood and explained to mean that should the court rule against the government, or should for any other reason there be a change of government policy then the MPA could be terminated, amended, adjusted, whatever was necessary.

Q. That is a constant, Mr Roberts. We, of course, accept that and that would have to be included. There was ongoing litigation at a European Court of Human Rights

level, but just trying to really help you, Mr Roberts, that you were talking in terms of reassuring the US, you mentioned earlier that this was subsequently, this is the list of them, is it not?

A. Yes.

Q. What I was putting to you was a rather broader picture and that is as follows: the meeting in terms, we are talking about three players at the moment. Leave the UK out of it. The US, Mauritius and the Chagossians. The three sine qua nons. Is this a fair summary, you were telling the US government representatives in relation to the United States that the no take MPA would not affect them in summary?

A. I think it was rightly more precise than that. It was not that it would not affect the military operations on the base.

Q. Did you tell them then they could all continue to fish or did that come later?

A. The question about recreational and subsistence fishing in the three mile zone around Diego Garcia might have come up at that point but it certainly came up in the period between then and September.

Q. Again, I am trying to make it as short as possible. So it is reassuring the Americans. They wanted a meeting, you told us. In relation to Mauritius what

you were saying in summary is that they could be managed but it was early days?

A. I think in relation to Mauritius we would have presented the issues broadly in the same way as we presented them to the Foreign Secretary that there were some very challenging issues to work through with the government of Mauritius if we were to secure their agreement.

Q. In relation to the Chagossians, the proposed no take MPA would to coin a phrase put paid to their claims for resettlement?

A. As I have said before that was if the MPA that was implemented would be an entrenched one that could not be changed.

Q. So as far as your evidence is that it was all to do with entrenchment?

A. Substantially, yes.

Q. Can you go to the last paragraph, last four lines. This is not you speaking, it is a summary. It is under a heading of comment which begins above paragraph 14. Right at the end of that document "establishing a" -- the topic in paragraph 15 is the government's resolve to prevent resettlement which is how it is introduced. At the foot of the paragraph:

"Establishing a marine reserve might indeed ...(Reading to the words)... in the BIOT."

Is that something you recall saying or is it a fair summary of what you said?
A. No, for the reasons that I have described.
Q. What is inaccurate about the summary?
A. I do not think I can answer that question.
Q. You cannot answer that question?
A. I think I have answered it by trying to say what I believe was the exchange with the Americans at that meeting and, indeed, at subsequent meetings with the Americans both directly and through our Embassy in Washington. We moved very quickly from the point of the presentation to the Foreign Secretary to recognising that there could not be entrenchment of the MPA and the focus of discussion was around developing the assurances on that point.
Q. Mr Roberts, that will of course be a matter for their Lordships when considering your evidence. There is another meeting recorded referred to in this article. If you would go to paragraph 10 on page 420F. Do you recall that there was a subsequent meeting, that is a meeting after the meeting with you which was a meeting with Joanne Yeadon?
A. I would not have been aware of it at the time, but it was not unusual for there to be a separate meeting with a head of section or desk office after a meeting

with a director.
Q. Paragraph 12 is a record of what Miss Yeadon said. Do you have any notes at all of her meeting? Did she come back to you and report the meeting that she had had?
A. No.
Q. What I have been putting to you, Mr Roberts, is that the British Government had a motive, other than environmental, for proposing and then implementing a no take MPA?
A. I think as I have tried to answer in my questions, as we looked into the detail of what was being proposed we recognised that there was a key issue -- I say we in the UK government, I cannot speak for anyone else concerned -- relating to the issue of entrenchment. We recognised that. We realised that the policy could not go forward with entrenchment and we therefore developed ideas for how we could implement an MPA without entrenchment.
Q. Let me try and unpack that answer. So when you were speaking in 2009 in May, it was your purpose to use the MPA to prevent or kill off the claims for resettlement but that was only on a condition that you added the added ingredients of entrenchment?
A. No. I think that is precisely what I am not saying.

Q. What were you saying in May 2009?
A. I was saying that looking at an extremely complex proposal we recognised, as indeed the Chagossians themselves had raised, that there could be forms of implementation of an MPA which would prevent or render extremely difficult resettlement, and so I believe the audit trail of decisions shows that was not a policy which was pursued. It was never adopted by the British Government and it was certainly never presented to ministers. It was never a policy.
Q. What I am also putting to you is that the policy shines out of the record of that meeting and is not a policy you would want to put in written form so that it could ever be seen by the Chagossians or in any litigation? In other words, you had every reason to keep it quiet.
A. No, I reject that suggestion entirely. I do not believe it is possible to keep a policy of that significance quiet.
Q. It is indeed possible in your world, Mr Roberts, because you do not take notes. That is the problem. There were no notes of these meetings. As far as you are aware, no notes of the meeting with the Foreign Secretary on 6 May?
A. Well, I believe there is a sufficiently clear trail of documents which shows what we did put to the

Foreign Secretary and I believe also those assurances which are recorded in the paper given to the United States in September also demonstrate clearly that there was no intention to use the establishment of an MPA to prevent resettlement and if I can go on to say it has not done.
Q. It certainly has not stopped the claims, indeed one of the reasons we are here. What I am putting to you is that that was a motive, a motive where indeed you had been caught out by a WikiLeaks cable which shows what you were saying privately to the Americans in 2009?
A. The position is as I have explained to the court.
MR PLEMING: My Lord, those are my questions of Mr Roberts, subject to the opportunity to ask him again as to the accuracy of that record.
LORD JUSTICE RICHARDS: Yes. Mr Kovats, do you agree that we should suspend the evidence at this stage pending submissions on the substantial issue of the NCND policy?
MR KOVATS: My Lord, yes.
LORD JUSTICE RICHARDS: Yes. What is the position of Miss Yeadon in the meantime?
MR PLEMING: She is outside court somewhere. I was going to give her notice. I had hoped to have finished with Mr Roberts some time ago.
LORD JUSTICE RICHARDS: I am sure Mr Roberts would have

appeal against the ruling that the court has effectively given.

Now, clearly that would have unfortunate consequences and clearly ordinarily, apart from the fact that you will appeal after the final judgment has been given, there is the difficulty that you normally appeal after the court has had an opportunity to give its reasons in full.

LORD JUSTICE RICHARDS: We have given no reasons. The reasons would be putting in our ultimate judgment and at this stage I have to say that even from your submissions I had understood that you were not bitterly opposed to the notion of Mr Roberts just being asked whether the record is an accurate one or not, it being a distinct point from the authenticity of the --

MR KOVATS: It may be that I am at fault. I have no objection whatsoever to questions being asked. It is what he is required to answer.

LORD JUSTICE RICHARDS: We will invite him to answer the question.

MR KOVATS: Those instructing me are anxious that Mr Roberts should not be required to answer any question to the effect that why do you say that this is or is not an authentic cable.

LORD JUSTICE RICHARDS: Mr Pleming did not suggest that

he was going to be putting those questions.

MR KOVATS: Perhaps I can just put it this way: when Mr Pleming says is this accurate, if Mr Roberts is entitled to interpret that as saying, did you say this, then there is no problem.

MR PLEMING: No, I am sorry, my Lord.

LORD JUSTICE MITTING: What Mr Pleming wants is, is this an accurate record or summary of what you have said I think. Yes.

MR KOVATS: If Mr Roberts' reply is, well I did not say it so --

LORD JUSTICE MITTING: That is the answer.

LORD JUSTICE RICHARDS: It is the answer. It may be that we should ask Mr Roberts to come back in and have the questions put, but if you say that you want to seek advice in relation to an appeal against what is preeminently a case of only precision in the course of the trial, well so be it.

MR KOVATS: Let Mr Pleming proceed. If I can deal with it on this basis: if he does ask a question in a particular form then --

LORD JUSTICE RICHARDS: You can rise to object if you have an objection to the form of the question.

MR PLEMING: I can see that my learned friend is -- I have been in this position before where instructions are

coming in quite firmly from different parts of the field. It is now 10 past 4. Unless Mr Roberts does have a pressing engagement early tomorrow morning I am content for him to come back tomorrow morning.

LORD JUSTICE RICHARDS: If Mr Roberts does not mind coming back tomorrow morning I think that may have to be the course adopted.

MR KOVATS: I am sorry, can I just mention one other thing. As I understand it Mr Roberts does have an official engagement at the Mansion House I think at half past 12. I am told that we require him to leave here about 11 if he is permitted to leave.

LORD JUSTICE RICHARDS: By permitted to leave, you are referring to conditions outside the court rather than something said within the court.

MR KOVATS: Sorry, I am told from Mr Roberts himself that he would rather go ahead and give some more evidence now and get it over with.

LORD JUSTICE RICHARDS: That is very sensible. Let us see whether we can dispose of his evidence. Mr Roberts, do you mind coming back into the witness box? Thank you very much. We quite understand if you have an objection to the form in which a question is put we will listen to it.

MR COLIN ROBERTS (continued)

Cross-examination by MR PLEMING (continued)

MR PLEMING: Mr Roberts, you are still under oath. Mr Roberts, I wanted to put to you really just the same questions that I have been putting to you before about the contents of a document with which you are now very familiar in volume 2 at tab 53. I had being putting to you some composite questions as we went through each paragraph of this document.

Paragraph 2 is on page 420B and really the quickest way of dealing with this, Mr Roberts, is if you could just read through paragraph 2 to yourself. Is there anything in that paragraph which is inaccurate?

A. My Lord, I think I have to just preface the answer to that question by saying that I do not want anything that I am now asked to say to be taken as disrespectful to our American colleagues. The answer to that question is paragraph 2 is very largely inaccurate. Most of the paragraph is inaccurate and I will walk you through it.

Q. Please.

A. I have already said that the title that is given to me is broadly accurate; but if I go from the sentence beginning noting, noting that the uninhabited islands of the Chagos Archipelago are already protected under British law. There was no British law providing any protection in BIOT.

Q. Did you tell them there was?
A. No. There is a reference to protection from development. I do not think there is any protection from development in BIOT because there is no prospect of development in BIOT and the only development that can happen in BIOT is the construction of new defence facilities which are expressly permitted in BIOT under the exchange of notes with the United States. It is a reference again to British law. British law does not apply in BIOT. It says it does not provide --
Q. What does apply?
A. BIOT law.
Q. What is BIOT law?
A. The law of the British Indian Ocean Territory.
Q. So the word British is in there somewhere?
A. Can I complete the sequence?
LORD JUSTICE RICHARDS: Yes.
A. It says the British law does not provide protected status for either reefs or waters. This is entirely inaccurate as you will see from the summary of the protections provided.
MR PLEMING: I am sorry, Mr Roberts, you have just said there is no British law applying but then current British law does not provide?
A. Right, I do not think that is the intention behind the

drafting of this document.
Q. Right, carry on.
A. What I am trying to say is I believe in this paragraph that whoever has drafted this paragraph has not listened carefully to what was being said. They have confused British with British Indian Ocean Territory which is a fundamental constitutional point and they are suggesting that the law does not provide protected status for either reefs or waters. The facts are very different. Earlier environmental protection, as I would have explained, does provide through the conservation and management zone a high level of protection particularly for the Chagos bank. It then goes on to say -- and you raised earlier the bruited word which is certainly not language that we would use, I would use -- would only concern the exclusive zone around the islands. That makes no sense whatsoever because the exclusive zone is the whole lot. It is the 200 mile limit.
Q. Since when has fishing taken place on land?
A. The marine protected area applies also, well we have not defined all the terms to mean protected area, but it was clear from the outset that it would cover the islands and the flora and fauna on the islands.
Q. Result in protected area?

A. Result in protected area would constitute, I believe that is broadly accurate.
Q. Right. So the errors by the American recording this conversation is to misuse the word British or British law, that is where the errors are, is that right?
A. In that paragraph, but I think it is important if you ask me questions about the accuracy of this document, there are questions relating to the accuracy line by line and word by word. There is also a question of whether it accurately reflects the whole tone of the meeting.
If one goes to the final sentence in the summary at the outset, I would say that the conclusion which is comment and I recognise it is comment, but I think it would be difficult to make that and a curious conclusion to draw from the meeting since it seems to overlook the fact that the interest of the United States was to prevent entrenchment. Yet there seems to be a conclusion that we were arguing for entrenchment in order to prevent resettlement.
MR KOVATS: I am sorry to rise. I hope it is now apparent how this may or may not develop, but those concerned, those behind me do ask me to ask that we adjourn at this stage.
The question of considering our position and,

in particular, in relation to the matters that I have tried to identify about the impact on international relations, I hope your Lordships do appreciate from the nature of what Mr Roberts is now being required to do that I do now on instructions ask that we have time to consider our position.
LORD JUSTICE RICHARDS: This is on a different basis from the NCND basis.
MR KOVATS: It may be my fault, but I had not perceived it that way. The NCND is designed to protect in this context, amongst other things, our international relations. I hope that is a point that I have been making to your Lordships.
LORD JUSTICE RICHARDS: I see. We will adjourn to allow consideration to be given to the matter overnight but we do so with great reluctance.
Sorry about that, Mr Roberts, you will have to come back tomorrow morning. 10 o'clock start.
LORD JUSTICE MITTING: May I say something before you go? Those behind you may wish to reflect upon this proposition: how can it impact upon our relations with the United States that two parties to a friendly discussion disagree about the precise terms?
MR KOVATS: My Lord, yes.
LORD JUSTICE MITTING: Thank you.

LORD JUSTICE RICHARDS: That will be one of a number of matters they will want to reflect on overnight as to whether a decision to allow this witness to give, to invite him to give limited answers to limited questions really is a matter of justifying at an interlocutory appeal but we will leave it to you.
MR KOVATS: My Lord, yes.
(4.20 pm)
(The court adjourned until 10.00 am on Wednesday, 17th April 2013)

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LORD JUSTICE RICHARDS: Unless it's an extremely long case in Luxembourg, so she can't catch the evening flight back --
MR KOVATS: Yes.
LORD JUSTICE RICHARDS: -- the normal position would be that she would be back for a Wednesday hearing.
MR PLEMING: My Lord, this is really all --
LORD JUSTICE RICHARDS: It can be sorted out overnight, I think is the right course, relying on what we have indicated about our availability or the way in which we will make ourselves available so as to enable this matter to be concluded, and hoping that counsel will be able to stop themselves in within that timetable. They certainly can't go on beyond next Wednesday. I make that very clear. Thank you all very much.
We will resume at -- no, re-examination, I'm sorry. We will resume now.
MR KOVATS: It will be very short but there is some.

MR COLIN ROBERTS (continued)
Re-examination by MR KOVATS

LORD JUSTICE RICHARDS: Mr Roberts, welcome back. You are still under oath.
MR KOVATS: Mr Roberts, you were asked by Mr Pleming a question to which you gave an answer to the effect that you spent no more than a small percentage of your

time on overseas territories matters in relation to BIOT. I appreciate you cannot be precise about that, but is it possible to put any sort of a number on the percentage that you spent on BIOT, in terms of your time?
A. 3/4 per cent.
LORD JUSTICE RICHARDS: 3 to 4 per cent?
A. 3 to 4 per cent, 5 would be maximum.
LORD JUSTICE RICHARDS: That is in the course of a year or something, because presumably things go in phases?
A. Obviously it's lumpy but, with the overall portfolio, as Director of the Overseas Territories, it's in that order.
LORD JUSTICE RICHARDS: Yes.
MR KOVATS: You were asked by Mr Pleming about reference to employment of Chagossians, and it was being put to you that employment of Chagossians means resettlement of Chagossians, and your evidence was that there was a distinction between the two.
Do you have any knowledge of whether there are persons employed on Ascension Island?
A. (Pause) Whether anybody is employed?
Q. Yes?
A. Yes, people are employed on Ascension Island.
Q. Is there a resident population on Ascension Island

analogous to the sort of resettlement that the claimant is seeking for the Chagos Islands?
A. No.
Q. Could I ask you to turn to core bundle number 1, please, Mr Roberts, tab 23. This, Mr Roberts, is your second witness statement. And exhibited to that, at exhibit CR2 and beginning on page 210, is a printout from FCONet, and you were asked questions about this by Mr Pleming. Could you just remind us all what FCONet is please?
A. It's the Foreign and Commonwealth Office internal website which contains all the guidance for how we should conduct our work and much else besides.
Q. You were referred, and this is page 211, to the section with the heading "Meetings", the heading about a quarter way down the page. And in that section there is D, "Recording decisions", and then there's a bullet point:
"There is no need to produce ...(Reading to the words)... notice of meetings if, as a result of your discussions, decisions are taken."
Now, as regards the meeting with the US on 12 May 2009, was that a meeting at which decisions were taken?
A. No, no decisions were taken.
Q. And I'm not sure whether this was put to you expressly

or not by Mr Pleming, but I'll put it to you expressly, if the UK side had not taken a note of that meeting on 12 May, would that have been contrary to the instructions, I'll call them, on FCONet?
A. No.
MR KOVATS: Thank you, Mr Roberts. I have no further questions.
LORD JUSTICE RICHARDS: Thank you.
Mr Roberts, finally you can be released. Thank you very much indeed for your patience in the matter.
(The witness withdrew)
LORD JUSTICE RICHARDS: With that we can resume at 10.00 tomorrow morning with Ms Yeadon.
(4.15 pm)
(The hearing was adjourned until the following day at 10.00 am)

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Annex 175

African Union Assembly of Heads of State and Government, 50th Anniversary Solemn Declaration, 26 May 2013, Addis Ababa

50th ANNIVERSARY SOLEMN DECLARATION

50th ANNIVERSARY SOLEMN DECLARATION

We, Heads of State and Government of the African Union assembled to celebrate the Golden Jubilee of the OAU/AU established in the city of Addis Ababa, Ethiopia on 25 May 1963,

Evoking the uniqueness of the history of Africa as the cradle of humanity and a centre of civilization, and dehumanized by slavery, deportation, dispossession, apartheid and colonialism as well as our struggles against these evils, which shaped our common destiny and enhanced our solidarity with peoples of African descent;

Recalling with pride, the historical role and efforts of the Founders of the Pan-African Movement and the nationalist movements, whose visions, wisdom, solidarity and commitment continue to inspire us;

Reaffirming our commitment to the ideals of Pan-Africanism and Africa's aspiration for greater unity, and paying tribute to the Founders of the Organization of African Unity (OAU) as well as the African peoples on the continent and in the Diaspora for their glorious and successful struggles against all forms of oppression, colonialism and apartheid;

Mindful that the OAU/AU have been relentlessly championing for the complete decolonization of the African continent and that one of the fundamental objectives is unconditional respect for the sovereignty and territorial integrity of each of its Member States;

Stressing our commitment to build a united and integrated Africa;

Guided by the vision of our Union and affirming our determination to "*build an integrated, prosperous and peaceful Africa, driven and managed by its own citizens and representing a dynamic force in the international arena*";

Determined to take full responsibility for the realisation of this vision;

Guided by the principles enshrined in the Constitutive Act of our Union and our Shared Values, in particular our commitment to ensure gender equality and a people centred approach in all our endeavours as well as respect for sovereignty and territorial integrity of our countries .

ACKNOWLEDGE THAT:

I. ***The Organisation of African Unity (OAU)*** overcame internal and external challenges, persevered in the quest for continental unity and solidarity; contributed actively to the liberation of Africa from colonialism and apartheid; provided a political and diplomatic platform to generations

of leaders on continental and international matters; and elaborated frameworks for Africa's development and integration agenda through programmes such as NEPAD and APRM.

II. ***The African Union (AU)*** carried forward our struggle for self-determination and drive for development and integration; formulated a clear vision for our Union; agreed that the ultimate goal of the Union is the construction of a united and integrated Africa; instituted the principle of non-indifference by authorizing the right of the Union to intervene in Member States in conformity with the Constitutive Act; and laid the groundwork for the entrenchment of the rule of law, democracy, respect for human rights, solidarity, promotion of gender equality and the empowerment of Women and Youth in Africa.

III. The implementation of the integration agenda; the involvement of people, including our Diaspora in the affairs of the Union; the quest for peace and security and preventing wars and genocide such as the 1994 Rwandan genocide; the alignment between our institutional framework and the vision of the Union; the fight against poverty; inequality and underdevelopment; and, assuring Africa's rightful place in the world, remain challenges.

WE HEREBY DECLARE:

A. On the African Identity and Renaissance

i) Our strong commitment to accelerate the African Renaissance by ensuring the integration of the principles of Pan Africanism in all our policies and initiatives;

ii) Our unflinching belief in our common destiny, our Shared Values and the affirmation of the African identity; the celebration of unity in diversity and the institution of the African citizenship;

iii) Our commitment to strengthen AU programmes and Member States institutions aimed at reviving our cultural identity, heritage, history and Shared values, as well as undertake, henceforth, to fly the AU flag and sing the AU anthem along with our national flags and anthems;

iv) Promote and harmonize the teaching of African history, values and Pan Africanism in all our schools and educational institutions as part of advancing our African identity and Renaissance;

v) Promote people to people engagements including Youth and civil society exchanges in order to strengthen Pan Africanism.

B. The struggle against colonialism and the right to self-determination of people still under colonial rule

i) The completion of the decolonization process in Africa; to protect the right to self-determination of African peoples still under colonial rule; solidarity with people of African descend and in the Diaspora in their struggles against racial discrimination; and resist all forms of influences contrary to the interests of the continent;

ii) The reaffirmation of our call to end expeditiously the unlawful occupation of the Chagos Archipelago, the Comorian Island of Mayotte and also reaffirm the right to self-determination of the people of Western Sahara, with a view to enable these countries and peoples, to effectively exercise sovereignty over their respective territories.

C. On the integration agenda

Our commitment to Africa's political, social and economic integration agenda, and in this regard, speed up the process of attaining the objectives of the African Economic Community and take steps towards the construction of a united and integrated Africa. Consolidating existing commitments and instruments, we undertake, in particular, to:

i) Speedily implement the Continental Free Trade Area; ensure free movement of goods, with focus on integrating local and regional markets as well as facilitate African citizenship to allow free movement of people through the gradual removal of visa requirements;

ii) Accelerate action on the ultimate establishment of a united and integrated Africa, through the implementation of our common continental governance, democracy and human rights frameworks. Move with speed towards the integration and merger of the Regional Economic Communities as the building blocks of the Union.

D. On the agenda for social and economic development

Our commitment to place the African people, in particular women, children and the youth, as well as persons with disabilities, at the centre of our endeavours and to eradicate poverty. In this regard, we undertake to:

i) Develop our human capital as our most important resource, through education and training, especially in science, technology and

innovation, and ensure that Africa takes its place and contributes to humanity, including in the field of space sciences and explorations;

ii) Eradicate disease, especially HIV/AIDS, Malaria and Tuberculosis, ensure that no African woman dies while giving life, address maternal, infant and child mortality as well as provide universal health care services to our citizens;

iii) Accelerate Africa's infrastructural development, to link African peoples, countries and economies; and help to drive social, cultural and economic development. In this regard, we commit to meet our strategic targets in transport, ICT, energy and other social infrastructure by committing national, regional and continental resources to this end;

iv) Create an enabling environment for the effective development of the African private sector through meaningful public-private sector dialogue at all levels to foster socially responsive business, good corporate governance and inclusive economic growth;

v) Take ownership of, use and develop, our natural endowments and resources, through value addition, as the basis for industrialization; promote intra-Africa trade and tourism, in order to foster economic integration, development, employment and inclusive growth to the benefit of the African people;

vi) Also take ownership, preserve, protect and use our oceanic spaces and resources, improve our maritime and transport industries to the benefit of the continent and its peoples, including by contributing to food security

vii) Preserve our arable land for current and future generations, develop our rural economies, our agricultural production and agro-processing to eradicate hunger and malnutrition, as well as achieve food security and self-sufficiency;

viii) Expand and develop urban infrastructure and develop planned approaches to rapid urbanization and the emergence of new cities;

ix) Make our development agenda responsive to the needs of our peoples, anchored on the preservation of our environment for current and future generations, including in the fight against desertification and mitigation of the effects of climate change, especially with regards to island states and land-locked countries.

E. On peace and security

Our determination to achieve the goal of a conflict-free Africa, to make peace a reality for all our people and to rid the continent of wars, civil conflicts, human rights violations, humanitarian disasters and violent conflicts, and to prevent genocide. We pledge not to bequeath the burden of conflicts to the next generation of Africans and undertake to end all wars in Africa by 2020. In this regard, we undertake to:

i) Address the root causes of conflicts including economic and social disparities; put an end to impunity by strengthening national and continental judicial institutions, and ensure accountability in line with our collective responsibility to the principle of non-indifference;

ii) Eradicate recurrent and address emerging sources of conflict including piracy, trafficking in narcotics and humans, all forms of extremism, armed rebellions, terrorism, transnational organized crime and new crimes such as cybercrime.

iii) Push forward the agenda of conflict prevention, peacemaking, peace support, national reconciliation and post-conflict reconstruction and development through the African Peace and Security Architecture; as well as, ensure enforcement of and compliance with peace agreements and build Africa's peace-keeping and enforcement capacities through the African Standby Force;

iv) Maintain a nuclear-free Africa and call for global nuclear disarmament, non-proliferation and peaceful uses of nuclear energy;

v) Ensure the effective implementation of agreements on landmines and the non-proliferation of small arms and light weapons;

vi) Address the plight of internally displaced persons and refugees and eliminate the root causes of this phenomenon by fully implementing continental and universal frameworks.

F. On democratic governance

Our determination to anchor our societies, governments and institutions on respect for the rule of law, human rights and dignity, popular participation, the management of diversity, as well as inclusion and democracy. In this regard, we undertake to:

i) Strengthen democratic governance including through decentralized systems, the rule of law and the capacities of our institutions to meet the aspirations of our people;

ii) Reiterate our rejection of unconstitutional change of government, including through any attempts to seize power by force but recognize the right of our people to peacefully express their will against oppressive systems;

iii) Promote integrity, fight corruption in the management of public affairs and promote leadership that is committed to the interests of the people;

iv) Foster the participation of our people through democratic elections and ensure accountability and transparency.

G. On Determining Africa's Destiny

Our determination to take responsibility for our destiny. We pledge to foster self-reliance and self-sufficiency. In this regard, we undertake to:

i) Take ownership of African issues and provide African solutions to African problems;

ii) Mobilize our domestic resources, on a predictable and sustainable basis to strengthen institutions and advance our continental agenda;

iii) Take all necessary measures, using our rich natural endowments and human resources, to transform Africa and make it a leading continent in the area of innovation and creativity;

H. Africa's place in the world

Our endeavour for Africa to take its rightful place in the political, security, economic, and social systems of global governance towards the realization of its Renaissance and establishing Africa as a leading continent. We undertake to:

i) Continue the global struggle against all forms of racism and discrimination, xenophobia and related intolerances;

ii) Act in solidarity with oppressed countries and peoples;

iii) Advance international cooperation that promotes and defends Africa's interests, is mutually beneficial and aligned to our Pan Africanist vision;

iv) Continue to speak with one voice and act collectively to promote our common interests and positions in the international arena;

v) Reiterate our commitment to Africa's active role in the globalization process and international forums including in Financial and Economic Institutions;

vi) Advocate for our common position for reform of the United Nations (UN) and other global institutions with particular reference to the UN Security Council, in order to correct the historical injustice with Africa as the only region without a permanent seat.

We pledge to articulate the above ideals and goals in our national development plans and in the development of the Continental Agenda 2063, through a people-driven process for the realization of our vision for an integrated, people-centred, prosperous Africa at peace with itself.

As Heads of State and Government, mindful of our responsibility and commitment, we pledge to act together with our Peoples and the African Diaspora to realize our vision of Pan Africanism and African Renaissance.

Adopted by the 21st Ordinary session of the Assembly of Heads of State and Government of the African Union, at Addis Ababa, on 26 May 2013.

Annex 176

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

DECLARATION ON THE REPORT OF THE PEACE AND SECURITY COUNCIL ON ITS ACTIVITIES AND THE STATE OF PEACE AND SECURITY IN AFRICA
Doc. Assembly/AU/5(XXI)

The Assembly,

Having reviewed the state of peace and security on the continent and the steps we need to take to hasten the attainment of our common objective of a conflict-free Africa, on the basis of the report of the Peace and Security Council on its activities and the state of peace and security in Africa;

Welcoming the significant progress made in the operationalization of the African Peace and Security Architecture (APSA), the adoption of a number of instruments on democracy, human rights and good governance, which represent a consolidated framework of norms and principles towards the structural prevention of conflicts, the advances in conflict resolution and peace building on the continent, as well as the partnerships built with relevant international stakeholders;

Noting, however, the challenges that continue to be encountered in the full operationalization of the APSA, including key components such as the African Standby Force (ASF), continued prevalence of conflict, insecurity and instability in some parts of the continent, with its attendant humanitarian consequences and socio-economic impact, as well as the resurgence of unconstitutional changes of Government, the frequent recourse to armed rebellion to further political claims, the threats posed by terrorism, hostage taking and the attendant payment of ransoms, illicit proliferation of arms, transnational organized crime, drug trafficking, piracy, and illicit exploitation of natural resources to fuel conflicts;

Noting *also* the need for increased funding from within the continent to assert Africa's ownership and leadership, as well as the challenges faced in building innovative and flexible partnership with the United Nations and other stakeholders;

Stressing that the 50th anniversary of the OAU/AU offers a unique opportunity to review progress made and challenges encountered, as well as to chart the way forward, and *reiterating,* in this respect, our determination to address decisively the scourge of conflict and violence on our continent, with the view to bequeath to the next generation of Africans a prosperous continent at peace with itself:

1. **RECOMMIT OURSELVES** to accelerate the full operationalization of the APSA, including refinement, where necessary, of existing provisions to facilitate their implementation. WE **CALL FOR** the strengthening of the relations between the AU and the Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolution (RECs/RMs), notably through the effective implementation of the relevant provisions of the PSC Protocol and the Memorandum of Understanding between the AU and the RECs/RMs, bearing in mind AU's primary responsibility in the maintenance of peace and security in

Africa. WE **ENDORSE** the establishment of the Pan-Wise network comprising the Panel of the Wise, similar structures within the RECs/RMs and all other African actors contributing to peace-making through preventive action and mediation, as agreed to during the second retreat of these organs held in Addis Ababa from 11 to 12 April 2013;

2. **UNDERTAKE** to make renewed efforts to address the root causes of conflicts in a holistic and systematic manner, including through implementing existing instruments in the areas of human rights, rule of law, democracy, elections and good governance, as well as programmes relating to cooperation, human development, youth and employment. In this respect, WE **CALL ON** all Member States that have not yet done so, to become parties to these instruments, by the end of 2013, and **REQUEST** the Commission to review thoroughly the implementation status of these instruments and programmes and to submit to the Assembly, by January 2014, concrete proposals on how to improve compliance;

3. **COMMIT OURSELVES**, within the framework of the African Solidary Initiative, to extend full support to those African countries emerging from conflict, to assist them to consolidate their hard-won peace and avoid relapse into violence. WE **LOOK FORWARD** to the convening of the planned African Solidary Conference (ASC), in Addis Ababa, in September 2013, and **COMMIT** to making significant pledges on that occasion;

4. **STRESS** the need for all Member States to extend full cooperation and support to the PSC, bearing in mind that, in carrying out its duties under the Protocol, the PSC acts on behalf of the entire membership of the AU;

5. **COMMIT** ourselves to increase substantially our contribution to the Peace Fund, for Africa truly to own the efforts to promote peace, security and stability on the continent. In this respect, we request the Commission to submit concrete proposals to the Assembly, in January 2014, including with respect to the statutory transfer from the AU regular budget to the Peace Fund. In the meantime, WE **ENCOURAGE** all Member States to make exceptional voluntary contributions to the Peace Fund on the occasion of the OAU Golden Jubilee, and **REQUEST** the Commission to report, by January 2014, to the Assembly on Member States response to this appeal;

6. **STRESS THE NEED** to build an innovative, flexible action-oriented and balanced partnership with the international partners, notably the United Nations, to ensure that Africa's concerns and positions are adequately taken into account by the Security Council when making decisions on matters of fundamental interest to Africa, **REITERATE** the terms of the communiqué issued by the PSC at its 307th meeting held on 9 January 2012, and **REQUEST** the PSC to convene an open session at Summit level, in order to review the partnership with the United Nations in light of the challenges encountered recently regarding the situation in Mali and other issues related to peace and security on the continent;

7. **CALL ON** the African civil society to continue to play its positive role in promoting peace, security and stability as called for by the PSC Protocol and **REQUEST** the Commission and the PSC to take all necessary steps to enhance interaction with civil society;

8. **WELCOME** the progress made in the relations between Sudan and South Sudan, with the signing of the Implementation Matrix for the Agreements signed of 27 September 2012 and **CALL FOR** a transparent inquiry into the killing of the paramount Chief of the Ngok Dinga Community in Abyei, as well as the strengthening and acceleration of the process of resolving the Abyei issue; in Somalia, with the consolidation of the security and political gains recorded over the past few years; the Great Lakes Region, with the signing of Peace, Security and Cooperation Framework; and in Mali, with the liberation of the northern part of the country and on-going efforts for the holding of elections. WE **CALL ON** all concerned stakeholders to spare no efforts in consolidating these achievements, and addressing the challenges at hand, in line with the relevant PSC communiqués. WE also **WELCOME** the progress made in peace building and post-conflict recovery in Burundi, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Liberia and Sierra Leone, **ENCOURAGE** the countries concerned to pursue their efforts and **CALL ON** fellow African countries and the rest of the international community to continue assisting them in their efforts;

9. **REITERATE** the AU's concern at the continued challenges in the peace processes between Eritrea and Ethiopia and the relations between Eritrea and Djibouti, and **REQUEST** the Chairperson of the Commission to take appropriate steps to facilitate progress in these situations, in line with the powers entrusted to her by the PSC Protocol and earlier relevant decisions of the Assembly, and to report to the PSC, no later than October 2013, on the steps taken in this regard. WE **ALSO REITERATE OUR CONCERN** at the continued impasse in the conflict in Western Sahara, and **CALL FOR** renewed efforts based on relevant OAU/AU and UN resolutions, in order to overcome this impasse;

10. **ALSO EXPRESS CONCERN** at the prevailing situation in Madagascar and fully support the PSC and SADC decisions on the issue of candidatures to the forthcoming presidential elections. WE **CONDEMN** the illegal seizure of power in Central African Republic and the serious violations of human rights committed by the Seleka rebel group and in this regard, **COMMEND** the efforts of the Economic Community of Central African States (ECCAS), **ENDORSE** the PSC decisions on the matter and **CALL FOR** renewed efforts to restore security and ensure the return to constitutional order, bearing in mind the relevant PSC decisions and conclusions of the inaugural meeting of the International Contact Group on CAR (ICG-CAR). WE **STRESS THE NEED** for the early return to constitutional order in Guinea Bissau, noting with satisfaction ECOWAS, AU, CPLP, EU and UN coordinated efforts;

11. **REITERATE** our support to the sovereignty of the Union of the Comoros over the island of Mayotte, as well as the sovereignty of the Republic of Mauritius over the Chagos Archipelago;

12. **REQUEST** the PSC to actively keep under review the implementation of the Declaration and Plan of Action adopted by the Special Session on the Consideration and Resolution of Conflicts in Africa, held in August 2009, at its Summit meeting referred to in paragraph 6 above;

13. **PLEDGE OUR FULL COMMITMENT** to the effective implementation of this Declaration and to adopting new measures, as and of necessary, so as to open a new chapter in our collective action in favor of peace, security, stability and shared prosperity throughout Africa and the rest of the world.

Annex 177

National Report submitted by the Republic of Mauritius in view of the Third International Conference on Small Island Developing States, July 2013

Republic of Mauritius

THIRD INTERNATIONAL CONFERENCE ON SMALL ISLAND DEVELOPING STATES

National Report of the Republic of Mauritius

UNDESA

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List of Abbreviations

BPO	Business Process Outsourcing
BPoA	Barbados Programme of Action
CEB	Central Electricity Board
CERT	Computer Emergency Response Team
CFL	Compact Fluorescent Lamp
DAI	Digital Access Index
EE	Energy Efficiency
EEMO	Energy Efficiency Management Office
EEZ	Exclusive Economic Zone
ESD	Education for Sustainable Development
ESTP	Economic and Social Transformation Plan
FIT	Feed In Tariff
GEF	Global Environment Facility
ICT	Information and Communication Technology
IOC	Indian Ocean Commission
LED	Light Emitting Diode
LTES	Long Term Energy Strategy
MID	Maurice Ile Durable (Mauritius Sustainable Island)
MSI	Mauritius Strategy for Implementation
NDS	National Development Strategy
NTM	Non-Tariff Measure
PBB	Programme Based Budget
RE	Renewable Energy
S&T	Science and Technology
SCP	Sustainable Consumption and Production
SDGs	Sustainable Development Goals
SIDS	Small Island Developing States
SIPP	Small Independent Power Producers
SSDGS	Small Scale Distribution Generation System
TNA	Technology Needs Assessment
UNDESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
URA	Utility Regulatory Authority

Message by the Hon. Minister of Foreign Affairs, Regional Integration and International Trade

The Government of the Republic of Mauritius is pleased to present this report on the occasion of the Third Global Conference of Small Island Developing States to be held in Samoa in 2014.

As an essential preparatory exercise for the Conference, the Republic of Mauritius has itself undertaken a review of its implementation of the Barbados Plan of Action (BPoA) for the sustainable development of Small Island Developing States adopted at the Global Conference on the Sustainable Development of Small Island Developing States in 1994 and of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States adopted at the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States in 2005. The national report produced as a result of this review highlights the successes and constraints, the new and emerging challenges, the best practices, the way forward and the vision of the future. This report underscores, in particular, the sustained efforts made by the Republic of Mauritius to build resilience to adapt to unfavourable regional and international conjectures as well as to the negative effects of climate change.

Small Island Developing States remain a special case for sustainable development and continue to face unique and increasing challenges including the negative effects of climate change and a unique vulnerability of natural disasters but also to the degradation of key eco systems. They face built in constraints such as small economies, remoteness and limited fresh water, land and other natural resources. Waste disposal is a growing problem and energy costs are high meaning that more must be done to promote renewable energy. Barely above sea level and remote from world markets, many Small Island Developing States occupy the margins of our global community and for some their very existence is in jeopardy. Average vulnerability of Small Island Developing States has worsened over the last decade because of their high exposure to external shocks such the fuel, food and financial crises – events of a truly global character – combined with lower coping capacity as well as inadequate international support.

As a Small Island Developing State with an export oriented economy, the Republic of Mauritius is both economically and ecologically, fragile and vulnerable. It is therefore essential to frame and implement the right policies and create appropriate conditions and environment so as not only to meet the challenges but also to take advantage of the opportunities offered by this new paradigm of globalization. All this is perfectly in line with the vision of the Government to make the Republic of Mauritius a Modern and Sustainable Society through the *Maurice Ile Durable* Vision. The Government of the Republic Mauritius, thus, is fully committed to integrating Sustainable Development concepts and norms into its overall projects policies.

We look forward to the outcome of the 2014 Samoa Global Conference on Small Island Developing States to guide us in our efforts towards meeting new and emerging challenges of sustainable development. Finally, I would like to express my sincere appreciation to all those who have contributed to the preparation of this report.

Dr the Honourable Arvin Boolell G.O.S.K,
Minister of Foreign Affairs, Regional Integration and International Trade

Message by the Hon. Minister of Environment & Sustainable Development

The 3rd Global SIDS Conference will be held in Samoa from 1 to 4 September 2014. The conference will undertake a comprehensive review of the implementation of the Barbados Programme of Action (BPoA) for the sustainable development of SIDS and the Mauritius Strategy (MSI) for further implementation of the BPoA. As an essential preparatory exercise, Mauritius has undertaken, in advance of the conference, a review of the implementation of the BPoA and the MSI with a view to proposing concise, action oriented and pragmatic recommendations for the forthcoming Conference to enhance the resilience of SIDS. The preparation of the National Report has adopted an all-inclusive and broad based approach by involving a range of stakeholders for its preparation.

This National Report takes us through the achievements of the Republic of Mauritius in the quest for a more resilient society. It highlights the resources and investment injected in sustainable development programmes and projects and also the constraints that sometimes stall efforts towards building resilience. Constraints that are heralding our efforts towards sustainable development are essentially related to finance, infrastructural and human capacity, technology, smallness and remoteness of our markets.

Taking these constraints into consideration, the report presents some new and emerging challenges. Those are cross cutting in nature and range from water resources management, food security and global economic crises to migration and development. These constraints and new challenges should however, not dampen down our motivation and drive to seek opportunities in this ever dynamic world.

This is why the report has made pragmatic recommendations for further action as we aim to establish a new agenda for the sustainable development of SIDS. We need to move ahead keeping in mind the immense potential already available among all SIDS and give SIDS/SIDS partnerships an opportunity to flourish. In so doing, we have to be particularly careful in managing our fragile ecosystems and natural resources. We need to continuously table the adverse effects of climate change on our economies and people. We are ready to turn challenges into opportunities and for SIDS; the Ocean Economy is an opportunity that has to be tapped for our future development. We have also pointed out that for an action plan to be successful, it needs to be properly monitored. The setting up of the right institutional framework at national, regional and international levels will help us measure success and take timely action to address hurdles on the way.

Solidarity, collaboration and cooperation among us SIDS will take us a long way towards our destination. We also expect the international community to commit themselves with more tangible support for an effective outcome of the 2014 Samoa meeting.

Devanand Viransawmy, GOSK
Minister of Environment and Sustainable Development

The Republic of Mauritius

The Republic of Mauritius comprises a group of islands in the South West Indian Ocean, consisting of the main island Mauritius and the outer islands of Rodrigues, Agalega, Saint Brandon, Tromelin and the Chagos Archipelago. The total land area of the Republic of Mauritius is 2040 km^2 and the country has jurisdiction over a large Exclusive Economic Zone of approximately 2.3 million km^2 with significant potential for the development of a modern and prosperous marine and fisheries-based sustainable industry. The population, estimated at 1.3 million, is composed of several ethnicities, mostly people of Indian, African, Chinese and European descent. Most Mauritians are multilingual and speak and write in English, French, Creole and several Asian languages.

The Republic of Mauritius is a democracy with a Government elected every five years. The 2012 Mo Ibrahim Index of African Governance ranked Mauritius first in good governance. According to the 2012 Democracy Index compiled by the Economist Intelligence Unit and which measures the state of democracy in 167 countries, Mauritius ranks 18th worldwide.

Mauritius has a well-established welfare system. Free health care services and education to the population have contributed significantly to the economic and social advancement of the country. Support to inclusive development, gender equality and women empowerment are being addressed through the development of strategies, action plans and activities geared to meet the social targets set by the Government. To facilitate social integration and empowerment of vulnerable groups, a Ministry of Social Integration and Economic Empowerment has been set up in 2010.

Significant structural changes have been brought to ensure that Mauritius transforms itself from a sugar, manufacturing, tourism economy to a high-tech, innovative financial and business services hub. Policy and institutional reforms programmes have been articulated to enhance competitiveness; consolidate fiscal performance and improve public sector efficiency; improve the business climate and widen the circle of opportunity through participation, social inclusion and sustainability. The adoption of the “Maurice Ile Durable” framework and the Economic and Social Transformation Plan are the new development paradigm for the Republic of Mauritius as they strive to promote sustainable development and transform itself into a middle-income country.

Section I: INTRODUCTION

Sustainable development emphasises a holistic, equitable and far-sighted approach to decision-making at all levels. It rests on integration and a balanced consideration of social, economic and environmental goals and objectives in both public and private decision-making.

This concept of sustainability is very important in Small Island Developing States (SIDS) and this was first acknowledged at the Earth Summit in 1992. The vulnerabilities of SIDS arise from a number of physical, socio-economic and environmental factors. SIDS small size, limited resources, geographical dispersion and isolation from markets, place them at a disadvantage economically and prevent economies of scale. For instance, due to the small size of their economies, SIDS are highly dependent on trade but lack the factors that are decisive for competitiveness. Similarly, international macroeconomic shocks tend to have higher relative impacts on SIDS small economies. The combination of small size and remoteness leads to high production and trade costs, high levels of economic specialisation and exposure to commodity price volatility. Furthermore, in SIDS, the following natural resource base: energy, water, mineral and agricultural resources are limited and resource extraction tends quickly to meet the carrying capacities of the small islands. The latter also face unique threats related to global environmental issues, mainly climate change, biodiversity loss, waste management, pollution, freshwater scarcity, and acidification of the oceans.

As a SIDS, much progress has been achieved in Mauritius due to benefits derived from the Welfare State, namely: free access to education from pre-primary to university levels, transport to students and the elderly and health services to all and also from bilateral and multilateral trading agreements, the skilled work force, entrepreneurship, a stable democratic government and peace. However, despite its performance, the country is now facing the brunt of a number of global challenges, namely, the global economic, financial, energy and food security crises. The impacts of climate change, sea level rise, natural disasters and biodiversity loss are also having their toll on progress achieved so far.

Third International Conference on Small Island Developing States

The 3rd International Conference on SIDS to be held from 1 - 4 September 2014 in Apia, Samoa, will seek a renewed political commitment to address the special needs and vulnerabilities of SIDS by focusing on practical and pragmatic actions. Building on assessments of the Barbados Programme of Action (BPoA) and the Mauritius Strategy for Implementation (MSI), the Conference will aim to identify new and emerging challenges and opportunities for sustainable development of those States, particularly through the strengthening of partnerships between small islands and the international community.

In addition, the Conference will provide an opportunity for the elaboration of sustainable development issues of concern to SIDS in the process of charting the Post-2015 Development Agenda, including the sustainable development goals. Towards this end, the Conference is intending to serve as a platform for the international community to strengthen existing partnerships and voluntary commitments, as well as act as a launch pad of new initiatives, all with the common objective of advancing the implementation of the BPoA/MSI.

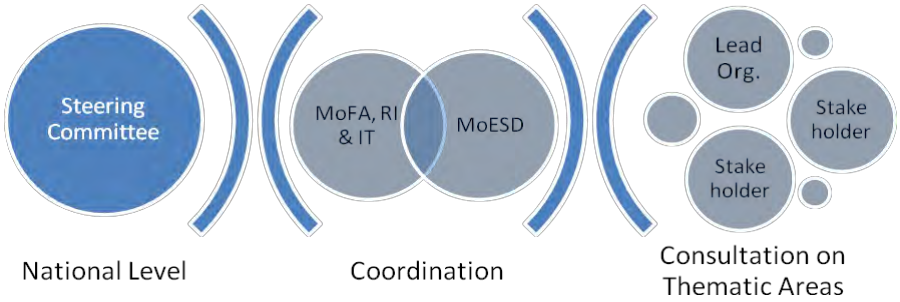
National Preparatory Process

The effectiveness of the Samoa SIDS Conference will depend first and foremost on national level preparations that will feed into the regional, interregional and global processes. National preparations for the 3rd International SIDS Conference are currently underway. The preparatory process has begun with the preparation of a National Assessment Report. The results of the national consultations will in turn feed into the discussions at regional and inter-regional meetings, leading up to the conference itself.

National Steering Committee

Broad based consultation, an inclusive approach and ownership are at the heart of the national preparatory process. To this effect, the Ministries of Environment & Sustainable Development and Foreign Affairs, Regional Integration and International Trade are jointly chairing a multi-stakeholder Steering Committee comprising Government, the private sector and civil society representatives[1]. The Committee is the platform for the 2014 SIDS meeting and mandated to among others to:

a) Provide support and guidance for the preparation of the National Report;
b) Provide guidance on any other matters and activities related to the conference until the Samoa Meeting in 2014; and
c) Follow up on the 2014 Samoa outcome.



The National Report – The Methodology for the consultative process

The national report is based on both the responses to the guiding questions[i] prepared by the United Nations to steer discussions at the national level and on a bottom-up, inclusive consultative process. This report needs to be read in conjunction with the following documents which provide detailed background information on the actions already undertaken by the Government of Mauritius to implement the BPoA and the MSI and the challenges thereof:

- State of the Environment Report prepared for 1992 UN Earth Summit;
- Report of the International meeting to review the Implementation of the Programme of Action for the sustainable Development of small Islands Developing States 1994;
- Mauritius Staking Out the Future - National Report for Mauritius International Meeting 2005;
- The Mauritius Strategy for Implementation National Assessment Report of 2010;
- Mauritius Environment Outlook Report 2011;
- National Synthesis report 2012 for the RIO+20 Conference
- Mauritius Report on the Post 2015 UN Development Agenda – The Future we want, and
- Maurice Ile Durable report, June 2013

[1] *The list of the members of the National Steering Committee is at Annex* 1

A. Summary of the consultations with the 18 thematic focus groups

A series of consultations were undertaken with key stakeholders to ensure cross-sectoral participation and diversity of views. 18 thematic focus groups were set up on the MSI thematic areas. A lead Ministry was identified with regard to each of the 18 thematic themes of the BPoA and MSI:

1. Climate Change & Sea Level Rise
2. Natural & Environmental Disasters
3. Management of Waste
4. Coastal & Marine Resources
5. Freshwater Resources
6. Land Resources
7. Energy Resources
8. Tourism Resources
9. Biodiversity Resources
10. Transport & Communication
11. Science & Technology
12. Trade: Globalization & Trade Liberalization
13. Sustainable Capacity Development & Education For Sustainable Development
14. Sustainable Production & Consumption
15. National & Regional Enabling Environments
16. Health
17. Knowledge Management & Information For Decision-Making
18. Culture

Each focus thematic group was composed of relevant stakeholders from both public and private sector and most of these groups met on at least two occasions[2]. Each group considered the 8 guiding questions and responded accordingly. The main recommendations from the group reports are given under the relevant sections II, III, IV and V of this report.

B. National Consultative Workshops

Three national workshops were held. The first national workshop[3] was held on 21 May 2013 and saw the participation of representatives from various sub-sections of society such as the youth, women, NGOs, civil society, trade unionists and local authorities. A second workshop[4] was held on 11 June 2013 in Rodrigues to ensure that the specific concerns of that particular territory of Mauritius were fed into the process. The Mauritius Private sector was also briefed on the process and their views were sought on 11 June 2013. Finally, a national validation workshop[5] was held to present the report, and to seek its endorsement from the representatives of all stakeholders who participated in the focus group meetings and consultations.

1) Summary of the National Dialogue with Major Groups

- Need for better adapted education, employment and a better quality of life, including through the promotion of family values, protection of traditions and cultures;
- Need for increased transparency, equity, security and good governance and in this respect better enforcement of laws and regulations at national level;
- Need for more education/information on sustainable development since some of the participants had limited knowledge of the existence and implementation of Agenda 21, BPoA, MSI, MDGs and the Post 2015 UN Development Agenda process;
- Need for more information on climate change, Disaster Risk Reduction and its impacts cross-sectorally;
- Concern over unpredictable changes in weather conditions and its consequences and the need for mitigative measures to be taken as well as contingency plans to be prepared;

[2] *Please see annex 2 for consolidated paper on the themes identified in the Mauritius Strategy.*
[3] *Please see annex 3 for agenda and list of participants*
[4] *Please see annex 4 for agenda and list of participants*
[5] *Please see annex 5 for agenda and list of participants*

- Concern over waste management, protection of water resources, and the lack of proper urbanisation controls;
- Concern with regard to the ageing population and the economic and social effects thereof;
- Concern over the lack of recognition of the important role NGOs play in society and their lack of human and financial support

2) Summary of consultations held in Rodrigues

- Water Resources Management remains their main priority. Water harnessing, storage and distribution is the main island challenge;
- Optimal use of land through judicious planning and zoning is considered essential for sustainable development. Incompatible development has been responsible for severe erosion and coastal siltation and conflictual co-habitation;
- A management strategy and action plan for optimal protection of coastal areas from sea level rise, erosion, inundation etc. (Rodrigues was severely impacted by Tsunami in 2004) and exploitation of marine resources should be prepared and implemented;
- Energy is produced from imported fossil fuel which is expensive and there are concerns over the regularity of supply during cyclonic seasons. There is a need to develop optimally renewable energy from wind and sun. They need affordable resources and technology;
- Waste characterisation has shown new challenges as there an increasing amount of E-waste (batteries, aluminium cans, bottles and plastic waste) entering the waste stream. Lack of capacity and scale of economies are not conducive to recycling and therefore poses serious problem of disposal; and
- The meeting also recognised and recommended that the concept of Education for Sustainable Development should be further strengthened in the formal education curriculum from primary to tertiary levels. Other issues discussed were in relation to the creation of employment, transparency in decision making and governance, security, enhancing equity for all and new and additional funding to attend to the above.

3) Summary of the dialogue with the Private Sector

- The private sector renewed its commitment to partner with the Government of Mauritius in its initiatives to meet the challenges of implementing the BPOA and MSI;
- The Private sector remains concerned over the poor coordination at the national/regional levels with regard to a holistic implementation of the BPOA and MSI;
- The private sector is keen to work towards sustainable consumption and production as long as this does not negatively impact the competitiveness of Mauritian products which already suffer from diseconomies of scale;
- In this respect, in order to avoid duplicative processes, the private sector would like the national consultative process to include the ideas/views already expressed/submitted through their participation in the 6 working groups working on finalising the national action plan to implement the MID initiative over the long term;
- The private sector has begun work on an energy efficiency initiative whereby it is working to seek energy conservation in production;
- The private sector has also embarked on a project to map the carbon footprint of the main industries with a view to reviewing and reducing same.
- The other issues raised were: protection and coastal and marine resources, especially in relation to the fisheries and aquaculture sectors and the need for SIDS to be provided with special trade preferences in order to increase their competitiveness given their remote geographical location from major exporting markets.

4) Summary of issues raised during the National validation Workshop

During the National Validation workshop, six sub-groups were set up to reflect on the six chosen themes and their recommendations were as follows:

A. Climate Change Group

Adaptation would be focused on the following three sectors: health sector; coastal zone sector and infrastructure, in this respect, there would be a need to prepare national plan of action for implementation.

B. Ocean Economy & Development of a land based Oceanic Industry

- *Objective*: To reduce use and reliance on fossil fuel
- *Way and means*: Exploitation of deep sea water for cooling systems, generation of power etc.
- *Benefit*: Provides sustainably; Integrates MDG principle; Fits in national MID policies
- *Needed:* Funding and transfer of technologies

C. Energy:

Focus should be on having technical and financial assistance with regard to energy auditing, energy efficiency and energy management.

D. Waste Management:

To promote and enhance waste segregation at source for eventual recycling and re-use

E. Food Security:

Make Agriculture more resilient; Involve vulnerable groups in the production chain; provide support to small planters to adapt to new technologies; prime arable land should be protected and used only for agricultural purposes; SIDS to benefit from an Insurance Scheme operated internationally to cater for food shortages resulting from natural disasters.

F. Culture:

Enhancement of cultural Values through education and adoption of the Gross National Happiness Index

Section II:
PROGRESS IN BPOA & MSI IMPLEMENTATION

The sustainable development agenda of small islands states like Mauritius has been largely shaped by the BPoA and MSI. Since its adoption in 1994, the BPoA has been to a great extent implemented in Mauritius. As regards the MSI, since 2005, Mauritius has been very committed in implementing this strategy at the domestic level as well as in advocating SIDS issues at regional, multilateral and international levels. Overall, there has been substantial progress in areas such as biodiversity protection and the establishment of terrestrial, coastal and marine protected areas. Political commitment to advance sustainable development has also been observed with the adoption of the new long term vision "Maurice Ile Durable".

National Sustainable Development Frameworks

Mauritius embraced sustainable development as the guiding paradigm to promote national development in the early 90s, with the adoption of the Integrated Management Approach to Sustainable Environmental Management under the in the Environment Protection Act of 1991. With environmental protection at its heart, this approach also had cross-cutting bearings across a range of sectoral concerns, development patterns and in decision making. It promoted broad-based administrative and consultative mechanisms and ensure that all stakeholders were party to decision-making in a structured manner.

In 1997, "Vision 2020: The National Long- Term Perspective Study" was adopted as the core development strategy to promote sustainable development in the country. The Vision 2020 set out the scenario for promoting development based on gains in agricultural efficiency, tourism, industrial production and development of financial and value-added services. As a result, the sugar and textile sectors were restructured; an offshore financial sector was established; the telecommunications system was strengthened and liberalised; new incentive schemes were offered to IT and pioneer firms; a Cyber Park was established, state secondary school capacity was doubled; port facilities were modernised, and a Freeport was established, among others.

In the face of looming global challenges like the triple economic-food-energy crises, in 2008 Government adopted "Maurice Ile Durable" as the new sustainable vision to guide national development. Maurice Ile Durable (MID) can be considered as the ***ground breaking, unique, innovative milestone project leading to a reinforced integrated, participatory approach to sustainable development and which seeks to include each and every citizen of Mauritius***. The MID Policy, Strategy and Action Plan has been developed in a broad-based participatory approach and focuses on 5 sectors, commonly referred to as the 5 Es: Energy; Environment; Employment and Economy; Education; and Equity. The MID goals are as follows:

Energy sector is to ensure that the Republic of Mauritius is an efficient user of energy, with its economy decoupled from fossil fuel. The main targets are to achieve the national target of 35% renewable energy by 2025; and reduce energy consumption in non-residential and public sector buildings by 10% by 2020.

Environment sector is to ensure sound environmental management and sustainability of our ecosystem services. Goals are to meet the environmental sustainability targets of the Millennium Development Goals; and reduce the ecological footprint to be in the upper quartile of performance of similar income nations, by 2020.

Employment/Economy sector is to green the economy with decent jobs, offering long term career prospects. The targets are to increase the percentage of green jobs, from 6.3% in 2010, to 10% by 2020 and maintain or improve position in the World Economic Forum's International Competitiveness Index.

Education sector is to have an education system that promotes the holistic development of all citizens. The goals are to achieve 100% MID literacy by 2020 and be an internationally recognised knowledge hub for sustainable development in the region by 2020.

Equity is to ensure that all citizens are able to contribute to the Republic's continuing growth and share its combined wealth. Specific goals are to improve the position of the Republic of Mauritius in the World Poverty Index and improve current status in the Gini coefficient of income inequality.

Policies and Strategies:

The policy framework of Mauritius is anchored in the concept of sustainable development and incorporates the relevant recommendations of the major international conferences, since the 1992 Rio Earth Summit. In this context, various sectoral policies and strategies have been developed and are being implemented across various thematic areas such as: energy, coastal zone management, land, biodiversity, forests, wastewater, solid waste, and tourism among others. To report on progress achieved in BPoA and MSI implementation, the following cluster has been used:

ENVIRONMENT	EDUCATION	TRADE AND ECONOMY	HEALTH	TRANSPORT & COMMUNICATION
✓ Climate change and sea level rise ✓ Natural & environmental disasters ✓ Management of wastes ✓ Coastal & marine resources ✓ Freshwater resources ✓ Land resources ✓ Biodiversity resources ✓ Sustainable production & consumption	✓ Sustainable capacity development & education for sustainable development ✓ Science & technology ✓ Knowledge management & information for decision-making ✓ Culture	✓ Energy resources ✓ Tourism resources ✓ Trade: globalization & trade liberalization ✓ National & regional enabling environments	✓ Health	✓ Transportation & communication

1) Climate Change

Fully aware of the possible impacts of climate change on its economy, citizens and their livelihoods, Government of the Republic of Mauritius has made climate change adaptation and mitigation a national priority. This is reflected in the Maurice Ile Durable programme as well as the Government Programme 2010-2015. In this endeavour, Government has adopted a multi-pronged approach to address impacts of climate change and enhance the resilience of Mauritius. To that effect, a climate

change mitigation and adaptation framework has been developed. Several priority sectors like disaster risk reduction and management, renewable energy, water, coastal zones, fisheries, tourism, public infrastructure, health and agriculture have been targeted and actions are being taken at different levels ranging from policy and legislative review, application of long term dynamic tools, institutional strengthening, infrastructural works, promotion of research and development, awareness raising, education and training. A Technology Needs Assessment (TNA) has also been undertaken to define a set of clean technologies which are best suited for an enhanced climate change mitigation and adaptation approach. The outcome of this study will help mobilise international funding.

2) Disaster Risks Reduction and Management

In order to make the country resilient to the impacts of extreme events and climate change, a Disaster Risk Reduction and Management project was undertaken. Climate risk analysis, comprising comprehensive climate modelling studies has been conducted for inland flooding, landslides and coastal inundation. National Risk Profiles (Risks and Hazards Maps), Strategy Framework and Action Plan for disaster risk management have been developed under this project. These will contribute to designing robust disaster risk policies, management practices and enhance the country's preparedness in the face of disasters.

3) Management of Waste

A Solid Waste Management Strategy (2011 - 2015) was adopted in 2011 with the overall policy objective of reducing, reusing and recycling waste. Moreover, a number of actions are being taken to reduce the volume of wastes in Mauritius. For example, of the 420,000 tons of wastes being generated annually, about 63,000 tons are composted at the newly established composting plant. It is expected that by 2014, the capacity of the composting plant would be doubled, thus implying that a total amount of 126,000 tons of waste would be diverted from the landfill annually. Government has also embarked on a range of projects since the mid-term review to assess Mauritius Strategy Implementation. These include: Recycling of e-wastes from Government bodies; drafting of a regulation for the registration of recyclers; feasibility Study for the setting up and operation of recycling facilities for used tyres and Compact Fluorescent lamps and feasibility on Anaerobic Digestion for selected wastes such as: food, market and farming waste

4) Coastal and Marine Resources

The regulation of large scale development in the coastal zone is undertaken through the Environment Impact Assessment/Preliminary Environment Report mechanism as well as the Building and Land Use Permit requirements, which take into consideration the provisions of the Planning Policy Guidelines, Outline Schemes on setbacks, plot coverage and development density of coastal development. An Integrated Coastal Zone Management Framework for the Republic of Mauritius was adopted in 2010 and is presently under implementation to ensure effective management of the coastal zone. Coastal protection works, beach re-profiling and other restoration works are being taken to abate the impacts of erosion. Coral reef ecosystem monitoring and lagoonal water quality monitoring are undertaken at various sites across the island.

During the past 20 years, Mauritius has progressively established a system of marine protected areas to include fishing reserves, marine parks and marine reserves in the waters around Mauritius and Rodrigues. This has been done with a view to manage, conserve marine resources, ecosystems, natural habitats and species biodiversity and to enhance fish productivity. The Republic of Mauritius has, so far, proclaimed six Fishing Reserves and two Marine Parks in Mauritius and four marine reserves, one Marine Park and three fisheries reserved areas in Rodrigues. A National Plan of Action to prevent, deter and eliminate Illegal, Unregulated and Unreported, Fishing for Mauritius

is being implemented. An Aquaculture Master Plan was prepared to develop marine and inland aquaculture.

5) Freshwater resources

A Master Plan for "*Development of the Water Resources in Mauritius*" was prepared in 2012 with ultimate objective to satisfy the water demand in the different supply zones for the various sectors of the economy by ensuring continuous supply over the island even during the dry season. According to the Master Plan, the main challenges of the water sector are to identify additional water resources mobilisation options; review the existing legislative framework governing the water resources sector; assess the existing water rights system and present proposals for its rationalisation; and review the institutional set-up governing the water resources sector. In addition to the above, the key long-term national development goals for the water sector comprise of mobilisation of additional water resources through rehabilitation of existing dams and water infrastructures, water management through the use of treated wastewater for irrigation purposes, public water conservation campaigns and reduction of non-revenue water.

6) Land resources

In the Republic of Mauritius, the National Development Strategy (NDS) provides the basis for land use planning. The policies and proposals of the NDS have been successfully translated at the local level through the preparation and approval of local development plans for both Urban and rural areas. A series of Planning Policy Guidance have been prepared to assist developers, local bodies and the general public in complying with principles of good design, appropriate siting and location of activities.

7) Biodiversity resources

To ensure that biodiversity is managed in a sustainable manner, a number of strategies are under implementation. These include the National Biodiversity Strategy and Action Plan (2006 – 2015), National Invasive Alien Species Strategy and Action Plan (2010 – 2019), National Forest Policy 2006, and the Islet National Park Strategic Plan (2004) for 16 offshore islets and a management plan for the shallow water demersal fish species of the Saya de Malha and the Nazareth banks.

Furthermore, in line with its international commitments, Mauritius ratified the Nagoya Protocol in 2013. Mauritius has also been working in close collaboration with the international community and has received funding and technical assistance in the preparation of policy and projects such as National Forest Policy, Sustainable Land Management Project, Forest Land Information System and ongoing NAP alignment as well as preparation of the Management Plans for the inland nature reserves. Moreover, Government is also implementing the Protected Areas Network project to manage the protected areas in collaboration with the private land owners.

To tackle food security, the following plans are also being implemented: Multiannual Adaptation Strategy – Sugar sector Action plan (2006 – 2015); Food Security Plan (2008 – 2013); Blueprint for a diversified Agri-Food Strategy for Mauritius (2008 – 2015) and the Mauritius Food Security Fund Strategic Plan (2013 – 2015). The Plant Genetic Resources Unit at the Agricultural Services of the Ministry of Agro-Industry and Food Security is also conserving plant genetic resources through in situ and ex situ agro-biodiversity collections. A food security Fund of USD 33 million has been set up.

8) Sustainable consumption and production

Mauritius was the first country in Africa to develop its National Programme on Sustainable Consumption and Production (SCP), under the guidance of UNEP to implement the 10-Year

Framework of Programmes of the Marrakech Process. Adopted in 2008, the National Programme on SCP aspires to decouple economic growth from use of natural resources, bring a change in consumption patterns, promote technological shifts and encourage the adoption of more sustainable lifestyles.

The national programme focuses on 5 priority areas, namely: Resource efficiency in energy, water and sustainable buildings and constructions; Education and communication for sustainable lifestyles; Waste management; Sustainable public procurement, and Market opportunities for sustainable products. To date, 13 projects have successfully been implemented and include among others the development of Minimum Energy Performance Standards for key household appliances, capacity building of Energy Audit providers, Green Building Rating system with Integrated Guidelines to promote sustainable buildings and an Action plan for Green Public Procurement.

9) Sustainable capacity development & education for sustainable development

A range of programmes being offered for teachers at various levels including Special education needs, remedial education, entrepreneurship education. Measures are being taken to ensure equal opportunity, gender equity and provision of appropriate education to bring about appropriate behavioural change among learners (e.g. through ESD related projects). Ongoing capacity building sessions focus on a range of ESD related themes such as HIV and AIDS, Climate change, Disaster Risk reduction and on Education, Communication and Sustainable Lifestyles. At tertiary level, Sustainable Development is being mainstreamed in a range of undergraduate and post graduate programmes.

10) Science & Technology

Science and Technology (S&T) has been mainstreamed in all sectors of the economy. In the Education sector, ICT facilities have been improved in all schools. Government has set up a Ministry, namely the Ministry of Tertiary Education, Science Research and Technology, which has taken a number of initiatives to boost Research in Science and Technology. However, broad-band speed needs to be increased with installation of fibre optics.

Mobile telephony and access to Internet facilities have grown exponentially and has facilitated communication to the world. The Digital Access Index (DAI) for Mauritius was 0.5 in 2011 as compared to Sweden, the leader, which was 0.85. The percentage subscription to Mobile cellular has increased from 14% in 2000 to 92% in 2010. Usage of technology in the Mauritian households as well as offices has also improved in line with international trends. To ensure proper implementation of priority areas of the country, better collaboration between research institutions and public bodies, the Government of the Republic of Mauritius has set up five National Research Groups to address priority issues.

11) Knowledge management & information for decision-making

Government is implementing the National ICT Strategic Plan 2011 - 2014 in order to make the ICT/ BPO Sector as one of the main pillars of the economy and develop Mauritius into a Knowledge Hub. In this context, an ICT Skills Development Programme and the ICT Academy are being implemented. Furthermore, coordinated efforts towards Cyber Security threats and incidents are being undertaken and these include: strengthening Mauritian Computer Emergency Response team (CERT); cross border collaboration of issues pertaining to Cyber Security; strengthening and harmonization of Cyber Security Legislations and establishing Regional CERTS.

12) Culture

Mauritius being a multi cultural society, legislations have been enacted to give equal treatment for the preservation and promotion of all cultures and languages of the Mauritian Society. Financial assistance is also provided for the development of the Creative Industries by way of Grants to artists, creators and performers. International exposure is given to them through their participation in events of worldwide repute. Assistance is also provided for the local production of cultural goods. In order to protect author's rights and intellectual property, the Mauritius Society of Authors was set up in 1986.

13) Energy Resources

A long term energy strategy for the period 2009-2025 and an Energy Strategy (Action Plan) 2011 - 2025 have been adopted by Government. The strategy involves a series of action that pertains to increasing the share of renewable in the energy mix (35% by 2025), energy conservation and energy efficiency. Recently, an Integrated Electricity Plan 2013-2022 has been prepared to address the energy challenges of Mauritius and aiming to create a sufficiently broad energy portfolio that will safeguard the country against energy security concerns and price instability while being sensitive to environmental imperatives.

To allow for the implementation of the Long Term Energy Strategy, an Energy Efficiency Act was promulgated in 2011. This Act paved the way for the setting up a dedicated institution, the Energy Efficiency Management Office (EEMO), for promoting energy efficiency in all economic sectors of the country. Government is also encouraging innovation by households as well as businesses to produce electricity using renewable energy technologies. Small Independent Power Producers (SIPPs) can now produce and use electricity from photovoltaic, micro-hydro and wind turbines through systems not exceeding 50 kW and export the extra electricity to the grid.

14) Tourism resources

Mauritius is predominantly a beach holiday destination and it relies to a large extent on its coastal resources. Both the Tourism Development Plan (2002) and the Tourism Sector Strategy Plan (2009-2015) recommended the introduction of Blue Flag Programme in Mauritius. The Government of Mauritius has embarked on a Blue Flag Programme with the objectives to promote inter-alia the sustainable use of the coastal resources and sound national policies on lagoon water quality, reefs, protection of the beaches and safety. Spatial planning of the lagoons has also become of prime importance, which has prompted the need for the preparation of a master plan for the zoning and sustainable management of the lagoon. To move towards the "greening" of the tourism industry, the Government of Mauritius is in the process of introducing an eco label scheme for the environmental and sustainability of the sector.

The following is a list of some of the Projects / Programmes implemented. This non-exhaustive list is from the feedback received from the 18 thematic groups:

- National Biodiversity Strategy & Action Plan 2006-2015
- Invasive alien species strategic Action Plan 2010 - 2019
- National Forest Policy was formulated and approved by Government in 2006;
- Forest Land Information System was set up in 2010;
- Formulation and implantation of a National Forestry Action Programme is in progress;
- Sustainable Land Management is already integrated in the National Forest Policy;
- A national water policy is being finalised at Ministry of Energy and Public Utilities;
- Interim Hazardous Waste Storage Facility at La Chaumière, which is expected to come into operation by 2015;

- From the 420,000 tons of wastes being generated annually, about 63,000 tons p.a. is effectively diverted (taking into account rejects from composting) from land-filling and sent to the composting plant at La Chaumière;
- The National Development Strategy (NDS) provides the basis for land use planning. It was approved in 2003 and subsequently given legal force through proclamation of section (12) of the Planning and Development Act in 2005;
- Mauritius has made significant progress over the past years to implement its renewable energy and energy efficiency policy and strategy as enshrined in the Long Term Energy Strategy (2009-2025) as hereunder:
  - The Energy Efficiency Act has been enacted in 2011;
  - The Utility Regulatory Authority (URA) Act 2004 has been proclaimed.
  - The Energy Efficiency Management Office is operational since December 2011;
  - The "Observatoire de l'Energie" has been set up in 2011 and provides a national database on energy usage.
  - A certification system for energy auditors and energy managers is being developed;
  - Design Guide for Energy Efficient Buildings less than 500 m^2 have been developed;
  - Energy Efficiency Building Code has been developed for buildings with a surface area of more than 500 m^2;
  - A report on Energy Audit Management Scheme for non-residential Buildings has been prepared;
  - A project for the setting up of a "Framework for Energy Efficiency and Energy Conservation in Industries" has been implemented;
  - Mandatory energy audits to be carried out by large consumers of electricity;
  - Small scale distributed generation has been allowed into CEB's grid since 2011. Capacity of SSDGs under the FIT has been increased to 3 MW (incl. 100 kW for Rodrigues);
  - A Renewable Energy Development Plan is being finalized;
  - Grid-connected photovoltaic plants of a total capacity of 25 MW is being set up;
  - 50,000 street lights are being replaced by low energy bulbs in urban and rural areas;
  - Traffic lights have been replaced by LED;
  - A wind farm of 29.4 MW at Plaines Sophie is expected to be operational in 2014;
  - A Landfill Gas to Energy Plant started operation in 2011 and electricity (2 – 3 MW) is generated;
  - A policy and guidelines on sustainable buildings and a building rating system have been developed;
  - Rs 150 M are provided in 2012 and 2013 as subsidy for the purchase of solar water heaters;
  - A comprehensive national energy savings programme will be implemented by the EEMO to raise public awareness on energy efficiency and to solicit their collaboration in the national endeavour to make the country energy efficient;

Section III:
GAPS AND CONSTRAINTS ENCOUNTERED IN BPOA/MSI IMPLEMENTATION

Despite the tremendous efforts showcased above, national consultations have revealed the following constraints/challenges in implementation:

1) Local level

- ***Coordination and monitoring***

There is a need for enhanced coordination at local level to assess and monitor national progress on the implementation of the BPoA and MSI issues and also the need to streamline these issues in the Programme Based Budgeting of the concerned Ministry. There is also a need for the implementation process to be coherent with the Economic and Social Transformation Plan (ESTP) process.

- ***Motivation for Sustainable Development Initiatives(SDI)***

Efforts to implement SDI have had mixed results. There is need for better understanding of the SDI at all levels and to sustain SDI initiatives including a better mechanism to implement same.

- ***Accessing financial resources***

The limited access to financial and technical resources has limited Mauritius in its ability to mobilise the necessary funding and technical expertise to fully implement the BPoA and MSI. External support is required but the difficult global economic situation has impacted on the capacity of SIDS like Mauritius to access financing. Most middle-income SIDS do not have access to appropriate preferential treatment, concessionary financing, sufficient Official Development Assistance flows and other special programmes owing to the lack of formal recognition of SIDS and criteria that do not recognise their unique vulnerabilities. Mauritius therefore remains dependent on expensive financing from the international financial institutions, and thus further increasing its vulnerability.

- ***Research and Development technologies***

Further research and development both at the national and regional levels is required to promote sustainable development. Transfer of green technology to alleviate dependence on non-renewable energy is limited and there is much need for up scaling investment in R&D.

2) Regional level

- ***regional coordinating mechanism/organisation***

The AIMS region to which Mauritius belongs is too dispersed, has no assigned coordinating mechanism. AIMS region has no mechanism to mobilise resources and monitor the implementation of BPoA and MSI.

3) International level

Both the BPoA and the MSI include a wide range of international support measures to support national level action to address the vulnerability and development needs of SIDS. Beyond these, there are several instruments, conventions, agreements and strategies that also tackle challenges directly related to SIDS vulnerabilities SIDS, including the Convention on Biological Diversity, the Hyogo Framework for Action on disaster risk reduction and the United Nations Framework Convention on Climate Change. But there still remains an urgent need for scaled-up international measures, in some instances, substantially.

- Climate change remains the greatest challenge, as adverse impacts continue to undermine progress towards development. International actions, particularly by developed countries to stabilise greenhouse gas concentrations in the atmosphere at a level that would ensure the survival of SIDS, remain insufficient.

- International support for adaptation strategies has not been adequately forthcoming to enable SIDS increase their resilience to the negative impacts from climate change. In this respect, international support is needed to ensure sustainable financing initiatives such as green-growth policies and climate change adaptation programmes.

- The economies of SIDS remain highly volatile notably due to their openness and smallness and high dependency on imports with high vulnerability to energy and food price shocks. These combined vulnerabilities have been further exacerbated by the global energy, financial and economic crises.

- No SIDS dedicated and effective response measures, such as financing and technology transfer mechanisms, have been established. In this respect, provision and access to affordable and SIDS-adapted technology and financing would catalyse the greening of SIDS economies.

- The international trading system needs to be crafted to address the special and particular needs of SIDS in a more pragmatic manner.

- Access to multilateral financing is difficult owing to eligibility criteria that do not take into account small populations and small size of projects coupled with burdensome application and monitoring requirements.

- Resources from the international community often do not reflect national priorities and needs and are frequently not directed to the implementation of concrete projects at the national level.

Section IV:
NEW AND EMERGING CHALLENGES

In addition to the existing challenges facing SIDS as identified in the BPoA, the MSI and in previous national reports, the following challenges also bear heavily on the socio-economic and sustainable development of SIDS, especially in the AIMS region.

1) Water Resources Management

Water plays a critical role in supporting economic development, public health and environmental protection. The sector is closely tied to others such as tourism, waste (wastewater pollution), energy (distribution, hydropower and supplies for cooling) and fisheries (reflected by the health of inland and coastal fisheries, a direct result of water quality).

For SIDS, being able to meet the growing demands for access to clean potable water is one of the greatest challenges faced by this sector. Climate change poses a significant challenge to the management of water resources in SIDS. The islands' dependency on rainfall leaves them vulnerable to both long-term and short-term changes in rainfall patterns.

Furthermore, significant pressure is placed on existing freshwater systems in SIDS by urbanisation, unsustainable agricultural practices, the demands of tourism and deforestation. These pressures exacerbate environmental conditions and ultimately affect the fragile economies of these islands. As water intrinsically links several sectors, without sufficient water quantity and quality, the development of other sectors will be restricted. For this reason, water resources management should be considered in all stages of planning and development and that it is prioritised at national, region and international levels.

2) Food Security

SIDS have felt the impact of increases in global food prices due to decreased levels of production, droughts or disasters, which have resulted in increased protectionism by food exporting countries. The issue of food security is increasingly on the agenda for SIDS.

Mauritius imports about 75% of its food, amounting to 19% of the country's total imports bill. As a Net-Food Importing Developing Country, Mauritius is particularly vulnerable to the rapidly changing global food system resulting from volatile prices of food commodities, climate change and diversion of food crops to bio-fuels.

It is therefore imperative to increase the country's ability to produce its own food. However, competing demands on the limited land resources, decreasing soil fertility, water scarcity as well as insufficient interest of the young generation in agricultural activities, make this a particularly challenging issue. Policies and actions need to be devised as national, regional and international level to tackle this challenge.

3) Global Economic crises

The global financial and economic crisis has had a significant impact on SIDS, which have experienced increasingly limited access to affordable credit. The existing frameworks for evaluating loan eligibility and assessing interest rates for lending are largely based on Gross Domestic Product (GDP) and do not take into account the specific vulnerabilities of SIDS, depriving SIDS of concessionary financing and much needed assistance.

In this context, the international community is urged to consider the special needs of SIDS especially regarding climate change and disaster risks reduction issues and also SIDS stewardship in sustaining global goods, such as the oceans and marine resources.

4) Migration and Development

Migration is an issue that is of concern to many, if most of the SIDS, both with their nationals abroad and non-SIDS nationals on their soil. In most, if not all cases, the reason for that movement is economic, with those individuals trying to find abroad a lifestyle better than the one they would have in their own country. This is a concern that holds true for all migratory movements worldwide and was taken up during the Global Forum on Migration and Development held in Mauritius in October 2012.

SIDS are therefore under pressure to address high unemployment and underemployment, particularly among the urban youth. There is thus a need to develop a proper framework addressing the interface between migration and development.

Section V:
WAY FORWARD & RECOMMENDATIONS

Mauritius re-affirms its commitment to meet the sustainable development goals and priorities in the BPoA and the MSI. The successful implementation of the BPoA and MSI, however, depends both on the commitment of individual governments and on the commitment of development partners to support these goals and assist in the implementation of actions to achieve them, particularly through the provision of financial and technical support. This joint commitment should be accompanied by a more coherent, coordinated and collaborative approach to the sustainable development of SIDS more generally.

New, pragmatic way forward

The last 20 years has shown that progress in the implementation of the BPOA/MSI has not been entirely successful. The High-Level Review of MSI+5 once again recalled the unique and particular vulnerabilities of SIDS and clarified that urgent action was required to address those vulnerabilities. The challenges faced by SIDS and the constraints they face in responding to these challenges cannot be addressed without the support of the UN system and the international community

This situation can be explained by the fact that there is an absence of the definition of the SIDS category. The absence of criteria defining "small and islandness" is the fundamental reasons for which countries falling in that category were not able to gain special treatment with the development organisations or donor countries. Considering the exceptional economic disadvantages faced by most SIDS as a result of their permanent handicaps, the notion of special treatment by virtue of SIDS status is important to genuine SIDS in the multilateral trading system and in the area of development financing. Thus, there is a need to do things differently, to explore new more practical, pragmatic and innovative avenues for SIDS to get special and differential treatment.

Recommendations to be taken forward to the 3rd international conference on SIDS:

A. Coordination at Regional level – SIDS as one voice:

AIMS should be endowed with a regional organisation that can truly support and lead the implementation of the AIMS-SIDS programmes in areas such as the Climate Change adaptation, by coordinating the development of adapted technologies, and skills to cope with the fast changing scenarios and models of development in SIDS.

Furthermore, new models of partnerships between private and public sectors, between SIDS and SIDS, between the AIMS/CARIBBEAN/PACIFIC should be enhanced and formalised to enable exchange of proven experiences for the sustainable development of SIDS.

B. Climate Change, Disaster Risk Reduction & Management and Financing for Sustainable Development:

Priorities for implementation are the following:

1) Enhance resilience of the Republic of Mauritius in areas related to climate risk management as well as to improve climate prediction ability through the development of national capacities of SIDS;

2) Ensure the protection of coastal areas from inundation due to sea level rise;

3) Address holistically the relocation of populations from low lying vulnerable areas;

4) Develop the SIDS Strategy for Disaster Reduction to contribute to the attainment of sustainable development and poverty eradication by facilitating the integration of disaster risk reduction into development. The Strategy should have the following objectives:
    a) Increase political commitment to disaster risk reduction
    b) Improve identification and assessment of disaster risk
    c) Enhance knowledge management for disaster risk reduction
    d) Increase public awareness of disaster risk reduction
    e) Improve governance of disaster risk reduction institutions
    f) Integrate disaster risk reduction into emergency response management.

Once agreed and adopted, this strategy should be promoted at the forthcoming World Conference on Disaster Reduction to be held in 2015 in Japan.

C. Energy:

To achieve the Mauritian vision of 35% of renewable energy by 2025, the international support to SIDS including through North-South, South-South, SIDS-SIDS and triangular cooperation, aimed at reducing fossil fuel dependency and increasing availability of electric power services, by using more efficient technologies and renewable energy sources needs to be highlighted. Support should be provided to enhance regional and SIDS-SIDS cooperation for research and technological development on SIDS appropriate renewable energy and energy efficiency technologies.

1. A hybrid financing mechanism comprising concessionary loans/grants should be made available to SIDS for the implementation of Renewable Energy (RE) projects; SIDS can promote the creation of a pool of certified energy auditors who would be allowed to work in any SIDS;
2. A certification body and an accreditation body for all SIDS Energy Auditors can be set up in one of the SIDS' countries, probably on a regional basis;
3. SIDS should publish the best practices in RE and Energy Efficiency (EE) in each country on a bi-annual basis;
4. Access to efficient technologies such as LED/Solar for lighting can be improved if the cost of these technologies can be made affordable for SIDS;
5. SIDS can harmonize the standards of the labels for household appliances, so as to promote efficient appliances only;
6. One of the SIDS Universities can provide advanced training for graduates in the field on RE & EE;
7. An international carbon financing mechanism should be set up to allow SIDS to de-carbonize their energy sectors as much as possible;

8. Smart grid technology development to be accelerated to allow adoption in SIDS for greater penetration of RE; development partners can help to allow the development of a pilot smart grid in one of the SIDS;
9. To develop an internationally agreed regulatory framework for renewable energy such as a WTO Sustainable Energy Trade Agreement.[ii]

D. Development of an Ocean Economy / Coastal and Marine resources:

The ocean economy will open up untold opportunities such as on the economic front, the Ocean State could be a driver for a foray of new sectors such as Ocean for Energy; Ocean for Food; Ocean for Water; Ocean for Minerals; Ocean for Leisure; Ocean for Health as well as efficient fisheries and for innovation-driven maritime research and exploration.

1. Setting up of a dedicated Regional Oceanographic Centre;
2. Development of Land Based Ocean Industry including for the generation of renewable energy to replace fossil fuel;
3. Increase means and resources at the regional level for research and implementation of plans and strategies on coastal zone management including erosion processes. In this respect it is also important to strengthen the Regional Fisheries Management Organisations.
4. Provide assistance to ensure domestic fishing and related industries of SIDS accounts for a greater share of the benefit than is currently realised of the total catch and value, in particular for highly migratory stocks harvested within the EEZs of SIDS and within proximate geographical areas including high seas, as appropriate.
5. Eliminate subsidies that contribute to illegal, unreported and unregulated fishing and to over capacity while completing the efforts undertaken at the World Trade Organisation to clarify and improve its disciplines on fisheries subsidies. There is also need for a carve out for subsidies for SIDS to develop its fishing capacity and fish processing plants.

E. Management of Waste:

Waste management in SIDS, is a growing problem because of population growth, urbanisation, changing consumption patterns and the large numbers of tourists. In this context the following needs to be addressed with the support of the International Community:

1. Support effective planning and implementation of waste management practices
2. Establish technical cooperation programmes to enable the creation and the strengthening of regional mechanisms to protect the oceans and coastal areas from ship-generated waste and oil spills, among others.
3. Setting up of a regional infrastructure for the treatment and disposal of hazardous waste.

F. Trade:

Given the vulnerability of SIDS and their disadvantage with regard to traditional markets, trade policy is instrumental in the developing and strengthening of SIDS resilience. It is therefore recommended to:

1. Establish a mechanism to promote intra SIDS movement of goods, capital and professional services with flexible rules of origin.
2. Non Tariff Measures (NTMs) present a challenge to small economies in their efforts to compete in foreign markets. Though many NTMs are concerned with justifiable health and related requirements, and others, can be explained as important for standard setting, the increasing number and rising stringency of these standards can be barriers to trade. It is

also recommended that the impact of Non Tariff Measures on Small economies be effectively addressed.[iii]

G. Migration and Development:

Climate Change is already impacting and will impact further on migration, both within a country and between countries. Proactive planning and financing are crucial and in this context, financing and support from international financing agencies would be required to fast-track the regional integration programme with its SIDS counterparts, particularly in the following:

1. The **Accelerated Program for Economic Integration (APEI)** seeks to enhance regional capacity building, by facilitating the export of services and talents. The main objectives of the APEI are to address the poor allocation and mismatch of skills across national borders, to provide a boost to the flow of foreign investment and the export of services and to foster faster economic integration through enhanced growth and employment opportunities.
2. The **Regional Multi-disciplinary Centre of Excellence (RMCE)** aims to improve the capacity for policy making in the Eastern and Southern African region, as well as the small states network, with an emphasis on regional integration. The strategy is based on improving macroeconomic management, trade and transit, cross-border finance and business development and investment. The emphasis is on peer learning and peer support and benchmarking of good performers and adoption of best practices.

Due to its specificities, the RMCE and the APEI complement the initiatives of AFS and ATI. As at date through the PBB 2013-2015, Mauritius has contributed Rs 22 M to RMCE initiatives, with Rs 10 M earmarked for 2014 and Rs 7 M for 2015. To conduct a full-fledge programme under RMCE, we would require at least USD 1 million annually from the international community. For APEI, as at date, Mauritius has secured financial assistance to the tune of USD 3.6 M over three years from World Bank for movement of professionals. However, additional funds are needed to address other pillars under APEI.

H. Setting up of regional /global monitoring system:

The establishment of a robust global monitoring system can help to strengthen accountability at all levels and to ensure adequate and timely analysis of the implementation of the BPoA, MSI and Samoa objectives/outcomes. The monitoring framework should be based on existing regional and national monitoring frameworks. At the same time, the monitoring framework should also fully utilise readily available international data on vulnerabilities, development needs and policy responses relevant for SIDS, including the relevant indicators used in the economic vulnerability index developed by the UN Committee for Development Policy. Adequate resources would be required.

Section VI:
POST-2015 UN DEVELOPMENT AGENDA

The outcome of the Samoa meeting needs to be seen as converging with the Post-2015 UN Development Agenda, the Rio +20 process and the proposed Sustainable Development Goals (SDGs). Accordingly, the process initiated for the preparation of the SIDS conference should:

- Continue to strengthen national partnerships between governments, private sector, civil society organisations, women, trade unionists, non-governmental organizations, the elderly and the youth in order for the holistic implementation of the goals to be adopted at the Samoa meeting to be fully integrated into the development policies at national and regional levels;

- Encourage the mainstreaming of the concept of Education and culture for Sustainable Development across the globe;

- Indicate in its national post 2015 Development Agenda report, the current MDGs health goals need to be clustered into one goal entitled 'Universal Health Coverage' which would provide a multi-sectoral approach with a view to reducing health inequities. The rapid spread of Non-Communicable Diseases compels urgent global action for the prevention and treatment of these diseases. Universal Health Coverage would imply that people have access to all health services such as Maternal and Child Health, Family Planning, Sexual and Reproductive Health Education, Prevention of and Treatment for Substance Abuse, Occupational and other health hazards, Mental Health, HIV/AIDS, malaria and other emerging/ re-emerging diseases;

- Support and recommend the building of resilience and addressing the issue of population dynamics in a future post 2015 international development goals;

- Coordinate through the Delivery As One umbrella a system-wide coherence which will lead to a more coordinated and structured approach at national, regional and international levels;

- Adopt a pragmatic approach with regard to the question of special treatment for financial and technical assistance for SIDS. The much stretched diplomatic and financial resources of SIDS and the generally limited interest shown toward SIDS and their concerns by the international community have added to the inevitable inertia in the international bureaucracy and are likely to make the realisation of the above recommendations a long process. In this context, there is a need for SIDS to gain special recognition within the UN system

Section VII:
PARTNERSHIPS FOR SIDS

- The vision of the Government is to promote Mauritius as a Knowledge Hub, the Tertiary Education Sector is being internationalized and more and more international students are now choosing Mauritius for their higher education.

- Mauritius is presently offering 50 scholarships to students from African countries of the African Union, for undergraduate programs and 50 scholarships for post-graduate programs offered on a Distance Learning Mode by the Open University of Mauritius to Commonwealth Countries.

- The GEF - Western Indian Ocean Marine Highway Development and Coastal and Marine Contamination Prevention Project is an excellent example of a regional project with 8 countries [6] to bring-up to the same standard and level of preparedness for oil spill, sharing of resources and putting in place a regional collective, pro-active and reactive plan. This project is being replicated in other regions. Similar programs should be undertaken to establish technical cooperation programmes to support SIDS' development of appropriate systems for recycling, waste minimization and treatment, reuse and management; establish and strengthen systems and networks for the dissemination of information on appropriate environmentally sound technologies.

[6] Comoros, France (Reunion Island), Kenya, Madagascar, Mauritius, Mozambique, Seychelles, South Africa and Tanzania.

Section VIII:
CONCLUSION

There are many challenges and obstacles facing Small Island Developing States in reconciling economic and social development and building their resilience in a more sustainable development manner. The various obstacles should be identified and recognized; international cooperation measures should be taken to enable and support the sustainable development efforts. Care should be taken to ensure that the sustainable development concept is well understood to address not only the negative effects of climate change, but to also include the social, equity and development dimensions, including the international provision of finance and technology.

The Government of the Republic of Mauritius is convinced that solidarity amongst SIDS is of paramount importance to successfully address SIDS issues, with international support.

International collaboration has never meant so much in this era of globalization and trans-boundary challenges.

[i] The guiding questions are the following

i. Building on progress reports already prepared for the MSI+5 and Rio+20, what is the progress made to date and gaps limiting implementation of the BPoA and MSI, that the country wishes to highlight through the SIDS conference preparatory process?

ii. What progress has been made since 1992 to strengthen the national institutional framework in terms of coordination between sectors and the integration of the 3 pillar of sustainable development? How well are sustainable development principles integrated and mainstreamed in national development planning?

iii. What new and emerging challenges are likely to affect the prospects for sustainable development in the coming decade? Do the new and emerging challenges pose a fundamental risk to the prospects of economic growth and development in your country? What new and emerging challenges should the SIDS Conference in 2014 enact upon?

iv. What kind of new and/or additional practical and pragmatic actions are needed to address identified gaps in implementation?

v. What is the level of awareness at the country level of MDGs, Sustainable Development Goals (SDGs) and the post-2015 development agenda? What would be your country priorities in elaboration of the post-2015 development agenda?

vi. How could such identified challenges and opportunities be addressed through collaborative partnerships with the international community? What kind of partnerships have worked or not worked and why? What changes are needed, if any, in how partnerships are forged in the future, in order to strengthen in the way that help address SIDS address the identified challenges and opportunities?

vii. What is the accountability mechanisms used to monitor performance? What can be done to strengthen national data and information systems, national account systems, national indicators for development, and frameworks for monitoring and evaluation?

viii. With an eye toward the "concise, focused, forward-looking and action-oriented political document" called for in paragraph 10 of the modalities resolution (A/RES/67/207), what are the key priorities areas (up to five) that your country would like to see addressed, in the national preparations and beyond? The responses here could be most constructive if conceived in terms of key words or short phrases rather than long descriptive paragraphs.

[ii] *The UN has declared 2012 as the International Year of Sustainable Energy for all and its Advisory Group on Energy and Climate Change has recommended universal access and a 40 per cent increase in energy efficiency in the next 20 years. Cutting energy related emissions in half by 2050 would require de-carbonisation of the power sector. To maintain the same level of output, fossil fuel would need to be offset by sustainable energy, the largest increase, according to the World Bank's World Development Report (2010)t, would have to come from renewable energy sources. The World Bank report illustrates the enormous magnitude of the effort to increase the share of low carbon energy to 30-40 per cent by 2050 from present levels of 13 percent. This would imply over the next 40 years deploying annually an additional 17000 wind turbines, 215 million square metres of solar photovoltaic panels, 80 concentrated*

solar power plants. Domestic Sustainable Energy policies as well as trade policies can both create barriers for supply chain optimisation in the sustainable energy sector. Hence policies that prevent or constrain supply chain optimisation increase costs and consequently process for sustainable energy goods and services. Non tariff trade related barriers to SEGS are diverse. They can range from domestic support measures to export restrictions on critical raw materials as well as restrictions on the modes by which services are supplied across borders. The use of certain types of barriers can be addressed through existing WTO rules or potentially as part of the Doha round of negotiations. However, while WTO rules and disciplines could be evoked in certain cases, they are often ambiguous as far as the energy sector is concerned. It is thus worthwhile to consider a fresh approach that takes a holistic and integrated view of the sustainable energy sector while simultaneously tackling a variety of market and trade related barriers. A Sustainable Energy Trade Agreement could be a way of bringing together countries that are committed to addressing climate change and longer term energy security while maintaining open markets.

[iii] *The WTO's World Trade Report of 2012 dealt quite extensively with the issue, but it did not identify small economies as a group. However, several of its conclusions point to the fact or to the implication that small economies are more adversely affected by NTMs than several other groupings. The requested study helps to supplement the important work already conducted by the WTO, and to focus on the issue from a small economy perspective. Studies by the World Bank in collaboration with ITC (Non Tariff measures- A Fresh look at Trade Policy ed. O Cadot and M. Malouche. World Bank. CEPR , 2012*) *also show that many NTMs adversely affect the costs of contesting foreign markets by many developing countries. They introduce procedural requirements which add to costs at borders, and sometimes add numerous regulations which sometimes act as barriers to entry. While many product standards and technical regulations are quite reasonable, they can act as trade inhibitors. They can make compliance costs generally higher and can keep small and medium sized enterprises out of international trade. Indeed developing country markets are increasingly constrained by stringent sanitary requirements that are costly to implement. The level of stringency is constantly being raised.*

Studies conducted by the World Bank include among NTMs, not only SPS measures but note that NTMs can include several other measures such as quotas, voluntary export restraint, non automatic authorizations, price and quality constraints, anti-dumping safeguards, administrative pricing, duties and trade defensive policies, and pre-shipment inspection. In some cases implementation of these measures require retooling, increased or enhanced product design and testing and confirmation systems, so that productive processes become more expensive and sometimes need to be outsourced. Prima facie indications are that some measures impact more adversely on small economies, but a study on the topic would be required in order to substantiate this position.

The 2012 Report of the WTO, for example, speaks of evidence that TBT/SPS measures have a stronger effect on small rather than large firms (p 10 & p 147). Since small economies are more likely to have mostly small firms, it is useful to explore the extent to which this observation applies to SVEs.

Also, it notes that TBT/SPS measures have prevalently positive effects for more technologically advanced sectors, but negative effects on trade in fresh and processed foods. (p 10). Small economies tend to have sectors which produce fresh and processed foods and less so, technologically advanced sectors.

The Report also suggests that specific provisions in l trading arrangements appear to follow a hub and spoke structure, with the larger partner representing the hub to whose standards the spokes will confirm. Small economies would be considered the spokes in these arrangements. This concept is also worth exploring as it applies to small economies.

The Report notes that when retailers have buying power, private sector food safety standards can become "de facto" barriers to market entry for certain producers. This is particularly the case for developing countries which act as "standard takers" rather than standard makers (p 86). It would seem that small economies, because of their lack of market power, are more easily pushed into being standard takers than most other countries. It would be useful to further examine this observation.

The ITC business surveys also find greater use of TBT/SPS measures by developed countries, than developing countries. Also, it is not mentioned where small economies stand relative to other developing economies in terms of the use of NTMs. (p 115). It is assumed that SVEs as a group also use TBTs and SPSs less than developed countries. This could be usefully confirmed.

The report notes that agricultural products are disproportionately affected by NTMs, and notes further that the evidence that agricultural products are disproportionately affected by non-tariff measures relative to manufacturing is echoed in the ITC business surveys. It is noted that NTMs in agriculture appear to be more restrictive than NTMs in manufacturing (p136). Small economies may well be in the category of exporting more agricultural than manufacturing goods and therefore would fall into the category of having to face more restrictive NTMs. (p117). It would be instructive to examine whether this is in fact the case.

The report also found that TBT/ SPS measures had a negative effect on export market diversification of the countries (i.e. in the product variety of exports to that market). Developed countries tended to have a greater range of TBTs. It suggests that developing countries export diversification becomes more restricted as a result of the TBTs of developed countries, but the study does not mention small economies. The Report also notes that where TBTs/SPS measures have a negative effect, the impact tends to be greater for developing country exports (p153). It would be useful to determine whether it is even more onerous for small economies.

Annex 178

Memorandum dated 18 July 2013 from Kailash Ruhee, Chief of Staff of the Prime Minister of Mauritius to the Secretary to Cabinet, Mauritius, 18 July 2013

PRIME MINISTER'S OFFICE
REPUBLIC OF MAURITIUS

18 July 2013

Secretary to Cabinet,

MPA

I did have a meeting with the then British High Commissioner at his request, and I told him that nobody would dispute the setting up of an MPA on strictly environmental ground but that we should look into all its implications including the issue of sovereignty of Mauritius. I also told him that the "Shoals of Capricorn" which is a scientific NGO was working with the lessee of St Brandon on the setting up of an MPA. He insisted that we should keep the issue of environmental protection and that of sovereignty separate. As a matter of fact the legacy that is mentioned is in specific reference to the PM's determination on the issue of sovereignty of Mauritius over the Chagos Archipelago. I never even considered it important to discuss this with PM.

Subsequently on the 22nd of October at a meeting in the office of the Prime Minister which I attended, the Prime Minister informed the High Commissioner that he takes serious exception to the proposal for the setting up of an MPA and expressed his firm intention to take this matter up with Prime Minister Gordon Brown at CHOGM that was scheduled to take place in Trinidad and Tobago from 27 to 29 November 2009.

The issue came up later during a meeting between the UK High Commissioner and PM where PM expressed his utter disagreement and disappointment with the fact that the UK has reneged on the assurance given by PM Gordon Brown at CHOGM Meeting 2009 in Trinidad and Tobago that the UK will not proceed with the project of setting up an MPA.

K. Ruhee

Annex 179

Indian Ocean Tuna Commission, “Catch and bycatch composition of illegal fishing in the British Indian Ocean Territory (BIOT)”, IOTC–2013–WPEB09–46 Rev_1

Received: 2 & 11 September 2013

Catch and bycatch composition of illegal fishing in the British Indian Ocean Territory (BIOT)

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Introduction

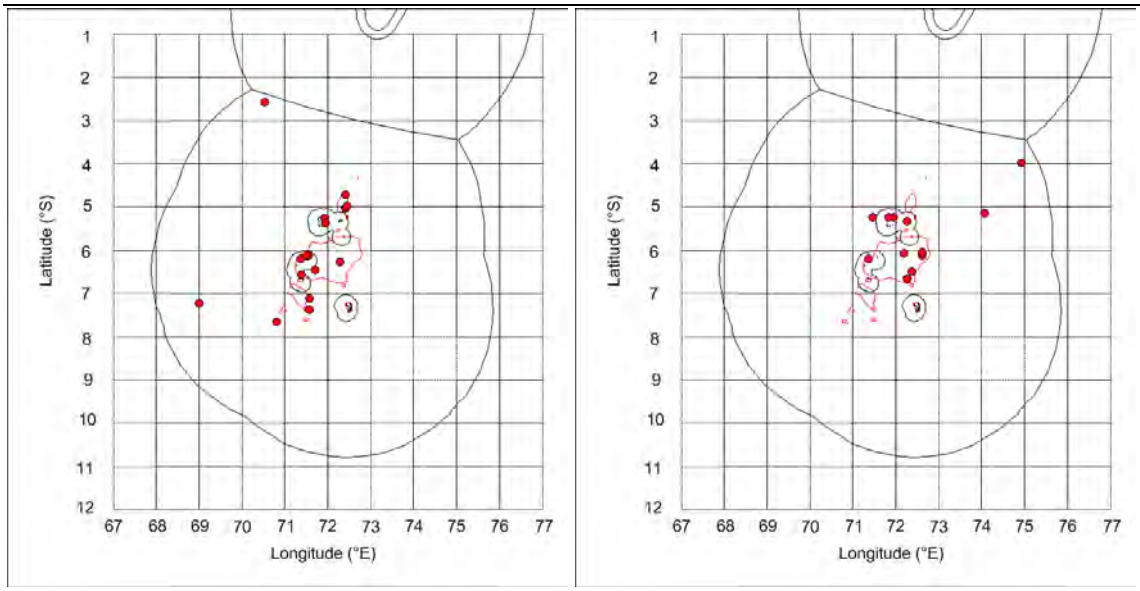
In April 2010, the UK government declared the BIOT (British Indian Ocean Territory) a no-take MPA to commercial fishing. The MPA covers an area over 544,000 km^2 and was created with aims of biodiversity conservation and creating a scientific reference site within the region (Mangi *et al*., 2010). Encompassing both coastal and pelagic areas, the MPA has doubled the area of ocean covered by MPAs worldwide and protects approximately half of the coral reefs in the Indian Ocean that are still classed as 'high quality'. There are about 10 Important Bird Areas, with some of the Indian Ocean's most dense populations of several seabird species. The area also includes undisturbed and recovering populations of Hawksbill and Green Turtles. Although commercial fishing within 200 nautical miles of the islands ceased in November 2010, recreational fishing for pelagic and demersal species with hook and lines is still permitted in an MPA exclusion zone covering the territorial waters around the island of Diego Garcia. Some tuna and tuna-like species are caught as part of this fishery, but sharks must be released alive. Catches of this fishery have been falling in recent years with landings of 42t, 31t and 21t recorded in 2010, 2011 and 2012 respectively. Recreational fishing for personal consumption by visiting yachts is also permitted outside the exclusion zone within the MPA. Angling from the shore remains difficult to quantify with no recent data available, however previous surveys suggests is approximately 10-15t annually.

There has also been illegal fishing operating for a number of years and Illegal, Unregulated and Unreported (IUU) fishing is considered as a significant threat to the ecosystem. The area is monitored by the BIOT Patrol vessel, the surveillance strategy of which is based on a combination of ecological risk assessment, historical fisheries data and intelligence on IUU activities. Beyond the blanket protection of all species through the declaration of the MPA, there are no separate national plans of action in place for individual species or species groups.

While the primary purpose of the Senior Fisheries Protection Officer (SFPO) is the enforcement of BIOT regulations, this position has also provided an opportunity to collect biological information on the catch onboard vessels fishing illegally in the area. While information collected was very basic at first, this has become increasingly more detailed through the development of more comprehensive monitoring forms. In this paper, catch data collected by the BIOT patrol vessel from 2007-2013 are analysed, with formal interview records with the arrested individual (the captain), comprising 37 arrests in total.

Location of arrests

The majority of arrests have been made in inshore areas with fewer taking place outside the island archipelago (Figure 1). Nevertheless, this is not necessarily a direct reflection of where the majority of illegal fishing is taking place as the location of arrests is based on a combination of both where the most illegal fishing is taking place and the location of the surveillance operations. Patrols routes have varied based on a number of factors including reported threats of piracy and IUU fishing intelligence. .



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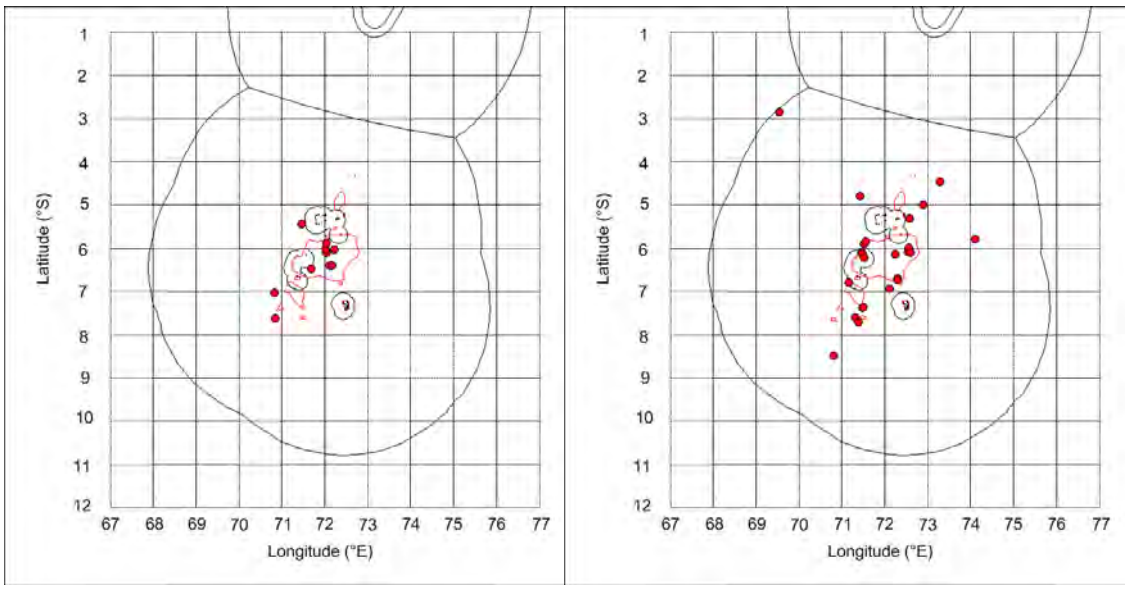


(c) (d)

Figure 1. Map showing location of arrests in the BIOT Fisheries Conservation and Management Zone / MPA from (a) 2001-2003, (b) 2004-2006, (c) 2007-2009 and (d) 2010-2013.

Numbers of arrested vessels

Between 1 and 12 arrests have taken place annually since 1996 (Figure 2). There was a marked peak in arrests in the year the MPA was designated (2010), but this has decreased again in more recent years to roughly the same level as previously. Nevertheless, this is set against a background of variable offshore patrol time. In addition to fisheries patrols, the vessel is also used for conducting periodic sovereignty patrols of the outer islands, scientific surveys and other BIOT Administration tasks.

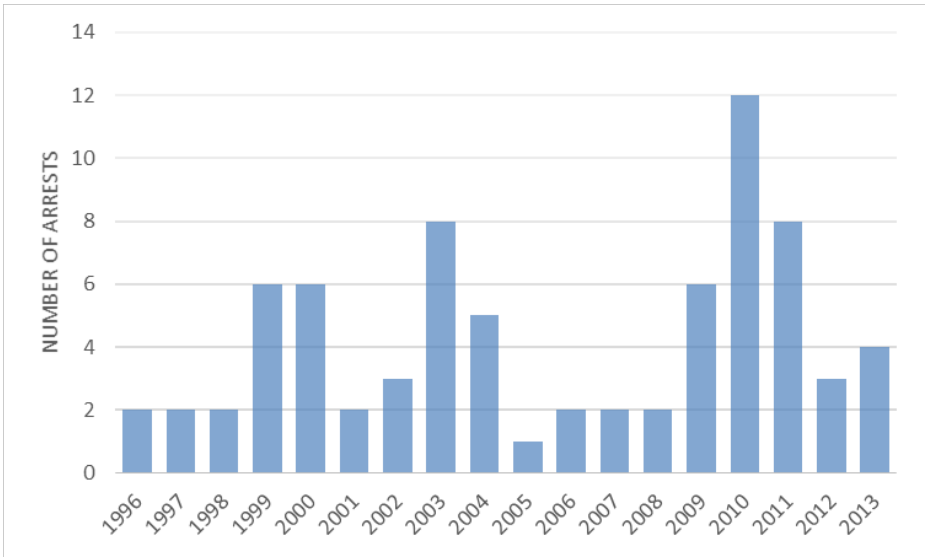


Figure 2. Number of arrested vessels in BIOT by year.

Gear

Fishing gear observed on board arrested vessels were predominantly longlines and drift nets, but troll lines, hand lines and harpoons were also recorded. Wire trace[2] was present on 89% of boats using longlines, indicating they were targeting sharks. Two types of fishing methods have been reported by the SFPO as being used for different target fisheries:

1) The first method uses a lightweight monofilament nylon driftnet a few hundred metres long which is predominantly used to fish to catch small pelagics such as flying fish (Exocoetidae) which are used to bait long line hooks. Vessels fishing using this method will generally then target tuna with their longline gear and rarely possess wire trace (unless stowed). This type of vessel will normally also carry a larger multifilament drift net, approximately 2.5km in length to fish for large pelagic species.

2) The second type of gear configuration is found on vessels which target shark species. These tend to only use the larger, multifilament drift nets to fish for pelagic species which are then

[2] Wire traces are used to prevent sharks biting off the hook so they can be taken onboard the vessel.

processed and used as bait on hooks with wire trace to target sharks. The current SFPO has reported consistently finding wire trace on vessels that do not possess the smaller monofilament nets.

Information on the type of gear types and species observed on board arrested vessels suggests that sharks are being targeted by many of those conducting illegal fishing. During the arrest interviews, fishers were questioned about the species groups they were targeting. Of the 6 responses3 provided, one captain reported that the vessel was targeting tuna, while the other five stated that sharks were the target catch.

Catch composition

Catch data available for analysis were limited, based on what had been recorded at the time. Data from 2007-2013 are analysed below. The mean total catch onboard (where catches were present as two boats had no catches onboard) was 2,030kg and 207 individuals. Sharks were present on 91% of vessels which had catch onboard, of which two vessels had finned sharks. On vessels where sharks were present, there was an average of 156 specimens weighing 1,961kg. This formed 61% of the total catch numbers and 78% of the total weight. The remaining species comprised predominantly tuna and reef fish.

Figure 3 provides a summary of the number of identified shark species observed on arrested vessels between 2007 and 2013. These data should be interpreted cautiously, however, as many specimens were not identified to species level. This may have been because the SFPO did not have sufficient time in addition to patrol activities or because catches were already partially decomposed or part-processed. Species which have more distinguishing features and so are more easily identifiable are also likely to show higher relative abundance. Nevertheless the data provide an indication of the main species caught. The most dominant species were the reef sharks; black tip (*Carcharhinus limbatus)*, grey reef (*C. amblyrhynchos*) and white tip reef (*Triaenodon obesus*), followed by the pelagic oceanic white tip (*C. longimanus*), blue (*Prionace glauca*) and hammerhead (Sphyrnidae) shark species.

The relatively high landings of reef species is not unexpected as many of the vessels were arrested in inshore areas, although due to the multi-day nature of the trips the exact locations of the arrests are not necessarily indicative of where the catch was taken. While the reef shark species dominated in terms of catch numbers, in terms of total biomass, the pelagic species would be expected to be higher than as represented by numbers, however, these data were not available.

The non-shark species were dominated by tuna; yellowfin (*Thunnus albacares*) and skipjack (*Katsuwonus pelamis*), snappers (Crimson jobfish (Sacré chien blanc) *Pristipomoides filamentosus* and Green jobfish (*Vacoas) Aprion virescens*), mackerel tuna (*Euthynnus affinis*), barracudas (*Sphyraena)*, trevally (Carangidae) and a variety of billfish (Xiphiidae and Istiophorus).

[3] Many respondents did not answer

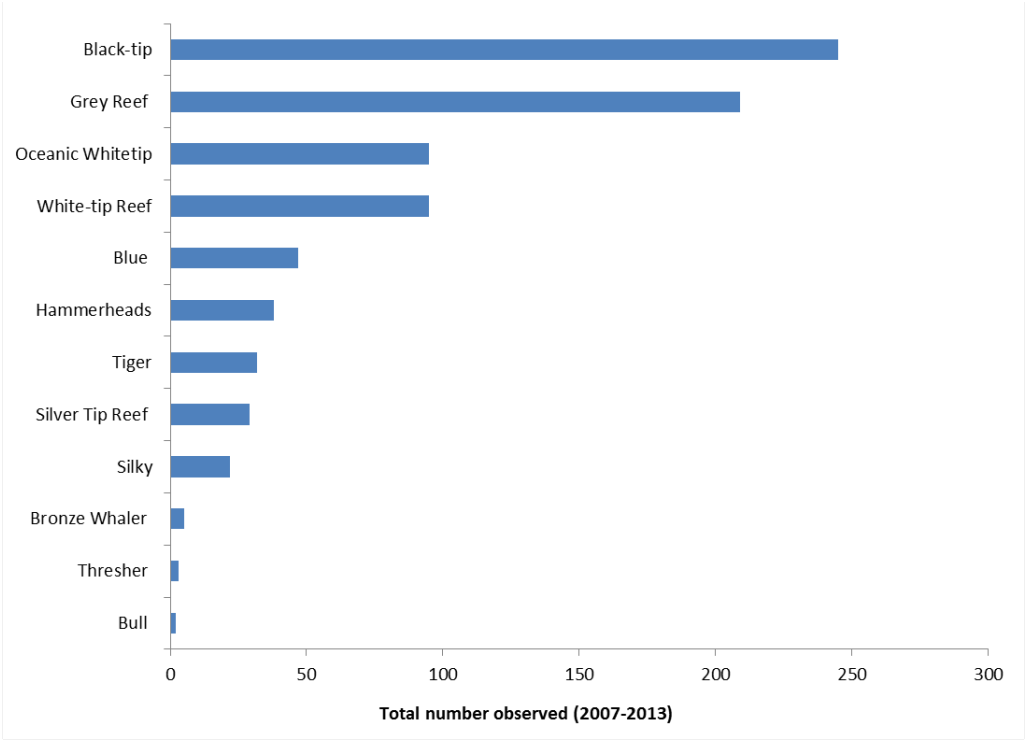


Figure 3. Numbers of identified sharks observed onboard arrested vessel between 2007 and 2013 (based on records from 11 vessels).

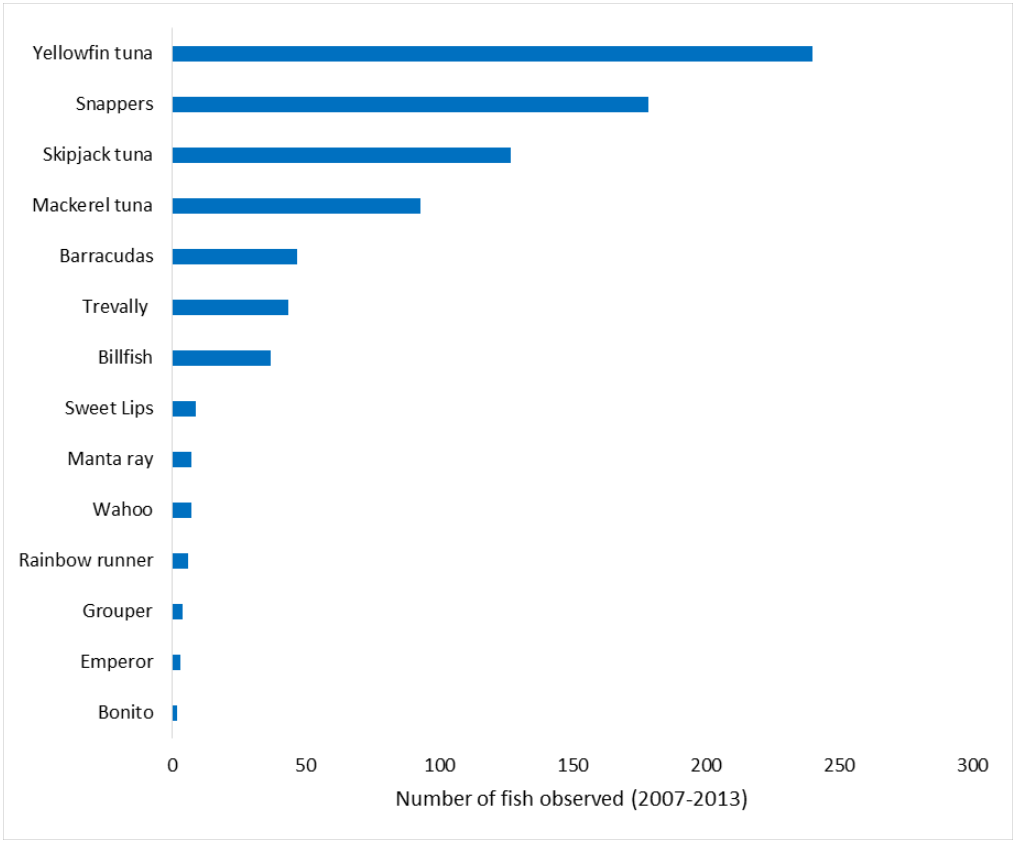


Figure 4. Numbers of identified non-shark species observed onboard arrested vessel between 2007 and 2013 (based on records from 14 vessels).

The nature of illegal fishing makes it impossible to calculate accurately how many fishing boats are operating within the EEZ illegally, but it has been attempted. Price et al. (2010) estimated the potential number of vessels operating legally in BIOT using sea cucumber landings data which resulted in a range from 30-60 up to 100-200. They estimate 20-50 boats per year based on anecdotal evidence from yacht owners anchored in BIOT waters. While these ranges are unlikely to be accurate given such high uncertainty and anecdotal methods of estimation, they nevertheless provide a starting point for exploratory catch predictions. The total annual catch can therefore be estimated from the mean total catch for all vessels for which catch information is available (including vessels which had no catch on board) multiplied by these estimates (Table 1). Based on these figures, total catch could be in the region of 50-360 t or 5,000-36,000 specimens while total shark catches might range from 40-280 t or 4,000 – 25,000 specimens. These estimates are not considered to be robust, but introduce the possible avenues for further work when more and better catch data and better surveillance estimates are available.

Table 1. Predicted total catches based on estimates of vessel numbers (Price et al., 2010)

Number of vessels	Total catch		Shark catch	
	Weight (t)	Number	Weight (t)	Number
200	355	36,163	283	25,215
100	178	18,081	142	12,608
60	107	10,849	85	7,565
30	53	5,424	42	3,782

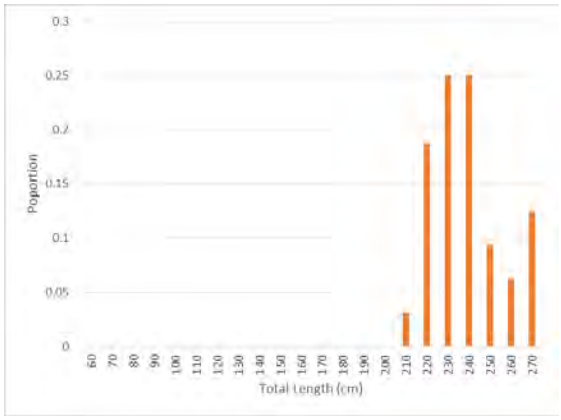
Size composition of catches

The mean length of specimens (Table 2) and length frequencies were investigated for species with the highest representation of measured individuals (Figure 5). The mean total length of blue sharks was 243cm. Compared with the length at maturity (170-221cm[4]), this suggests the majority caught are mature species. The total mean length of Oceanic Whitetips is 152cm[5], however, suggesting the majority are juveniles (length at maturity ranges from 180-200cm). This was also true for the majority of Silky sharks which mature at a length of 228cm, but averaged 183cm[6] TL in the BIOT catch records. Again, due to the low sample sizes, these figures should be interpreted cautiously, but will be increasingly useful to monitor as the number of records increase.

Table 2. Mean length of the species with the highest frequency of records

Shark	Mean length, cm (±1 s.e.)	Measurement[7]
Bigeye thresher	305 (12)	TL
Blacktip	175 (9)	TL
Blacktip reef	104 (9)	TL
Blue shark	243 (3)	TL
Grey reef	119 (2)	TL
Lemon	244 (7)	TL
Silvertip	126 (4)	TL
Tiger	133 (10)	TL
Whitetip Reef	98 (3)	TL
Bronze whaler	176 (10)	FL
Oceanic whitetip	123 (6)	FL
Scalloped hammerhead	168 (8)	FL
Silky	151 (5)	FL

[4] www.fishbase.org
[5] Converted from fork length based on the relationship in Ariz et al., (2007)
[6] Converted from fork length based on the relationship in Ariz et al., (2007)
[7] TL= total length, FL = fork length



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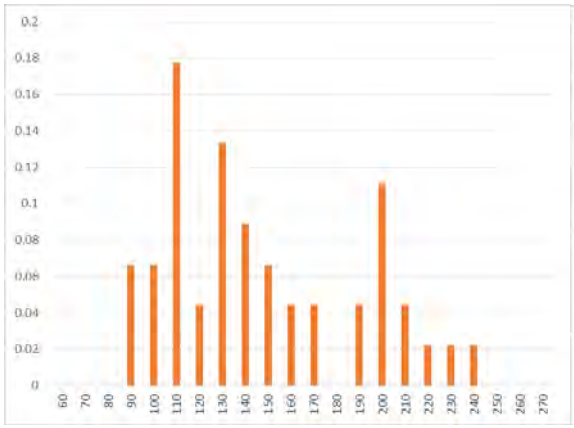

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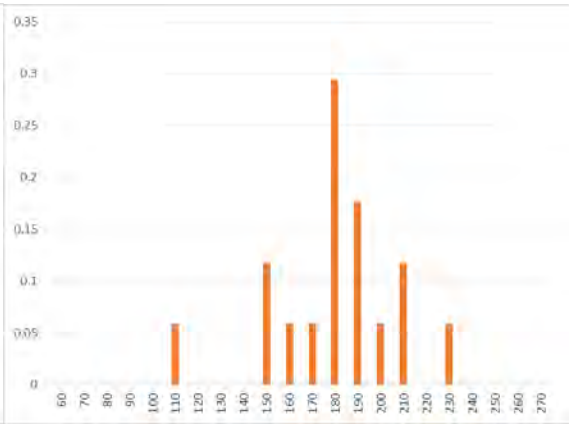

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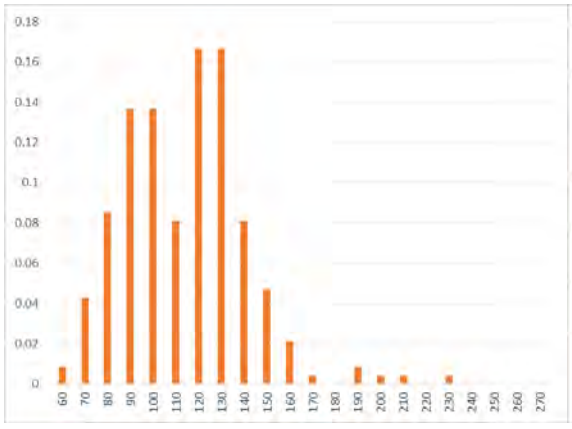

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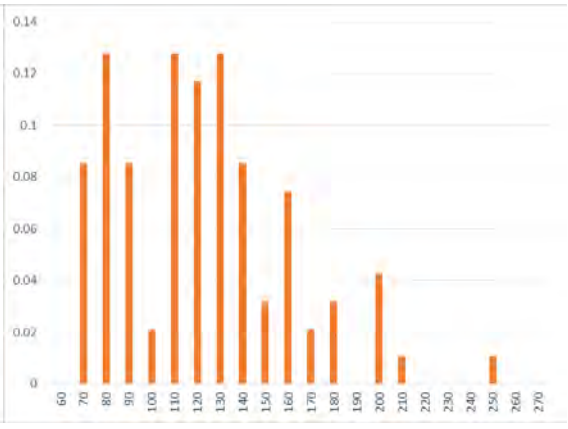

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Figure 5. Length-frequency distributions based on total length (cm) for (a) blue sharks (n=32), (b) Oceanic whitetip sharks (n=45), (c) Silky sharks (n=(17), (d) Grey reef shark (n=234) and (e) Silvertip sharks (n=94). NB Total lengths for Oceanic whitetip and Silky sharks were calculated from fork lengths based on the species-specific relationships in Ariz et al., (2007) (TL=aFL+b, where a=1.339 and b=12.8071 for Oceanic whitetips and a=1.206, b=1.574 for silky sharks) .

Conclusions

This paper provides a short summary of the information obtained from the illegal fishery operating in BIOT. The majority of arrests have taken place in inshore areas and the majority of species recorded have been reef fish. Sharks are the prime target species for these vessels, present on 91% of vessels with landings onboard and comprising 78% of the catch when present.

While the analysis is currently fairly limited due to the many issues with obtaining the data which have been discussed, the improvements in data collection forms and training of the SFPOs has allowed much more information to be collected in recent years. Continued use of these more detailed recording forms are likely to provide an increasingly large and more comprehensive biological dataset through which the effect of these particular fisheries can be explored.

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Annex 180

Statement by the Prime Minister of Mauritius at the General Debate of the 68th Session of the United Nations General Assembly, New York, 28 September 2013

THE REPUBLIC OF MAURITIUS

S T A T E M E N T

BY

DR. THE HON. NAVINCHANDRA RAMGOOLAM, GCSK, FRCP
PRIME MINISTER
OF THE REPUBLIC OF MAURITIUS

AT THE

GENERAL DEBATE OF THE 68TH SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

SATURDAY 28 SEPTEMBER 2013
NEW YORK

Mr. President,

As we meet this morning to address global concerns and to seek ways to ensure progress and lasting peace, the people of Kenya are emerging from a terrorist act that has cost many lives and that has shaken the Continent. In expressing our solidarity to the Government and people of Kenya and to the families of all victims, Mauritius would also like to express its unreserved condemnation of this abominable and dastardly act of terrorism.

The Nairobi attack should also compel us to re-visit regional and global responses to national and international security threats including extension of support to countries in particular those on the African Continent.

Mr President,

Mauritius commends you for the theme you have proposed for the 68th session: the Post 2015 Development Agenda.

The goals which we set ourselves for the sustainable development of our national economies and for the global economy will shape the lives of generations to come.

Let me say, at the outset, that Mauritius welcomes the Report of the High Level Panel of Eminent Persons on the Post-2015 Development Agenda and in particular the recommendation that "deliberations on a new development agenda must be guided by the vision of eradicating extreme poverty once for all, in the context of sustainable development".

We also welcome the Panel's view that one of the transformative shifts for the post-2015 should be the need "to bring a new sense of global partnership into national and international politics."

Mr President,

Climate Change should be one of the top priorities on the global agenda.

The IPCC Report on Climate Change, released yesterday, is unequivocal. It is clear scientific confirmation that we humans are responsible for global warming and that it is up to us to take appropriate measures to try and save our home planet.

We cannot and should no longer ignore the evidence that we, humans, are putting life on earth in jeopardy.

In our region, we have recently seen increased intensity and unpredictability of weather events.

In March this year, my own country experienced unprecedented flash floods that caused loss of human lives and also heavy economic losses.

No country is safe from natural disasters and from the damaging effects of Climate Change. But, for many Small Island Developing States the foreseeable consequences of climate change threaten us even more dramatically both in terms of human and economic development.

For some SIDS, they are an existential threat.

We fully support the Secretary-General's proposal to convene world leaders to a Climate Summit in 2014 in New York. We hope that this meeting will provide an opportunity for world leaders to focus our political attention on climate change and take meaningful action to mitigate its effects.

We must start putting the interests of our home planet above everything else.

The world needs a global, legally binding agreement on climate change by 2015.

At the Paris meeting of the Conference of Parties we should adopt a Treaty which is universal, ambitious and which addresses concretely the concerns of all, including those of the most vulnerable states.

Mr President,

The international community should also pay more attention to Disaster Risk Reduction and adopt a more concerted and accelerated approach to reach the goals set out in the Hyogo Framework for Action.

The time has come to address disaster risks and climate change adaptation through an integrated approach and adopt 'Resilience' as a common and shared vision.

Mauritius welcomes the decision of Japan to host the World Conference on Disaster Risk Reduction in early 2015 to review the implementation of the Hyogo Framework and to chart out an ambitious post-2015 framework for disaster risk reduction.

In this regard, the organization of the Third International Conference on Small Island Developing States in Samoa next year, could not be more timely.

We hope that the Conference will be a landmark in the history of a more active and collaborative partnership among SIDS and between SIDS and the international community.

Furthermore, this could be an opportunity to give new meaning to the concept of "Global Concerns": issues which are or should be the concern of the global community at large and not only of those who are more vulnerable and more at risk. This would be in line with the spirit of the Global Partnership which the High level Panel has called for.

Mr President,

The prospects for growth of the global economy remain uncertain, largely as a result of multiple challenges faced by developed countries.

In such an interconnected and inter-dependent world as ours, not a single nation is immune from external shocks.

Small developing countries are very much concerned at the slowdown of global growth, decline in international trade, decreasing job opportunities and rising inequality.

Small states are particularly susceptible to external shocks as they are heavily dependent on foreign markets for trade, tourism and investments. They are also concerned about energy and food prices, which are subject to high volatility.

My Government believes that the post-2015 development agenda should include a Roadmap for an interconnected world economic system, premised on the assumption that the global economy could very well be as weak as its weakest links.

Of course, the specificities of some countries or regions and the pace at which transformative shifts are implemented may not always be appropriate for universal targets. But the conceptual approach to, and the construct of, the post-2015 agenda should more than ever before in history start with the shared conviction that economies are interdependent.

Eradicating extreme poverty, empowering more women, providing wider opportunities to young people for education and jobs, improving health care and management of energy, water and food are all universal concerns.

The conventional divides of the past are no longer valid.

We need a common development framework but with differentiated milestones and implementation strategies because of existing disparities in levels of development.

Actions taken at national level are not sufficient; there should also be reinforced cooperation and partnerships at regional and international levels. It is therefore imperative that the weaknesses and inequity of present global economic governance should be addressed urgently.

We are at a juncture where we have no option but to revisit the existing global economic governance mechanisms.

An overhaul of present economic governance is long overdue.

We must have a more participatory system of global economic governance where developing countries should be more involved in international economic decision-making and norm-setting.

The voice of all nations, big or small, should be equally heard and taken into consideration.

Mauritius has, on several occasions, reiterated that ECOSOC needs to play a more prominent role on global economic, social, and environmental issues.

We cannot overstate the importance of coordination and synergy to avoid duplication among UN parallel processes and initiatives so as to ensure optimal benefit for all.

Mr President,

My Government is of the view that all the processes initiated in Rio last year, including those relating to Strengthening of ECOSOC, Sustainable Development Goals and Sustainable Development Financing, should converge towards a single Post-2015 development agenda that should be adopted during a High Level Development Summit in 2015.

The Post-2015 development agenda should complete the unfinished business of the MDGs. However it should go beyond this and provide for a systemic change and new global economic governance.

The guiding principles enshrined in the Declaration on the Right to Development adopted in December 1986 are still relevant today and should not be overlooked in the formulation of a post-2015 development agenda.

My country will follow, with particular interest, the work of the High Level Political Forum especially since it replaces the Commission on Sustainable Development which was the primary intergovernmental forum for monitoring the implementation of the Barbados Plan of Action and the Mauritius Strategy on Implementation.

Mr President,

As we set the stage for the post-2015 development agenda, we must, as global leaders, define a new global vision for the world's oceans.

The United Nations system has played a crucial role in formulating, implementing and enforcing a new international order relating to the oceans.

Indeed, the adoption of UNCLOS in 1982 will remain as one of the landmarks of the 20th century.

The jurisprudence of the International Court of Justice and of the International Tribunal for the Law of the Sea has contributed to settlement of maritime disputes and to promotion of international peace, security and equity in a manner not always witnessed in other areas of international relations.

The establishment of the International Seabed Authority is another significant example of what international cooperation can lead to, in other sectors. The International Maritime Organisation, the Inter-Governmental Oceanic Commission of UNESCO are also making significant contributions.

I believe the United Nations must now take the lead in formulating a Global Vision for the Oceans which will in particular, expand economic space for small islands states nations, whilst ensuring sustainable use of living and non-living resources.

The health of our economies will depend on the health of our oceans.

Our vision for the future must also preserve the inherent values of Ocean space to which we are looking for economic expansion.

Mauritius has taken the initiative of launching a National Dialogue on how to promote the Ocean Economy as one of the main pillars of development. We urge the international community to build on what the world has achieved so far in relation to ocean-related economic activities and conservation to propose to future generations a fundamental paradigm shift with respect to economic space.

Whilst this global vision and strategy will be beneficial to all nations it will be of particular interest to small islands. With limited land area these islands can potentially be Large Ocean States and thus overcome some of their vulnerabilities as SIDS.

As the world realizes the tremendous potential of Marine Renewable Energies, we will see the Oceans from a different perspective.

Mr President,

The United Nations has a key role to play in promoting the Rule of Law at both national and international levels.

Rule of law at the international level must be an integral part of the post-2015 agenda.

Open and participative democracy, accountability, transparency are not concepts which should be promoted only at national levels.

The United Nations should lead by example here.

We should focus on reforming our organization and making it more responsive to the needs and aspirations of its constituents.

In this context, we should work together on the reform of the Security Council, the revitalization of the General Assembly and improving the working methods of our organization.

Mauritius believes that a comprehensive reform of the Security Council should include reform in the membership of both the permanent and non-permanent categories. We reaffirm our commitment to the African Common position enshrined in the Ezulwini Consensus and the Sirte Declaration. We believe that Africa should not be deprived of its right to permanent representation in the Council.

Likewise, we believe that Latin America deserves permanent representation in the Council and that SIDS should also be entitled to a seat on the Council.

Mauritius further reiterates its support to India's legitimate aspiration to a permanent seat in a reformed Security Council.

Mr President,

Mauritius reiterates its firm conviction that Rule of Law should prevail in the resolution of disputes, in accordance with the UN Charter.

We believe that the international community has an obligation to ensure that, in line with the principles of the Rule of Law, nations should submit their disputes to conciliation, mediation, adjudication or other peaceful means, both non-judicial and judicial.

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

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

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

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

Tromelin, which is also an integral part of our territory, is the subject of ongoing discussions with the French Government and pending a final resolution of this issue, Mauritius and France have concluded a framework agreement on co-management of the island and its surrounding maritime areas without prejudice to the sovereignty of Mauritius over Tromelin.

Mr President,

In our part of the world, we welcome the rise of a re-energised Africa.

The return to normalcy in Mali and the recent holding of elections there, show the relevance of international partnerships. The situation in Madagascar and the Democratic Republic of the Congo will, hopefully, be resolved soon through the support of the International Community to SADC initiatives in this regard.

Earlier this year, Mauritius hosted an African Ministerial Conference on Regional Integration. We are convinced that African nations will benefit significantly from a greater focus on regional cooperation, I am pleased to note that the Solemn Declaration on the 50th Anniversary of the African Union supports this view.

Mr President,

The tragic events in Syria over the last two years are of serious concern to the global community. There is also concern about attempts to by-pass the Security Council and initiate action in breach of the UN Charter. Respect for Rule of Law at international level entails compliance with internationally agreed norms. Mauritius will support decisions taken by organs of the UN under the Charter.

We welcome the Security Council resolution which addresses one of the issues in the Syrian crisis.

However, the international community needs to go further and assist the political dialogue which will enable the Syrian people to live in peace.

Mauritius also supports a Middle East which is free of Weapons of Mass Destruction. This will mean that no country in the region should hold nuclear or chemical weapons.

Mauritius is convinced that an essential condition for peace and prosperity in the Middle East is the peaceful co-existence of the States of Palestine and Israel.

Mauritius wishes to reiterate its solidarity with the Palestine National Authority and the Palestinian people in their rightful aspiration to win full recognition as a UN Member State.

Mauritius also supports the peaceful restoration of democracy in Egypt which has a key role to play in promoting stability and security in the region.

The international community cannot condone the removal, by force, from office and the detention of a democratically elected leader.

Monsieur le Président,

L'Assemblée générale des Nations Unies nous offre une occasion unique de mettre en évidence les défis les plus urgents auxquels l'humanité est confrontée.

Il nous appartient de saisir cet instant privilégié afin de passer en revue les évènements récents et de tracer de nouvelles voies qui puissent répondre à ces défis, dans le respect des principes énoncés par la Charte des Nations Unies.

Ces défis, nous devons les relever dans le cadre d'une vision partagée de paix, de sécurité, d'inter-dépendance et de respect des droits et libertés fondamentaux.

Nous devons rester intraitables quant à la défense du droit au développement !

Nous avons aussi le devoir, dans une démarche différenciée, de nous assurer que notre modèle de développement soit durable et nous permette de transmettre aux générations futures les valeurs de notre planète.

Notre réussite dépendra de la volonté de tous et de l'engagement collectif.

Si nous réussissons, l'Histoire retiendra que nous avons répondu aux défis du présent et que nous avons été à la hauteur de ce que l'avenir attend de nous.

Mr President,

We need to act together, in a spirit of compromise and tolerance.

There isn't, and never will be, ideal solutions which will satisfy all of us.

We, the leaders of our respective countries, need to look beyond the horizon and have the moral courage to look at our common humanity so that we may move towards making our world a better, more prosperous and safer place for the whole of human kind.

I thank you for your attention.

****

Annex 181

Letter dated 3 October 2013 from Clifford Chance LLP to Treasury Solicitor's Department

CLIFFORD
CHANCE

CLIFFORD CHANCE LLP

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Your ref: Q100326H/JYY/B4
Our ref: 70-40426608
Direct Dial: +44 207006 4666
E-mail: luke.tolaini@cliffordchance.com

BY EMAIL

James Spybey
Treasury Solicitor's Department
1 Kemble Street
London
WC2B 4TS

3 October 2013

Dear Sirs

R(Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (CO/8588/2010)

We write in relation to the case referred to above, in which we are currently awaiting the outcome of an application for permission to appeal to the Court of Appeal.

As you may be aware, some of the legal team representing Mauritius in the ongoing UNCLOS arbitration proceedings with the United Kingdom attended and observed the judicial review trial. During the course of the trial a member of Mauritius' legal team asked Clifford Chance to review certain documents that were being used in the case. In response to this request Clifford Chance sent a copy of the trial bundle to Matrix Chambers after the trial had concluded. The copy included the Core Bundles, the Correspondence Bundle and the Exhibit Bundles. For the avoidance of any doubt, neither our client, Olivier Bancoult, nor any official of the Government of Mauritius was involved in, or had any knowledge of, these actions.

We have had cause to revisit the decision to send a copy of the trial bundle to Mauritius' legal team, in light of the obligations owed to your client and to the court under CPR r 31.22, and their potential application to certain documents in the trial bundle. We have, in this context, requested that the copy of the trial bundle be returned.

Mauritius' legal team agreed to our request and have now returned the copy of the trial bundle. Mauritius' legal team also notified Clifford Chance that they have made copies of certain documents that they do not consider to be subject to any prohibition on being used outside of the Bancoult (3) litigation. They have produced a list of the copied documents

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which, with their agreement, we enclose with this letter. If your client wishes to discuss any issue relating to the copied documents then we would invite them to contact Mauritius' legal team, to whom this letter is copied, directly.

Yours faithfully

Clifford Chance LLP

Clifford Chance LLP

cc. Philippe Sands QC and Alison Macdonald, Matrix Chambers

Bancoult JR documents retained by the Mauritius legal team

Written submissions and skeleton arguments
Witness statements
Transcript of the first four days of the JR hearing (15-18 April 2013)
Exhibits produced by Richard Dunne (EB7 and RPD3)
EB1, tab C
CB1, tabs 29-34
CB1, tab 39-40
CB2, tab 42-43
CB2, tab 46-48
CB2, tab 50
CB2, tab 92
CB2, tab 94
CB3, tab 104-105
CB3, tab 119
EB10, Annexes B, D and H
IPC, tab 70
EB10, Annex G
CB1, tab 16
EB2, tab 3
EB2, tab 5 -19
EB3, tab 2-16
EB3, tab 19-20
EB3, tab 22-23
EB3, tab 25
EB3, tab 28-29
EB3, tab 32
EB3, tab 35-40
EB11, tab 1-2
EB11, tab 4-17
EB11, tab 19-24
ZPR5, tab 5-6
ZPR5, tab 9
ZPR5, tab 10
ZPR5, tab 12-13
ZPR5, tab 24-26
ZPR5, tab 31-37
ZPR5, tab 39
ZPR5, tab 41-42
ZPR5, tab 44-209

Annex 182

Letter dated 10 October 2013 from Solicitor-General of Mauritius to Mr. L. Tolaini, Clifford Chance LLP

Solicitor - General's Chambers
Mauritius

My Ref: AG/FA/38/9

10 October 2013

Mr L. Tolaini,
Clifford Chance LLP,
10, Upper Bank Street
London E14 5JJ
UNITED KINGDOM

Email: Luke.Tolaini@CliffordChance.com

Dear Mr Tolaini,

Communication, by Clifford Chance LLP, to the "UNCLOS Arbitration" Mauritius Legal Team, of the trial bundle in the R (Bancoult Judicial Review case)

I write in response to, and clarification of, your letter of 3 October 2013, to Mr James Spybey of Treasury Solicitor's Department. a copy of which has been passed to me.

Two members of the Mauritius legal team attended some of the Bancoult judicial review hearing, along with me and Mr Suresh Seebaluck, Cabinet Secretary of the Government of Mauritius. During the hearing, the Mauritius legal team asked Mr Bancoult's solicitors, Clifford Chance, whether they were able to provide copies of some of the documents in the case. This was done with my knowledge and on my instructions. On the final day of the hearing, Mr Bancoult's solicitors emailed the Mauritius legal team to ask whether they would like a copy of the judicial review bundle. This offer was taken up, upon my instruction, and accordingly Clifford Chance provided a copy.

Following a thorough review of the materials in order to establish which had entered the public domain within the meaning of CPR 31.22(1)(a), Mauritius returned the bundles to Clifford Chance, retaining only the materials so identified.

I would be grateful if all future communications in respect of this matter be directed to me.

Yours sincerely,

Dheerendra Kumar DABEE G.O.S.K., S.C.
Solicitor-General of Mauritius

Annex 183

Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, 6 November 2013

Prime Minister
Republic of Mauritius

Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius

I, Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, say as follows:

1. I qualified as a doctor in 1975 after studying at the Royal College of Surgeons in Dublin. In 1990, I obtained a Bachelor of Laws (Honours) from the London School of Economics and Political Science, University of London and in 1993, I was called to the Bar of England and Wales. In May 2009, I became a Fellow of the Royal College of Physicians (FRCP) and in April 2011, an Overseas Bencher of the Inner Temple. I have served as Prime Minister of Mauritius from 27 December 1995 until September 2000 and then as Leader of the Opposition until I again became Prime Minister of Mauritius on 5 July 2005.

2. I have always had a very close and cordial relationship with Mr Gordon Brown, former Prime Minister of the United Kingdom of Great Britain and Northern Ireland.

3. I first met Mr Brown when he came to Mauritius in his capacity as Chancellor of the Exchequer of the United Kingdom to attend the Commonwealth Finance Ministers Meeting held from 15 to 17 September 1997. I was then Prime Minister.

4. I have subsequently met Mr Brown on several occasions, both as Prime Minister and as Leader of the Opposition. We have developed a constructive and positive working relationship.

5. For example, when Mauritius was not initially selected in 2008 by the Secretary-General of the Commonwealth to form part of a small representative group of Commonwealth Heads of State/Government to

reflect on reforms to be brought to international institutions, it was at the suggestion of Mr Brown, then Prime Minister of the United Kingdom, that Mauritius was included in the list of participating countries for the meeting at 10 Downing Street.

6. While Mr Brown served as Prime Minister of the United Kingdom, I had meetings with him on, *inter alia*, 24 November 2007 in Kampala, Uganda, on 9 June 2008 in London, and on 27 November 2009 in Port of Spain, Trinidad and Tobago.

7. The meeting I had with Mr Brown on 27 November 2009 was a tête-a-tête in the margins of the Commonwealth Heads of Government Meeting (CHOGM) held in Port of Spain, Trinidad and Tobago from 27 to 29 November 2009.

8. My meeting with Mr Brown was pre-arranged by both Governments and took place at Hyatt Hotel in Port of Spain. Dr the Hon. Arvin Boolell, Minister of Foreign Affairs, Regional Integration and International Trade of Mauritius, and H.E. Mr Abhimanu Kundasamy, High Commissioner of Mauritius in London, were present in the background.

9. At the outset of our conversation, Mr Brown praised the leading role which I had played in forging a consensus on a crucial and delicate issue which arose in the course of the meeting. Despite intense lobbying, the matter could not be resolved, but following my conversation with the parties concerned, an agreement was reached and the issue in question was resolved to the satisfaction of all parties concerned.

10. Mr Brown recognized the positive leadership role I had played on this issue and asked me what he could do for Mauritius. He then reiterated his thanks and his invitation to assist me. I therefore took the opportunity to convey to Mr Brown the deep concern of Mauritius over the proposal of the United Kingdom to establish a 'marine protected area' around the Chagos Archipelago and the launching of a public consultation by the UK Foreign and Commonwealth Office on 10 November 2009, just two weeks earlier, in this regard. That announcement had been the subject of media attention. I indicated to Mr Brown that when the British High Commissioner in Mauritius had called on me on 22 October 2009 to announce the UK's proposal, I had expressed surprise that he was not able to offer me any

document in relation to that proposal and told him that I would raise the matter with the British Prime Minister during the forthcoming CHOGM in Port of Spain. I had made very clear the objection of Mauritius to the UK's proposal.

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

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

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

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

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

16. Despite the clear commitment given to me by Mr Brown, the British Government did not halt the public consultation on the proposed 'marine protected area'. It extended the deadline for the consultation from 12 February to 5 March 2010.

17. I mentioned the commitment given to me by Mr Brown during a press conference which I gave on 5 December 2009 immediately after my return to Mauritius and in reply to a Private Notice Question in the Mauritian Parliament on 18 January 2010.

18. The then UK Secretary of State for Foreign and Commonwealth Affairs, Hon. David Miliband, subsequently decided on Thursday 1 April 2010 that a 'marine protected area' should be established around the Chagos

Archipelago. I was not given any prior notice that such a decision was to be announced.

19. Mr Miliband called me on that very day to announce his decision. I told him that I was totally surprised to hear that a 'marine protected area' would purportedly be created by the United Kingdom around the Chagos Archipelago. I expressed to him my strong disapproval of such a decision being taken in spite of the clear commitment given to me by Mr Brown that the proposed 'marine protected area' would be put on hold. This was a commitment on which I placed reliance.

20. I immediately instructed that an objection to the establishment of the 'marine protected area' be made in writing. A Note Verbale was sent by the Ministry of Foreign Affairs, Regional Integration and International Trade to the British High Commission on the next day, 2 April 2010. On Tuesday 6 April 2010, the British Parliament was dissolved and Mr Brown left office after the elections held on 6 May 2010.

21. I next met Mr Brown on 17 April 2013 in London. On that occasion, I mentioned my understanding that the subject of his commitment to me had been raised in court proceedings in London and reiterated the deep concern and disappointment of Mauritius at the purported establishment of a 'marine protected area' by the United Kingdom around the Chagos Archipelago.

22. Mr Brown plainly understood the commitment to which I was referring. He did not deny that he had ever made such a commitment, and he did not indicate any surprise or lack of understanding of what I had raised. Mr Brown simply said: "The truth always comes out."

Dr N. Ramgoolam

Dr the Hon Navinchandra Ramgoolam, GCSK, FRCP
Prime Minister

6 November 2013

Annex 184

Natural England, Marine Protected Areas, Definition, 11 November 2013

NATURAL ENGLAND

Marine Protected Areas

Marine Protected Areas (MPAs) are zones of the seas and coasts where wildlife is protected from damage and disturbance. The Government is committed to establishing a well-managed ecologically coherent network of MPAs in our seas.

By linking MPAs together into a coherent network, supported by wider environmental management measures, we will promote the recovery and conservation of marine ecosystems. The network will contain MPAs of different sizes containing different habitats and species, connected through movements of adults and larvae, with a range of protection levels that are designed to meet objectives that single MPAs cannot. A well designed network is key to achieving biodiversity goals.

The UK has committed to establishing an ecologically coherent network of MPAs under several agreements including the OSPAR Convention, World Summit on Sustainable Development and Convention on Biological Diversity.

Why do we need MPAs?

Marine Protected Areas are essential for healthy, functioning and resilient ecosystems – they help us deliver the Government's vision of a clean, healthy, safe, productive and biologically diverse oceans and seas.
Some human activities damage or cause disturbance to marine habitats and their species. Within an MPA such activities will be managed or restricted.

Specifically, MPAs enable us to:

- Protect and restore the ecosystems in our seas and around our coasts.
- Ensure that the species and habitats found there can thrive and are not threatened or damaged.
- Maintain a diverse range of marine life that can be resistant to changes brought about by physical disturbance, pollution and climate change.
- Provide areas where the public can enjoy a healthy marine environment learn about marine life and enjoy activities such as diving, photography, exploring rock pools and coastal walking.
- Provide natural areas for scientific study.

Lundy Marine Conservation Zone: case study of a marine protected area

Marine Protected Areas in England

There are five designations which together will form the MPA network in England:

- Special Areas of Conservation (SACs)
  Protect marine habitats or species of European importance (for example sea caves and reefs)
- Special Protection Areas (SPAs)
  Protects populations of specific species of birds of European importance.

SPAs and SACs are together termed 'European Marine Sites' or 'Natura 2000 sites' designated under the European Habitats and Birds Directives.

- Sites of Special Scientific Interest (SSSI)
  Although most SSSIs are on land and intertidal area there are some which extend into the marine environment below low water mark.
- RAMSAR sites
  Protect internationally important sites for wetland birds
- Marine Conservation Zones (MCZs)
  Protect nationally important habitats, species and geology. Presently only one MCZ around Lundy Island has been designated.

The Joint Nature Conservation Committee have produced an information document on different types of MPAs.

Marine Protected Areas and the Marine and Coastal Access Act

The Marine and Coastal Access Act strengthens the network of Marine Protected Areas in England and Wales. The Act has created a duty on Ministers to designate new areas of national importance as Marine Conservation Zones to protect the range of marine habitats

and species in England's seas contributing to a network of MPAs. The Act also provides for improved duties and powers for public bodies to manage MPAs.

Natural England's work on Marine Protected Areas

Natural England aims to achieve the favourable condition of all MPAs in the network. This will be delivered by:

- Securing the favourable condition of designated MPAs by improving our conservation advice
- Identifying new Special Areas of Conservation and Special Protection Areas
- Identifying and recommending Marine Conservation Zones
- Providing comprehensive, up to date and user-friendly conservation advice for all MPAs in English waters

New UK Marine Protected Area Interactive Map

The Joint Nature Conservation Committee have just launched an interaetive map to display UK Marine Protected Areas (MPAs). This is an innovative new tool which provides information on the designated MPAs throughout the UK and where in UK waters the habitats and speeies that the MPAs are designed to protect occur.

Explore the UK MPA Interactive Map

-

  Unprecedented demand for marine data helped by joint monitoring initiative

  (15 July 2013) With the unprecedented expansion of the UK's Marine Protected Area (MPA) network the demands for obtaining quality marine data - which can often be expensive to collect and maintain – are ever increasing.

  More

-

  Southampton shipping channel dredge approved

  (20 February 2013) Southampton's shipping lane is being expanded to allow the largest ships in the world to visit the port.

  More

Annex 185

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

~~CONFIDENTIAL~~

From: W N Wenban-Smith
East African Department

Date: 24 August 1983

PS/Mr Rifkind

cc: PS/Mr Whitney
Sir J Bullard
Sir J Leahy
Mr Squire o.r.

SITREP: EAST AFRICA

Indian Ocean

1. Action was taken to ensure that the Mauritian vessel, MV Romaya, left the Peros Banhos lagoon in the British Indian Ocean Territory, where she was illegally gathering coconuts. With the Prime Minister's approval, contingency plans were made for the Armilla patrol to be available to assist in sailing the vessel to a point outside territorial waters. Fortunately, the Romaya left on 13 August, as requested by the local RN Liaison Officer, and should now be nearing Port Louis. Meanwhile, a second boat, the Nazareth, was seen fishing in the area and intends to remain there until about 30 September. With Mr Whitney's agreement, we are proposing to continue to allow it to fish for the present, while we look afresh at our policy on access by Mauritian vessels to BIOT. Our High Commissioner in Port Louis is in contact with the owners of both vessels.

2. The result of the Mauritian elections, held on 21 August, was an unexpectedly clear cut win for Mr Jugnauth's MSM/ Labour Party Alliance, which won 37 seats to the 19 obtained by the MMM, whose leader, Mr Berenger, lost his seat (two small parties won 2 and 4 seats respectively, the latter being likely to join the governing coalition). The result reflects Hindu solidarity and nervousness of Berenger. Mr Jugnauth will presumably remain Prime Minister; other appointments have yet to be decided. The result is probably better for us than if Berenger had won, especially on Diego Garcia.

[redacted]

[redacted]

[redacted]

[redacted]

/ here.

~~CONFIDENTIAL~~

[redacted]

W N Wenban-Smith

~~CONFIDENTIAL~~

(115)

BRITISH INDIAN OCEAN TERRITORY COMMISSION

063/1

1 September 1983

RECEIVED IN REGISTRY
7 SEP 1983
DS | PS | PS/Mrs
INDEX | 1 | 2

cc Mrs Weatherhead (Research Dept)
Miss Pearce (Defence Dept)
Mr Tipple (MOD - DSS)
Mr Hearle (MOD - DS11)
Miss Pearce (MAED)
RH 5/9.

P L Hunt Esq
EAD
FCO
London

My dear Peter

CHAGOS: MAURITIAN ACTIVITIES (115)

1. My letter 063/1 of 26 August to you crossed with FCO telno 97 of 28 August. (105)

2. I must tell you that I was very disappointed that we had decided to take such a rigid line particularly as I now realise that we had shown flexibility in the past. I naturally carried out my instructions and informed the Talbots of our ruling about the Nazareth and Seesaram about the Romaya.

3. Joseph Talbot came in to see me today. Because of the position taken by us, the Nazareth has now moved on to the Saya de Malha bank. Talbot was worried that this particular voyage would be something of a financial disaster because, as he had explained earlier, weather conditions away from the immediate vicinity of the Chagos are always bad at this time of year. He pressed me to ask for a reconsideration of our position. He emphasised that his firm did not in anyway want to challenge our sovereignty and would be very happy to sign any necessary undertakings. He hoped that the British Government would show goodwill towards Mauritians who were genuinely trying to make an honest living. There was fish in the sea round Chagos and it seemed a tragedy that it was not going to be exploited (he assured me that there would be no overfishing). He further found it somewhat galling that many yachtsmen spent months in the Chagos using the old plantation houses and genuinely making free with the islands. I sought to console him on all these points and also to make clear that there was a real distinction between the activities of individual yachtsmen and professionals.

4. Talbot explained to me that the winter trip to the Chagos was all important in obtaining enough money to carry out the repairs on both the Nazareth and Topic for their summer fishing on the other banks. There was also the problem of supporting the fishermen in the winter. For these reasons he very much hoped that this whole question could be looked at again so that the Nazareth could fish in the Chagos sometime during the period June-September 1984.

5. I did not, of course, hold out any hope for Talbot. Although he is, I think, sincere in wanting to deal with us direct, one cannot rule out his going to the Mauritians for some sort of moral support. I would therefore

be useful to know the real reasons why we are being so tough about the three-mile limit. Is it because of fishery considerations in other parts of the world?

6. Before leaving my office Talbot asked me about sea freight arrangements with the Chagos and showed me a letter from R & O Ferries, a copy of which I attach. I said I was unsighted on this matter but that a cursory glance at the exchange of notes with the Americans revealed little on this subject. Personally, it seemed to me that this was very much a chicken and egg situation. Unless there were goods which those on Diego Garcia wanted to buy from Mauritius, there was no point in having transportation; on the other hand, unless there was some link people might prefer to use traditional suppliers. I did not go into the question of the undoubted American preference for their own bottoms. I should be grateful for your comments in due course. It is clear from this part of the conversation that Talbot is desperately looking for some use for his boats which each have a 300 ton capacity.

7. My telephonic talk with Seesaram was altogether briefer. I tried to prepare him for an unfavourable decision but he seemed sanguine that the British authorities would see good sense. Certainly, Ministers in the new Mauritian Government are likely to find it strange if we refuse to allow the use of natural resources which will go to waste if not harvested. This is, of course, a view not only held by the Mauritians and I was surprised when the retiring American Ambassador, Bob Gordon, said to me the other day that he believed we should not stand in the way of the coconut collection. This seems to reflect the local American view on Diego Garcia as reported in para 2 of BNIO Diego Garcia telno 011321z of 1 August.

J M Allan

Ou X : I spoke to Miss Peirce (MIND). Her views & those which she is circulating to Departments (e.g. ECD) on our proposed Mauritian fisheries regime (the 'three mile limit' which we intend will be imposed shortly) envisage the exclusion of foreign vessels to Mauritian waters, with the possible exception of one or two vessels from Seychelles. Miss Peirce (MIND) will check with us before any Diego Garcia fishing licences are issued. HH 6/9

~~CONFIDENTIAL~~

FROM: W N WENBAN-SMITH
East African Department

DATE: 20 SEPTEMBER 1983

Mr Squire
PS/Mr Rifkind

cc: PS
PS/PUS
Defence Department
MAED
Legal Advisers
Planning Staff

MAURITIAN ACCESS TO THE BIOT AND ITS TERRITORIAL SEA

PROBLEM

1. In the aftermath of the illegal intrusions of the motor vessels Romaya and Nazareth into the BIOT and its territorial sea in July and August this year, one to collect coconuts on Peros Banhos and the other to fish in the adjacent territorial sea, Mr Rifkind, to whom we originally submitted on the problem, agreed that we should review our policy on Mauritian access to BIOT land and territorial sea. What should our policy now be?

FLAG A
FLAG B

RECOMMENDATION

2. I recommend that we should allow Mauritian vessels limited and conditional access to the outer islands of the BIOT (including the territorial waters) both for fishing and coconut collecting provided that permission is obtained in advance on each occasion. I further recommend that the Secretary of State should inform the Mauritian Foreign Minister of our intentions during the latter's call on 23 September.

BACKGROUND

3. Ever since the copra plantations were closed in 1973 and the workers removed, our policy has been to keep BIOT free of people and of commercial activity. It was nevertheless agreed with the Mauritian Government in 1965 that fishing rights (in the fishing zone between territorial limits and the high seas) would remain available to the Mauritius

/Government

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Government as far as practicable. And fishing vessels, Mauritian or other, do of course have the right to fish outside the fishing limits on the Chagos Bank. The fact is, however, that the best fishing is close to the reef, mostly within the territorial waters of BIOT. At least one Mauritius company has fished the Chagos Bank for many years, almost certainly within as well as outside territorial limits. This was of no practical concern as long as Mauritius' claim to BIOT was dormant, as was the case until Mr Jugnauth's first government came to power in a landslide victory in June 1982. He then decided to pursue the Mauritian claim more vigorously. We became more concerned that one way of advancing the claim would be to reintroduce the Ilois into the outer islands of the Archipelago [redacted]

[redacted]

ARGUMENT

4. There are inherent practical problems in policing the outer islands of the BIOT. The Royal Navy Liaison Officer (RNLO) and his staff do not have a vessel which would enable them to travel independently from Diego Garcia to the main outer islands of Peros Banhos and the Salomon Islands. The US Navy is, however, able to help in two ways. First, ad hoc surveillance of any or all the outer islands presents no problems, even if we occasionally ask for this to be done at frequent intervals or at short notice. General surveillance is one of the tasks of both ships and aircraft involved, so no costs are involved. Second, US Navy vessels are only too pleased to provide transport for RNLO and his staff on

/patrol [illegible]

surveillance or immigration control; and can embark his boats without problems. But the US Navy would not be permitted to become involved in law enforcement (e.g. transporting prisoners or escorting ships from the area). The position therefore is that, without the permanent deployment of RN ships, we cannot enforce a policy of total exclusion. The cost of such deployment, even if ships could be spared, appears wholly disproportionate to the requirement: as a guide, the full costs of keeping one frigate on station are over £40m per year. We cannot of course do more than monitor a policy of conditional access. If, however, we can secure the cooperation of the mariners concerned and the acquiescence of the Mauritian Government, the latter policy should not require additional resources to enable the RNLO to visit the islands for periodic spot checks. (The wider question of how we should respond to threats to the security of the outer islands is the subject of separate discussion with MOD.)

5. Apart from the practicalities of enforcement, there is the political aspect. The question of coconut collection is an issue upon which the Mauritians feel strongly. It has been raised with our High Commissioner in Port Louis by the Prime Minister, the Minister of External Affairs and the Minister of Commerce. It was also raised by the Minister of Finance during his call on Mr Raison on 15 September and could well be raised by the Minister of External Affairs when he calls upon the Secretary of State on 23 September. The Mauritian view is that it is simply churlish to allow the coconuts to waste: they save Mauritian foreign exchange and above all give employment to Mauritians. The Foreign Minister, a lawyer, also affects to believe that the 1965 agreement with Mauritius reserves to the latter the right to exploit BIOT's natural resources.

6. The newly-elected government in Mauritius is basically friendly to the West and pragmatic in its economic policies. There are encouraging signs too that the new government is becoming more critical of the Soviet Union than Mr Jugnauth proved in the early months of his first administration. We wish to encourage Mauritius in its present orientation.

[redacted]

If we reject the Mauritian representations we shall put these bilateral interests at risk. More important we shall, without securing advantage in return, make it more difficult for Mauritius to soft-pedal their claim to sovereignty over BIOT or their political attitudes to the Diego Garcia facility. This could have immediate repercussions at the forthcoming UN General Assembly and CHOGM. In the longer term a negative attitude could tempt Mauritius to try its luck with an infiltration of the islands.

7. Finally, we need to safeguard our juridical position. If we make access, whether of fishermen or of coconut gatherers, subject to a licensing procedure, we demonstrate unambiguously that we are exercising our sovereign rights in BIOT's outer islands; and the Mauritian government, by acquiescing in its citizens' adherence to such a system, will come close to a tacit acceptance of our position. We have looked into the changes that would be required to the existing BIOT Fishing Ordinance and satisfied ourselves that these would not create any awkward precedents. We are considering urgently whether permission to gather coconuts could best be covered by the same Ordinance or by some other means (e.g. under the existing Immigration Ordinance) but anticipate no particular difficulties.

/8.

~~CONFIDENTIAL~~

8. Together, these factors provide, I believe, a strong case for permitting limited and conditional acce. to the outer islands of BIOT. Although recent press leaks about the diversion of HMS Andromeda may have served a useful purpose in indicating readiness to enforce our sovereignty, our present policy has clear political disadvantages and depends for success either on bluff or the commitment of very substantial resources. The policy recommended in this submission will not altogether remove the risk of infiltration; it will however provide both the mariners and government of Mauritius with an interest in cooperation with no diminution and, arguably, some enhancement of our juridical position.

W N Wenban-Smith

~~RESTRICTED~~

5/9/83.

GRS 100
RESTRICTED
FM PORT LOUIS 050510Z SEPT 83
TO PRIORITY FCO
TELEGRAM NUMBER 115 OF 5 SEPTEMBER
INFO PRIORITY RNLO DIEGO GARCIA (FOR WENBAN SMITH)

MY TELNO 97: CHAGOS COCONUTS

1. WHEN I SAW PRIME MINISTER ON 2 SEPTEMBER ON OTHER MATTERS HE RAISED WITH ME QUESTION OF ROMAYA HARVESTING COCONUTS (SEESARAM HAD JUST HAD AN APPOINTMENT WITH HIM). HE FORCEFULLY EXPRESSED THE HOPE THAT WE WOULD AUTHORISE SUCH HARVESTING AND DISMISSED MY REMARK THAT IF PERMISSION WAS GIVEN THIS COULD BE THE START OF A NEW ILOIS PROBLEM: HE IMPLIED THAT THERE WOULD BE NO QUESTION OF THE HARVESTERS SEEKING TO SET UP EVEN TEMPORARY CAMPS. HE SAID THAT IF NECESSARY HE WOULD RAISE ISSUE WITH MRS THATCHER IN NEW DELHI IN NOVEMBER.

ALLAN

[THIS TELEGRAM WAS NOT ADVANCED]

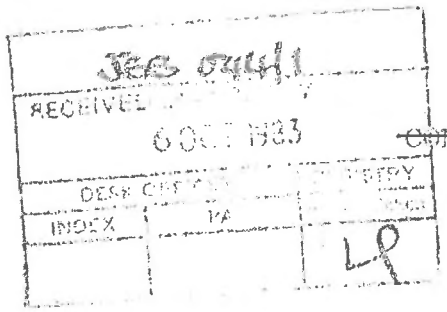
LIMITED
EAD
DEF D
LEGAL ADVISERS
MAED
PLANNING STAFF
NEWS D

PS/MR WHITNEY
SIR J BULLARD
SIR J LEAHY
MR WRIGHT
MR CARTLEDGE
MR SQUIRE

~~RESTRICTED~~

(135)

Minister



~~CONFIDENTIAL~~

FROM: W N WENBAN-SMITH
EAST AFRICAN DEPARTMENT

DATE: 22 SEPTEMBER 1983

~~Mr Squire~~
~~PS/Mr Rifkind~~

cc: PS
PS/PUS
Defence Department
MAED
Legal Advisers
Planning Staff

MAURITIAN ACCESS TO THE BIOT AND ITS TERRITORIAL SEA

A (134) 1. PS/Mr Rifkind's minute of today records the Minister of State's decision on the line to be taken when the Mauritius Foreign Minister calls tomorrow. We have briefed the Secretary of State accordingly.

2. Mr Rifkind also raised three specific questions on my

B (133) submission of 20 September:

(a) Surveillance of the outer islands

[redacted]

The introduction of a licensing system should not however increase the surveillance requirement: once a vessel had been identified as having permission to fish/land in the area concerned, the issue of control would not normally arise i.e. we would not, as now, be faced with an awkward choice between turning a blind eye, or bringing to bear the necessary force to impose our will.

(b) Risk of attracting more vessels to BIOT waters

Our High Commission think that Mauritius has very few vessels capable of making the voyage involved, whose economics are rather uncertain. Not much is known about the fisheries potential of the Chagos, but our impression is that the Talbot Brothers, owners of the MV Nazareth, who know the waters best, do not usually find it easy to fill their hold.

/(c)

(c) Intensification of the risk of infiltration

This risk remains as long as vessels can legitimately approach the area; and we undertook in 1965 to ensure that fishing rights in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable. Without permanent escort it is not possible to prevent surreptitious landings. While Mr Jugnauth himself has told us that he would not contemplate such activity (Port Louis telno 115 of 5 September), in the long run we believe that the risk is best reduced by maintaining a satisfactory political relationship with Mauritius and by giving them an interest in the continuation of such activity as we choose to permit and can reasonably justify.

3. In the light of these comments, I feel bound to advise that our interests are liable to suffer if we do not take the initiative in being forthcoming on an issue on which Mauritian Ministers have told us they feel strongly (they are more concerned about coconut collection than about fishing, which they probably believe not to be a problem). My fears are as follows:-

(i) Mr Gayan may regard as provocative an invitation to him to put forward proposals for access to the islands consistent with our sovereignty and defence requirements. He could hardly do this without appearing to disavow the Mauritian claim to sovereignty over BIOT. It is true that we should then be able to lay the blame for lack of agreement at Mauritius' door; but this would not make Mauritian Ministers any less frustrated and angry.

(ii) With luck, Mr Gayan's immediate reaction will not be such as to raise the temperature of his Prime Minister's address to the UNGA on 27 September, and thus to provide ammunition for our opponents who see parallels between Diego Garcia and the Falklands. But it seems all too likely that Jugnauth would carry out his threat to raise the matter at the Commonwealth Heads of Government Meeting in November (Port Louis telno 115),

/where

where we should attract little sympathy.

[redacted]

(iv) In the longer term we risk goading the Mauritians into deliberately encouraging intrusion into the BIOT and its territorial waters with the result either of highlighting our inability to enforce a policy of total exclusion or forcing us to divert scarce naval resources at disproportionate cost to prove the contrary.

4. For these reasons, I hope that Mr Rifkind can agree to our preparing a restrictive licensing scheme, and letting Mauritian Ministers know soon that we are making arrangements to ensure their vessels a reasonable degree of access.

W N Wenban-Smith

There are risks in the licensing idea; but the air surveillance capability should go a long way to establishing whether the system is being abused. The Department expect the frequency to be at least weekly.

2. Infiltration remains a risk under either system. But this way we calculate there is a better chance of good faith collaboration with the Mauritians.

3. I am told that access was the first point Mr Sayan raised with the Secretary of State this morning. It was given/a

temporising reply. If the case a restrictive licensing scheme were authorised, I could explain this to Mauritian ministers when I am in Port Louis next month (DATE OCTOBER 4/5). This would help to avoid unhelpful exchanges at CHOGM.

23/IX

~~RESTRICTED~~

Foreign and Commonwealth Office
London SW1A 2AH

Telephone 01- 233 3696

11 FEB 1984

J N Allan Esq CBE
Port Louis

Your reference

Our reference

Date 30 November 1983

Dear James,

MAURITIAN FISHING OFF THE CHAGOS ARCHIPELAGO

Thank you for your letter 063/1 of 3 November.

2. Because of the envisaged expansion of the civilian work-force on Diego Garcia, we had long had it in mind to recruit a lawyer to carry out a revision of the BIOT Civil Code. This revision is now underway and a key item will be the revision of the 1971 Fishing Ordinance. We will of course be designating Mauritius under Article 4 and adding licensing and control powers and some alternative penalties to the Ordinance. Our view is that permissible traditional fishing should not automatically include purse-seining and that we will need to have the discretion to forbid it on conservation grounds. When we have a draft we will send it to you to let you see what we have in mind. Legislation will not be required for the Commissioner to license coconut collecting. Incidentally, we note from your letter 063/1 of 19 October that Seesaram told you that he would let you have a letter in the near future requesting up to two visits for the period to the end of this year. Has he yet produced his letter?

3. I am sorry that I have not sent you before the attached papers and information to which we are entirely indebted to Dr Cashmore in Research Department on the Crown's claim to France as an example of defacto acceptance of sovereignty. Basically, from the reign of Edward III the English Crown claimed the throne of France. This anachronistic claim survived the defeat of the Hundred Years' War and the Kingdom of France was listed amongst the English Crown's titles for several hundred years (e.g. the attached Succession Act of 1604). Although the Crown of England claimed the title this never stopped them doing business, through numerous treaties etc. with the real Kings of France (some examples attached). Ironically, it was only under Napoleon's France (he then being Consul) that England dropped the claim (see the attached extract from the Peace of Amiens, 1802).

/ 4 On

4. On your point about the Law of Innocent Passage. The Captain and crew off the Romaya were committing offences under Section 4 of the Immigration Ordinance 1971 by entering and remaining in BIOT without the necessary permits. In this context references to 'the Territory' include not only the land but the territorial sea over which we have sovereignty just as we do over the land. In the case of the Romaya, of course, some members of the party put ashore, and they will have committed offences against the Immigration Ordinance without any need to rely on the application of the Ordinance to the Territorial Sea. The application of the Ordinance to entry into BIOT Territorial Sea, is internationally, subject to the vessel's right to be engaged in innocent passage. Whilst the evidence available would have served to rebut any claims of such rights by the Romaya or Nazareth, the rules set out in the 1955 Convention on the Territorial Sea are clearly complex and would require careful examination in the light of any future case.

Yours ever,

Peter

P L Hunt
East African Department

~~RESTRICTED~~

073637
MDHOAN 3742

N Macl...
The SOS came very close to agreeing one Govt. TV crew to accompany Kasenally. The latter, I suspect, thought he had agreed, I sense anxiety on this.
AG 31/1

RESTRICTED
FM FCO
TO IMMEDIATE PORT LOUIS
TELNO 11
OF 281655Z JANUARY 94
INFO ROUTINE VICTORIA, ANTANANARIVO, COLOMBO
INFO ROUTINE WASHINGTON, ROME
INFO ROUTINE DIEGO GARCIA

DER 044/94/21
RECEIVED REGISTRY
18 FEB 1994

SIC

ROME FOR UKDEL FAO
DIEGO GARCIA FOR BRITREP

SIGNATURE OF ANGLO-MAURITIAN FISHERIES AGREEMENT
SUMMARY

1. The Anglo-Mauritian joint statement on Fisheries co-operation signed on 27 January. Each side stresses that their respective positions on sovereignty over BIOT is preserved, but Kasenally welcomes it as a major confidence-building measure. Subsequent official talks on proposed visit by Kasenally to BIOT, dates of first Anglo-Mauritian joint commission meeting and handling of Ilois.

DETAIL
2. The Mauritian Foreign Minister, Kasenally called on the Secretary of State on 27 January. He thanked him for accommodating a change of dates for the signing ceremony and for providing the political impetus which had led to agreement on the text of the joint statement. During his recent visit, the Chinese Foreign Minister had asked whether the new agreement meant that the UK was handing over Diego Garcia. He had been disabused. The new agreement should be regarded as a major confidence-building measure. He confirmed that he wished to visit BIOT and was grateful for British Ministers' agreement in principle to this proposal.

3. The Secretary of State said that the practical arrangements for a visit would need to be discussed by officials but there could be no question of Kasenally being accompanied by a large group of officials or journalists. We should move forward by ring-fencing our disagreement over sovereignty but by seeking

areas of possible cooperation. This process could be spoilt if there was a lack of sensitivity in the early stages. (Kasenally indicated his agreement but then spoke of being accompanied by one carefully controlled crew from Mauritian National Television - see below).

4. [redacted]

5. Finally Kasenally extended an invitation to visit Mauritius, possibly in connection with a trip to South Africa. The Secretary of State said that this was a tempting offer which he would bear in mind.

6. The two principals then moved to a separate room for the formal signing ceremony which was filmed, by inter alia, Mauritian television. In their public comments, both commented on the recent improvement in bilateral relations and the fact that the joint statement did not alter their respective positions on sovereignty over BIOT.

7. In subsequent exchanges at official level, Harris (AD(E)) explained to Ambassador Makhan that there was an absolute ban on journalists visiting Diego Garcia. This was not anti-Mauritian, it applied to all including British and American journalists. We had recently refused permission for journalists from the Australian MOD to visit the island. On the other hand, we would be perfectly content for Kasenally to fly to BIOT on a US aircraft, provided we knew in advance who was in the Mauritian party. Makhan said that no final decision had been taken on dates. He would continue to liaise with you.

8. We suggested that the first meeting of the Anglo-Mauritian Fishing Commission might take place in Port Louis in mid-April. The Mauritians agreed to let us have their reaction.

9. There was also an exchange of views on the proposed visit to the outer islands by a small group of Ilois. Harris made clear that, despite misleading press reports in Mauritius, no agreement had yet been given for such a visit. He passed over a copy of his letter to the lawyers acting for the Ilois. It was agreed that we should continue to maintain unpublicised liaison over this issue but the Mauritians made it clear that they would not be able to prevent such an expedition if it took place. (They were, however, making discreet enquiries into the financing arrangements behind the proposal).

COMMENT

10. The talks and signing ceremony clearly pleased the Mauritian team and we must now work to maintain the more constructive tone in our bilateral relations, while recognising that long term Mauritian objectives do not coincide with ours.

11. Instructions on the sugar issue raised by the Mauritians will follow by separate telegram.

HURD

YYYY

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PS/BARONESS CHALKER
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SIR T LANKESTER
MR ELLIOTT
MR AINSCOW
MR ALSTON
MR GOODENOUGH

UK/US POL/MIL TALKS: JUNE 1984
DIEGO GARCIA SUB-GROUP:25 JUNE
AGENDA ITEM A: INTRODUCTORY REMARKS

POINTS TO MAKE

1. Now more than 12 months since last meeting. Much to discuss, a long agenda to get through, so will be brief.

2. Separate item on agenda of main talks on Indian Ocean. No need for detailed consideration here. Two points worth mentioning. New Mauritian Government, pro-western-has set aside claim to Diego Garcia. No progress on IOPZ. Overall little international attention paid to Diego Garcia. Hope this continues.

3. One exception to this; Mauritians fishing illegally and collecting coconuts at Peros Banhos last August. They left quietly when asked. Thank you for your help with transportation. Little likelihood of a repetition; we now have a licensing system - both Mauritian Government and fishermen are happy with it.

4. One problem persists - the Ilois. Spending their way through £4 million we gave at end of 1982; have now approached your Embassy in Port Louis seeking the balance of £4 million from their £8 million claim. Not a problem which will go away easily.

5. Have visited Diego Garcia twice in the last year; struck by:
(a) the continuing level of cooperation between our respective teams there. This is reflected in the normally good process of consultation which we have off the island but a couple of occasions in the past year when this has not been as good as we might have wished [redacted]

/But

But we will mention these items when we get to them.

(b) the change from building to running;

(c) the change from having a military support system to having a civilian support system.

(b) and (c) above are reflected in the subjects on the Agenda.

6. With the main thrust of the construction work tailed off, the facility seems near to completion. What is the overall importance you now attach to the Facility?

EAST AFRICAN DEPARTMENT

FOREIGN AND COMMONWEALTH OFFICE

JUNE 1984

~~SECRET~~

UK/US POL/MIL TALKS: JUNE 1984

DIEGO GARCIA SUB-GROUP: 25 JUNE

AGENDA ITEM B: [redacted] (UK TO LEAD)

POINTS TO MAKE

1. Your proposals on this matter have been long standing and at previous meetings we have told you of the political difficulties which have delayed us giving you a definite response. Our Ministers have now however reluctantly concluded that because of the likely political and environmental consequences, we cannot agree to Eagle Island being used [redacted] FOR THESE PURPOSES. In reaching this decision they have asked us to explore with you the possibility of [redacted] ALTERNATIVES in the vicinity of Eagle Island as an alternative. We would be happy to consider any proposals you may have on this alternative in due course.

[Defensive]
2./ Blenheim Reef - Not something we have examined in any detail. At first sight, use [redacted] FOR THESE PURPOSES would be unacceptable for two reasons: it would have the the same political and environmental drawbacks as Eagle Island does; and would interfere with Mauritian fishermen who traditionally fish around the Reef.

Attachments: (a) Joint FCO/MOD Position Paper

(b) Exchange of letters between Mr Stanley and Mr Rifkin

EAST AFRICAN DEPARTMENT
FOREIGN AND COMMONWEALTH OFFICE
JUNE 1984

~~SECRET~~

~~CONFIDENTIAL~~

U /US POL/MIL TALKS: JUNE 1984
DIEGO GARCIA SUB-GROUP: 25 JUNE
AGENDA ITEM F: REVIEW OF VISITS POLICY, MEDIA AND OTHERS

POINTS TO MAKE

1. Now customary to include discussion about visits as a regular item.

2. Happy that present restrictive guidlines should remain in force.

3. Case of John Madeley, a free-lance journalist with a particular interest in the case of the Ilois claimed in a recent article that an Ilois leader has asked US permission to return to Diego Garcia to attend family graves. We have not been approached on this, have you?

4. Fisheries limits Ordinance, 1984 (shortly to be enacted) will provide for restrictive licensing procedure to control the few Mauritian vessels wishing to go to BIOT territorial waters to carry out traditional fishing. Condition is that no landings to be made except in cases of dire emergency.

5. Want to inform you that we may wish to allow a couple of scientists to Diego Garcia in due course to study whether the environment is suitable for Rodrigues fruit bats, which are near to extinction elsewhere. [Dr Stebbings: Institute of Terrestrial Ecology].

EAST AFRICAN DEPARTMENT

FOREIGN AND COMMONWEALTH OFFICE

JUNE 1984

UK/US POL/MIL TALKS: JUNE 1984

DIEGO GARCIA SUB-GROUP: 25 JUNE

AGENDA ITEM NO. F: REVIEW OF VISITS POLICY, MEDIA AND OTHERWISE

ESSENTIAL FACTS

1. At last year's meeting Commander Austin said that the US side made a point of including the subject of visits as a regular agenda item. It is important that the UK and US sides regularly reaffirm that we are agreed on visits procedure.

2. We normally reply to requests to visit the Chagos Islands from members of the public, journalists and expeditions by stating that access to BIOT is restricted to representatives of UK and US governments, service personnel and civilians directly involved with construction work. Usually, when the visits policy is explained to would-be visitors, they have not pursued the issue further.

3. John Madeley is a freelance journalist who has espoused the cause of the Ilois and written several biased reports which have been unhelpful to us, in particular comparing the Ilois to the Falkland Islanders, a comparison based on false premises. In an article in 'Africa' in May he claimed that one of the Ilois leaders, Christian Ramdas, had asked the US permission to visit Diego Garcia to tend the graves of his forefathers. But HMG has not so far been approached by any Ilois requesting to visit family graves.

/4. Following

4. Following the incident last August in which Mauritian fishermen and coconut collectors visited Peros Banhos, it was decided that the best method of control would be to introduce a licensing system. The Fisheries Limits Ordinance, soon to be enacted, will formally enable the Commissioner to grant a licence; not only does this provide some control over the exploitation of fish stocks in the area but it also will help to underline UK sovereignty in the eyes of the Mauritians who are required to address themselves to HMG for a licence. Two fishing companies have obtained permission to fish in BIOT waters.

East African Department
Foreign and Commonwealth Office
June 1984

~~RESTRICTED COVERING CONFIDENTIAL~~

From: P S Fairweather
Date: 28 September 1990

cc: Mr Hemans
Mr Hudson ODA
Policy Planning Staff
SAD
RAD
CSAD. ODA
Mr Murray, AMD
Miss Rowland-Jones, ECD(I)
Mr Jones ECD(I)
Mr Noakes, NPDD
Mr Powles, CCD
Mr Anderson, Legal Advisers
Ms Brookes, Legal Advisers
Mr Codrington, SAD
Dr Tarbit, ODA Fisheries Adviser
Mr Iremonger, SEC(O)C, MOD

Mr Edis, EAD

BRITISH INDIAN OCEAN TERRITORY

1. We spoke about your twin submissions of 17 September: "Should We Have an Indian Ocean Policy?"; and "BIOT Fisheries Limit".

[redacted] The first of the submissions does little more in any case than recommend that we should maintain our existing degree of involvement in the region. Ministers are unlikely to question this unless - and it is an important proviso - the PES round, or the need to compensate for what we are doing by way of burden-sharing in the Gulf crisis, leads to our (or the ODA) having to find savings from lower priority areas.

3. The arguments in favour of an extension of fisheries limits round BIOT are convincing. I would not normally hesitate to forward the department's recommendation to Mr Waldegrave. I doubt, however, if he would welcome being asked to take a decision on this issue at this time.

[redacted]

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~~RESTRICTED COVERING CONFIDENTIAL~~

[redacted] You told me that there were no overwhelming reasons why a decision should not be deferred for some months. My instinct therefore is not to take any further action but to suggest that the department should bring these papers up again at the beginning of 1991.

4. On the assumption that your submissions have already been copied laterally, this minute is copied to the same people.

P S Fairweather

P S Fairweather

~~RESTRICTED COVERING CONFIDENTIAL~~

Reference

70

JEB 0414/8

BA. 14/11

Mr Harris

BIOT - MAURITIUS : IOTC

65b

1. The attached letter from Mike Howell refers.

2. We briefly discussed the implications for the IOTC and I have now spoken to Moore in the FAO. He was annoyed by the press article and said that it clearly misrepresented the facts. If he did visit Mauritius (see below) he would make a point of ensuring that there was no press coverage of the visit and would leave the Mauritians in no doubt as to his thoughts on their previous action. He went on to say that the Mauritians had sent a note verbale (copy being faxed to us) but the decision to delay discussion of the IOTC until the June Council could not in any sense be construed as a result of Mauritian diplomacy.

3. Prior to our conversation, he had been working on a new form of words for the membership clause in the IOTC agreement. This would attempt to avoid the use of the word "territory" and may be more palatable to the [redacted] Mauritians. However he now wondered whether we would be prepared to look at it. I said we would if we thought it might help move the [redacted]. He will fax us a copy.

X AND SCOTTISH COASTAL STATES

4. In the meantime I have brought all parties involved in the forthcoming FAO meeting (next week) up to date with developments and would suggest we hold action with New Delhi and other posts until we have seen the Mauritian note and Moore's proposals.

5. Leaving aside the IOTC for the moment, we should now decide how to respond to Berenger's latest "victory". We agreed that some action is necessary, as to do nothing may encourage him to become progressively bolder in relation to BIOT. We need to find some way of bringing the level of our discontent to Jugnauth's attention but without tempting him to move any closer to Berenger's point of view. This will not be easy, particularly as ODA have already replied negatively to the recent request for assistance with the Science Museum - you will recall that we had thought of using the response as a suitable vehicle.

6. I have, therefore, prepared the following list of options together with relevant comments.

don.min

a) the Mauritians have asked for assistance over the training of their Sergeant at Arms in January/February 1993. We are awaiting a decision on AUSPB funding. We could refuse the request and explain why.

b) An advisory visit has been arranged for the training of the Presidential Guard (30 November- 11 December). AUSPB funds have been agreed to cover the costs. This could be cancelled but would ruffle feathers at this end.

c) Aid talks - now scheduled for January. These could be slipped again.

d) Fishing Licences - we could start charging and/or refuse permission to land on islands for fresh water. This would be too excessive at this stage and would hurt the wrong people.

7. On balance, I would suggest we go for a mix of a) and c). We should refuse to assist on a), and then ask Mike Howell to speak to Bacha (the intermediary previously used with Jugnauth). Mike would take the line that we have deliberately refused a) and that we have some difficulty with c) as Berenger's actions have raised the question of whether the time is in fact right to reinstitute the talks.

8. Perhaps we could discuss the above when convenient.

D H Cairns AD(E)
African Department (Equatorial)
K103 270 2890
9 November 1992

MOORE HAS NOW FAXED THROUGH COPIES OF FAO CORRESPONDENCE WITH THE MAURITIANS. THIS IS ATTACHED (FAX B) AND THE RELEVANT PARTS ARE HIGHLIGHTED.

don.min

~~RESTRICTED~~

Secretary of State

26

26/1

QEB 0414
18 FEB 1994

FS

From: T G Harris
African Department
(Equatorial)

Date: 26 January 1994

cc: PS/Baroness Chalker
Mr Elliott
Mr Goodenough

CALL ON SECRETARY OF STATE BY DR KASENALLY, MAURITIAN FOREIGN MINISTER, THURSDAY 27 JANUARY AT 16.15: SIGNATURE OF UK/MAURITIAN JOINT STATEMENT ON FISHERIES CONSERVATION

A/B/C/D/E/

1. I submit Points to Make and a background brief for this call together with a detailed programme for the signing ceremony, a copy of the document for signature, and some speaking notes for the Secretary of State during the ceremony.

2. Mr Goodenough and I will attend the call.

T G Harris
African Department (Equatorial)

Mr Carin

2/1

~~RESTRICTED~~

~~RESTRICTED~~

CALL ON SECRETARY OF STATE BY DR. KASENALLY, MAURITIAN FOREIGN MINISTER, THURSDAY 27 JANUARY AT 16.15: SIGNATURE OF UK/MAURITIUS JOINT STATEMENT ON FISHERIES CONSERVATION

POINTS TO MAKE

- Welcome your government's more constructive attitude over Diego Garcia. We can agree to disagree over sovereignty, but we should not let this issue damage our broader relationship.

- Pleased that our last meeting (28 October) helped forge final agreement on the text of the Joint Statement. This marks a significant step forward and signals our mutual desire for co-operation. Next step will be the establishment of the joint Fisheries Commission.

- Understand that you wish to visit Diego Garcia. We can agree to this but it must be clearly understood that there can be no journalists/television and the size of the party must be limited. Suggest our officials discuss details.

- Pity that outside parties are stirring up the Ilois issue. There is scope for mischief making and we must not allow this matter to damage relations.

- Grateful for your participation in the Commonwealth Uruguay Round Group - successful outcome.

- (If raised) Lomé Sugar - EC guaranteed market at over twice world price. We cannot pay more than EC producers receive. We are pushing for greater access.

- (If raised) Aid - Will do our best but the bulk of our aid programme has to be focussed on poorer countries. We are reviewing and will wish to discuss this shortly.

~~RESTRICTED~~

CALL ON SECRETARY OF STATE BY DR. KASENALLY, MAURITIAN FOREIGN MINISTER, THURSDAY 27 JANUARY AT 16.15: SIGNATURE OF UK/MAURITIUS JOINT STATEMENT ON FISHERIES CONSERVATION

BACKGROUND

1. The Secretary of State met Dr. Kasenally when he called on 28 October 1993.

Internal Politics

2. Mauritius became a Republic within the Commonwealth on 12 March 1992. It is a democracy with a good human rights record, free press and independent judiciary. The General Election in September 1991 resulted in a landslide return for Sir Anerood Jugnauth, (MSM) who won 57 of the 62 seats for his ruling coalition with the Mouvement Militant Mauricien (MMM), whose then leader and the Foreign Minister, Berenger, was sacked by Jugnauth last August. Jugnauth has maintained the MSM/MMM coalition with the appointment of Dr. Swaley Kasenally, the former MMM Minister of Economic Planning. Following the Francophone Summit on 14-18 October, the MMM removed Berenger as the Secretary General of the party and he has since retaliated by attempting to expel Kasenally and other MMM Ministers in the coalition.

External Relations

3. Mauritius is a member of OAU and the NAM, but pursues generally moderate and pro-western policies. It has close economic links with South Africa and supports the concept of a nuclear free zone in the Indian Ocean.

4. At CHOGM, Mauritius was selected as one of the Commonwealth countries to participate in the proposed mission to press for a successful outcome to the Uruguay Round. Mauritius hosted the Francophone Summit on 14-18 October where the discussion on GATT focused largely on a French-inspired resolution seeking to exclude cultural activities (eg films and TV) from GATT liberalisation.

Bilateral Relations

5. Mauritius is generally sympathetic to the UK and links are close. The only significant irritant is the dispute over sovereignty of the British Indian Ocean Territory (BIOT) where we have an agreement with the USA for use of the military base in Diego Garcia until at least 2016. The Mauritian claim to sovereignty has usually been manageable, but it took on a much higher profile when Berenger (a long time hawk on the issue) became Foreign Minister in 1991.

6. Since the departure of Berenger, relations have improved and Dr Kasenally has repeatedly referred to the excellent relations which now exist between the two countries since his call on the Secretary of State last October. He has requested permission to visit Diego Garcia in the summer and Ministers have agreed. However, as there are no commercial flights to the island and journalists are prohibited from visiting the military base we will have to maintain a close monitoring role on the visit.

7 We have invited four Mauritian MPs (including the new Minister of Fisheries) to the UK in February. This sponsored visit is targeted towards a greater understanding of the working of the UK parliament.

BIOT

8. At CHOGM in 1991 Prime Minister Jugnauth (almost certainly provoked by Berenger) made an unexpected and unwarranted attack on British policy in plenary. He accused HMG of cheating and threatened to take the dispute to the UN. We responded by postponing the scheduled bilateral talks on aid and cancelling signature on three aid projects. Following further provocative statements by Berenger (and attempts to whip up support among other non-aligned countries) Jugnauth took personal charge of the issue in February 1992. He made it clear that he wanted to reduce the temperature and that he wished to bring Berenger to heel. He succeeded.

9. Following a series of bilateral exchanges, our High Commissioner wrote to Jugnauth in July 1992 summarising HMG's policy over BIOT and reiterated our recognition that Mauritius had first claim to BIOT once we ceded sovereignty. Although the letter contained no shift in our policy, Jugnauth was pleased with it. He referred to the letter in parliament and further defused the issue by declaring that Mauritius would no longer seek international support for their sovereignty claim. Since then Mauritian addresses to the UN have been conciliatory.

10. During these exchanges we had emphasised our wish to lay aside the question of sovereignty over BIOT and to develop a more constructive relationship. The Mauritians responded by proposing a Joint Fisheries Statement covering the conservation of fish stocks in the area of interest to both parties. This was to be modelled on the UK/Argentine understanding over Falkland waters in which differences over sovereignty are also set aside.

11. Progress on the negotiation was blocked by the Mauritian insistence that the Statement should include joint management of fish stocks in BIOT waters. As management implies jurisdiction this was unacceptable. However, following Dr Kasenally's call on the Secretary of State in October 1993, the Mauritians withdrew their demand and a suitable form of words for the Joint Statement was agreed.

12. The definition of the maritime area covered by the statement will be left to the British-Mauritian Fisheries Commission. The Mauritians want it to look as if only the waters around BIOT are involved: we have said that it must also cover some Mauritian
D/ waters. A copy of the Joint Statement is attached.

Ilois

13. Some of the Ilois (former Mauritian contract workers on the islands of BIOT) are agitating for further compensation and the right to return to these islands. The UK paid compensation in 1972 and 1982 and regards the issue as closed. But we are being dragged back into controversy.

14. A delegation representing these Ilois visited London in October 1993 to confer with their lawyer (Bindman & Partners) and other interested parties (Tam Dalyell) about the possibility of further action against HMG. Twelve Ilois have subsequently made application through their lawyer to the Commissioner of BIOT for the right to visit the Territory. It is clear that their goal is to establish a right to return to the islands and to seek publicity (Channel 4 are currently making a film about the Ilois issue) by causing as much embarrassment to HMG as possible.

15. We will consult Ministers before any final decision is taken about the proposed visit. At present we are seeking more detailed information. An outright refusal might result in attempts to take the matter to the UN (human rights), as these Ilois are British Dependent Territory Citizen (BIOT) passport holders, or to launch a legal action in the UK courts. The Mauritian Government is <u>not</u> backing this group and have been cooperative in handling this issue.

[redacted]

<u>Aid</u>

17. Bilateral aid to Mauritius in 1991/92 totalled around £3.1m, including £1.1m through the Commonwealth Development Corporation. In line with our policy of concentrating the Aid Programme, a gradual decline in the size of the Mauritius programme is planned (£1.2m in 1995/96). It is proposed that a low level mission visit Mauritius in April to discuss the future programme.

<u>Lome/Sugar</u>

18. Mauritians have expressed concern over the price they receive for their exports of sugar to the EC. The Sugar Protocol of the Lomé Convention is of unlimited duration and there is a provision for the protocol to continue in force even if the

convention itself should lapse. Under Lomé IV the EC guarantees to import most of the Mauritian sugar production at annually negotiated prices. In practice, the ACP guaranteed price is the same as the EC intervention price - currently over twice world market prices. The price was frozen from 1985-89, cut by 2% in 1989/90 and has been frozen ever since. The Commission has recently proposed rolling over the existing guaranteed price for 93/94.

20. When the price was cut in 1989, the ACP countries successfully sought compensation and the Community agreed a 30 mecu(£24m) aid package. Mauritian claims for further compensation for the frozen price level are unlikely to receive a sympathetic hearing. However, the UK supports the ACP requests for greater market access.

21. The UK supports the Sugar Protocol in the Lome Convention as fulfilling development objectives of Maaastricht 130v. However, a complete review of EC sugar matters is long overdue. Although this will not take place until the situation has settled after current GATT negotiations, the EC has reaffirmed its commitment to ACP suppliers.

(18)

Minister

SBS 6/5

PS | Secretary of State

Mr Goodenough

Mr Maclennan

Lady Chalker has seen. Thank you very much. SBS 9/5

From: D R MacLennan
Date: 5 May 1994

BRITISH/MAURITIUS FISHERIES COMMISSION: 26-28 APRIL

1. Mr Cairns represented BIOT at the first meeting of the Fisheries Commission in Port Louis last week. He was supported by Mr Beddington of MRAG, our Fisheries Consultant. Mr Cairns' impressions are attached.

2. On the whole this went well. As we had anticipated, the Mauritians initially proposed that the area covered by the Commission should be confined to BIOT waters. We argued for a large box around Mauritius/Chagos. In the end the Mauritians accepted that we would talk about fisheries around both sets of islands without actually defining the area in terms of latitude and longitude. We also agreed that there should be no reference to this in the published portion of the Agreed Minutes.

3. At the technical level, useful contact was established. There will now be an exchange of data which will serve to give some further substance to the work on fisheries.

4. There is one potential cloud on the horizon. We have a long standing agreement which allows Mauritian artisanal fishing vessels free licenced access to our waters. This was extended to include the tuna fishery. We have subsequently discovered that the Mauritians appear to be sub-letting this facility to the Japanese through joint venture ownership and charter arrangements. The Mauritians have accepted that chartered vessels cannot be given free access but we may need to take a stand over joint venture vessels. Total catch value to the Mauritians last season was £1.7 million and some £50,000 in licence fees is involved.

5. In the margins of the talks, Mr Cairns was able to discuss the forthcoming visit to Diego Garcia by the Mauritian Foreign Minister. The Mauritians appear to be satisfied with the arrangements we are proposing and have raised no further difficulty over the ban on journalists.

D R MacLennan
African Department (Equatorial)

ade17/BIOT/Goode4May

The Minister may care to glance. This meeting went well. The Mauritians have not made trouble over BIOT

Mr Goodenough 5/5

~~RESTRICTED~~
FM PORT LOUIS
TO T LETTER FCO
TELELETTER
OF 140441Z MARCH 95

FROM: J C HARRISON
HIGH COMMISSIONER

TO: DAVID SMITH
AD(E)
FCO

SUBJECT: JOINT FISHERIES COMMISSION

BACKGROUND

1. When I called on Makhan on 10 March to discuss preparations for the Fisheries Commission meeting, he was looking and feeling somewhat harassed - in fact he kept me waiting half an hour because of an office meeting in his room. He had only returned from Addis Ababa the previous evening and was due to leave for London today. Meanwhile a French delegation had just arrived (at short notice) to discuss Tromelin. Moreover one or two non-resident Heads of Mission were in Mauritius for the National Day celebrations.

2. Looking further ahead this month Makhan expects to attend a special OAU Foreign Ministers meeting in Cairo. In addition there is an inaugural Indian Ocean Rim meeting in Mauritius on 29-31 March (albeit mainly academics and economists to do some brainstorming), not to mention the UN/OAU meeting in Pretoria on ANWFZ (probably now postponed).

3. All this means that Makhan is overstretched. His three Minister/Counsellor deputies, including Baichoo (ex-London), do not have the authority or experience to cope with major or sensitive (i.e. political) issues during his frequent absences, so some of the work in the Ministry gets paralysed, or alternatively fossilised into set positions with no apparent flexibility e.g. on NPT or the BNFL shipment. There have also been whispers about the degree of Foreign Minister Jaddoo's confidence in him and some suggestions that he is still in effect carrying out Berenger's foreign policy. His position may not therefore be wholly secure. In fact the whole political scene is somewhat uncertain (as I am describing separately in a letter to David MacLennan).

COMMISSION MEETING

4. I expressed surprise that Makhan had no specific proposals on agenda items, as previously promised. He offered no explanation but simply said the Commission should carry on where it left off last April. There was a Mauritian 'position' on definition of waters of concern which, he hinted, could be developed if there was some 'give' on our side. (Comment: The Mauritian position paper has clearly been to Cabinet. Dr Kasenally, who continues to take an interest and is acting Foreign Minister when Jaddoo is away, told me separately that there was some 'softening' in their position on the EEZ, it being acknowledged now that fish migrate and do not recognise EEZ boundaries.)

5. On licencing arrangements I said you might wish to raise the question of the issuing of licences by the Ministry of Fisheries to Maur an fishing vessels to include Chagos. This could be confusing since the only valid licences for BIOT waters were those issued by the BIOT authorities. Makhan countered by asking to whom we issued such licences other than Mauritian vessels. I said I would have to refer this question to you and MRAG. He said he hoped MRAG were not being given any political role. (Comment: This remains unsatisfactory and unresolved. There may indeed have been a 'misunderstanding' in the Ministry of Fisheries and Lacle may even naively think there is some 'arrangement' (my teleletter of 8 March), but doubts linger about Makhan's role and innocence.)

6. There will be local press interest in the meeting. Grateful to receive a copy of any communique, plus any other points, as soon as possible afterwards.

SIGNED J C HARRISON

YYYY
MAIN 1
SINGLE COPIES 0
AD(E)//DAVID SMITH 1

PJLNAN 0285

PA talks with Mauritius
OTI 020/001
(4-5)

~~RESTRICTED~~

10 DOWNING STREET
LONDON SW1A 2AA
www.pm.gov.uk

From the Private Secretary for Foreign Affairs

24 November 2007

Dear Stephen

PRIME MINISTER'S BILATERAL WITH NAVIN RAMGOOLAN: 24 NOVEMBER

The Prime Minister met Ramgoolan in the margins of CHOGM.

Ramgoolan applauded the Prime Minister's commitment to development and the MDGs. For example, Mauritius was funding new projects in Mozambique. He planned to host a Summit on the MDGs in April, and hoped that the Prime Minister would attend.

Ramgoolan said that he faced growing domestic pressure on BIOT. The opposition had criticised him for not doing more. Mauritius continued to believe that the UK should transfer sovereignty of the islands. It was important to show that there was a serious UK/Mauritius dialogue on the issue. The Prime Minister said that he was aware of the sensitivities, and appreciated Ramgoolan's efforts to take the heat out of the issue. He would be happy to establish a dialogue between the Mauritian High Commission in London and Foreign Office officials. He was also happy for Ramgoolan to brief the press that he had raised the issue (Comment: as Ramgoolan subsequently did with flourish).

I am copying this letter to Simon McDonald, Jon Cunliffe, Tim Dowse and Ciaran Martin (Cabinet Office), Howard Taylor (DFID), Ian Forber (MOD), P/S C, Paul Boateng (Pretoria), Nigel Sheinwald (Washington) and to John Murton (Port Louis).

Yours ever,

Stephen Hickey, FCO

Refs with Mauritius

071020/001

Tony Humphries

From: Chris C Mees [c.mees@mrag.co.uk]
Sent: 30 November 2007 15:20
To: Tony Humphries; John Beddington
Cc: Andrew Allen; Joanne Yeadon; Helen Setchell
Subject: RE: BRITISH MAURITIAN FISHERIES COMMISSION

Dear Tony

I have spoken with Professor Beddington who has asked me to respond on his behalf as he is currently very busy for the next few days.

The British Mauritian Fisheries Commission met five times from its inception in 1994 to the last meeting in 1999. Three meetings were held in Mauritius and two in UK. The scientific sub committee met four times directly before the Commission meetings 1995-1999. The Commission meetings consistently had a high level of representation, and tended to be more politicised than the corresponding meetings with Seychelles. Excellent collaboration occurred at a scientific level and during the scientific meetings. However when the meetings were held in London there was only one scientist (usually the Principal Scientist at Albion Fisheries Research Centre, AFRC) in their delegation. MRAG was also involved in other projects that collaborated with AFRC, maintaining and strengthening the scientific linkages outside the Commission. We still maintain good scientific linkages today.

I assume that you have copies of the reports of the Scientific Sub Committee meetings and the Joint Communiqués arising from the Commission meetings? There was also a joint statement on the conservation of fisheries (1994), paragraph 1 of which defined the formula by which sovereignty issues were dealt with during the meetings. The Joint Communiqué of the second meeting of the BMFC, para 8 defined the area of waters of concern to the Commission, which include the BIOT FCMZ, the Mauritian EEZ and the intervening international waters. As the Communiqués are public documents we also had 'Agreed confidential minutes' attached to some Communiqués where appropriate. I have copies of these documents for all the meetings should you need them.

Tuna fisheries in Mauritian waters are much less significant than is the case with Seychelles. However the Mauritian banks fishery historically also included fishing in Chagos. Consequently the scientific meetings tended to emphasise the inshore fisheries, whilst with Seychelles the emphasis is on tuna fisheries..

With respect to 'Mauritian claims to rights on the fishing permits in BIOT' UK recognised the historical fishing rights of Mauritius and has granted licences to Mauritian flagged fishing vessels free of charge. This has included mothership dory fishing ventures (inshore fisheries) and the Lady Sushil I and II which were tuna purse seine vessels. The purse seiners have not applied for licences for a number of years. The number of inshore licences has decreased significantly over time, and for the past two years we have charged a licence fee as the vessel concerned has reflagged to Madagascar. We are not immediately aware if Mauritius has any plans for resuming tuna fishing in BIOT. To the best of our recollection, the Mauritians have not formally suggested that they should receive the fees generated from licensing vessels to fish within the BIOT FCMZ.

As I indicated on the telephone this morning, I would be happy to discuss this further with Joanne and others as appropriate. I attended all but the first BMFC and attended all the scientific meetings.

Best regards

Chris

From: Tony.Humphries@fco.gov.uk [mailto:Tony.Humphries@fco.gov.uk]
Sent: 29 November 2007 19:49
To: John Beddington
Cc: Chris C Mees; Andrew.Allen@fco.gov.uk; Joanne.Yeadon@fco.gov.uk; Helen.Setchell@fco.gov.uk
Subject: BRITISH MAURITIAN FISHERIES COMMISSION

John

Thanks for joining us for lunch today. We consider the Commission meeting went well. Thanks to all at MRAG.

I meant to mention to you that the Prime Minister met the Mauritian Prime Minister in the margins of the Commonwealth Heads of Government Meeting in Uganda over the weekend. [redacted] But Ramgoolam also wants to revive Mauritian claims to rights on the fishing permits in BIOT and indicated that he wanted to resurrect the British Mauritian Fishing Commission.

I thought that you, Chris and MRAG should be aware of this development. We are beginning to think through the possible handling. I recall you once described the earlier sessions to me so any thoughts would, I am sure, be welcomed by us here.

Regards

Tony Humphries

Head, BIOT and Pitcairn Section
Overseas Territories Directorate
Foreign and Commonwealth Office
Tel: 020 7008 2890
e-mail: tony.humphries@fco.gov.uk

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(PA) Relations with Mauritius (7)

10.4.08.

10 DOWNING STREET
LONDON SW1A 2AA
www.pm.gov.uk

THE PRIME MINISTER

10 April 2008

Dear Valerie

Thank you for representing the UK at the celebrations marking the 40th anniversary of Mauritian independence and for taking the time to report your conversations with Prime Minister Ramgoolam in your letter of 14 March.

I am aware of the domestic pressure Ramgoolam faces over the British Indian Ocean Territories (BIOT). The recent revelations over US rendition activity do not help. We also share the Mauritian assessment that Chagossian groups seeking independence might in the future present a domestic challenge to Mauritius.

We have stated frequently that the UK acknowledges that Mauritius is the only State that has a right to claim sovereignty over the islands, but only when we relinquish our own. In 2004, the Foreign Secretary proposed a Treaty formally recognising that we would cede the islands when they are no longer needed for defence purposes; this offer was repeated in 2005. This would help cement our relationships with Mauritius and might provide a good domestic result for Ramgoolam.

[redacted]

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

ahead formed the basis of my agreement with Ramgoolam in the margins of CHOGM, and I look forward to hearing the outcome of bilateral discussions on these topics.

I hope this clarifies my position on sovereignty of BIOT, with respect to the entire Archipelago.

Yours sincerely

The Right Honourable The Baroness Amos

Prime Minister

I visited Mauritius from 12-13 March to represent the UK at celebrations to mark the 40th anniversary of Mauritian independence. During my stay I paid a courtesy call on Labour Prime Minister Navin Ramgoolam, whom you met in the margins of CHOGM last year.

The Prime Minister was focussed on the Chagos/BIOT issue. He had received your letter agreeing to talks in London on BIOT between FCO and Mauritian High Commission officials. Whilst glad that you had agreed to the talks, he was concerned that the Mauritian High Commission in London (with only 2 Mauritian diplomats) was not equipped to engage properly with the Foreign Office officials on the issues. He would like to have discussions take place between officials from both Foreign Ministries in London, Port Louis or elsewhere. Depending on the outcome of these discussions, consideration will need to be given to how best to engage the Americans on any proposed changes.

The Prime Minister recalled discussions from his first term of office (1995-2000) with Robin Cook, first as opposition foreign affairs spokesman and then as Foreign Secretary. He expressed his view that Ministers needed to provide a clear steer for official-level resolution of the BIOT issue.

Mauritius is concerned that the recent success of the Chagossians in the courts may undermine our ability to eventually cede the islands to Mauritius (as we have promised since 1982). This remains a contentious political domestic issue for the Prime Minister. He is essentially constructive over BIOT but is under considerable political pressure on the matter, especially since the Diego Garcia rendition case.

I undertook to report this conversation to you and, in light of your conversation with him at CHOGM, felt able to agree to talks of the kind that Prime Minister Ramgoolam suggested. I reiterated the line in your recent letter, that the UK Government is happy to engage on these issues and is open to ideas as long as the red lines (preservation of the base in Diego Garcia) are understood in advance.

The BIOT/Chagos issue will be heard in the House of Lords this summer. Two rulings from the High Court and two from the Court of Appeal give the Chagossians the right of return to the islands.

I am aware that the UK faces considerable contingent liabilities over resettlement.

The High Commissioner, John Murton will report separately on the other issues raised in discussion.

Valerie Amos
14 March 2008

(P5)

Joanne Yeadon

From: Joanne Yeadon
Sent: 31 October 2008 11:49
To: Sarah Riley
Cc: Janet Douglas; Rebecca Davies; Bradley Porter; Alison Balfour; John Murton*Port Louis-Conf; Ewan Ormiston*Port Louis - Conf; Andrew Allen
Subject: RE: REST: formal Mauritian request for start of official-level talks on BIOT
Security Label: RESTRICTED

Sarah,

I would like to discuss possible dates with Andrew (who is back in the office on Tuesday) before offering up suggestions.

As I mentioned on the telephone, for "senior official", we would not want to look any higher than either the Head of Southern Oceans Group/Deputy BIOT Commissioner (Andrew) or our Director/BIOT Commissioner (Colin). For venue, we would infinitely prefer the UK: We have concerns over the prospect of publicity if this first meeting is held in Port Louis - although we understand that we will need to consider Port Louis as a venue for any follow up meetings.

As discussed briefly yesterday, the agenda is not going to live up to Mauritian expectations. What we are willing to discuss are fishing rights and a potential formal Treaty on sovereignty. At one point we were looking at the possibility of the extension of the continental shelf under UNCLOS which would benefit Mauritius when we reach the point of ceding the territory, but this would be astronomically expensive so I am not convinced it is on the cards. But ceding any part of the archipelago is, for the time-being, a non-starter. The US have re-confirmed that they are happy dealing with us as landlords [redacted] The PM has stated that "our Treaty obligations with the US require us to maintain sovereignty over the whole of the Archipelago, so we cannot at this stage consider any option to cede the outer islands".

Should make for an interesting discussion!

Joanne

Joanne Yeadon | Head of Section | BIOT & Pitcairn | Overseas Territories Directorate | K2.218 | Foreign & Commonwealth Office | SW1A 2AH |
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From: Sarah Riley
Sent: 30 October 2008 18:33
To: Joanne Yeadon
Cc: Janet Douglas; Rebecca Davies; Bradley Porter; Alison Balfour; John Murton*Port Louis-Conf; Ewan Ormiston*Port Louis - Conf
Subject: REST: formal Mauritian request for start of official-level talks on BIOT

Joanne,

as discussed, I have now received the note verbale from the Mauritian High Commission requesting the start of the UK-Mauritius official-level dialogue on BIOT.

I can drop a copy up to you tomorrow morning. (I will fax it to Port Louis.) But the gist is that Mauritius is requesting that the first meeting at senior official level should be held as early as possible on mutually convenient dates and in a mutually convenient venue. The note verbale asks the FCO to suggest some possible dates and a possible venue.

The Mauritian High Commissioner has a 15 minute meeting with Adam Wood on Friday 7 November (at 1100 GMT, I think). The High Commissioner called me before (to tell me what it would say) and after (to check that I'd received it) sending the note verbale. He will hand over the hard copy of the note verbale to Adam at the meeting. He hoped that Adam would be able to give him an answer on some proposed dates and a venue at the meeting. I made no promises and send I would need to talk to OTD colleagues. I asked if the Mauritians had a timescale in mind by which the first meeting should take place. The High Commissioner said he understood the UK would need time to prepare.

I'd welcome your views (and those of colleagues in Port Louis) on how best to take this forward. Are we in a position to suggest eg two or three possible dates when an appropriate senior official is available and to suggest a venue?

John - other than handing over the BIOT note verbale, the meeting with Adam will be an introductory call for the HC, as well as a chance for him to hand over a copy of the ECA/SADC/COMESA trading bloc summit in Kampala and underline Mauritius' support for Tanzanian President Kikwete's comments on the importance of the summit's outcomes.

Best regards,
Sarah.

Sarah Riley
Head, Southern Africa Section
Africa Department (Southern, Central and Western)
Foreign and Commonwealth Office

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7.11.08

Joanne Yeadon

From: Joanne Yeadon
Sent: 05 November 2008 14:08
To: John Murton*Port Louis-Conf
Cc: Sarah Riley; Andrew Allen; Colin Roberts
Subject: RESTRICTED: FCO/MAURITIUS TALKS ON BIOT: INSTRUCTIONS TO SPEAK TO PM/FM
Security Label: RESTRICTED

Dear John,

Sarah has copied you the NV from the Mauritian HC about establishing dates and a venue for the first meeting between senior officials from the FCO and Mauritius regarding BIOT.

You are aware of the difficulties we will have establishing a worthwhile agenda given that we are not prepared to discuss sovereignty or ceding the outer islands. At the same time, we know that Ramgoolam needs to be seen to be pushing for these talks to commence for his domestic audience. We wonder though whether he is really aware that we are not going to be discussing handing over any part of the Chagos Archipelago and that this will have to be reflected in any public statement issued after the event. We are surprised, therefore, that he is pushing for such an early date. This will not help him.

We believe that before we offer dates, it would be worth while talking the problems through as openly as we can with Ramgoolam {or Boolell, Minister for Foreign Affairs} along the following lines:

- We have received the Note Verbale from the Mauritius High Commission in London which has asked us to look at dates for the first meeting of senior officials about BIOT. We are happy to suggest dates early in the New Year for a first discussion ; but

- As the UK Prime Minister has made clear we have no doubts about UK sovereignty over the Chagos Archipelago. As we have reiterated on many occasions, we have undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes. During these talks, we will need to bear in mind our treaty obligations with the US;

- You will have seen the Foreign Secretary's statement after the Law Lords judgment on 22 October. This makes clear that we are not going to resettle the Chagossians on the outer islands. To a great extent, this removes the danger of the Chagossians resettling and making a claim for self-determination which we know was a major concern;

- Must be realistic about what can be achieved in talks. We are not going to talk about ceding any part of BIOT to Mauritius while treaty obligations are ongoing. This means until 2016 at the earliest and prospect of 20 years beyond; {NB: the EoN states that after an initial period of 50 years, this Agreement shall continue in force for a further period of 20 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. [redacted]

- We realise the domestic difficulties that you face and wonder whether pressing for the talks to take place as early as possible is going to help given the limitations imposed on the agenda;

- Subjects we can talk about are fishing rights and the possibility of drawing up of a Treaty confirming our commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes. We are open to other suggestions.

- Is this going to be sufficient for your domestic audience? Is there a way we can help handle this?

Joanne

Joanne Yeadon | Head of Section | BIOT & Pitcairn | Overseas Territories Directorate | K2.218 | Foreign & Commonwealth Office | SW1A 2AH | ☎ 020 7008 2890 | E-Mail: Joanne.Yeadon@fco.gov.uk]

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Please note: the Out-of-Office function will not reply to a different security tier (non Confidential)or to any external [internet] e-mail recipients. If you feel you have not had a reply within a reasonable length of time, please telephone to check for any extended absence greeting on my voicemail .

Joanne Yeadon

Sent:	07 November 2008 10:15
To:	Joanne Yeadon
Subject:	Fwd: NOSEC: BIOT: PRIME MINISTER BRIEFED ON PROSPECTS FOR BIOT TALKS:Id=0659559
Importance:	Low
Attachments:	BIOT.doc
Action Routine:	eP FCO
Additional Recipients:	eDL BIOT;eDL SOUTHERN AFRICA
Classification:	CONFIDENTIAL
ContactName:	JOHN MURTON
ContactNumber:	+230 9420
Create Timestamp:	07/11/2008 09:03:00
Egram No:	44316/08
FCO Department:	PORT LOUIS
Info Routine:	ePL AFRICAN UNION POSTS;ePL EU POSTS;eP WASHINGTON
Lead:	eD OTD
Precedence:	LEAD
Received:	07/11/2008 10:17:45
Security Label:	CONFIDENTIAL
Sign Off:	MURTON
Summary:	Action taken as requested. PM sanguine about our limited expectations. Forthcoming by-election set to shape the political playing field in Mauritius, possibly impacting BIOT politics.

Steven Bickers

Southern Oceans Team,
Overseas Territories
WH2.311, KCS
Telephone 02070082748 FTN 8008 2748

From:	OTD - eGrams
Sent:	07 November 2008 09:29
To:	OTD - Support Staff
Subject:	FW: NOSEC: BIOT: PRIME MINISTER BRIEFED ON PROSPECTS FOR BIOT TALKS:Id=0659559
Importance:	Low

From:	eGram Gateway
Sent:	Friday, November 07, 2008 9:29:12 AM
To:	eD OTD
Subject:	NOSEC: BIOT: PRIME MINISTER BRIEFED ON PROSPECTS FOR BIOT TALKS:Id=0659559
Importance:	Low

Auto forwarded by a Rule

1. I met Prime Minister Ramgoolam alone this morning before Cabinet and we discussed a number of issues including BIOT[redacted]

2. As requested by OTD, I briefed the PM on the limitations we faced in the forthcoming UK-Mauritius talks on BIOT (speaking to the attached note). The PM was sanguine in his response and grateful I had come directly to him about the matter.

3. Ramgoolam noted that he understood the contours of our position. He went on to state how he placed greater

emphasis on the dialogue he hopes to have with members of the incoming Obama administration. The PM recalled how he had travelled to Denver for the Democratic convention and said kind words about Obama (Comment: an unusually party-political step which won him much criticism from the opposition here).

Internal Party Politics and possible impacts on BIOT policy

4. Later in our meeting, Ramgoolam spoke about Mauritian party politics. Appetites for e-grams on this subject in London are no doubt limited, but what was discussed may impact on BIOT.

5. Ashock Jugnauth, half-brother of President Jugnauth and uncle to MSM Leader Pravind Jugnauth, yesterday lost his appeal to the Privy Council against a Mauritian Court's conviction for corruption during the 2005 general election campaign (in which he was elected MP as Leader of his own small party). Following yesterday's judgement, Jugnauth submitted his resignation to the Speaker of Parliament, thereby triggering a by-election which must be held within 8 months.

5. Ashock's nephew, Pravind, failed to win a seat in the same 2005 election, despite being leader of the MSM party (Mauritius' 3rd party after Ramgoolam's Labour Party and Berenger's MMM). The by-election is widely seen as Pravind Jugnauth's best chance to get back into Parliament. However Pravind is not assured of winning a 3-way fight if both Labour and the MMM put up candidates. This has led to much speculation that an MSM-MMM alliance or an MSM-Labour Party alliance will be formed for the by-election. Any alliance would likely continue into the next General Election and, if it involved the Labour Party, might precipitate a General Election early next year, before the by-election is due.

6. Ramgoolam told me he had been contacted by Pravind Jugnauth that morning asking for an MSM-Labour alliance at the by-election. Ramgoolam said he was minded to refuse this request (and ruled out the possibility of an early election). This leaves open the possibility of an MSM-MMM alliance or a 3-way fight. To complicate matters, the disgraced Ashock Jugnauth has indicated he will stand again (and Berenger has made supporting noises). Ramgoolam told me today this would not be allowed and that Ashock would be prosecuted for the corruption that had been confirmed by the Privy Council ruling.

7. A 3-way by-election fight would, in effect, be a continuation of today's situation. However, if Pravind Jugnauth was not confident of victory he might be tempted to cut a deal with Berenger's MMM in order to get into Parliament at the by-election. Berenger is demanding that, as part of any deal, he be made Prime Minister for the first half of any MSM-MMM administration. Jugnauth has previously resisted this in the belief that the (white) Berenger would be an electoral handicap amongst an electorate where being Hindu is deemed by many to be a pre-requisite for success. If Jugnauth swallows these doubts, then a unified opposition (and possibly subsequently a Berenger-led MSM-MMM government) would be more likely to give Ramgoolam (and us) a hard time over BIOT.

BIOT.doc (22 KB)

BIOT

Note Verbale from the Mauritius High Commission in London has asked us to look at dates for the first meeting of senior officials about BIOT.

We are happy to suggest dates early in the New Year for a first discussion but:

- Prime Minister has stated we have no doubts about UK sovereignty over the Chagos Archipelago although we have, on many occasions, undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes

- Current exchange of notes with USA runs till 2016 and will continue in force for a further period of 20 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

- [redacted]

- Talks at this stage can only cover so much ground: we are unable to talk about ceding any part of BIOT to Mauritius while US-UK treaty obligations are ongoing.

- We realise the domestic difficulties that you face over BIOT. Want to ensure that, if these talks go ahead early, they will help rather than hinder you given the limitations imposed on the agenda

- Subjects we <u>can</u> talk about are fishing rights and the possibility of drawing up of a Treaty confirming our commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes. We are open to other suggestions

- Is this going to be sufficient for your domestic audience? Is there a way we can help handle this?

Joanne Yeadon

From: Andrew Allen
Sent: 31 December 2008 11:56
To: Joanne Yeadon
Cc: Colin Roberts; Zoe Townsley; Katharine Shepherd; Janet Douglas; Jennifer Townson; Sarah Riley; Rebecca Davies; Benedict Mann; John Murton*Port Louis-Conf; Ewan Ormiston*Port Louis - Conf
Subject: REST: UK/MAURITIUS TALKS ON BIOT - 14 JANUARY
Security Label: RESTRICTED

Joanne o/r

1 I've just seen a Note Verbale from the Mauritius HC setting out their delegation for talks planned for 14 January (though they say "during the week beginning 12 January"). Not least given that I am off next week, I thought I should put down a few thoughts on issues on which you will need to work when you are back. I sense from the delegation list that we are going to be working at the uncomfortable end of our expectations!

Delegations

2 Theirs. The Mauritians have said that their delegation is going to be led by their Secretary to the Cabinet, Mr Seeballuck. He is going to be joined by i) their Solicitor-General, Mr Dabee; ii) their Parliamentary Counsel, Mr Boolell; iii) their HC, Mr Kundasamy; iv) a First Secretary, Mr Gokool (presumably from the HC here); and v) their Legal Adviser, Professor Ian Brownlie. While the level of this is higher than I had expected given earlier conversations, it is of course up to them who they send. That said, I am surprised to see Prof Brownlie on the list. Brownlie was formerly Professor of Public International Law at Oxford and is still a practising silk at Blackstone Chambers with expertise/experience in ICJ. I assume that he has therefore been hired by GoM. Given that these are supposed to be State to State talks and they clearly have state lawyers available, I wonder whether we shouldn't challenge Brownlie's place on the team. He is not part of GoM, the PM only agreed to "exploratory talks between officials", and we do not want to give the talks a legal challenge focus. I would have thought it reasonable to go back to the Mauritius HC on this. But up to Colin o/r.

3 Ours. We clearly need a lawyer present! Is Katherine able to cover this? Does she think we should have further legal cover given the Mauritius delegation? Otherwise, I think we agreed Colin to lead + you, John and me. I also wonder whether we might want an MoD official around who could cover the "UK/US defence needs" point. May not be necessary and I'm not sure who I'd ask. And does anyone from AD want to attend?

Venue etc

4 It sounds from the NV as though the Mauritians are still a bit unclear. We need to confirm 14 January and I think suggest a mid-morning start with a suggestion of lunch sandwiches to finish. I really can't see more time needed (or wanted). And we might need a bigger room than we had planned.

Agenda

5 I think we should get a draft to them next week to give a bit of focus to the discussions and to draw out of them anything that they might want to bring up. Many thanks for your earlier work on this and on a draft communiqué. For an agenda, I would suggest:

i) Introductory statements - UK update on recent legal proceedings and current policy; Mauritius current policy;
ii) Look ahead at UK/US defence needs to 2016 and beyond; [redacted]
iii) Possible Treaty formalising the UK commitment on sovereignty; [Chance to try and draw out how they really feel about this];
iv) Fishing rights/protection of the environment; [Means of discussing current/possible Mauritian rights in BIOT waters and introducing discussion of Pew ideas, if not name];
v) Possibility of any application for an extension of the continental shelf under UN Commission on the Limits of the Continental Shelf; [We need to find out what their plans are];

vi) Future visits by Chagossians to BIOT; (Chance as you say to test Mauritian appetite for further joint visit);
vii) Future meetings/next steps.

Communiqué

6 Thanks again for your draft which I'll return separately. I do think it will be important to have something in our back pockets. The Mauritians will want to go to their press immediately. Far better if we have baselines agreed. As to what it says, the basics should be along the lines you suggest - who met, topics discussed, repetition of sovereignty positions, will meet again.

Submitting

7 I was pondering whether we needed to submit any of this to Gillian Merron in advance. My feeling is that we have no interest in going beyond current policy lines in these "exploratory talks" and so will need no policy direction. But we ought to make sure that Gillian Merron (and private office and cabinet office) know that a date has now been set for a first meeting and that we intend to stick to agreed policy.

8 I'm not sure how we are going to be in contact with John before the talks as I think he is now in the UK. But it would be very useful to have his take on all of this in advance of the meeting. I'd also be grateful for any comment from Ewan in the meantime, including on the Mauritian delegation and what we might read in to it.

9 I'm out from 5-9 January, so please ensure any responses go to Joanne as well.

Andrew

Andrew Allen
Head of Southern Oceans Team, Overseas Territories Directorate
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~~RESTRICTED~~

BRITISH INDIAN OCEAN TERRITORY: UK/MAURITIUS TALKS, WEDNESDAY 14 JANUARY 2009

1. Introductory Statements

The UK delegation made the following points:

- The UK valued the friendly relations with Mauritius and the importance of that relationship.

- The British position, as had been made clear to Prime Minister Ramgoolam, was that the UK was not prepared to negotiate on the issue of sovereignty. The UK had no doubts about its sovereignty over the British Indian Ocean Territory which was ceded to Britain in 1814 and had been a British dependency every since. As we had reiterated on many occasions, we have undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes.

- The UK was ready to explore whether there were areas regarding BIOT where both sides saw merit in discussion without prejudice to our respective positions on sovereignty.

- There were three things which needed to be borne in mind during the talks: (i) the international security environment which was challenging and uncertain and was unlikely to change in the foreseeable future. (ii) the regional and possibly global environmental significance (especially the marine and coral assets) of BIOT had grown considerably as had its fragility; and (iii) the Chagossian movement had political traction in the UK which was a factor that needed to be dealt with.

The Mauritian delegation echoed the comments on the valued relationship between the UK and Mauritius. Mauritius welcomed this first opportunity which marked a new chapter in Mauritian and UK relations and hoped that the talks would be constructive and a way ahead could be found on the Chagos Archipelago.

2. Legal position of Mauritius

A paper prepared by Ian Brownlie QC was delivered (attached).

Mauritius enjoyment of sovereignty in respect of the Chagos Archipelago had been deferred as a result of the policy of the UK Government and this without any legal justification. In order to effect a restoration of legality the following was necessary:

(a) Recognition of the sovereignty of Mauritius in respect of the Chagos Archipelago
(b) The restoration of the legal authority of Mauritius, involving political and administrative control management of natural resources, and protection of the environment
(c) Freedom of access for citizens of Mauritius and the resettlement of individuals displaced in disregard of recognised standards of human rights

(d) The recognition on the part of Mauritius of considerations of security in respect of Diego Garcia and adjacent maritime areas; and
(e) Payment of compensation as a necessary part of the restoration of legality including recompense for unjust eviction.

The Mauritius Government believed that the legal framework adhered to was not incompatible with agreements relating to access to natural resources, resettlement and defence requirements and would be without prejudice to the sovereignty of Mauritius and the conflicting claim of the UK.

Both delegations agreed that whatever passed at the meeting would be without prejudice to the UK and Mauritius respective positions on sovereignty. The UK delegation suggested that a joint communiqué might be issued at the end of the meeting.

Mr Neewoor, Secretary for Foreign Affairs re-stated the importance the Mauritians attached to excellent relations. The main aim of Mauritius was to seek the end of the "lease" over BIOT between the US and the UK and thus bring the reversion of the Chagos Archipelago under the sovereignty of Mauritius. All the issues on the agenda derived from the sovereignty issue. Both delegations could agree that this is the beginning of a process leading ultimately to discussion of sovereignty issue if not today then later. The UK had promised that the Territory would be ceded to Mauritius when no longer needed for defence purposes. But there was no definition as to when the Territory would no longer be needed. The situation could be indefinite and that was not justifiable. While these exploratory talks were just the beginning of a process, Mauritius expected the process to have an end-date and that should be before 2014 so that Mauritius' expectations that the Chagos Archipelago would revert to Mauritian sovereignty when the UK/US "lease" ended in 2016.

In response, the UK reiterated that we were ready to talk about issues in relation to BIOT but the UK delegation did not have a mandate to discuss the substance of sovereignty issues other than the questions related to our undertaking to cede the Territory to Mauritius when no longer needed for defence purposes. We could not accept that the process of talks would inevitably lead to substantive discussion of UK and Mauritius respective sovereignty claims.

3. UK/US defence needs to 2016 and beyond

[redacted]

(i) [redacted]

(ii) [redacted]

[redacted]

[redacted]

4. Possible Treaty formalising the UK undertaking to cede the Territory when no loner needed for defence purposes

The UK delegation reiterated its sovereignty position, suggested formalising this in a Treaty while pointing out that this would not be easy for us to achieve. We were still facing legal and political challenges which the Mauritians should be aware of. We gave a brief run-down of the litigation brought by the Chagossians to date and pointed out that Bancoult had lodged an application with the ECHR reactivating an older claim for compensation together with the issue of resettlement of the Chagossians. The possibility was that Strasbourg could make a decision which included the possibility of resettlement of the Chagossians in the outer islands. This could impact on the UK's ability to meet its commitments to Mauritius.

We were also still facing intense political pressure. The pro-Chagossian lobby in Parliament's reaction to the Law Lords judgment had been strong. An APPG had been launched which included Labour backbenchers. In addition, there was FAC interest. At the time, there had been substantial media coverage. This was the environment in which our Ministers had to work and they had taken a great deal of flack but had remained steadfast. There was now another legal challenge which could result in resettlement – the Mauritians would be aware that Bancoult had said to the FAC that it was in his interests to keep the islands British.

The Mauritians would also be aware that the FAC had recommended that any discussions between the UK and Mauritius over the future of BIOT on sovereignty should include the Chagossians. We wanted to reassure the Mauritians that we had made it clear that any discussions about the Territory would be between sovereign states concerned ie., the UK and Mauritius. While the views of other interested parties are welcomed, a balance needs to be struck, and it is the views of the sovereign states concerned that will be paramount in any discussions. NB: this is one thing that both delegations agreed on!

In response to the proposed Treaty, the Mauritian delegation said that this was not necessary. They had our government's undertakings already. In any case, an open-ended Treaty would not serve any purpose. The Treaty would need to include a definite time when the Chagos Archipelago would be ceded.

5. Resettlement of the Chagos Archipelago

This agenda item was proposed by the Mauritians. The Mauritians had experience of managing outer islands and believed that Chagossians could be resettled on the outer islands without an impact on the base on Diego Garcia. They were comfortable over sustainability and pointed to the report produced by the Chagossians (Returning Home – Proposal for the Resettlement of the Chagos Islands) which stated that there were no environmental or economic reasons that stood in the way of resettlement of Peros Banhos and Salomon. We should consider the "segregation" of Diego Garcia and resettlement of the outer islands. It could and should be addressed by the two governments. The Mauritian delegation submitted that resettlement of the outer islands was not incompatible with continued use of Diego Garcia as a military base given the distance that separates Diego Garcia from the outer islands. The issue of resettlement should eventually be the subject of bilateral discussions between the UK and Mauritius.

The UK delegation could not agree. Defence security and feasibility of resettlement were at the heart of our legal challenge to resettlement. We were surprised to learn that the Mauritian's supported resettlement given that Chagossian settlement could lead to claims of self-determination which would complicate our existing agreement to cede the Territory to Mauritius. We also pointed out that the Exchange of Notes between the UK and US covered the whole of BIOT so "segregation" was not on the agenda and would need a new Exchange of Notes. We did not consider the Chagossian proposal for resettlement to be independent or feasible. It was a much less substantial study than our own.

The Mauritian delegation pointed out that it was difficult to see how we could pursue the agenda if the UK were sticking to the point that the US licence applied to the whole of BIOT. However, the UK explained that we had made it very clear to the Mauritian Prime Minister before these talks that there were very serious limitations to the areas we could go including not entering into substantive discussions about sovereignty.

6. Access to natural resources

(1) Fishing Rights

"The only part of the Indian Ocean where the fish die of old age" – Mauritius delegation.

The UK pointed out that although BIOT was a rich fishery, it was not a profitable one. Revenue from licences was lower than expenditure on administration and modest level of fishing protection. It was only made financially viable through a subsidy from HMG to BIOTA. The UK and Mauritius had a framework for discussing fisheries in the 1994 Agreement. It was not the UK's fault that this had lapsed. The UK was ready to look at returning to the 1994 Agreement. But we were talking about the grant of privileged access; nothing more. The UK was also looking at more ambitious approaches to managing the marine resource.

The Mauritians explained that their lack of interest in taking up fishing rights (free licences) & continuing with the British Mauritian Fisheries Commission was that they felt this impacted on their position on sovereignty. They were, however, prepared to have a fresh look to ensure that the resources of the Chagos Archipelago were exploited in an equitable and responsible manner. This could be the subject of further talks. It became apparent

during the rest of this discussion that the Mauritians were under the illusion that we were agreeing to share resources. The UK pointed out again that this was not the case. We were talking about privileged access only. We added, too, that the BMFC had been constructed under a bullet-proof sovereignty umbrella.

(2) Continental Shelf

The UK opened up the possibility of co-operating with the Mauritians, under a sovereignty umbrella, on an extended continental shelf agreement (ie., a joint submission to the Commission on the Limits of the Continental Shelf). We had no interest ourselves in seabed mineral extraction. That would be for Mauritius when we have ceded BIOT. There would be no exploration or exploitation until then. It would require much expensive scientific and research work to collect and analyse data but it could be done if both sides agreed that a joint submission was appropriate.

The Mauritian delegation welcomed the UK statement about a joint submission but was concerned that the deadline was 30 May 2009 so much work would need to be done. They already had some basic data that could help. Mauritian agreement to a joint submission would, however, be conditional upon an equitable exploitation of resources whenever they may occur.

The UK delegation clarified that all that was needed by May was an outline submission. The UK delegation reiterated that the UK had no expectation of deriving commercial or economic benefit from anything discovered on the continental shelf. Our understanding was that this would flow to Mauritius once the territory had been ceded. This was one of the reasons why the UK had not invested resources in collecting data. What we were talking about was legal and political co-operation to secure the continental shelf on the premise that it is scientifically possible to do this.

The Mauritians questioned why the UK was insisting on its position on sovereignty but prepared to accept a joint submission to the Continental Shelf? We explained that the Mauritians should not see our position as a sign of weakness or obligation. We wanted to be helpful where we could within the limits set out on sovereignty and treaty obligations. Our offers were on specific subjects we thought would be useful.

Comment

It appears that the fact that the UK was not going to share resources on fish or exploit the benefits of the continental shelf was lost on the Mauritian delegation who continued to talk about equitable exploitation from both. They also continued to link up the two issues. However, they did reiterate their willingness to a joint submission on the continental shelf.

7. Visits by Chagossians to the British Indian Ocean Territory

The UK delegation thanked the Mauritians for their support and co-operation over the 2006 humanitarian visit of 100 Chagossians to BIOT. Following Law Lords judgment on 22 October 2008, our Ministers were keen that we continue to arrange visits by Chagossians to BIOT. While this would probably mean small visits, we flagged up to the Mauritians the

possibility of a larger visit and hoped that the Mauritians would be able to co-operate once more.

The Mauritian delegation stated that they would like **any** future visit to Chagos to be organised in the same spirit as 2006 on a cost-sharing basis and under joint supervision in consultation with both sides. The UK delegation could not agree. Some visits were small scale and involved British citizens going to a British Territory. We would inform the Mauritians of such visits but joint supervision for such small visits was a non-starter.

8. Conclusions

The UK delegation thanked the Mauritians for coming to the talks and for the constructive and open spirit they had brought. There were some very difficult issues for the Mauritius government and people in relation to BIOT. It was not surprising that we had not reached full agreement on all the issues. On the issue of sovereignty, we had our positions and we had a sovereignty umbrella for these talks. Our conclusion was that today's talks had revealed that there were issues worth discussing. Today's agenda would serve for future talks. We should meet again at some point. We proposed keeping the issue of a Treaty live but if the Mauritians didn't want to discuss if further so be it. On the question of the continental shelf, there were timing issues that needed to be clarified by the legal teams.

[redacted]

The Mauritians added that they had not expected to come out with a result on sovereignty but wanted to put their legal position to the UK. There were issues we could work on and hoped that at the next talks in Port Louis, progress could be made.

A communiqué was subsequently agreed (attached) with agreement to a further meeting in Port Louis at a date to be decided and on discussions on a joint continental shelf submission in the meantime.

Comment

- Fairly amicable talks. Neewoor (Secretary for Foreign Affairs) and Ian Brownlie (Legal Adviser) inclined to be more confrontational. Some noticeable disagreement on positions among the Mauritian delegation
- Despite warning Ramgoolam that talks would be severely limited by our position on sovereignty and treaty obligations, this did not appear to have been cascaded down to the delegation who believed that we were ready to talk about such issues as separation of the outer islands.
- Disappointment (but no surprise) over Mauritian unwillingness to formalise arrangements in a Treaty. Without an end-date, there is little in it for them.

- Surprise that they propose resettling the Chagossians on BIOT despite the risk that such resettlement may result in a Chagossian claim for self-determination.
- Some movement on a possible joint submission on the continental shelf.
- Veiled reference to ICJ but from Neewoor who is not liked or trusted by Ramgoolam.
- It was clear that for Mauritius the continuation of the process was politically very important for them.

Overseas Territories Directorate
15 January 2009

~~UNCLASSIFIED - SENSITIVE~~
~~COVERING CONFIDENTIAL~~

From: Colin Roberts, OTD
Date: 05 May 2009

cc: PS/Gillian Merron
PS/Lord Malloch Brown
PS/PUS
Michael Denison, SPAD
Mariot Leslie
Adam Wood
Philip Barton
Vicky Bowman/Deborah Bronnert
Simon Manley
Ian Hargreaves
Nick Pickard
Benedict Mann, Press Office

Reference:

To: Private Secretary

SUBJECT: BRITISH INDIAN OCEAN TERRITORY: THE WORLD'S LARGEST MARINE RESERVE?

1. I attach a short paper on the marine reserve concept for BIOT in advance of tomorrow's briefing session.

2. Professor Charles Sheppard, BIOT's Environmental Adviser, will be joining us.

Colin Roberts
Director, Overseas Territories
WH2.307(A)
Tel: 020 7008 2742
Fax: 020 7008 2108

NO. OF ATTACHMENTS: 1

~~COVERING CONFIDENTIAL~~
~~UNCLASSIFIED - SENSITIVE~~

MAKING BRITISH INDIAN OCEAN TERRITORY THE WORLD'S LARGEST MARINE RESERVE

This note sets out where matters stand on the question of turning British Indian Ocean Territory (BIOT) into a large-scale marine reserve, and what further work needs to be done.

What is BIOT?

BIOT is a British overseas territory in the centre of the Indian Ocean. Its reason for being is the military base on the atoll of Diego Garcia. Its land surface is negligible. Diego Garcia supports the US base with a fluctuating military and contracted civilian population of a few thousand. The other 50-odd islands are uninhabited. The territory includes the world's largest coral atoll, the best preserved coral atolls in the world, the UK's richest marine biodiversity and some quarter of a million square miles of the world's cleanest ocean. The territory is administered from the FCO, with BIOT Administration functions on the ground delivered by a 40 strong UK naval and marine contingent.

What, in a nutshell, is the marine reserve proposal?

In practical terms the broad concept would be to declare the entirety of BIOT's EEZ a no-take Marine Protected Area (MPA), bring an end to fishing and legislate for the protection of the seas and atolls. The military base arrangements on Diego Garcia would be unchanged.

What are the benefits of turning the territory into a marine reserve?

There are numerous benefits and a wide range of potential beneficiaries. These include:

Conservation benefits: The absence of a settled human population and the strict environmental regime and minimal footprint of the military base have enabled a high level of environmental preservation with very low administrative inputs. The key control is limited and conditional access. Commercial interest in the fishery is limited, although we suspect that there there is a high level of illegal fishing mostly carried out by Sri Lankan vessels . The only internationally recognised protection measure is a small Ramsar site on Diego Garcia itself. Our stated aspiration is to administer the territory to World Heritage Site standards. Overall our approach has been ad hoc, cautious and we have not encouraged media interest in the territory's environmental assets. In recent years scientists and environmentalists have stressed the value of a large-scale ecosystem approach to conservation. For geographical, economic and political reasons there are not many places where this is possible. BIOT is one of the few. An impressive range of UK and international environmental organisations have come together in the Chagos Environment Network to help enhance environmental protection in BIOT. These include the International Union for the Conservation of Nature, the UN Environment Programme, the Nature Conservancy, The Linnean Society, the Pew Environment Group, the Royal Society, the RSPB, the Zoological Society of London. The creation of a marine reserve in BIOT would be a move of global significance in environmental terms.

Climate Change benefits: BIOT has a special and growing significance in climate change science as a "control" against which to measure changes in the marine environment elsewhere. Reserve protection would help guarantee this in the future.

Scientific benefits: BIOT offers great scope for research in all fields of oceanography, biodiversity and many aspects of climate change. These are core research issues for UK science. At the moment scientific research in BIOT is ad hoc. The National Environmental Research Council bodies (the National Oceanography Centre and the British Geological Survey) have expressed an interest in providing a structured framework for scientific work in BIOT.

Development benefits: BIOT is likely to be key, both in research and geographical terms, to the repopulation of coral systems along the East coast of Africa and therefore to the recovery in marine food supply in sub-saharan Africa.

Reputational/political benefits: BIOT would not just be a large marine reserve, but the largest marine reserve in the world and the most globally significant. There would be a tremendous welcome for the move from the British and international environmental community. It would help confirm UK credentials, setting an example for others to follow. This would bring benefits to Defra who have found it difficult to make progress against their international commitments on MPAs and biodiversity . It should also help promote a positive image of the overseas territories in the public's mind and offset some of the negative associations with Diego Garcia.

Security benefits: overall the creation of a reserve could involve greater control over access to the territory. This would bring a net security benefit.

How do we create a marine reserve?

Declaration/Legislation

The creation of a reserve is essentially a declaratory act followed by the implementation of a legislative and administrative framework to give it effect. In the case of BIOT we would also need to repeal the existing fisheries legislation. We would need to ensure compliance with UNCLOS and notify a range of international organisations, regional and other governments.The Foreign Secretary has full legislative powers in BIOT. We could declare BIOT a marine reserve today, repeal the fisheries legislation, revoke all licences and legislate for the governance of the reserve. In practice we would take this in stages and take account of the sensitivities of the fishing nations. (Those whose nationals have an interest in BIOT and those who have a general regional interest, for example, members of the Indian Ocean Tuna Commission, some of which are opposed in principle to MPAs). We could choose between a Big Bang approach (going straight for a full reserve for the whole EEZ) and a gradualist approach (protecting first those areas known to be of exceptional scientific interest and gradually extending the protection).

Monitoring and enforcement

We would need a reasonable level of monitoring and enforcement to enable us to know when vessels were in the reserve and to prevent fishing or other illegal activity. Much of this is already in place and paid for by the BIOT Administration. We have a modest fisheries protection, immigration and customs capability. We would be looking for technological solutions to enhance monitoring [redacted] We would not aim at total protection, but would expect the international community to assist by ensuring BIOT's reserve status is effectively communicated to fishing and shipping interests. We would also need to take more robust action with Sri Lanka to curb illegal fishing. Defra have some useful (but unused) levers in this regard. They might be less reluctant to exert pressure if they had a genuine stake in BIOT.

Framework for science

Science is integral to the reserve concept. We need a strong scientific basis to support the creation of an MPA (some we have, some needs putting in place). Although there is a significant body of scientific opinion in favour of large-scale marine reserves, opting for a full EEZ reserve would be a political as well as a scientific decision. Research is also necessary to exploit and demonstrate the value of the reserve over time. We would need a managed programme of scientific research to be carried out in BIOT. This would need to meet recognised international benchmarks. We are discussing with NERC whether they might be ready to take this on. We have asked them to look at the possibility of managing an international research programme with no permanent footprint in BIOT. This would be a pattern of ship-based visits.

What are the risks and how can they be managed ?

The big risks are political:

1. Mauritius

Mauritius claims sovereignty over BIOT on the grounds that its excision from the colony of Mauritius in the independence process was unlawful. We have committed to ceding sovereignty of BIOT to Mauritius when the territory is no longer needed for the defence purposes of the UK and US. In reality this is likely to be at least a generation away. Mauritius pursues its claim for the most part in a low key, although Mauritian domestic politics can always drive it up the agenda. We are confident of our sovereignty. However, a less well-disposed Mauritian government could well succeed in securing a UN General Assembly Resolution for an ICJ Advisory Opinion. We need to deter this. We have not yet had substantive official talks with them on the marine reserve proposal, but we know they are opposed. They have formally stated their opposition on grounds of sovereignty, but we know they are also bothered by the risk of losing forever the chance to exploit the fishery. The position is complicated by a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free of charge.

We believe it would be possible, if very difficult, to convince the government of Mauritius that creation of a marine reserve would be in its interest. This would involve

- reminding them that there has in practice been very little take up of BIOT fishing licences by Mauritians. There are no (legal) livelihoods dependent on the BIOT fishery.
- finding a role for the government of Mauritius in the governance of the reserve which does not infringe our position on sovereignty
- engaging with the conservation lobby in Mauritius
- convincing Mauritius that a reserve would enhance the future value of BIOT and reassure them that we would manage the reserve in a way which did not tie their hands when BIOT is ceded. That is, we would avoid any public commitment that BIOT would continue to be a reserve when no longer under British sovereignty.
- heavy lifting by the Foreign Secretary and possibly the Prime Minister
- possibly some other sweetener

2. The Chagossian movements

The people removed from the territory when the military base was established, with their descendants, number several thousand. They now live in communities in Mauritius, Seychelles and the UK (mostly in Crawley). Many are British citizens. They have a number of representative organisations and diverse objectives. They have attracted a large measure of support in the UK parliament for their return to resettle the outer islands of BIOT. Following the House of Lords judgment of 22 October 2008 which allowed the government's appeal in the Judicial Review of the 2004 BIOT Orders in Council, they have gone to the ECtHR. In addition, they have ratcheted up political pressure for the government to re-think its policy on resettlement through the establishment of a very active cross-party All Party Parliamentary Group on Chagos (BIOT). The FAC have also said that the Government has a "moral responsibility" to let the Chagossians return and expressed their views most recently at the Westminster Hall Debate on the OTs on 23 April. Their plans for resettlement are based on the establishment of an economy based on fishing and tourism. In the specific context of BIOT this would be incompatible with a marine reserve. They are therefore hostile to the proposal, unless the right of return comes with it. They have expressed unrealistic hopes that the reserve would create permanent resident employment based on the outer islands for Chagossians.

Assuming we win in Strasbourg (contingency for losing the case is dealt with in earlier submissions), we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement. This could include:

- presenting new evidence about the precariousness of any settlement (climate change, rising sea levels, known coastal defence costs on Diego Garcia)
- activating the environmental lobby
- contributing to the establishment of community institutions in the UK and possibly elsewhere
- committing to an annual visit for representatives of the communities to the outer islands on All Saints' Day
- inclusion of a chagossian representative in the reserve governance

If we cannot defuse the resettlement movement there is a risk that the Chagossians and Mauritius will join forces in seeking an ICJ Advisory on the understanding that a sovereign Mauritius would guarantee resettlement.

3. The US military

We do not expect opposition from the US administration, but we expect we will have our work cut out to reassure the US military that creation of a reserve will not result in trouble for them. Trouble could be any rise in the security risk, any impediment to their freedom of maneouvre, or any significant raising of the bar in terms of environmental regulation. We think we can give these reassurances. We are drawing on the experience of the Pew Foundation who have worked closely with the US Navy in setting up the two American large scale reserves (Western Hawaii and Mariana Trench).

How would the project be funded?

There is also, at this stage, a degree financial risk. We have not yet reached the point of doing the budgetary modelling necessary to confirm that the creation of a reserve would be budget neutral to the FCO. However, the status quo is unsatisfactory and possibly unsustainable. The revenue from fishing licences, mooring fees and other enterprises contributes less than 30% of the cost to the FCO of administering BIOT. The main expense is the charter of a ship for fisheries protection, law enforcement and inter-atoll transport. The Overseas Territories Programme Fund fills the deficit (c £1.25m in FY 2008-9). Second, Creating a marine reserve is not necessarily resource intensive. The main recurring costs falling to the BIOT Administration would be monitoring and enforcement. Third, the establishment of a marine reserve will create a new range of stakeholders, including in Whitehall.

We will need to explore a range of revenue and subsidy sources:

- increased mooring fees for yachts

- limited high-end ship-based tourism. We have been looking at the model of Aldabra (to Seychelles) where a scheme was set up by the Royal Society. The Royal Society have expressed an interest in helping develop a tourism model for BIOT.

- photography and film permits (subject to base security requirements)

- Defra. Defra are supportive of the reserve proposal in very general terms. We also hope shortly to reach an agreement with them under which they would formally assume the Whitehall lead for biodiversity issues in the overseas territories. This will involve an increase and relaunch of the Overseas Territories Environment Programme (OTEP). Currently a £1m joint FCO/DfID fund, we are aiming to make it a £2m Defra/FCO/DfID fund. Given its remit OTEP would be a reasonable source of funding for a reserve in BIOT

We would look to NERC to fund the science programme in the normal way, flowing from the necessary policy decisions by the FCO, Defra and DfID

There would be a spike in start up costs. The Pew Foundation have earmarked funds for this, although these will only be available until 2011.

Are there other risks to take into account?

Timing: we will need to judge carefully the relative merits of a Big Bang or a more gradual approach. A Big Bang would be administratively and legislatively simpler, and have the greatest public impact. But it would also trigger - as things stand today - the sharpest reaction from Mauritius and the Chagossians and their parliamentary supporters. A gradual approach would avoid some heavy flak, but could have much less impact. However we proceed we need to take account of a range of variables: the Chagossian legal process, Mauritian politics, other environmental initiatives and the state of the rendition issue. Any active steps by us in the short term would need to weigh potential impact on the case in Strasbourg. This might be concluded later this year, but could drag on longer.

It may be possible to manage some of these risks through a qualified statement of intent ("government would like to explore possibility of establishing an MPA in BIOT and will want to consult interested parties on how this might be achieved") or by launching a formal public consultation process.

Natural or man made disaster: BIOT is vulnerable to a range of risks including rising sea levels, tsunami, increase in water temperature and oil spillage. These could cause such damage that benefits of reserve status become less obvious.

Where are we now and what are the next steps and realistic timelines?

The formal position is that a generic proposal to turn BIOT into a marine reserve has been made by the Chagos Environment Network. I attach their pamphlet. This has received a bit of publicity both positive and negative . The proposal does not pretend to address the practical and political issues covered above. We have not commented on the proposal other than to take credit for the high level of environmental protection in BIPT to date and to confirm that we are engaging with the international environmental and scientific community on options for enhancing environemental protection.

The focus of our work so far has been to identify and engage with stakeholders and to develop the thinking summarised in this note.

If Ministers wish to proceed next steps would include:

- pursuing our negotiations with partners in government and NGOs

- financial modelling to evaluate and manage the budgetary risk to the FCO

- commissioning specialist work on Monitoring and Enforcement

- commissioning work on the tourism model

- building a **project team** to take forward and learn from the experience of the recently established US marine reserves

- opening talks with **Mauritius**

- opening talks with the **US**

-developing a **communications strategy** to help deliver and ensure we exploit to the full a decision to establish a reserve.

We would need to make significant progress in all these areas before publicly committing to a reserve

In slower time we would need to

- develop a **scientific research** approach with the NERC and others

- after the ECtHR judgement, develop measures for the **Chagossians**

Overseas Territories Directorate

5 May 2009

Registered

Joanne Yeadon

(Pew Trust)

8/6/09

From: Joanne Yeadon
Sent: 04 June 2009 14:42
To: Ian Collard * Washi -CONF
Cc: Andrew Allen; Colin Roberts; Zoe Townsley; Katharine Shepherd
Subject: RE: CONF: BIOT MARINE RESERVE
Security Label: CONFIDENTIAL

Ian

The Government established an Environment (Protection and Preservation) Zone around BIOT in 2003. This is internationally recognised. Under this umbrella declaration, there are already strict controls over fishing, pollution (air, land and water), damage to the environment etc etc. The military base already lives quite happily with these and it also sits alongside a Ramsar designated site on Diego Garcia and other strict conservation areas. MSC ships operate without problems as well.

The establishment of a marine park is a concept. We can pick and choose what we want to do inside that concept. One of the big issues would be to make the whole of the EEZ a no-take zone for fishing and we would also want to protect the coral reefs. But we would not legislate in any way that impacted on the operational capability of Diego Garcia. Although we would want the park to be internationally recognised, we would not be seeking UN World Heritage status and all that such status entails.

We have not yet engaged with Mauritius on the proposal but we will be doing so soon. They have already expressed concern but more for sovereignty reasons than anything else - they do not, for example, often exploit their historical inshore fishing rights. We are going to have to try and convince Mauritius of the value of a marine reserve and the benefits that Mauritius will eventually inherit so they don't go running off trying to seek an Advisory Opinion on BIOT at the ICJ. The plan is also to manage the reserve in a way which will not tie their hands when BIOT is ceded. That is, we would avoid any public commitment that BIOT would continue to be a reserve when no longer under British sovereignty. Any plan which involved trying to rope the Mauritians in to saying they would stick to the principles of a marine park and not seek to exploit (aka trash) its benefits in future would be doomed to failure.

Hope this helps,

Joanne

From: Ian Collard * Washi -CONF
Sent: 04 June 2009 13:31
To: Joanne Yeadon
Cc: Andrew Allen; Colin Roberts; Zoe Townsley; Katharine Shepherd
Subject: RE: CONF: BIOT MARINE RESERVE

Joanne

Many thanks for this comprehensive response. Very useful in light of my forthcoming chat with State. And I will be certain to ask the questions you need answers to.

On the issue of Chagossians returning - my mistake. I had meant when (if) we return the islands to Mauritius, and if they then allow the Chagossians to return. What status would a marine park have then? Would it be enshrined with an international status (e.g. a UN World Heritage site or something similar), or would it only be a marine park in the eyes of the UK? Does it have a legal status - national or international? Would our decision now have an impact on future decisions that could be taken on the use of the area by e.g. Mauritius?

Separately, and I ask this as a complete novice, but doesn't a marine park enjoy some sort of environmental protections? In which case there seems to me to be some inconsistency in saying that military vessels can trundle in and out (presumably polluting as they go).

Apologies if the attachments contain the answers - I have not yet had a chance to pore over them.

Thanks again

Ian

-----Original Message-----
From: Joanne Yeadon
Sent: 04 June 2009 06:59
To: Ian Collard * Washi -CONF
Cc: Andrew Allen; Colin Roberts; Zoe Townsley; Katharine Shepherd
Subject: CONF: BIOT MARINE RESERVE
Importance: High

Dear Ian,

Your e-mail to Colin of 3 June refers. I attach a copy of Colin's submission and note to the Foreign Secretary of 5 May 2009 which gives all the details.

Following a presentation on the Chagos Environment Network proposal for a marine park in BIOT to the FS and Gillian Merron on 6 May, the FS asked officials to engage with other Whitehall colleagues. The FS is very keen to forge ahead with the idea.

Colin also met [redacted] and [redacted] from the US Embassy on 12 May 2009 to talk about the proposal. [redacted] called on me yesterday to give some unofficial soundings he had received from State/DoD/Pacific Command. There is keen US interest but they have two main concerns:

(1) that any marine park would not interfere with US military vessels/submarines operating in the area.

I told Chris that any marine park established in BIOT would have to be administered in accordance with UNCLOS which insisted on the right of innocent passage. (The US are not signatories to UNCLOS which could be why they are not familiar with the conditions set down.)

(2) that there would not be a decision five years down the line that a military base would be seen as incompatible with the MPA.

The concern could stem from the fact that five years down the line ties in with 2014 which is when, if it is going to happen, the Exchange of Notes could be terminated by either the UK or US governments. It also stems, no doubt, from the difference between the UK and US in running protected areas. In the US, they tend to move out people and businesses. In he UK normal life continues. [redacted] and I discussed the above and also, and with regard to point 1 above, I pointed out that BIOT was created for the defence purposes of both the UK and US so we both had an interest in making sure that the operational capability of the base was not compromised by the establishment of a park.

[redacted] felt that (1) above could be dealt with by putting our view on record. Point (2), he thought might need a telephone call from people higher up the food chain. OTD's view is that we could wrap up all the concerns in the record of the 2009 Pol-Mil talks ie., [redacted] that were there to be a marine park in place at that point, it would not have any impact on the use for defence purposes of the agreement; and cover the UNCLOS point on innocent passage. This should satisfy the US on both points, and perhaps more so than a high level call as it be an agreed record of conversation at the meeting.

So, taking your questions in turn:

- Is it true? Yes. This is not a government proposal but we are keen.
- What is the scope? The Marine Park would take in the already declared 200 mile EEZ around BIOT. Further details in the note to the FS.
- What will it mean for DG and our relations with the US? No impact on DG. We are keeping the US fully informed on our thinking as we go along.
- What are the implications in the context of the Chagossians, whose right to return we affirm (once our defence needs are fulfilled)?

We are committed to return the Territory to Mauritius once BIOT is no longer needed for defence purposes. We do not (not) affirm the right of the Chagossians to return. Quite the opposite. Following the Law Lords judgment on 22 October 2008, the 2004 BIOT Orders-in-Council were reinstated meaning that no-one has the right of abode in the Territory and that a permit is needed for anyone to visit. There is no intention on the part of HMG to resettle the Chagossians. The principles behind this are that we need to keep the outer islands uninhabited for defence security reasons and that an independent feasibility study commissioned by HMG in 2002 found that long-term resettlement would be both precarious and costly and our view is that this would open up a long-term contingent liability for the UK taxpayer. If/when the Territory is ceded to Mauritius the Mauritians choose to let the Chagossians re-settle then that is a matter for them.

By separate e-mail I will send a letter recently issued from the Foreign Secretary to Jeremy Corbyn MP (Chairman of the APPG on Chagos (BIOT) which sets out Government policy clearly.

If you have an opportunity to ask about dates for the 2009 Pol-Mil meeting which will be being held in the US, please take it. We have been trying without success to pester for dates for a while now.

If you need any further information, please let me know. I will put a copy of the CEN proposal in the bag.

Joanne

Joanne Yeadon | Head of Section | BIOT & Pitcairn | Overseas Territories Directorate | K2.218 | Foreign & Commonwealth Office | SW1A 2AH | ☎ 020 7008 2890 | E-Mail: Joanne.Yeadon@fco.gov.uk |

Visit our blogs at <http://blogs.fco.gov.uk>

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Liam Abrams (Restricted)

From: Joanne Yeadon (Conf)
Sent: 14 July 2009 12:49
To: Colin Roberts (Conf)
Cc: Andrew Allen (Conf); Scott Parnell (Conf); Zoe Townsley (Conf); Katharine Shepherd (Conf)
Subject: RE: Restricted: BIOT: Marine Reserve: dialogues with Mauritius and US

Security Label: RESTRICTED

** REGISTERED **

Colin,

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

The Environment (Protection and Preservation) Zone was proclaimed on 17 September 2003. A copy of the Proclamation was deposited with the UN on 12 March 2004 in accordance with UNCLOS article 75. UNCLOS permits States to establish an EEZ extending 200 nautical miles form the territorial sea baselines, within which a state can exercise certain sovereign rights and jurisdiction for the purpose, among other things, of conserving and managing the natural resources of the waters, seabed and subsoil and also for the protection of the preservation of the marine environment of the zone. When the proclamation was made, we appear to have made it specific to the protection and preservation of the environment of the zone. We also advised the Mauritians in 2003 when the zone was in its proposal stages, that it would not be a full economic zone and that its purpose was to protect and preserve the environment of the Great Chagos Bank. So, in essence, the zone is an umbrella declaration under which further environmental regulation can be developed.

Environmental legislation enacted or extended to BIOT

1968 - Green Turtles Protection Regulation
1970 - Protection and Preservation of Wild Life Ordinance (last amended in 2002)
1988 - Marine Pollution
1994 - Prevention of Oil Pollution
1994 - The Diego Garcia Conservation (Restricted Area) Ordinance
1994 - Ozone Layer Protection Ordinance
1997 - BIOT Waters (Regulation of Activities)
2003 - Cites Scientific Authority
2003 - Wildlife Protection Regulations
2003 - Strict Nature Reserve Regulations
2007 - Trade in Endangered Species (Control) Ordinance
2007 - Latest Fisheries (Conservation and Management) Ordinance.

Other internationally binding legal protection includes: Ramsar Convention; Whaling Convention: Law of the Sea Convention (protection of fish stocks); the Indian Ocean Tuna Commission, CITES and the Bonn Convention (provisions to protect marine turtles and cetaceans).

(ii) Mauritian sweeteners. Taking your bullet points in order, my thoughts are:

[redacted]

- [redacted]
- [redacted]

NB: the definition of DG in the EoN is "atoll of DG, the lagoon and the 3 islets at the mouth of the lagoon

On the US:

(i) Its a 3-mile territorial limit. Although the EoN 1966 govern the use of the whole Territory for defence purposes, the 1976 notes specifically deal with Diego Garcia. As long as what we are planning for the Marine Park doesn't impact on the base etc etc.

(ii) On the recreational fishing point - the supplementary arrangements to the EoN state "US personnel and UK personnel are permitted reasonable reacreational fishing on DG and its environs without obtaining any licence or paying fees. Such recreational fishing includes fishing from boats as well as from the shore". I hope that the US don't simply quote this back to us. You should know that the US (and the UK) military will moan about the loss of this past-time but even if we are going to exclude Diego Garcia from any proposed Marine Park, it would be difficult to impose any kind of no-take zone in the rest of BIOT waters but permit them to carry on fishing in DG. A ban on recreational fishing will impact more on the Filippino community who fish to supplement their diet and save more money to send back to families at home.

A "military exclusion" might be one way of calming US nerves. I have tried explaining the concept of innocent passage under UNCLOS to them but it isn't working. I think they are worried that ships filled to the gills with ammunition etc might not be construed as "innocent".

I am copying this to recipients of your e-mail in case anyone else wishes to add to the above points.

Joanne

From: Colin Roberts (Conf)
Sent: 03 July 2009 16:59
To: Joanne Yeadon (Conf)
Cc: Andrew Allen (Conf); Scott Parnell (Conf); Zoe Townsley (Conf); Katharine Shepherd (Conf)
Subject: Restricted: BIOT: Marine Reserve: dialogues with Mauritius and US

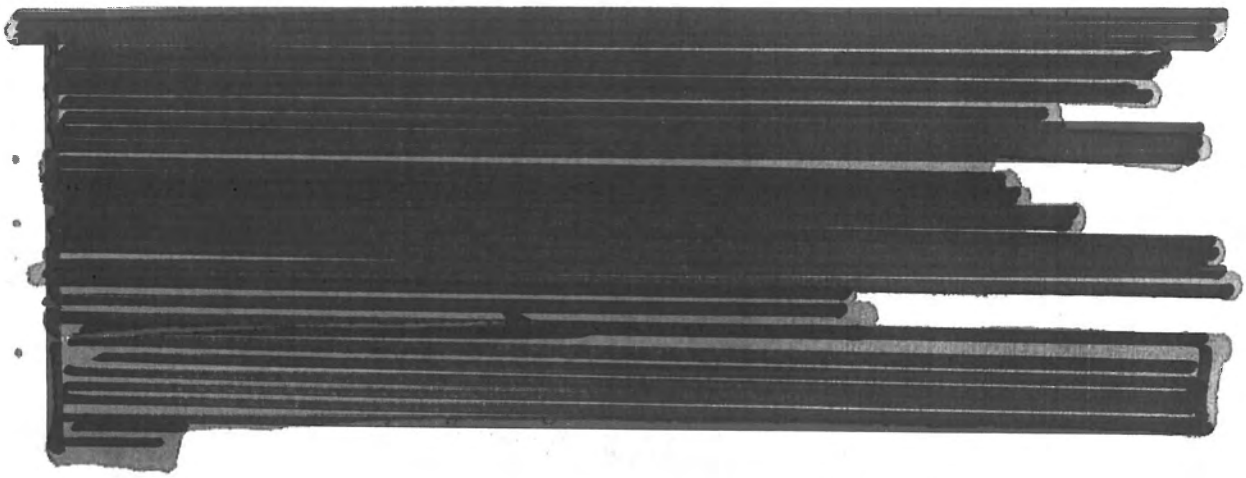
Joanne,

I'd be grateful if you could take forward some pieces of work on the Marine Reserve proposal, particularly in preparation for possible talks with Mauritius on 21 July and the response we owe Ian Collard.

For Mauritius we need

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

ii) to see what - if anything - we can offer the Mauritians as a sweetener. I sketched out some thoughts in my submission of... June. We need to think these through more carefully.



I had thought we might need to submit to Ministers before the talks for approval to put these points to Mauritius. But while we might explore these issues in talks, I don't think we can commit at this stage, so perhaps no submission necessary.

On the fisheries point, we also need to be confident that we can close the fishery without challenge from the other licenced nations esp EU member states. Could Scott advise?

On the US we need:

i) to establish clearly that the creation of an MPA (excluding DG itself and its 3 mile zone) is consistent with the exisiting EoNs. One question here is whether any of our agreements with the US have any application beyond the 12 mile territorial limit.

ii) refine a set of commitments to reassure the US, but which do not undermine the fundamental value of the MPA. My suggestions are:

- Nothing we are proposing will require any change to the EoNs governing the territory.
- MPA designation a matter fully within the UK's sovereign powers. But will of course want to consult US.
- Diego Garcia and its 3mile limit will be excluded from the MPA (so no relevance to the anchor/buoy question in the lagoon)
- There will be no change to the rights and freedoms currently enjoyed by the US government in the territory under the EoNs(However any recreational fishing will be banned in the MPA and separately we are proposing to ban recreational fishing in DG's 3-mile limit and the lagoon). The US must recognise that we do not exclude the possibility of future strengthening of environmental controls. But as in the past these would come through negotiation with the US. We do not propose any stricter controls on the US by virtue of creating an MPA.
- We are not aware of any US activity in the proposed MPA which would be inconsistent with the MPA. However, if the US think they do or will want to do anything inconsistent with an MPA, now is the time to tell us. They may find it useful to consider the extent to which the US Marine National Monuments have constrained any military activities. The BIOT MPA will be *sui generis*. If necessary we can consider a specific "military exclusion" in the MPA legislation.
- there will be no change to the fundamental purpose of BIOT: to serve the defence interests of the UK and US

- we will not seek any international status for the MPA which is inconsistent with the fundamental purpose of the territory

- there is no requirement for the US to contribute to policing the MPA. However, we are interested to see if there might be mutual benefit in enhancing situational awareness in the MPA.

- nothing in the MPA proposal affects the UK government's policy to prevent resettlement. There will be no resident presence on the outer islands

- There may be an increase in scientific research visits.

- The UK is considering modifying the yachting permit arrangements in the outer islands to allow limited small scale ship based eco-tourism. This is separate from the MPA proposal and we would want to discuss in detail with the US.

Finally, we will need a digital presentation for the Mauritians, Defra and others. Could you please work with Charles to produce a slightly expanded version of the one he used at the reception.

Many thanks,

Colin

Colin Roberts
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eGram 26453/09

Classification	RESTRICTED	**Caveat**
eGram Number	26453/09	
From	PORT LOUIS	
Date Created	21/07/2009 14:49:00	
Date Registered	21/07/2009 14:59:14	
Action Immediate		
Action Routine	eP FCO	
Info Immediate		
Info Routine	eP WASHINGTON;ePL EU POSTS;ePL SADC POSTS;eP COLOMBO;eP TAIPEI;eP BEIJING;eOGD DEFRA;eOGD DFID;eP VICTORIA	
FCO Distribution	eDL BIOT;eDL SOUTHERN AFRICA	
Lead	eD OTD	
Military Action Imm		
Military Action Rtn		
Military Info Imm		
Military Info Rtn		
Subject	BIOT: Marine Reserve: Talks with the Mauritians	
Summary	Second round of BIOT talks with Mauritian officials yields better than expected discussions on the issue of a possible marine reserve. Meeting with Foreign Minister Boolell similarly positive and tees up future engagement.	

SIC

1. An FCO team led by Colin Roberts (OTD) held the second round of BIOT talks with Mauritian officials today. The Mauritian delegation was headed by Seeballuck (Head of the Civil Service and Secretary to Cabinet). Before the meeting, we met for an hour with Foreign Minister Arvin Boolell, enabling us to give unfiltered messages on BIOT.

2. These talks proved more productive than the first bout held in January earlier this year. Discussion got less bogged down on sovereignty issues, which were rapidly parked under the sovereignty 'umbrella'. This enabled swift agreement on the desirability of a coordinated submission to UNCLOS for an extended continental shelf in the BIOT region. Technical discussions will clarify the way forward ahead of a third round of talks to be held in London in early October. At Mauritius' request, we agreed to further investigate their suggestion to set up a mechanism to look into the joint issuing of fishing licenses for BIOT waters, although discussion on this point (tabled on the agenda ahead of time) was somewhat overtaken by the larger

issue of a possible marine reserve in BIOT (see below) which might render the issue of fishing licenses redundant.

3. The Mauritians clarified their position on possible resettlement of BIOT by Chagossians. They were in favour of all Mauritians - not just Chagossians - having access to BIOT (since they consider it to be Mauritian territory). They are alert to the potential risks to future Mauritian sovereignty of dual-national Chagossians having preferential access to the islands.

4. The bulk of the talks, and of the meeting with Boolell, focused on the concept of a Marine Reserve in BIOT. This discussion went well. The narrative used - building value for the day when we cede the islands to Mauritius; protecting the archipelago's unique heritage; growing value of a globally important ecosystem - resonated with Prime Minister Ramgoolam's own 'Maurice: Ile Durable' (Mauritius: sustainable island) programme and the Mauritian side was ready to agree a communique which welcomed - in principle - the concept (attached). The Mauritians focused on the need for greater support to tackle IUU fishing both in BIOT waters and in the wider Indian Ocean area.

Comment

5. Mauritius had previously reacted testily to NGO proposals for a marine reserve in BIOT. But it appears this was in large-part due to western NGOs failing to consult with the Government here and thereby being seen to ignore Mauritius' sovereignty concerns. However, it is these same sovereignty concerns that have long prevented Mauritian fishermen from making large-scale use of fisheries in BIOT waters, with the result that most legal fishing is done by Taiwanese vessels and most IUU fishing by boats from Sri Lanka. Consequently, the economic impact of a reserve is likely to be marginal - or even positive - for Mauritius: the Minister, officials and the CEO of the sole Mauritian firm fishing in BIOT waters could all see that the potential economic value of high-end eco-tourism in any future reserve might outweigh the possible loss of fisheries revenue. This will be a useful angle for future ministerial engagement.

6. [redacted]

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(PS) UK Mauritius Talks later

UK/MAURITIUS TALKS ON THE BRITISH INDIAN OCEAN TERRITORY (BIOT), TUESDAY 21 JULY 2009: RECORD OF MEETING

Summary

1. Talks billed as the "2nd round" of discussions between the UK and Mauritius on BIOT took place in Port Louis on 21 July. Both sides agreed at the outset of the meeting that discussions should take place under the usual sovereignty umbrella in order to enable both sides to speak frankly. The agenda (attached) was almost a facsimile of the January agenda.

Detail

2. The UK delegation spelt out the 3 contextual issues to BIOT which needed to be born in mind during the talks: the security situation in the region remained challenging and uncertain; the significance of the environment and its science was increasing all the time and gaining traction in the international community; and the Chagossian community and their interests. There had been little movement on some of the agenda items since the January talks but there was potential to take forward co-operation on the extended Continental Shelf (eCS) claim process in the UN. The UK delegation also wanted to discuss issues relating to the environmental stewardship of BIOT.

Sovereignty

3. Both delegations stated that their respective positions remained the same and the talks should be pursued without prejudice to either side.

Resettlement

4. The Mauritius delegation stated that all Mauritians (NB: not just Chagossians) should have access to all the islands. They believed the Chagossians could be settled without impact on the defence installation. They also asked for an update on the Chagos Islanders v UK case at the ECtHR. The UK delegation explained that the UK position remained the same as in the January talks. A brief explanation of the case was given to the Mauritians along with confirmation that to the extent that the Strasbourg judgment found against the House of Lords, it would take precedence over the House of Lords judgment and the UK would be bound to respect the decision of the court.

5. Mr A P Neewoor, Secretary for Foreign Affairs pulled the discussion back to sovereignty and said that everything else that officials discussed was peripheral to this main issue. In a complete volte face from January, he cast doubt on the need for the continuation of the base on DG. The agreement between the UK/US should not be renewed in 2016, the US should leave and recompense should be paid to Mauritius. As in January, he made a veiled reference to the fact that the Mauritians could go to

the ICJ for a judgment. Comment: this intervention was completely ignored by the Mauritian side.. The Head of the delegation, Mr Seeballuck (Secretary to the Cabinet and Head of the Civil Service) made a point of turning to the colleague sat on his other side and talking throughout this and later interventions of Mr Neewoor. NB: In advance of the meeting, Mr Seeballuck had advised Colin Roberts, Head of the UK delegation, to ignore Neewoor.

EEZ delimitation

6. The Mauritians raised the issue of overlapping claims between BIOT and outer Maldives EEZ zones. The UK delegation was relatively unsighted but agreed to check the issue but did not believe there was a huge problem as the declaration of the EEZ in 2003 had gone ahead without any complaint from the Maldives.

Extended Continental Shelf (eCS)

7. The UK delegation suggested that Mauritius and the UK could work together within the UN process to secure a claim perhaps by a coordinated submission. This could be of benefit to Mauritius because otherwise the submission would effectively be put on ice because of the sovereignty dispute. All benefits of an eCS would ultimately fall to Mauritius when BIOT was no longer required for defence purposes. Mauritius welcomed the suggestion that UK and Mauritian teams could work together on this. The Mauritian delegation explained the reasons behind their preliminary note which flagged up their intention to lodge a submission over this area by 2012 was to ensure they were not prejudiced by failing to meeting the May 2009 deadline. The UK delegation commented that this time-frame for preparation of the submission seemed realistic. The UK delegation also explained that we were not proposing UK funding extensive analysis and surveys but could facilitate access to the technical sources and help with the legal process. It was agreed that the best way forward would be a coordinated submission under a sovereignty umbrella and that technical experts from both sides should get together. Comment: there was a need, as in the January talks, to reiterate the fact that the UK had no intention of benefiting from an eCS. Any exploitation would be for the benefit of Mauritius. Our proposal was to get an eCS established. We would then talk about the basis on which exploitation could begin. We could not define a date when BIOT will no longer be needed for defence purposes but this was one way of ensuring that the eCS could be established in principle pending the area being eventually ceded to Mauritius.

Environmental issues

8. The UK delegation explained that environmental law had been strengthened in BIOT over the last 15 years with the establishment of strict nature reserves, Ramsar designation in DG and the establishment of an EPPZ. The Territory and its environs had become one of the most valuable sites in the world for coral biodiversity and also had the cleanest oceans and was a valuable scientific resource. This was due to lack of inhabitants. The UK derived no commercial benefit from resources. The fishery

was a loss-making venture and heavily subsidised by HMG. Looking ahead, the value of BIOT as a reserve/sanctuary for marine life and coral would only increase. It was better to invest available resources in a higher level of environmental protection. There was a proposal from the Chagos Environment Network (CEN). One of the ideas being mooted was that the whole of the EEZ be a no-take zone for fishing. The scientific basis had not yet been fully established but the idea merited consideration. An alternative route would be a more gradual process, ie., to designate the reefs as no take or another proposal of a different / larger area than that of the closure of reef areas extending 12 n miles from the 200m depth contour and leave the rest of the fishery open.

9. There were powerful arguments in the UK to establish a marine protected area. However, many questions still needed to be worked through. The UK delegation explained the advantage to Mauritius that through a marine protected area, the value of the Territory would be raised and this resource would eventually be ceded to Mauritius. No decisions had yet been taken. The UK was discussing issues with the US: BIOT was created for defence purposes and the environmental agenda must not overcome that purpose.

10. The Mauritian delegation explained that they had taken exception to the proposal from the CEN but on the basis that it implied that the Mauritians had no interest in the environment. They had also found it necessary to protest on sovereignty grounds. There was a general agreement that scientific experts should be brought together. However, the Mauritians welcomed the project but would need to have more details and understand the involvement of the Mauritian government. The UK delegation explained that not many details were available as the UK wanted to talk to Mauritius before proposals were developed. If helpful the UK could, for the purposes of discussion, produce a proposal with variations on paper for the Mauritians to look at.

11. The UK delegation added that the Foreign Secretary was minded to go towards a consultative process and that would be a standard public consultation. However, the UK had wanted to speak to Mauritius about the ideas beforehand. Also, we needed to bear in mind the case before the ECtHR. Any ideas proposed would be without prejudice to any judgment by the Court.

Access to Fishing Rights

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

Next meeting

13. In London, possibly in October but with scientific experts and eCS experts meeting before then.

Comment

14. A surprisingly positive meeting with a more cohesive Mauritian delegation taking their line from the Mauritian Foreign Minister (who was positive about the proposal of a marine protected area in a meeting beforehand with Colin Roberts). Unlike the January talks, they were not dominated by the sovereignty issue. The only exception to this was Mr Neewoor who made the usual sovereignty/ICJ mutterings. His statements were tolerated but ignored by the Mauritian delegation. Much remains to talk about as far as a marine protected area is concerned and one of the Mauritians in the margins of the meeting explained that proposals for co-operation etc remained to be rubber-stamped at higher levels. But we did not get a rebuff on sovereignty grounds and a way forward on this issue and that of an eCS appears to be possible.

Joanne Yeadon
OTD

24 July 2009

BIOT MARINE RESERVE PROPOSAL: IMPLICATIONS FOR US ACTIVITIES IN DIEGO GARCIA AND BRITISH INDIAN OCEAN TERRITORY (BIOT)

Background

1 The British Indian Ocean Territory was created in 1965 to provide for the defence security needs of both the US and the UK. Defence security remains the primary purpose of BIOT. The UK has given an undertaking to Mauritius to cede the Territory when it is no longer needed for defence security purposes and have resisted Mauritian calls for the UK to consider ceding the outer islands of BIOT. For defence security purposes the UK considers BIOT to be indivisible and this has been reaffirmed at the highest levels of UK Government.

2 Defence security of the facility on Diego Garcia was the basis on which the resident population was removed firstly from Diego Garcia and subsequently from the outer islands. As the US will be aware, it is also one of the arguments behind the UK government's policy to prohibit resettlement in any part of the territory. In addition, an independent study came down heavily against the feasibility of long-term resettlement which would in any event open up demands for an open-ended and long-term commitment from the British taxpayer to fund resettlement. We have been through years of litigation in the UK courts over this policy and are now defending our stance once again at the European Court of Human Rights in Strasbourg.

3 BIOT is unique. The BIOT Administration aims to maintain standards of governance appropriate for a UK sovereign territory. The administrative structures and legislation have evolved over the years to meet the very specific requirements of the Territory, but the Administration aims to ensure adherence to the UK's international commitments and, where relevant, to reflect UK or US standards and best practice

4 Although BIOT is remote, the Territory is closely scrutinised by the UK Parliament and media because of the sensitive issues surrounding it eg., defence issues, resettlement of the Chagossians and Mauritian claims to sovereignty. Following the disclosure in 2008 of the two instances when the US rendited people through Diego Garcia and the continuing Chagossian legal actions, this scrutiny is likely to continue for the foreseeable future.

Environment

5 The UK and US environmental stewardship of BIOT has evolved over time reflecting developments in the wider world. On 17 September 2003, the BIOT Commissioner proclaimed the Environment (Protection and Preservation) Zone and a copy was deposited with the UN on 12 March 2004 in accordance with UNCLOS article 75. Within this zone, the UK can exercise certain sovereign rights and jurisdiction for the purpose, among other things, of conserving and managing the natural resources of the waters, seabed and subsoil and also for the protection of the preservation of the marine environment of the zone. In our case, we made our proclamation specific to

the protection and preservation of the environment of the zone. Its main purpose was to protect and preserve the environment of the Great Chagos Bank. Part of Diego Garcia has been designated as a Wetland of International Importance under the Ramsar Convention. It is worth nothing at this point that neither the proclamation, the Ramsar Designation or any of the other environmental laws enacted in BIOT has had any impact on the operational capability of Diego Garcia.

The same can be said of the laws enacted in the Territory to protect the fishery including the latest Fisheries (Conservation and Management) Ordinances enacted in 2007.

The environmental position in the Territory today can be summarised as follows:

- The islands, reef systems and waters of BIOT in terms of preservation and biodiversity are among the richest on the planet, certainly when the overall scale is taken into account. However,
- The formal protection is limited and inconsistent
- There is considerable IUU (Illegal Unregulated Unreported) fishing, especially by Sri Lanka
- There is long-standing rat infestation on some of the islands
- There is limited scientific knowledge of the marine ecosystem especially in deep water
- The commercial fishery generates less than half the revenue required to fund fishery protection and the BIOT account has to be heavily subsidised by the FCO. The fishery is, therefore, unviable.

Proposed marine protected area

6. The UK government's decision to review the regime for environmental protection has been influenced by a number of factors, including:

- The growing scientific support for establishing large scale marine reserves (which led in the US to the creation of two Marine National Monuments)
- Increased advocacy in the UK for protection of the marine environment (around the UK's Marine Bill)
- Growing scientific evidence of the global significance of BIOT as a pelagic/archipelagic ecosystem

The British Indian Ocean Territory Administration (BIOTA) has set itself the headline objective of ensuring the preservation of BIOT's unique environment and enabling controlled access for scientific research to this end. To achieve this we think we may need to

- increase restrictions on commercial fishing activity, particularly on and near the reef systems

- increase efforts to deter IUU fishing, through diplomatic activity

- strengthen the scientific understanding of BIOT's ecosystem (a first step was taken 6-7 August 2009 with a scientific workshop on BIOT under the auspices of the UK's National Oceanography Centre)

There appear to be two or three models for providing a framework for this, all of which could be termed the creation of a large scale marine reserve or marine protected area:

i) Declare a full no-take marine reserve for the whole of the BIOT territorial waters and EEZ/FCMZ

ii) Declare a no-take marine reserve for the whole of the territorial waters and EEZ/FCMZ, with exceptions for certain forms of pelagic fishery (eg, tuna) in certain zones at certain times of year. Some argue that this has a greater net conservation benefit than (i).

iii) Declare a no-take marine reserve for the highest value waters (ie the reef systems - this could for example be done by defining a zone bounded by a line12 miles out from the 200m contour around the reefs) and reserve a decision on the how best to handle the pelagic fishery for 5 years.

7. Whichever model we pursued the marine protected area would take legal effect only in BIOT law. There are no plans to pursue any form of international recognition which carried the risk of engaging international legal obligations inconsistent with the primary defence purpose of the territory eg., we have no plans to seek World Heritage Status. This would not prevent us from seeking to ensure international support for the enforcement of the MPA by informing certain international organisations, eg, the International Maritime Organisation, and the Indian Ocean Tuna Commission of our decision. Nor would it preclude us from possibly seeking further Ramsar designations for the outer islands.

UNCLOS – Right of Innocent Passage

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

Formal Consultation

9. Although technically what is proposed is a matter for BIOT, not UK law, we have taken the view that UK practice on public consultation should be followed. We envisage launching a 3-month public consultation in October 2009. We also plan detailed private consultations over a longer period of time with key stakeholders. Besides the US government, these will include further talks with Mauritius, the Chagossian communities in Mauritius, Seychelles and also in the UK, the Indian Ocean Tuna Commission and the various UK and international scientific and environmental organisations such as the Chagos Environment Network. Following the consultation, UK Ministers will make a decision on the marine protected area. Any formal public consultation and any proposal for the establishment of the marine protected area would need to be expressly without prejudice to the outcome of the proceedings at the European Court of Human Rights.

Practical Consequences

10. The practical consequences for the US should be very limited. We plan no changes to HQBF Diego Garcia. We have no plans to establish a permanent research facility on Diego Garcia or the northern atolls. The protection and enforcement function ie., Brit Ops which is carried out today by HQBF and the BIOT patrol vessel, the Pacific Marlin, will continue with a modified mission depending on which MPA model we decide to pursue. We plan to reinforce this through diplomatic activity, upgrading the technology and testing our punitive response for deterrence effect. The main practical changes would be a reduction in commercial fishing activities and a controlled increase in scientific access to ensure adequate monitoring of the environment.

Assurances

11. The following propositions may help reassure the US:

- There will be no change to the fundamental purpose of BIOT: to serve the defence interests of the UK and US
- Nothing we are proposing will require any change to the EoNs governing the territory.
- While MPA designation is a matter fully within the UK's sovereign powers, we will of course want to consult US.
- Diego Garcia and its 3mile territorial limit will be excluded from the MPA
- There will be no change to the rights and freedoms currently enjoyed by the US government in the territory under the EoNs.
- We do not exclude the possibility of future strengthening of environmental controls. But as in the past these would come through negotiation with the US. We do not propose any stricter controls on the US by virtue of creating an MPA.
- We are not aware of any US activity in the proposed MPA which would be inconsistent with the MPA. However, if the US thinks they do or that they will want to do anything inconsistent with an MPA, now is the time to tell us. They may find it useful to consider the extent to which the US Marine National Monuments have

constrained any military activities. The BIOT MPA will be *sui generis*. If necessary we can consider a specific "military exclusion" in the MPA legislation.

- We will not seek any international status for the MPA which is inconsistent with the fundamental purpose of the territory.
- There is no requirement for the US to contribute to policing the MPA. However, we are interested to see if there might be mutual benefit in enhancing situational awareness in the MPA.
- Nothing in the MPA proposal affects the UK government's policy to prevent resettlement. We envisage no resident presence on the outer islands. However, any MPA proposal will be without prejudice to the current proceedings at the ECtHR.
- There may be a modest and controlled increase in scientific research visits.

BIOT Administration

7 September 2009

eGram

11532/10

Classification	~~RESTRICTED~~ Caveat LOCSEN
eGram Number	11532/10
From	PORT LOUIS
Date Created	14/09/2010 05:14:00
Date Registered	14/09/2010 05:21:03
Action Immediate	eP FCO
Action Routine	
Info Immediate	
Info Routine	ePL AFRICAN UNION POSTS;eP WASHINGTON;ePL EU POSTS;eP NEW DELHI
FCO Distribution	eD OTD;eD AD(SCAW);eD AMERICAS DIRECTORATE;eD EU DIRECTORATE;eD AFRG;eDL EAST AFRICA;eDL SOUTHERN AFRICA
Lead	eD OTD
Military Action Imm	
Military Action Rtn	
Military Info Imm	
Military Info Rtn	
Subject	LOCSEN: MAURITIUS: BRITISH INDIAN OCEAN TERRITORY (BIOT)
Summary	I present my credentials to the Mauritian President and meet the Prime Minister and Foreign Minister. All take the opportunity to raise BIOT. Some signs that the Mauritians want to move on from recent strong rhetoric.
SIC	

DETAIL

1. I met President Jugnauth on 9 September to present my credentials (my second day in Post) and was able to meet Foreign Minister Boolell and Prime Minister Ramgoolam on the same day. The talks were wide-ranging, and other bilateral points will be reported separately to Africa Directorate. However, they all took the opportunity to raise Chagos/BIOT, which remains an irritant following the decision to establish a Marine Protection Area (MPA) in BIOT.

2. Jugnauth said that he understood that the UK position was that sovereignty would be ceded to Mauritius once Diego Garcia was no longer needed for military purposes. But Mauritius had always understood that this meant the Cold War. The Cold War was now over, so was Diego Garcia still needed for military purposes? And if so, would there not always be a reason why the island was still needed? Jugnauth later added that the UK should just hand back the Territory; Mauritius had no problem with the US continuing to use the base, but they should pay rent to Mauritius.

3. Prime Minister Ramgoolam said that he appreciated you seeing him at Carlton Gardens on his recent visit to London. He rehearsed his disappointment following his CHOGM meeting with Gordon Brown, where he felt he had been promised that the MPA would be put on hold. But he was in "more sorrow than anger" mode. I said that we did not want to raise any hopes of a change of policy. The UK recognised the Mauritian position on sovereignty, and we trusted that the Mauritians understood ours. But, aside from sovereignty, there were a number of issues which could be discussed, and we hoped for a resumption of bilateral talks. The excellent and important relationship between the two countries should allow constructive discussions. You would be writing to set out the position. Ramgoolam said he would wait for the letter before considering his next move, but if there was no progress he would "have to do something".

4. Foreign Minister Boolell was grateful that Mr Bellingham had met him in Kampala at the recent

EU summit. On BIOT he said that the MPA consultation had marred the relationship, but if there was a will we could make progress. Mauritius was keen to restart bilateral talks, but 2014 was just around the corner and this was an important date under the UK/US agreement. They would like more clarity on this - the Government was under increasing pressure "from African Union friends" to take action ahead of that date. Boolell also mentioned Mauritius' responsibilities under the Pelindaba Treaty (which says that there should be no nuclear weapons on the territory of AU members).

5. Boolell recognised that the US base was here to stay, but Mauritius wanted to exercise its "legitimate rights" over the territory. They wanted to be part of any discussions, and were unhappy that the US refused to engage with them and kept telling them to discuss all BIOT issues with us. Boolell drew attention to the Chagossian case in the ECHR, and said that this was a rare case where the Mauritian government and opposition were united. He also hinted at "mobilising world opinion", an ICJ case, and seeking "compensation for lost revenue" since independence.

COMMENT

6. All interlocutors appreciated the fact that you and Mr Bellingham had been willing to discuss these issues with the Mauritians so soon after the UK elections. Following a sticky period in the bilateral relationship, and with the Mauritian elections now behind them, there is a hint that they want to build bridges. But their grievances over BIOT are real, and we will need to continue to invest time and effort into managing the bilateral relationship, including in the context of the planned Royal visit in December. Your letter to Ramgoolam will be important, and I will be in touch with Africa Directorate and OTD. The Secretary of State for Business' letter to the New Statesman, apparently saying that we would facilitate resettlement in the Chagos Islands, and withdraw from the ECHR case, is front page news today and will be an additional complication. I am seeing the Chagossians' representative, Olivier Bancoult, tomorrow.

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From: Joanna Yeadon
Overseas Territories Directorate
Date: 29 October 2009
cc: [Desk lead to cut copy addressees in and originator's contact details]

For:	Colin Roberts PS/Foreign Secretary	Agreed in draft Colin 29/x

BRITISH INDIAN OCEAN TERRITORY (BIOT): PUBLIC CONSULTATION ON PROPOSED MARINE PROTECTED AREA

ISSUE

1. How to move forward the proposal to establish a large scale Marine Protected Area (MPA) in British Indian Ocean Territory (BIOT)?

TIMING

2. Priority. We propose the Foreign Secretary launches the consultation on 10 November.

PREFERRED OPTIONS

3. That the Foreign Secretary:

   (i) notes progress to date on the proposed MPA, agrees the main elements and timing of a 3-month public consultation exercise to be launched on 10 November;

   (ii) agrees the "Foreword" in the draft consultation document and also agrees the media and parliamentary strategies as set out in paragraphs 7 and 8 below; and

   (iii) agrees our recommendation that he telephones Prime Minister Ramgoolam in advance of the consultation launch (see para 11).

AGREED BY

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4. Legal Advisers, Communications Directorate and PUS, MOD, Port Louis, Victoria and Washington agree.

PARLIAMENTARY AND MEDIA

5. There has been some parliamentary interest in the proposal for a marine protected area in BIOT, mainly from the All Party Parliamentary Group on Chagos (BIOT). The APPG is likely to oppose any MPA proposal that does not encompass the resettlement of the outer islands by Chagossians. The APPG which comprises of around 50 MPs is active, meets on a monthly basis and has written frequently to both the Minister and the Foreign Secretary on Chagossian issues. The Foreign Affairs Committee maintains its keen interest in all the Overseas Territories following its recent Inquiry.

6. There has also been some interest in the UK media as well as coverage in the Mauritian media and specialist environmental/scientific magazines. A supportive article has just appeared in the latest edition of "Science in Parliament". We anticipate that the level of both parliamentary and media interest will rise with the launch of a public consultation.

Media Strategy

7. Press office will issue a press release announcing the consultation on 10 November and target the UK media including local press in Crawley. They also plan to post an article on the FCO website encouraging people to contribute to the consultation. Port Louis and Victoria will target local media in Mauritius and Seychelles. OTD will draft a blog. We will clear the press release and blog with Private Office beforehand.

Parliamentary Strategy

8. We recommend that the Foreign Secretary writes to Jeremy Corbyn MP, Chairman of the APPG on Chagos and also to Mike Gapes MP, Chairman of the Foreign Affairs Committee informing them of the launch of the consultation. We recommend, too, that the Foreign Secretary agrees a Written Ministerial Statement on the launch of the consultation. We will provide drafts nearer the time of the launch.

RISKS

9. [redacted]

[redacted]

[redacted] risk of opposition from the US military or from the Government of Mauritius although there is more to do to convince both sets of stakeholders.

US

10. The US obviously recognises UK sovereignty over BIOT and appreciate our efforts to consult with them over a possible MPA. They accept our assurance that creating an MPA in BIOT will have no impact on the operational capability of the base on Diego Garcia. They remain concerned, however, that the environmental lobby will continue to ratchet up pressure for further controls which may eventually end up affecting the base. We will continue to work with the US to mitigate this risk.

Mauritius

11. Our High Commissioner in Port Louis advises that while Prime Minister Ramgoolam can see the advantages in supporting the consultation, the fact that it is a "unilateral" UK consultation will be difficult for him in the run up to the elections in Mauritius next Spring. It would help if he could play up our bilateral dialogue. For this reason, we recommend that the Foreign Secretary telephones the Prime Minister ahead of the launch, to discuss the matter and so help optics in Mauritius.

Chagossians

12. The risk of an aggressive reaction from the Chagossians and their supporters is high. They may claim that we are establishing a Marine Protected Area in order to ensure that they can never return to BIOT. This is not the case. By going out to public consultation we hope to counter this claim and any potential claims that a decision on establishing an MPA has already taken place and to that extent, public consultation is part of the risk strategy. However, there is a risk that the Chagossians may well seek a judicial review of the consultation process.

13. [redacted]

ARGUMENT

14. Our engagement with key stakeholders (US, Mauritius and environmental NGOs) has so far been smoother than expected. There is good understanding of the principle of what we are aiming to achieve, but there is still more to do to resolve the details of US and Mauritian interests. We have not had separate discussions with the Chagossians on the issue of an MPA. However, Olivier Bancoult (Leader of the Mauritian-based Chagos Refugees Group) wrote to the Chagos Conservation Trust immediately following their launch of the MPA proposal to state that any conservation plan or project for the Chagos Islands must be made in consultation with the Chagossians and that any proposal must start with resettlement and the creation of employment for the Chagossians. This appears to be the position of the APPG and the Chagos Supporters Association in the UK.

15. So, while continuing our private dialogue with the US and Mauritius we need now to move to a public consultation process as suggested by the Foreign Secretary in the course of which the different Chagossian communities in Mauritius, Seychelles and Crawley will have an opportunity to express their views.

16. Although the BIOT Administration is not bound by UK Government guidelines on public consultation, we recommend the consultation follows BIS guidelines as far as possible. I attach a copy of the draft consultation (Flag B). [redacted] We have also hired an independent facilitator to gather opinion among the Chagossian communities in Mauritius, Seychelles and Crawley (where many of the Chagossians who moved to the UK following the 2002 Overseas Territories Act have settled). The main question will be whether we should create a Marine Protected Area in BIOT but we will also invite comment on options for the BIOT fishery (ie., do we move to a full or partial no-take zone) and are also seeking opinions on other environmental protection measures beyond marine protection. We have made sure that there is no inconsistency between this consultation exercise and DEFRA's work on the UK Marine Bill.

17. On substance, the key issue remains the scope of MPA designation. The technical work so far has identified three potential approaches:

i. Immediate designation of the whole EEZ as a no-take MPA

ii) The same, qualified by maintaining a limited amount of commercial fishing in designated areas and seasons for a 3-5 year interim period during which further scientific work would be done to provide a basis for moving to full no-take status

iii) Immediate designation of the most vulnerable and valuable sites (ie the reef systems and surrounding waters out 12 miles from the 200m depth contour) as a no-take MPA, reserving a decision on the rest of the EEZ for 3-5 years.

We need to take account of the results of the consultation before deciding which option to pursue.

18. In parallel we need to continue our work to evaluate the options from the perspectives of conservation benefit, enforcement challenge and impact on BIOTA and the FCO's budget.

BACKGROUND

19. Since our last submission on this subject:

- We held talks with the Government of Mauritius in July. This produced a joint communiqué in which the Government of Mauritius welcomed the proposal for an MPA. The Foreign Minister was supportive in principle. The key to their support or acquiescence is likely to be some form of recognition of their interests, although this must not breach our red lines on sovereignty. The next round of talks is scheduled for January 2010. We also used the visit to talk with Mauritian fishing interests and the Chagossian communities.

- The Commissioner's visit to BIOT in July included an opportunity to assess the enforcement capability currently at the disposal of the BIOT Administration (BPV Pacific Marlin and its varied complement of marines, police, immigration and customs officers and fisheries protection officer; the deterrent value of the way detected illegal fishing is dealt with in the courts and prison on Diego Garcia).

- With our approval, the National Oceanography Centre in Southampton ran a two-day workshop in August to assess the level of knowledge of BIOT in the scientific and environmental community. The report of this event (copy of executive summary attached at Flag C) provides a strong endorsement for moving to MPA designation

- The [illegible]

- In September in Washington we covered the MPA proposal in the annual UK/US Pol-Mil talks on BIOT. The US response was constructive. We gave them a set of assurances which went some way to addressing their concerns. We had a follow-up meeting with the US on 28 October. We will continue to work with them to alleviate their remaining concerns.

- Drafted the consultation document.

RESOURCE IMPLICATIONS

20. The consultation process will cost around £25,000. We will meet this initially from the BIOT Administration Account with help from the OTPF if necessary. We may be able to persuade the Pew Foundation to help with costs.

21. The decision to move ahead with consultation does not commit us to any particular outcome. When we come to decide the scope of MPA designation, the resource implications will become a factor. In general terms, of the options set out in para 17 above, i) will bring a reduction in BIOTA revenue of c £800,000 per annum reduced by any new sources of revenue iii) will be budget neutral to BIOTA and ii) will be somewhere in between depending on the amount of fishing permitted. As the FCO, through the OTPF effectively provides budgetary aid to BIOTA, any budgetary impacts on BIOTA will be passed through to OTPF/FCO.

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Overseas Territories Directorate

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PS/PUS
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~~RESTRICTED~~ Submission

To Colin Roberts (agreed in draft)

PS/Chris Bryant)

PS/Foreign Secretary) submitting in parallel

From Joanne Yeadon
Date 30 March 2010
Pages 5

BRITISH INDIAN OCEAN TERRITORY (BIOT): PROPOSED MARINE PROTECTED AREA (MPA): NEXT STEPS

Issue

1. How to progress the proposal for the establishment of a Marine Protected Area (MPA) in the British Indian Ocean Territory.

Timing

2. Immediate The consultation report is widely anticipated and we should put it into the public domain as soon as we can.

Preferred options

3. That the Foreign Secretary announces the publication of the report on the responses to the FCO public consultation into whether to create an MPA in the Territory; commenting on the level of interest in the consultation and general support for environmental protection and for a no-take fishing zone; noting that the consultation has thrown up a range of views which need to be explored further; stating that he believes that the establishment of an MPA is the way ahead for the protection of the environment of the Territory and that he will ask officials to work towards this. But he should stop short of announcing that he is going to ask the BIOT Commissioner to declare an MPA in the Territory at this stage. I attach a draft statement which could be used as both as a press statement and as a Written Ministerial Statement

Agreed by

4. Legal Advisers, Paul Lodge, DEFRA, DFID and Press Office

Parliamentary and Media

5. Media

[illegible]

6. Parliamentary

The public consultation has stimulated a high level of interest in Government policy on the Territory and has resulted in the tabling of some 28 PQs on BIOT since the beginning of the year (compared with around 20 in the whole of 2009). The consultation has led the All Party Parliamentary Group on the Chagos to increase their efforts to secure the right of return for the Chagossians. Baroness Whitaker and Jeremy Corbyn MP have written to the Prime Minister and followed the letters up with meetings with No.10. Mr Corbyn led a Westminster Hall Debate on BIOT on Wednesday 10 March. Lord Luce has been actively lobbying the US Embassy and plans to call on the Department of Defense and State Department when he visits Washington at Easter. The Mauritian High Commissioner in London has also been active and has met with the Foreign Affairs Committee handing over a paper detailing Mauritian views on sovereignty and the MPA to which the Foreign Secretary responded on 23 February.

A vocal minority led by Labour backbenchers and the Liberal Democrats continue to press the case for resettlement. A number of their MPs attended the Westminster Hall debate. But even among these there is a diversity of views and Mr Corbyn was unsuccessful in his efforts to claim that there were only two views: for and against the Government. We judge that there are many more MPs who support the environmental protection objectives of a BIOT MPA, but who have no wish to get involved in the wider politics.

Argument

7. Given the amount of heat created by the public consultation it is worth recalling that:

(a) The consultation was (only) about how to strengthen protection of the marine environment in BIOT;
(b) It was expressly without prejudice to the sovereignty claim of Mauritius;
(c) It was expressly on the basis of current government policy against resettlement, but without prejudice to any outcome from the case in progress at Strasbourg.

8. I attach the Consultation facilitator's report on the consultation and summarise the outcome in the background below. If you take the petitions out of the equation, the majority of responses support the establishment of a full no-take MPA, although a large number of responses point out the need to resolve the Chagossian issue. The largest single response was a petition which supports an MPA but refers to working with Chagossians to protect the reef, which attracted over 200,000 signatures. But a consultation is not a vote but a qualitative exercise to collect views and evidence.

9. It is clear from our work so far and from the consultation exercise that establishing an MPA in BIOT would be a significant environmental move. Many in the environmental and conservation community would welcome it. But recent conferences have shown there would be little support to proceed if Mr Chagossian involvement. It is also clear that [illegible] significant number of [illegible] issues to work [illegible] such as Mauritius [illegible]

Page

10. [redacted] We have also offered them the opportunity of a joint statement which places a sovereignty neutral cover on the work on the MPA. The Mauritians continue to insist that any MPA takes account of their sovereignty claim and includes the resettlement of the Chagossian community – both red lines for UK Government policy on the Territory as the Mauritians know.

11. Mauritius' position hardened notably following the tete-a-tete between Gordon Brown and PM Ramgoolam at CHOGM. PM Ramgoolam has, historically, been moderate on BIOT. But he insists that Gordon Brown promised to halt the MPA consultation at CHOGM and he briefed the Mauritian press accordingly following his return from Port of Spain. The fact that we did not then cancel the consultation has caused him great Parliamentary embarrassment. He believes the FCO has ignored Gordon Brown's promise and this causes him greatly to distrust our position, especially in an election year.

12. Mauritian delegations at international meetings subsequently appear to have been briefed to raise their claim of sovereignty when they can. So far this has been done at the Commonwealth Meeting in London on 25 February, the Biodiversity Meeting in Bali attended by Hillary Benn on 25 February, and at the Indian Ocean Tuna Commission 1-4 March. Mauritius also complained to the Human Rights Council on 1 March over the Secret Detentions Report. They had no complaints over the substance of the report but did not like the fact that the study had used the terminology "British Indian Ocean Territory" rather than "Chagos Archipelago" and made their standard claim to sovereignty over the territory which we rebuffed. They have also approached the IMO.

13. The Mauritians have also since declined to take up our offer of a third round of bilateral talks, demanding that the MPA consultation be cancelled before a third round of talks could take place. There is little prospect of Mauritius changing tack before their own general elections (due in May or July/August). But, assuming Ramgoolam wins the elections, they may be willing to come back to the table thereafter.

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

Parliamentary Reaction

15. The All Party Parliamentary Group will continue to lobby on behalf of the Chagossian community and [redacted] to return to the Territory. They view the creation of an MPA as a possible [redacted] such a return. Without resettlement, the APPG will [redacted] an MPA.

Chagossians

16. [redacted] in favour of [redacted] which [redacted] later [redacted]

17. Questions in connection with an MPA's compliance with the UN Convention on the Law of the Sea have been raised by a number of lawyers responding to the consultation and by one of the Japanese fishing fleets. While our initial view is that nothing proposed so far would be in conflict with UNCLOS, we need to be absolutely sure. Legal Advisers have been tasked to work though some of the issues raised.

Costs

18. There are also budgetary questions to be sorted out. Options 2 and 3 in the consultation document (MPAs with a degree of residual pelagic fishing) can probably be managed within our existing budget. But if we move immediately to a full no-take MPA we will need a satisfactory funding arrangement to replace the income from the sale of fishing licences. Developments in other Overseas Territories have removed any flexibility from the Overseas Territories Programme Fund. The Pew Trust Group is seeking funding from charitable trusts/organisations and they say they are close to putting a funding proposal to us. [redacted] We believe we can progress this issue, but it will take more time and there is little prospect of a contribution from other interested Government departments (Defra, DfID, MoD) in the current resource climate. Without full funding for increased fisheries protection, and without the presence of licensed fishing vessels to report on unlicensed fishers, there is a risk that the declaration of a no-take zone would result in a "paper park" and lead to reduced rather than enhanced environmental protection.

Conclusion

19. None of the above is insurmountable and we must recognise that the majority of respondents to the consultation support an MPA (albeit with caveats relating to the Chagossians). We could make a decision now. But, for the reasons set out above, we are likely to be able to do so more securely and with less hostility if we take more time to work through the various issues. We, therefore, recommend a positive, but not definitive, announcement.

Background

20. The Foreign Secretary launched the public consultation on 10 November 2009. The consultation closed on 5 March following a short extension to allow us to consult with Chagossian communities in Mauritius. The facilitator has now concluded her report (Tab 2).

21.

22. As expected support for options 2 & 3 (fishing allowed at certain times of the year and full protection for the reefs only respectively) came from the Indian Ocean commercial tuna fishing community as well as fleets from Europe and Japan who fish in this area. The Indian Ocean Tuna Commission and officials and representatives in the Seychelles shared this view.

23. Opposition to any of the proposals came mainly from members of the Chagossian community and signatories to the Marine Education Trust petition.

24. Support for a zoned use or an Indian Ocean Network approach came from MRAG, the Seychelles Environment Ministry and the Joint Nature Conservation Committee.

Resource implications

25. As mentioned above, we have not managed to secure funding to replace the revenue brought into BIOTA by the sale of fishing licences. We would, therefore, face a shortfall of around £1 million a year for patrols on top of the £1.5 million OTD already provides from the OTPF.

Joanne Yeadon

Joanne Yeadon
Head of BIOT & Pitcairn Section

Number of attachments: 2

cc: PS/Baroness Kinnock
Colin Roberts, OTD
Andrew Allen, OTD
Katharine Shepherd, Legal Advisers
Judith Gough, Sec Pol
Louise Newby, PRT
Lisa Glover, Press Office
Sarah Riley, Africa Directorate
John Murton, Port Louis
Ian Collard, Washington
Matthew Forbes, Victoria
Ashley Smith, MoD
Richard Parsons, Defra
Anna Balance, DfID
Steven Garrett, Cabinet Office

DRAFT WMS/PRESS STATEMENT

I am pleased today to publish the report on the consultation that I announced on 10 November 2009 into whether to create a Marine Protected Area in the British Indian Ocean Territory.

The response to the consultation has been impressive both in terms of quality and quantity. There is clearly a great deal of interest in the idea of a Marine Protected Area and, more generally, in ensuring the on-going protection of the environment in BIOT.

I am absolutely clear that the UK should do all it can to protect the unique environment of BIOT and I believe that the way ahead should include the establishment of an MPA.

But the consultation has raised a range of issues which demonstrate that further work needs to be done to ensure that this is achieved in a realistic, sustainable and affordable way as part of a strategic approach. I have, therefore, instructed officials to take work forward to that end.

From: Andrew Allen (Restricted)
Sent: 31 March 2010 12:31
To: Colin Roberts (Restricted)
Cc: John Murton (Restricted); Jennifer Townson (Restricted); Ewan Ormiston (Restricted); Zoe Townsley (Restricted); Joanne Yeadon (Restricted)
Subject: RE: RESTRICTED: BIOT: MARINE PROTECTED AREA

Security Label: ~~RESTRICTED~~

** REGISTERED **

Colin

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

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

Andrew

From: Colin Roberts (Restricted)
Sent: 31 March 2010 12:07
To: Joanne Yeadon (Restricted)
Cc: Andrew Allen (Restricted); John Murton (Restricted); Jennifer Townson (Restricted); Ewan Ormiston (Restricted); Zoe Townsley (Restricted)
Subject: RE: RESTRICTED: BIOT: MARINE PROTECTED AREA

Joanne,

I think we need to give a clearer steer to the FS. I suggest the following:

i) FS decides now that BIOTA should establish a full no-take MPA in BIOT's EEZ

ii) FS notes that there are a number of issues to resolve, some of which have come up in the consultation process, and that therefore there should be a staged approach and transitional arrangements leading to a full no-take MPA in three years time

iii) He instructs BIOT Commissioner within the next 12 months to bring an end to the reef fishery and to introduce restrictions to the pelagic fishery.

iv) that Diego Garcia and its territorial waters be excluded from any MPA, but that BIOT Commissioner begin talks with the US with a view to bringing an end to recreational fishing within 2 years.

v) that BIOTA establish a governance structure for the MPA which ensures that the views of key regional stakeholders and in particular the Government of Mauritius can be taken into account.

vi) that BIOTA/FCO ensures through the programme of facilitated visits to the territory that reprersnelatives of the Chagossian community have opportunities to engage in activities in support of the MPA and other environmental protection measures in BIOT.

From: Joanne Yeadon (Restricted)
Sent: 31 March 2010 11:47
To: Ewan Ormiston (Restricted)
Cc: Colin Roberts (Restricted); Andrew Allen (Restricted); John Murton (Restricted); Jennifer Townson (Restricted)
Subject: ~~RESTRICTED~~; BIOT: MARINE PROTECTED AREA
Importance: High

Ewan,

The Private Office have just telephoned. The Foreign Secretary is minded to ask Colin to declare an MPA and go for option 1 (full no-take zone). BUT FINAL DECISION NOT YET TAKEN.

The FS has said that in an ideal world, he would like to go for declaring an MPA and spend the next 3 months reaching some sort of agreement with the Mauritian Government on the governance (management) of the area but making it clear that we will have 3 months to consult them. But if they won't come to any agreement, we will go ahead anyway. **He has asked for ideas, whether the above is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction.** We need to get something to him this afternoon.

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

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

Joanne

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Liam Abrams (Restricted)

From: John Murton (Restricted)
Sent: 07 June 2010 13:10
To: Ewan Ormiston (Restricted)
Subject: FW: RESTRICTED: Foreign Secretary's meeting with the Prime Minister of Mauritius, 3 June

Security Label: RESTRICTED

** REGISTERED **

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From: Catherine Brooker (Restricted)
Sent: 07 June 2010 12:25
To: John Dennis (Restricted)
Cc: Andrew Pocock (Restricted); Colin Roberts (Restricted); Sarah Riley (Restricted); Hayley Stebbing (Restricted); Joanne Yeadon (Restricted); William Gelling (Restricted); David Mcfarlane (Restricted); Matthew Gould (Restricted); DL PO - SPADS (Restricted); Carl Newns (Restricted); Lisa Glover (Restricted); David Frost (Restricted); PUS Action/Info (Restricted); PS Minister Bellingham - Action (Restricted); John Murton (Restricted); PS Minister Browne - Info (Restricted); Rosie Tapper (Restricted); Anwar Choudhury (Restricted); Nicholas Hopton (Restricted); Chris Holtby (Restricted); Simon Manley (Restricted)
Subject: RESTRICTED: Foreign Secretary's meeting with the Prime Minister of Mauritius, 3 June

John,

1. The Foreign Secretary met Dr Ramgoolam, Prime Minister of Mauritius, on 3 June. Dr Ramgoolam was accompanied by Seeblauck Suresh (Secretary to the Cabinet), High Commissioner Abhimanu Kundasamy, and Rakesh Buckhory (First Secretary, Mauritian High Commission). Henry Bellingham, Andrew Pocock, Colin Roberts and I accompanied the Foreign Secretary.

2. The Foreign Secretary welcomed Dr Ramgoolam as his first visitor to 1 Carlton Gardens. He was also the first African leader that the Foreign Secretary had met since his appointment. Ramgoolam congratulated the Foreign Secretary on the elections and forming a coalition government. The Foreign Secretary described the benefit of a fixed term government and the majority that the coalition enjoyed.

3. [redacted]

[redacted]

6. Ramgoolam raised the Marine Protected Area (MPA) commenting that it had not been good for the bilateral relationship. He had not wanted to embarrass Gordon Brown but Brown had promised to 'freeze' the consultation on the MPA. There had been no record of this and the Mauritian account of the meeting had been ignored, along with requests for bilateral talks. Ramgoolam thought the Chagossian community would contest the decision through judicial review. He commented that he thought there might be other motivating factors for this, sharing his suspicion that some of the Chagossian groups had funding from groups in the Middle East. He was concerned that the recent elections had resulted in Mauritius' first elected member of Hizbollah.

7. The Foreign Secretary told Ramgoolam that he would familiarise himself with the issues surrounding the MPA but would not raise Ramgoolam's hopes. The UK position on sovereignty of BIOT was clear: sovereignty would be ceded to Mauritius once the US no longer needed it for defence purposes. Ramgoolam insisted that he would be pragmatic: the territory could be handed over now and Mauritius would not object to the US using it as a military base. The Foreign Secretary stressed that he could not give Ramgoolam any reason to hope for a change in policy but that he and Mr Bellingham did want to work closely with Ramgoolam and his government.

8. Finally, Ramgoolam told the Foreign Secretary that he had a copy of his book on Wilberforce. In 2007, Ramgoolam had given a lecture on Wilberforce at Hull University.

Catherine

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~~RESTRICTED~~ **Submission**

To PS/Henry Bellingham
PS

From Joanne Yeadon (Agreed in draft with Andrew Allen)
Date 19 July 2010
Pages

BRITISH INDIAN OCEAN TERRITORY: BIOT POLICY

Issue

1. Following OTD's submission of 28 May on BIOT policy, the Foreign Secretary agreed that the decision to establish the Marine Protected Area should be implemented without any slowing down of the process; that the FCO should continue to contest the Chagos Islanders' application to the European Court of Human Rights (ECtHR) in Strasbourg; that we should maintain existing policy towards Mauritius on BIOT ie., that the UK will cede sovereignty to Mauritius when the Territory is no longer needed for defence purposes.
2. Now that overarching Government policy has been determined, there are a number of specific issues we need to look at. These, along with recommendations, are set out in the attached paper.

Timing

3. Immediate. We need to inform key players including Parliament, the leader of the Chagos Refugees Group (Olivier Bancoult) and the Chagossians' legal advisers about Government policy.

Preferred options

4. That Ministers agree the further recommendations as set out in the attached paper.

5. If agreed, we recommend that as a first step Mr Bellingham replies to Lord Luce's note of 29 June (Flag A) and Olivier Bancoult's letter to the Prime Minister of 21 May (Flag B). These replies will set out the Government's policy to Parliament and to the Chagossians (and their legal representatives) and also put the Government policy in the public domain. I attach draft replies.

Agreed by

6. Legal Advisers, Africa Directorate, Port Louis.

Parliamentary and Media

7. Parliament takes a keen interest in BIOT. Attention is focussed around an All-Party Parliamentary Group (Chaired by Jeremy Corby MP) which reformed at the beginning of the new Parliamentary session. It continues to be active as evidenced by Lord Luce's recent call on the Minister. Members of the APPG (which include Lord Luce, Lord Avebury, Baroness Walker and Baroness Whitaker) also took an active part in the debate in the Lords on 29 June following Viscount Montgomery of Alamein's oral question on the environmental and scientific awareness of BIOT. We can expect the APPG to continue to lobby Ministers and table PQs (we have received 9 so far this Parliamentary session) and seek debates
8. Media reporting on BIOT is sporadic and generally negative. There will be interest in the eventual ruling at the ECtHR and in any decisions on the MPA where we should expect some positive reporting by environment correspondents but also a revival of the normal negative coverage.

Risks

9. Whatever we offer the Chagossians will fall far short of their, and their supporters', ultimate aim that the Chagossians are allowed to return and settle in the Territory with Government help and that they are granted further compensation. And whatever we offer Mauritius will fall short of their desire for sovereignty over BIOT.

Background & Resource Implications

10. As set out in my submission of 28 May (Flag C).

Joanne Yeadon

Joanne Yeadon
Head of BIOT & Pitcairn Section

cc:
PS/Lord Howell
PS/PUS
Colin Roberts
Andrew Allen
Derek Walton, Legal Advisers

Theo Rycroft, Legal Advisers
Hayley Stebbing, Africa Directorate
Louise Newby, PRT
Matt Thoume, Press Office
Ashley Smith, MoD
John Murton, Port Louis
Matthew Forbes, Victoria
Ian Collard, Washington

BRITISH INDIAN OCEAN TERRITORY (BIOT): SECONDARY ISSUES AND NEXT STEPS

ISSUES

Chagos Islanders v the United Kingdom at the European Court of Human Rights (ECtHR)

- The Foreign Secretary has agreed that we should continue to contest this case.

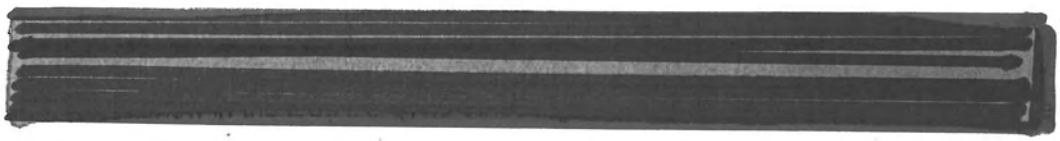
- We have just been informed by the Court Registrar that the application by the Chagos Islanders to the European Court of Human Rights (ECtHR) has been adjourned in order that the Chamber can take into account the eventual judgment or decision in Al-Skeini and Others v the UK which is pending before the Grand Chamber. They will assess the jurisdictional issues in the Chagos Islanders case in light of its guidance. The Chagos Islanders case is not likely to resume until next year and we are now looking at a considerably longer wait for a judgment than had previously been expected.

- We have made clear that the declaration of a Marine Protected Area (MPA) is without prejudice to these proceedings. The delay should not therefore mean a need to slow work on the MPA down.

A new Feasibility Study?

- The 2002 Feasibility Study into possible resettlement of the outer islands of the Territory was carried out by a group of independent experts who won an open tender for the project. It is an independent study. The report came down heavily against the feasibility of resettlement. While the report concluded that short-term habitation for limited numbers on a subsistence basis is possible, it also emphasised that any long-term resettlement would be precarious and costly. It is important to remember that the outer islands, which have been uninhabited for thirty years, lack all basic facilities and infrastructure, are tiny and very low-lying;

- We do not see a need for a new study. Although certain conditions will have changed for the worse (for example, the vulnerability of low lying atolls to the effects of climate change flagged up in the feasibility study has only been reinforced by subsequent experience), this does not call into question the basic conclusions of the study nor does it justify a new study.

- 

[redacted]

Chagossians Working on Diego Garcia

- Any Mauritian/Chagossian can apply for the jobs on Diego Garcia which are advertised locally in Mauritius provided they can demonstrate the required skills for the post. Selection is based on the best candidate being identified. We have sought and have obtained assurances from the US Government that there is no discrimination against the Chagossians when recruiting employees to work on Diego Garcia. The two Chagossian leaders in Mauritius, Olivier Bancoult and Fernand Mandarin, have been briefed regularly on the job opportunities available on Diego Garcia. At the moment, there are only three Chagossians working at the Base. The lack of take-up of jobs is likely to be the low-level wages offered by DG21 (the US Defence contractor). Chagossians could probably earn more for doing the same jobs in Mauritius.
- We should therefore make clear that Chagossians can and do work on Diego Garcia; and encourage the US to continue to advertise opportunities to Chagossians.

Fishing Rights

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

Mauritius/Maldives and the Marine Protected Area

- Mauritius is not opposed to the idea of increased environmental protection in the area. But they had two concerns over the declaration of the MPA. Firstly, they claim sovereignty over BIOT and see the MPA proposal as a challenge to this claim. Secondly, and related, they were unhappy about the public consultation exercise. The result was a worsening of the bilateral relationship. While policy on sovereignty

and the MPA has not changed, we hope that Mauritius will feel able to return to the discussion table on BIOT issues including the MPA. In the House of Lords on 29 June, Baroness Kinnock asked Lord Howell if he would respond positively to the expressed desire of the Mauritius government for the dialogue initiated by PM Ramgoolam and Gordon Brown to be continued as soon as possible. Lord Howell said that the Government remained happy to talk to the Mauritian Government at any time. We should make this offer to the Mauritians clear.

- The Maldives are not opposed to the Marine Protected Area. They support the idea in principle. However, they have alerted us to a possible overlap between BIOT's Environmental Preservation and Protection Zone and their own Exclusive Economic Zone and also have concerns about any impact that a no-take zone might have on their own fishery. We have offered to talk to them about this. The ball is in their court.

[redacted]

- [redacted]

UK/US and the British Indian Ocean Territory

- The use of the British Indian Ocean Territory (including Diego Garcia) is regulated by a series of bilateral agreements (Exchange of Notes) between the UK and US within the context of broader US-UK defence arrangements. The 1966 Exchange of Notes provides that the islands of the British Indian Ocean Territory, including Diego Garcia, shall be available for an initial period of 50 years ie, until 2016 and continuing thereafter for a further period of 20 years unless terminated by either Government at the end of the initial period. [redacted]

[redacted]

Dialogue with the Chagossians, Mauritius and others

The Chagossians and their supporters (including the All Party Parliamentary Group on the Chagos Islands) will be disappointed by the decision of the Government not to change the fundamental policy on resettlement, compensation and on the MPA. While any sort of resettlement or further compensation is not possible in this policy, there are other ways in which we could help to soften the blow and we recommend that we look into the following:

(a) Trying to involve the Chagossians in environmental projects taking place in the Territory. In the short term, there are opportunities on Diego Garcia (eg., the Barton Point restoration project (getting rid of invasive coconut trees and planting indigenous hardwood trees). Allen Vincatassin of the Crawley-based Diego Garcia Society has proposed some small craft activities associated with this. It is not clear how feasible these are, but we can be open-minded. As the MPA is established, there should be further opportunities for Chagossians to contribute to the Territory, especially if some acquire some relevant professional skills (eg., in Marine Biology). We would want to keep the framework for this kind of activity to permissive and short-term visits.

(b) Continuing to look into further general community or heritage visits to the Territory including repairing the graveyards on Diego Garcia, Peros Banhos and Salomon. But noting that;

(c) In the past, Chagossian visits have been funded by the Overseas Territories Programme Fund. Following the recent cuts and other budgetary pressures, the FCO no longer has any funding for this. We will need to look into alternative sources. We could raise with DfID who are a prime beneficiary of the Government's policy against resettlement. We could, as suggested above invite a small-scale goodwill contribution from the US. We could also encourage the Chagossians, NGOs and their supporters to contribute. While it is unlikely that the Chagossians themselves would be able to meet such costs, if their supporters or interested NGOs are willing to meet the cost of flights to the Territory (and this is the most expensive bit) then the BIOT Administration could seek to offset the other costs eg., accommodation, travelling to the outer islands etc).

(d) Continuing to be ready to meet the Chagossian communities to explain our policy. Our High Commissions in Victoria and Port Louis regularly meet the Chagossian communities there. Allen Vincatassin of the Crawley-based Diego Garcia Society is in frequent touch with the BIOT Administration. Ministerial contacts would no doubt be welcomed and we recommend that the Minister offers to meet Olivier Bancoult when he is next in the UK.

However, the Minister should be aware that whatever we offer the Chagossians will fall far short of their and their supporters' ultimate aim that the 2004 BIOT Orders in Council are repealed and the Chagossians allowed to return and settle in the Territory with Government help and that they are granted further compensation.

(e) The Mauritians may also be disappointed that the decision is to continue with the MPA. We recommend that we offer to resume the bilateral talks with Mauritius and also suggest talks with other regional players eg., Maldives and the Seychelles.

Next Steps: Implementation of the Marine Protected Area

The most immediate problem is funding. If we are to continue with a full no-take fishing zone then we need to replace the £800,000 - £1 million income which we used to receive from the sale of fishing licences. Otherwise we will not be able to continue to patrol the MPA. As mentioned in my submission of 28 May, OTD have been in discussion with a number of foundations and charities who have offered to meet the funding requirement for the MPA for a five year period. Now that we have the Foreign Secretary's decision, we are pursuing this and will submit to the Minister in due course.

We will establish a management framework for the MPA which will rest with the BIOT Administration with an advisory board. We will keep Ministers informed as this develops.

We will also aim to continue dialogue with the Chagossian communities, Mauritius and other regional players eg., Seychelles and the Maldives on implementation of the Marine Protected Area.

Making the Policy Public

Now that Government policy on BIOT has been agreed, we recommend that the Minister informs Parliament and the Chagossians as a priority by:

(a) Responding to Lord Luce's memo of 29 June; and

(b) Responding to Olivier Bancoult's (leader of the Chagos Refugees Group) letter to the Prime Minister of 21 May asking him to review policy towards the Chagossians. His letter asks us to consider a similar range of issues to those raised by Lord Luce.

At the same time as informing Parliament and the Chagossians, we also need to reply to two letters from the Chagossian legal representatives as follows:

We recommend

(c) [redacted]

(d) [redacted]

Overseas Territories Directorate
19 July 2010

Liam Abrams (Restricted)

From: Emily Maltman (Restricted)
Sent: 09 August 2010 12:56
To: Ewan Ormiston (Restricted)
Subject: FW: Prot: Records of Egyptian Foreign Minister and Mauritian Foreign Minister meetings with Mr Bellingham at AU Summit

Security Label: PROTECT

** REGISTERED **

Ewan, for you, following John's departure.

From: Emily Maltman (Restricted)
Sent: 09 August 2010 12:47
To: Norman Ling (Restricted); Sam Jeremy (Restricted); Kate Mccready (Restricted); Ade Onitolo (Restricted); Dominic Asquith * (Restricted); John Murton (Restricted); Philippa Saunders (Restricted); Sarah Riley (Restricted); Andrew Allen (Restricted)
Cc: Ian Millar (Restricted); Fiona Robertson (Restricted); Russ Dixon (Restricted)
Subject: Prot: Records of Egyptian Foreign Minister and Mauritian Foreign Minister meetings with Mr Bellingham at AU Summit

Dear all

My apologies for the lateness of these two final records of Henry Bellingham's meetings from the AU Summit in Kampala a fortnight ago. The further eight days of travelling meant my record writing was slower than usual. Please forward to anyone I've missed.

[redacted]

[redacted]

Meeting with Mauritian Foreign Minister, 22 July

1. On BIOT, the Minister set out the position as explained by the Foreign Secretary to the Mauritian Prime Minister in London some weeks earlier, noting that the Government was keen to work with Mauritius and consult them on the implementation.

2. The Foreign Minister was robust on BIOT, that it was essential that these issues were discussed properly. As Mauritius was not against environmental protection or the principle of an MPA, but wanted to be involved in the policy discussion. Mauritius was happy to continue the lease - to both US and UK - but, again, wanted to be involved in discussions in 2014. He was firm that Mauritius could not and would not be sidelined.
Henry Bellingham noted clearly that there would be a dialogue with Mauritius that the Government would maintain from now and through the years as the BIOT lease discussions with the US commenced, but gave no promises of Mauritian involvement or consultation. (comment: clearly a difficult issue on which we are not going to be able to give Mauritius what we want. The Minister created a marker for that, but we're unlikely to hear the end of it).

3. As for resettlement, it could not be decoupled from the sovereignty issue, which was clear that sovereignty would be ceded to Mauritius when the island(s) were no longer needed for defence purposes. Mauritius saw the islands (presumably including the Mauritius archipelago) as one country.

[redacted]

Thanks

Emily

Emily Maltman, Private Secretary to Henry Bellingham MP
Ministerial portfolio: Africa, UN, Conflict, Piracy, Global Economic Issues and Business, Climate Change, Overseas Territories, Protocol & FCO Services.
Tel: 020 7008 2173 Fax. 020 7008 2148 Mob: 07833 710020 K126, King Charles St

It is the responsibility of the lead department to register any comments made on the original correspondence. In line with FCO guidance, the Minister's office will not register this email chain or any attachments.

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~~RESTRICTED~~ Submission

To	(i) Colin Roberts (ii) PS/Mr Bellingham (iii) PS/Foreign Secretary
From	Joanne Yeadon
Date	1 September 2010
Pages	5

BRITISH INDIAN OCEAN TERRITORY (BIOT): MARINE PROTECTED AREA (MPA): IMPLEMENTATION AND FINANCING

Issue

1. How to take forward the Marine Protected Area (MPA) proposal. In particular, whether to go ahead with a full "no-take" approach and, if so, how to make up the loss of licence revenue to the BIOT Administration budget.

Timing

2. Pressing. We need to move ahead on financing issues. Ministers may wish to consider these issues at the meeting to discuss BIOT on 6 September.

Preferred options

3. That Minister's agree to a full "no-take" MPA (only excluding Diego Garcia and its Territorial waters (3 nautical miles)); and agree that the BIOT Administration finalise arrangements for funding the running of the BIOT Patrol Vessel through private funding and through arrangements with the US Government for fuel.

Agreed by

4. Legal Advisers, Press Office, PRT, Africa Directorate, Washington, Port Louis.

Parliamentary and Media

5. A number of Parliamentarians take a keen interest in BIOT. Attention is focussed primarily around the All-Party Parliamentary Group on Chagos which was reformed following the General Election. This is chaired by Jeremy Corbyn, and other active members include Lord Avebury, Lord Luce, Baroness Whitaker and Baroness Kinnock. It continues to be active, lobbying the US, as well as writing letters, seeking meetings with Ministers and tabling PQs here. Lord Howell answered an oral question on 29 June. We can expect interest to continue with calls for debates in both Houses very likely.

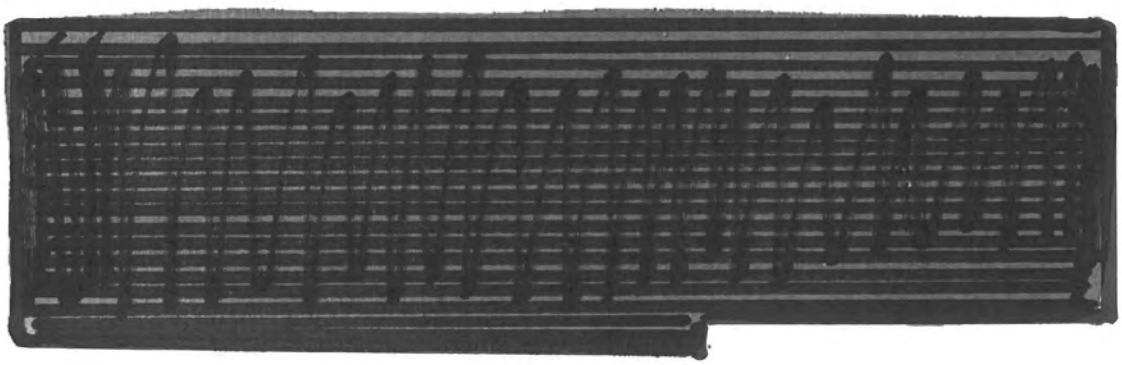
6. Media reporting on BIOT is sporadic and generally negative. The MPA proposal stimulated a much broader and more positive interest among the environmental and scientific writers. There will be continuing interest in future decisions on the MPA

including the idea of private funding.

7. Charles Clover of the Sunday Times has shown interest in running a positive story on the MPA and the potential for NGO/private-sector support to the tune of £3.5 million over 5 years. He has held off writing but with Government policy on BIOT now being made known, a positive Sunday Times article could help in the face of other opposition. The potential for collaboration with NGOs and private benefactors could be a good "Big Society" story. If Ministers agree to bring in private funding we will need to prepare a ministerial quote welcoming the contribution.

Risks

[redacted]

8. 

Political Risks

Mauritius

9. At his meeting with Prime Minister Ramgoolam on 3 June, the Foreign Secretary advised that he would familiarise himself with the issues surrounding the MPA but would not raise Ramgoolam's hopes. He stressed that he could not give Ramgoolam any reason to hope for a change in policy but that he and Mr Bellingham did want to work closely with Ramgoolam and his government. Mr Bellingham repeated these messaged when he met Foreign Minister Boolell at the AU Summit on 22 July 2010. The Acting High Commissioner in Port Louis has also recently informed Foreign Minister Boolell of the Minister for Africa's letters to Lord Luce and Olivier Bancoult. However, the Mauritians are likely still to be disappointed: they had high hopes for the new Government. This issue is likely to continue to cause tension in our otherwise good bilateral relations with Mauritius, and could impact on our wider bilateral objectives, including working with Mauritius on counter piracy in the Indian Ocean.

10. The decision to continue with the MPA of itself is unlikely to push Mauritius to seek an Advisory Opinion at the International Court of Justice. But Boolell warned the Acting High Commissioner in Port Louis on 23 August that they would be prepared to do so if there were no progress on sovereignty. They would also seek compensation for income accrued over the period of time which the "UK had denied them their rights over the

Territory". While we are confident in the strength of our legal case, a decision by Mauritius to challenge our position on sovereignty would be awkward. We will need to develop an active approach to Mauritius, therefore, being clear about our red lines, but being positive about bilateral talks and options for an advisory role in the implementation of the MPA. This might include options, such as offering Mauritius a "privileged partnership" where Mauritius could play an advisory role in the management of the MPA, which does not impact on the sovereignty position. While we are not obliged to offer Mauritius this, it might help to bring them along with us on the issue. We expect the new High Commissioner to have opportunities to take stock of Mauritian thinking in his introductory meetings.

11. There is a slim chance that Mauritius may raise the issue of their historical fishing rights in the Territory. During negotiations over the excision of the Chagos Archipelago between Mauritius and the UK in 1965, the UK gave an undertaking that HMG would use their good offices with the US government to ensure that certain facilities including fishing rights in Chagos would remain available "as far as was practicable". Over the years, these rights have come to mean free fishing licences to Mauritian-flagged vessels upon application. In our exchanges on the MPA to date the Mauritians have never raised the question of fishing rights. This may be because they see it as inconsistent with their sovereignty claim. Mauritius has shown interest only in trying to secure a percentage of the fishing licence money generated by the Territory's fisheries. They do not accept our figures which show that the fishery operates at a substantial loss. Very few Mauritian-flagged vessels have fished in the Territory's Fishing (Conservation and Management) Zone. Only a couple of Mauritian-flagged vessels are run by Chagossians and their "rights" are being taken up in the Judicial Review into the MPA case being brought by Clifford Chance against the Secretary of State.

Other Regional Interests

12. The BIOT MPA will be the most significant marine conservation move in the Indian Ocean. To realise its value to the full we will need to engage with neighbouring states besides Mauritius, in particular Seychelles and the Maldives, to discuss issues such as research, policing, and IUU countermeasures. We also need to keep the EU Commission informed and retain our involvement with the Indian Ocean Tuna Comission. We will aim to present this as a positive and constructive attempt to build regional cooperation.

International Fishing Community (particularly Spain)

13. Following the decision to establish a Marine Protected Area, we informed the EU Commission and the Indian Ocean Tuna Commission of decision and also that the MPA would include a no-take marine reserve. This appears to have fended off any negative comments so far but the Spanish fishing fleet are not happy with the decision and have been lobbying the BIOT Administration to change their minds over a full no-take MPA through their Embassy in London. Pressure is likely to continue.

DEFRA's Interests

14. Defra have been supportive of the proposal to create an MPA in BIOT. It contributes to the international MPA targets for which Defra is responsible within the UK Government. There is however some sensitivity over the relatively light scientific evidence base for the BIOT MPA. Defra is under pressure from the fishing industry over the need for extensive scientific evidence for the establishment of MPAs in the UK waters. We need to be alert to this and make sure the special circumstances of BIOT (for example the very low level of historical exploitation) are well presented in any public statements.

Argument

15. The FCO public consultation into whether to create a Marine Protected Area in BIOT suggested three possible options for a marine reserve:

    (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); or

    (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 consultation document noted the views of the scientific community that there was sufficient scientific information to make a convincing case for designating most of the Territory as a marine protected area (MPA), to include not only protection for fish-stocks but also to strengthen conservation of the reefs and land areas. It noted also that there was growing scientific support for establishing large scale marine reserves to protect fish stocks (which has already led the United States of America to create two Marine National Monuments) and there is growing scientific evidence of the global significance of BIOT as a pelagic/archipelagic eco system.

The response to the FCO public consultation into whether to create a Marine Protected Area in BIOT was high with over a quarter of a million people registering a view (although the vast majority of these were in response to petitions both for and against an MPA). The great majority of respondents – well over 90% - made clear that they supported greater marine protection of some sort in the Chagos Archipelago in principle.

16. The public consultation document also noted that it might be necessary to exclude Diego Garcia and its 3 mile territorial waters from any marine protected area. The use of the US military base on Diego Garcia is governed by a series of Exchanges of Notes between the UK and US which impose Treaty obligations on both parties. Because of our Treaty obligations, we discussed the possible creation of a marine protected area with the US. We have reassured the US that the primary purpose of BIOT will continue to be the defence purposes of the UK and US; and that creation of a Marine Protected Area to will not impact on the operational capability of the base on Diego Garcia. For this reason, we believe we should exclude Diego Garcia and its 3 mile territorial waters from any marine protected area. This would be a total of 470 km sq out of the total

proposed MPA area of 544,000 sq km. The existing environmental protection on Diego Garcia which includes a large Ramsar site and several Strict Nature Reserves and other conservation regulations such as those that affect turtles will not be affected by this exclusion. A practical consequence of this is that for the time being there will be some sport fishing within the 3-mile limit by US service personnel; and defence contractors fish to supplement their diet of imported food. BIOT's environmental adviser assesses this to be of no environmental significance, but it may well be quoted against us.

17. There will also be an exception for the small number of small private yachts that stage through the Outer Islands. In practice we cannot prevent yachties from fishing for subsistence and there is no other food supply. We propose to reduce the maximum yacht permitted stay from 6 to 1 month. With the numbers of permits issued this will continue to have very little environmental impact.

18. If Ministers agree to a "no-take" MPA where all commercial fishing is banned, the BIOT Administration will need to make alternative arrangements for funding the hire and running of the Territory's patrol vessel, the Pacific Marlin. At present, the Patrol Vessel is financed partly through the sale of commercial fishing licences (which used to bring in between £700k and £1 million per annum) and a subsidy from the FCO's Overseas Territories Programme Fund of approximately £1.5 million. It is the money from the fishing licences that must be replaced.

19. We have maintained contact with a range of NGO and private sector organisations as we have developed proposals for the MPA. A key interlocutor has been the US Pew Environment Group. Pew were the driving force behind the US decision to create two large scale MPAs in their waters. They have been working with a group of UK journalists and film makers responsible for the highly influential film "End of the Line", a documentary advocating the creation of "no-take" Areas. The UK group has formed a registered charity "Blue" of which a key objective is to find funds to replace the licence fee in BIOT. Blue have identified and secured a firm offer of funding from the Swiss-based Bertarelli Foundation (£600k/year for 5 years). The Pew Foundation have also proposed lobbying of the US Navy by their associate Senator (retired) Warner to secure a US Navy commitment of fuel for the Pacific Marlin (worth about £350k/year). Warner has been in frequent contact with our Embassy in Washington. He believes he can persuade the US Secretary of the Navy to contribute the fuel. Before taking this further Warner needs confirmation from the UK Government that we would welcome a contribution in this form. We recommend that Ministers agree that officials should try to tie down both these offers and the public lines that will be needed to greet any deal.

20. There are two alternatives to this. First, Ministers can agree to fund from within the FCO vote. On current figures this would require an uplift of about £1m/year to the OT Programme Fund. We cannot meet this cost through reprioritization.

21. Second, Ministers could decide to establish only a partial no-take zone in BIOT (effectively option 2 in the consultation document). We would continue to permit tuna fishing in parts of BIOT at certain times of year. There would probably be little difference in the take and therefore the licence fee, but the fishery protection operation would become more complex. Technically this would still be within the terms of the

Government's announcement of 1 April. However, the creation of a full no-take MPA has largely been assumed by all stakeholders and pursuing this middle path at this stage could expose the Government to criticism from all interested parties without satisfying any except the commercial fishers (ie the Spanish).

Background

22. Background to the decision to establish an MPA and Mauritian reactions are contained in my submission of 28 May 2010.

23. During the consultation process, the Blue Marine Foundation (BLUE) took note that the establishment of an MPA would cost the BIOT Administration around £1 million per annum from the loss of licence income. In recognition of this, they sought with the Pew Environment Group to put together a funding structure using public-private partnerships to cover the loss of revenue for the first five years in order to facilitate the UK Government's protection of the area in the immediate future. Mr Ernesto Bertarelli of the Bertarelli Foundation has agreed to give the BIOT Administration £3.5 million over the next five years to help finance the hire and running of the Territory's Patrol Vessel. While administration arrangements have not yet been finalised, it is expected that the money will be paid by Bertarelli to Blue (now a UK-registered charity) and then onto the BIOT Administration.

24. Our Embassy in Berne have advised us that the Bertarelli Foundation is registered in Saanen / Gstaad Canton of Bern and was set up by Ernesto Bertarelli, a Swiss national, ex-pharmaceutical industry and former member of the UBS board of directors. The Bertarelli Foundation is a charitable trust that supports a range of good causes, including the environment. Mr Bertarelli has a particular interest in the sea; he financed the Swiss sailing yacht Alinghi which was designed at the technical college EPFL in Lausanne and won the Americas Cup 2007. He also supports training for sailing in Switzerland. There appear to be no negative references that would cause us concern with him supporting the MPA. We have checked that Mr Bertarelli's advisers are aware of the Government's policy towards the Chagossians.

Resource implications

25. If Ministers agree to the financial arrangements suggested above, this will give BIOT about £1m/year over the next five years to help finance the continuing hire and running costs of the Patrol Vessel. This will give officials time to evaluate the MPA and put in place longer term funding arrangements.

26

Joanne Yeadon
Head of BIOT & Pitcairn Section

Number of attachments : 1
cc: PS/Lord Howell
PS/PUS
Robert Hannigan
Andrew Allen, OTD
Theo Rycroft, Legal Advisers
Derek Walton, Legal Advisers
Tim Hitchens, Africa Director
John Dennis, Head AD (SCAW)
Hayley Stebbing, Africa Directorate
Matt Thoume, Press Office
Louise Newby, PRT
Nick Leake/Ewan Ormiston, Port Louis
Ian Collard, Washington

Margaret Purdasy (Restricted)

Sent: 13 September 2010 15 23
Subject: REST: Tim Hitchens' Meeting with the Mauritian High Commissioner, 10 September 2010

Dear All,

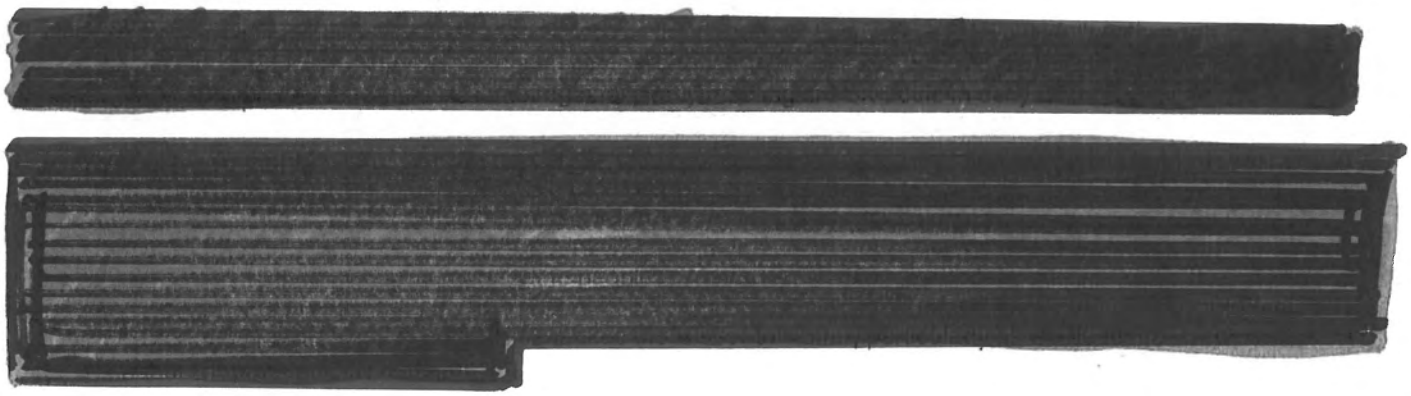
1. Tim Hitchens met the Mauritian High Commissioner, Mahen Kundasamy on 10 September 2010. The HC was accompanied by Haymangoyal Dillum, DHM, and Rakesh Bhuckory, First Secretary. I also sat in.

2. The HC began by congratulating Tim on his appointment as Africa Director, and stressed the importance that Mauritius attaches to the bilateral relationship. He said Tim should feel free to call on him at any time. He extended this invitation to Nick Leake, our new HC to Mauritius, who he had met before Nick went out to Post. It was important that there was a good relationship between the two HCs

3. The HC stressed that the Commonwealth was extremely important to Mauritius, including PM Ramgoolam. It acted as a force for good and brought countries together. However, he felt that it faced challenges - it was important for young people to be made aware of its value. Tim highlighted the new Coalition Government's aim to reinvigorate the Commonwealth.

4. On the British Indian Ocean Territory, the HC said he was aware of Lord Howell's recent statement that the UK Government stood ready to restart bilateral talks on this issue. However, Mauritius had not yet received a copy of a proposed agenda from the UK Government. The HC stressed that Mauritius was keen to take things forward, and said we should go back to the agenda that included the right of return and sovereignty. He said that the FS had told PM Ramgoolam during their meeting in June 2010 that he would be reviewing the policy. This issue was also raised at the AU summit in Kampala in July 2010 (he provided us with a copy of a statement that had been issued from the summit). He highlighted that there had recently been progress with the French on the issue of Tromelin, although he noted that BIOT was more complex. He recognised the issues around Diego Garcia, but said we needed to look at the outer islands. Tim said that BIOT was an Overseas Territories Directorate lead. However, we had an interest from a bilateral perspective and recognised that it was an important issue. Tim mentioned that as the FS had said in his meeting with PM Ramgoolam in June he would be looking in to the issues. The FS had held a recent meeting, and Ministers would soon be in touch directly.

6. The HC said that Mauritius had concerns about the forthcoming Royal visit. John Murton had mentioned it in his farewell letter, but the Mauritian Government had not received anything formal about the visit. **Action: Port Louis to urgently follow up with Mauritian Government.**



9. The HC said that nearly all of the Mauritian Cabinet had studied in the UK. He said that the new UK visa regime was being portrayed negatively in the Mauritian press, and made people think that the UK did not want Mauritian students to study here. He said that he understood the reason for the visa regime, but felt that the UK could do more to work with the media to clarify the situation so that students were not deterred from studying at British institutions. **Action:** HC Port Louis to look in to how we might be able to work with the media in Mauritius to make our policy clearer.

10. The HC said that he was taking forward the idea of setting up a UK/Africa Business Council, and had discussed it with David Frost, DG Chamber of Commerce. There was a big appetite from African HoMs. He said it was also important that the private sector was involved, as well as UKTI and the FCO. The HC said that trade was a way of dealing effectively with poverty, and infrastructure was a key area for development. The UK and EU countries were seen as privileged partners to Mauritius. He also said that British businesses might want to consider working with the Chinese. Tim reiterated that Ministers, including Henry Bellingham, were very keen on the trade agenda. British companies were looking for safe places to invest, and it was important that countries like Mauritius were able to demonstrate that they were business friendly.

11. The HC finished by raising the issue of Air Passenger Duty, which would increase on flights from the UK from 1 November 2010. As Mauritius was classified as a long haul destination it was in category C (the categories run from A-D), which meant that travellers would have to pay heavy additional charges. He recognised the UK's sovereign right to implement tax policies, but noted the negative impact that this could have. The Mauritian Ministry for Tourism had estimated that tourism could decrease by up to 30%. [redacted] Tim said this was a Treasury issue, and there was little we could do to prevent the tax increase. However, any statistics that Mauritius had on the impact that this was having on passenger numbers and revenue that they could present to the Treasury would be useful in putting forward their case.

Comment

12. Overall a positive and friendly meeting. As we expected, the HC took the opportunity to raise BIOT. However, as we have seen on previous occasions, he seemed keen to demonstrate a wish to return the bilateral relations to a more even keel by focussing discussion on a range of issues of mutual concern. It's positive that Mauritius is committed to playing a key role on important regional issues, including [redacted]
The HC also demonstrated that he continues to be focussed on trade. However, it's surprising to hear the Mauritians say that they have not formally been made aware of the Royal visit. We should follow this up urgently in Port Louis. I've also had a request today from the Mauritian HC in London for further details on the visit.

Hayley

Hayley Stebbing | Desk Officer for Botswana, Comoros Islands, Madagascar, Mauritius, Seychelles & Zambia | Africa Directorate - Southern, Central and Western | Foreign and Commonwealth Office | email: Hayley.Stebbing@fco.gov.uk ☎ telephone: +44 20 7008 2300 ☎ fax: +44 20 7008 1582

COUNTRY: MAURITIUS
HEAD OF DELEGATION: PRIME MINISTER DR NAVINCHANDRA ('NAVIN') RAMGOOLAM

Objectives

- To emphasise that we are keen to maintain good relations with Mauritius and to urge Ramgoolam to focus on positive bilateral areas of common interest such as climate change and trade.
- To reiterate that, for US/UK defence reasons, the British Indian Ocean Territory (BIOT) cannot be ceded to Mauritius in the short term.
- And to reiterate the message that you are happy for officials to conduct exploratory talks on BIOT issues; but that we are not yet at the point where we need to set up a Joint Commission.

Background

1. BIOT, and Mauritius' claim of sovereignty over the archipelago is a neuralgic issue in Mauritius. Although Ramgoolam is UK-friendly, moderate and not inclined to make a fuss over BIOT, he will be looking to go home with a good news story on BIOT. We should help him, as the new Leader of the Opposition (former PM Berenger) is pushing the government hard, pressuring him to leave the Commonwealth and thereby allow Mauritius to seek an advisory opinion from the International Court of Justice on the issue. Ramgoolam needs to be able to demonstrate that a more constructive approach yields results.
2. [redacted]
   Realistically, therefore, a discussion on sovereignty is not on the agenda from the UK's point of view. There are, however, other BIOT-related issues we can usefully discuss with the Mauritians eg., fishing, drawing up of a potential formal treaty on sovereignty etc.
3. Aside from BIOT there are many examples of positive cooperation in our bilateral relationship. Mauritius is a good partner and the best example of the benefits of good economic and political governance within Africa, coming first on the Ibrahim Index of African Governance and topped the global 'Doing Business' report for Africa. Areas of cooperation include:

   Tourism - over 100,000 UK tourists in Mauritius each year, BA and Virgin flights
   Trade - we are their largest export market,
   Investment - we are currently the largest investor in Mauritius – focused in the field of financial services: Mauritius is an offshore hub for India)

4. We could do more in the field of climate change. Richard Branson visited Mauritius last month and spoke at length about how Mauritius should aim to be a carbon-neutral island – solar, wind, ethanol from sugar

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