

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

MAURITIUS

v.

UNITED KINGDOM

REJOINDER

**SUBMITTED BY
THE UNITED KINGDOM**

17 MARCH 2014

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CHAPTER I

INTRODUCTION

1.1 This Rejoinder is submitted in accordance with the Tribunal’s Rules of Procedure and Procedural Order No. 1. It responds to Mauritius’ Reply of 18 November 2013. The United Kingdom in this Rejoinder, as in its Counter-Memorial, requests the Arbitral Tribunal to find that it is without jurisdiction in respect of the dispute submitted to the Tribunal by Mauritius in its Notification and Statement of Claim. It also, and without prejudice to this principal submission, addresses the merits of Mauritius’ claims.

A. Preliminary observations

1.2 In its Reply, Mauritius has sought to portray the jurisdictional issues as secondary matters, relegating these largely to the final Chapter (Chapter 7)¹. The strategy, it appears, is to present the case on the merits such that, when the Tribunal finally gets to the questions of jurisdiction, it will not dwell on the very material difficulties that face Mauritius on this score. Thus, in the introductory Chapter of its Reply, Mauritius sets out “six general observations on the UK’s Counter-Memorial”², not one of which concerns the United Kingdom’s objections to jurisdiction, objections that are central to the present proceedings and hence central in the Counter-Memorial. Instead, each “general observation” is devoted to matters on the merits, while the observations overall seek to portray the United Kingdom as having acted in bad faith in its relations with Mauritius so far as concerns the British Indian Overseas Territory (“BIOT”) / the Chagos Archipelago³, and also in the presentation of its defence before this Tribunal.

1.3 In the present chapter, the United Kingdom makes three introductory points.

1.4 *First*, it is not possible to gloss over the issues of jurisdiction. These are of fundamental importance to the United Kingdom as the respondent State but also, especially in

¹ Mauritius’ response to the article 283(1) objection is in Chapter 4 of its Reply.

² MR, para. 1.8 et seq. It appears in fact that there are only five such observations.

³ As to the correct name to be given to the territory, the United Kingdom refers to fn. 8 of its Counter-Memorial. This is not an issue on which this Tribunal need dwell.

so far as concerns Mauritius' attempt to have this Annex VII Tribunal decide the issue of which State has sovereignty over the BIOT, of fundamental importance to all States in relation to the 1982 Convention on the Law of the Sea ("the 1982 Convention" or "UNCLOS").

1.5 When it eventually comes to this critical aspect of the case in its Chapter 7, Mauritius again seeks to downplay the import of what it asks of the Tribunal. The issue of sovereignty is portrayed, quite incorrectly, as incidental or ancillary to a dispute under the 1982 Convention. The reality is that Mauritius' case before this Annex VII Tribunal has at its very heart a claim to sovereignty over the BIOT, a claim that dates back more than 30 years, to the early 1980s, which this Tribunal is now asked to determine in Mauritius' favour. Had there been no such sovereignty issue, it can safely be inferred that there would now be no case. And, just as this sovereignty issue is at the heart of Mauritius' case, so the question of jurisdiction to determine that issue is at the heart of these proceedings.

1.6 It remains the United Kingdom's firm view that a court or tribunal acting under the compulsory jurisdiction provided for in Part XV of the 1982 Convention has no jurisdiction over the questions of sovereignty over land territory that Mauritius seeks to raise. Mauritius is not asking the Tribunal to decide sovereignty issues that are incidental to a maritime boundary delimitation (as in a so-called "mixed dispute"). Instead its case is that, where a coastal State exercises any of the many and varied rights attributed to it under the 1982 Convention, there is jurisdiction under Part XV to determine whether that State is sovereign over land territory. Mauritius thus effectively asks the Tribunal to rule in favour of the existence of a system for the compulsory settlement of all territorial disputes over islands or mainland territories with a coastline. That, however, is not something to which the States Parties to the 1982 Convention agreed. To assume jurisdiction in these circumstances would be contrary to the fundamental principle of consent, which remains the basis for the jurisdiction of international courts and tribunals. To determine the question of sovereignty would exceed the Tribunal's powers under Part XV.

1.7 *Second*, in so far as this dispute is concerned with the Marine Protected Area ("MPA") at all (and leaving to one side the further objections to jurisdiction made pursuant to articles 283 and 297(3)), Mauritius in effect invites the Tribunal to overlook the fact that the declaration of the MPA is a matter of great benefit to the fisheries and other living resources

of this part of the Indian Ocean, and hence to all States in the region and indeed more widely. It is a conservation measure of global importance, established in accordance with the internationally recognised need for the establishment of marine protected areas. It does no harm to Mauritius which, despite the extended focus on asserted fishing rights in its Reply, does not have and has never had any dependency on fishing within 200 nautical miles of the BIOT. Indeed, fishing in this area has never been of the remotest economic significance to Mauritius: as noted in the Counter-Memorial and as is unchallenged, there have been many years when not a single BIOT fishing licence has been applied for by any Mauritian vessel. Further, given that the United Kingdom has undertaken to cede the islands to Mauritius when they are no longer needed for defence purposes, it is Mauritius that will ultimately take over the conserved area that the MPA will ensure. Notably, however, Mauritius has not indicated any commitment to the continuation of the MPA.

1.8 In order to give the Members of the Tribunal a better sense of what the MPA entails, the United Kingdom submits with this Rejoinder three short videos in DVD form⁴. The United Kingdom considers that it will be of benefit to the Tribunal to have some visual sense of the MPA, and a further understanding of the scientific research taking place in the MPA, as well as of the importance of the MPA in the eyes of the scientists undertaking their research there.

1.9 *Third*, seemingly in response to the fundamental difficulties with its case on jurisdiction over the sovereignty dispute, the emphasis has shifted in Mauritius' Reply towards interference with alleged fishing rights. In support of its case on fishing rights, and to a lesser degree the claims of failure to consult and abuse of rights, Mauritius has deployed a large number of United Kingdom internal documents that were disclosed by the United Kingdom Foreign and Commonwealth Office in the domestic judicial review proceedings. Particular emphasis is placed on these documents in Chapter 1 of Mauritius' Reply, where the United Kingdom is criticised for not having disclosed its internal documents in the present proceedings, and is even alleged to have suppressed evidence that is unhelpful to it through the redaction of certain documents⁵.

⁴ One of these is prepared by the Bertarelli Foundation. Two were prepared for the United Kingdom Foreign and Commonwealth Office, but not for the purposes of these (or any other) proceedings.

⁵ MR, paras. 1.11-1.21, esp. 1.20.

1.10 The United Kingdom has responded to these unfounded allegations in its letter of 3 March 2014. That letter encloses certain of the documents relied on by Mauritius in non-redacted form, and explains the redactions that are the basis for Mauritius' unfounded allegations – redactions made in other proceedings by reference to applicable rules in those (domestic) proceedings.

1.11 As a more general point, the United Kingdom does not consider its internal documentation to be relevant and material in the current proceedings. An array of ambiguous and conflicting internal views, by individual officials of varying seniority and experience, as to the nature or existence of fishing rights on the part of Mauritius is of no assistance to the Tribunal. What matters is whether the United Kingdom's concluded view as to the asserted fishing rights is correct, by reference to the 1965 understanding and subsequent practice on which Mauritius relies. Indeed, if Mauritius really considered that all internal documentation touching on the matters in this case was relevant and was to be put before the Tribunal, it would have disclosed its own internal documents. Notably, it has not done so⁶. And in so far as the United Kingdom internal documentation is to be looked at all, this must be in context and not by reference to the sound bites selected by Mauritius.

1.12 To assist in this task, the United Kingdom has prepared a detailed Appendix (at pages 188-236 below) which provides a chronological analysis of all the documentation, including the United Kingdom internal documents, that relate to the fishing rights that Mauritius belatedly asserts in these proceedings. As the Appendix shows, whenever and wherever fishing activities were authorised by designation or licence, the United Kingdom / BIOT has, as a matter of policy, consulted Mauritius and sought to accord preferential treatment to Mauritius and its fishing vessels, striving to meet and even go well beyond what had been contemplated in the 1965 understanding. This is consistent with the United Kingdom's general and long-term support to Mauritius.

⁶ See further at Chapter 3, section D, below.

B. Organisation of the Rejoinder

1.13 The present Rejoinder is divided into four parts. **Part One** (Chapters II and III) responds to what Mauritius has to say in its Reply concerning the facts; **Part Two** (Chapters IV and V) concern the sovereignty claim, and in particular the lack of jurisdiction of a court or tribunal acting under Part XV of the 1982 Convention over the question of sovereignty over land territory that has been raised by Mauritius; **Part Three** (Chapters VI and VII) deals with jurisdiction more generally (by reference to articles 283 and 297); and **Part Four** (Chapter VIII) with the merits of the claim that the MPA is incompatible with rights of Mauritius under the 1982 Convention.

1.14 In **Part One, Chapter II** responds to what Mauritius says in the Reply concerning the constitutional and diplomatic background. It confirms, by reference to constitutional, legislative and administrative arrangements that the islands now forming the BIOT were never part of the territory of Mauritius. The Chapter further shows that Mauritius' allegations of duress are without any factual basis. And it shows that the various resolutions of, and statements made in, the UN General Assembly do not have the legal effects Mauritius seeks to attribute to them.

1.15 **Chapter III** returns to issues with respect to the establishment of the MPA, and the factual aspects of Mauritius' allegations of a failure to consult. It also considers issues raised in Mauritius' Reply concerning the scientific basis for the MPA. It is recalled however that Mauritius has put in no expert evidence to question either the utility of the MPA for the purpose of conserving living resources, or the effectiveness of a ban on fishing in conserving biodiversity, coral reefs, endangered species and fish stocks. This Chapter also addresses the factual aspects of the claim in respect of fishing rights, including with respect to issues raised by Mauritius with respect to United Kingdom internal documents (as dealt with in detail in the Appendix).

1.16 **Part Two** sets out the further reasoning, in response to the Reply, for the United Kingdom's submission on the sovereignty dispute and the absence of jurisdiction under the 1982 Convention to decide the issues submitted by Mauritius. It does so in two Chapters, as follows:

- **Chapter IV** revisits, in light of the Reply, the United Kingdom's position that the Tribunal can have no jurisdiction over Mauritius' sovereignty claim, as the 1982 Convention does not provide for compulsory jurisdiction over questions of territorial sovereignty. The issues that Mauritius has raised in the Reply, and its particular emphasis on article 298(1)(a) and the *travaux préparatoires*, do not establish the radical, expansive assertion of jurisdiction on which the claim to sovereignty relies. It is not just that the alleged jurisdiction is unsupported by the terms of the 1982 Convention (both within and outside Part XV), or State practice, or the *travaux*. The absence of jurisdiction is all the more manifest once the question is asked as to why, if this jurisdiction over disputed issues of territorial sovereignty can be asserted wherever a State acts as a coastal State, there is no opt-out equivalent to that in article 298(1)(a) (on which such emphasis is placed by Mauritius in the context of its *a contrario* interpretation).

- **Chapter V** returns briefly to Mauritius' arguments on territorial sovereignty. Mauritius' Reply fails to address the main point made by the United Kingdom in the Counter-Memorial, that the United Kingdom acquired sovereignty over the islands which now form the BIOT in 1814, by cession from France, and has not subsequently relinquished sovereignty⁷. Mauritius has not begun to show that the Chagos Archipelago was within the territory of Mauritius at independence on 12 March 1968. Mauritius does not establish that any right of self-determination of the people of Mauritius⁸ was violated on 8 November 1965 when the BIOT was created (or on 12 March 1968 when Mauritius became independent). Nor has it explained how a breach of that supposed right could result in Mauritius having present title when no such title was acquired on 12 March 1968.

1.17 Part Three sets out the further reasoning, in response to the Reply, in relation to the absence of jurisdiction by virtue of articles 283 and 297 of the 1982 Convention, as follows:

- **Chapter VI** explains that the Tribunal has no jurisdiction over any of the claims because Mauritius has not met the requirements of article 283(1) of the Convention. Notwithstanding the contentions in the Reply, it remains the case that Mauritius and

⁷ UKCM, paras. 7.5-7.9.

⁸ MR, paras. 1.43-1.46.

the United Kingdom never exchanged views “regarding the settlement by negotiation or other peaceful means” of an identified dispute. There is a new emphasis in the Reply on supposed sovereignty impediments to raising claims as to fishing rights in the bilateral consultations. Such supposed impediments are wholly unconvincing. For example, during bilateral talks held under a “sovereignty umbrella” in 2009, there was nothing whatsoever to prevent Mauritius from raising the issue of fishing, mineral or oil rights without prejudice to its sovereignty claim if it had considered these were issues relevant to the proposed MPA. It did not do so. Mauritius also did not raise alleged deficiencies in terms of consultation under the Convention.

- **Chapter VII** responds to Mauritius’ continued attempt to establish that article 297(1)(c) provides a jurisdictional basis for its non-sovereignty claims. Article 297(1)(c) is limited to disputes about contravention of “specified international rules and standards for the protection and preservation of the marine environment”. This is not a reference to articles 55, 56, 63, 64 or 194 of the 1982 Convention or article 7 of the UN Fish Stocks Agreement, as alleged by Mauritius. This Chapter also responds to Mauritius’ approach to article 297(3)(a), which excludes from compulsory jurisdiction the ban on commercial fishing within the MPA. The United Kingdom does not dispute that the purpose of marine protected areas is “environmental” if that term is understood to encompass conservation and management of the living resources, ecosystems, and biodiversity of coral reefs and their surrounding seas. The point is that characterising the MPA or the fishing ban as measures intended to protect and preserve the marine environment does not somehow change the ordinary meaning or the application of article 297(3)(a), and nor does it bring the dispute within the terms of article 297(1)(c). However the purpose of the MPA is described, disputes relating to conservation and management of living resources remain excluded from jurisdiction by article 297(3)(a).

1.18 Part Four, which is without prejudice to the United Kingdom’s principal submission that the Tribunal is without jurisdiction, considers the merits of Mauritius’ Application so far as concerns the alleged incompatibility of the MPA with the 1982 Convention.

- **Chapter VIII** responds to Mauritius’ re-stated case on fishing rights and consultation, including the weight that it now places on United Kingdom internal documents.

Mauritius does not have the rights alleged in the territorial sea, fisheries conservation and management zone (“FCMZ”), environmental (protection and preservation) zone (“EPPZ”) or continental shelf of BIOT, and does not establish that the declaration of an MPA violates the rights claimed by Mauritius under the 1982 Convention or under other agreements relied on. The true position is that the United Kingdom has, for policy reasons, sought over the years to act consistently with, and even beyond, the 1965 understanding with respect to fishing rights. However, that does not mean that the understanding gave rise to enforceable obligations owed to Mauritius on the international plane. It did not. Likewise, the various claims Mauritius makes with regard to consultation and cooperation, including with respect to the UN Fish Stocks Agreement, lack all substance. The same applies with respect to Mauritius’ claim on abuse of rights.

1.19 The Rejoinder concludes with the United Kingdom’s Submissions.

PART ONE

THE FACTS

Part One responds to what Mauritius has to say in its Reply about the facts.

Chapter II deals with the constitutional and diplomatic background to the case. It responds to Mauritius' arguments concerning the constitutional, legislative and administrative arrangements, and confirms that the islands now forming the BIOT were never part of the territory of Mauritius. It responds to Mauritius' unfounded allegations of duress. And it shows that Mauritius' references to UN General Assembly resolutions and statements do not have the legal effects that it seeks to attribute to them.

Chapter III concerns the establishment of the MPA: Mauritius' allegations of a failure to consult, and the scientific basis for the MPA. Mauritius has put in no expert evidence to question the importance of the MPA for conservation of living resources, or the effectiveness of a ban on fishing in conserving biodiversity, coral reefs, endangered species and fish stocks.

Chapter III also deals with factual aspects of Mauritius' claim in respect of fishing rights, including what Mauritius says about United Kingdom internal documents.

An **Appendix** (at pages 186-236) sets out a detailed account of the documentary record as regards the 1965 understanding in relation to fishing rights.

CHAPTER II

CONSTITUTIONAL AND DIPLOMATIC BACKGROUND

A. Introduction

2.1 The present Chapter responds to Parts II to IV of Chapter 2 of Mauritius' Reply.

2.2 In Part II of Chapter 2 of the Reply⁹ Mauritius seeks to show that “the Chagos Archipelago has always been an integral part of the territory of Mauritius”¹⁰. Mauritius disputes the United Kingdom's description of the constitutional history of the Islands which now form the BIOT¹¹. Mauritius also seeks to bolster its own view of United Kingdom constitutional law by referring to what it claims are “economic, cultural and social links” and to its assertion that the “international community” has “recognised the Chagos Archipelago as part of the territory of Mauritius, and that the United Kingdom acted in a manner that implied such recognition”¹².

2.3 Part III of Chapter 2 of Mauritius' Reply¹³ seeks to rewrite history by repeating the unfounded assertions that the consent of the Mauritius Council of Ministers to detachment was vitiated by duress.

2.4 In Part IV of Chapter 2¹⁴, Mauritius deals with two matters: it refers, once again, to certain UNGA resolutions adopted between 1960 and 1967, and it repeats its references to what Mauritius itself said in UNGA General Debates, starting in 1980 and continuing to the present.

2.5 Mauritius begins its Chapter 2 by claiming that “much of the factual account set out in chapters 2 and 3 [of the Memorial] has not been challenged”¹⁵. To the extent that this may be

⁹ MR, paras. 2.5-2.29.

¹⁰ MR, paras. 1.33.

¹¹ UKCM, paras. 2.16-2.39.

¹² MR, para. 1.33.

¹³ MR, paras. 2.30-2.69.

¹⁴ MR, paras. 2.70-2.94.

¹⁵ MR, para. 2.1.

so, it does not of course mean that what Mauritius says is accepted by the United Kingdom; much that was in the Memorial is simply not relevant.

B. The islands that now form the BIOT were never part of the territory of Mauritius

2.6 It will be recalled that the BIOT is one of the most isolated island groups in the world. The distance from Diego Garcia to Port Louis, Mauritius is 1,140 nautical miles (2,110 kilometres); and the distance between the nearest point of the Republic of Mauritius (Agalega) and Diego Garcia is some 962 nautical miles (1,782 kilometres)¹⁶. Mauritius has not contested these facts, nor could it.

2.7 In Chapter 2, Part II of the Reply, Mauritius seeks to show “that the Chagos Archipelago has always been an integral part of the territory of Mauritius”¹⁷. This is incorrect as a matter of United Kingdom constitutional law (the applicable law until Mauritius’ independence), as is clear from the description of the constitutional position in the Counter-Memorial¹⁸.

2.8 The present section responds to the specific arguments in Chapter 2, Part II of Mauritius’ Reply¹⁹, as well as indicating where Part II fails to respond to points made in the Counter-Memorial. It will do so under the same headings as those used in the Reply.

2.9 It is, however, worth recalling at the outset that Mauritius has failed to respond to the passage in the Counter-Memorial which explained that the definition of ‘Mauritius’ in the law of Mauritius was only amended in 1982 so as to include the Chagos Archipelago²⁰.

2.10 It was only in 1982 that section 2(b) of the Interpretation and General Clauses Act 1974 was amended by the Interpretation and General Clauses (Amendment) Act 1982²¹, so as

¹⁶ UKCM, paras. 2.6-2.7.

¹⁷ MR, para. 2.4: see also paras. 2.8, 2.9, 2.10, 2.74 (“always unquestionably been part of the territory of Mauritius”), 5.22. Elsewhere in the Reply, Mauritius “does not accept the United Kingdom’s argument that the Chagos Archipelago was not an integral part of its territory ... on 8 November 1965.” (MR, para. 2.6).

¹⁸ UKCM, paras. 2.16-2.39.

¹⁹ MR, paras. 2.5-2.29.

²⁰ UKCM, paras. 2.45-2.49.

²¹ **Annex 26**. The 1982 Act was enacted by the Legislative Assembly on 7 July 1982.

to modify the definition of “State of Mauritius” or “Mauritius” by deleting the words “Tromelin and Cargadas Carajos” and replacing them by the words “Tromelin, Cargadas Carajos and the Chagos Archipelago, including Diego Garcia”. It will further be recalled that during the course of a previous (1980) amendment to the definition of “Mauritius” in the Interpretation and General Clauses Act 1974, by passage of the Interpretation and General Clauses Amendment Act 1980, an explicit mention of the Chagos Archipelago was proposed and rejected by both the Government of the day and the Legislative Assembly²².

2.11 It was not until 1991/1992 that section 111 of the Constitution of Mauritius, containing the definition of “Mauritius”, was amended by section 19 of the Constitution of Mauritius (Amendment No. 3) Act 1991²³ to read:

“Mauritius includes (a) the islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including Diego Garcia and any other island comprised in the State of Mauritius.”

The original definition of “Mauritius” in the Constitution was “the territories which immediately before 12th March 1968 constituted the colony of Mauritius.”

(i) Constitutional, legislative and administrative arrangements

2.12 Mauritius fails to comment on the practice concerning dependencies described in the appendix to Chapter 2 of the Counter-Memorial, merely asserting, without explanation, that “[r]egardless of that categorisation, the Chagos Archipelago has always been an integral part of Mauritius.”²⁴

2.13 Mauritius seeks to rely upon Lord Hoffmann’s statement in the *Bancoult (No. 2)* case that the islands were “a dependency of Mauritius when it was ceded to the United Kingdom by France in 1814 and until 1965 were administered as part of that colony”²⁵. It will be noted

²² UKCM, para. 2.48.

²³ The Constitution of Mauritius (Amendment No. 3) Act 1991 was passed on 17 December 1991 and came into force on 12 March 1992 (**Annex 32**).

²⁴ MR, para. 2.7.

²⁵ MR, para. 2.8.

that Lord Hoffman did *not* say that the islands were part of the territory of Mauritius²⁶, but that they were “a dependency of Mauritius ... *administered* as part of that colony”²⁷. This is consistent with the constitutional position described in the Counter-Memorial²⁸. Moreover, the constitutional position of the BIOT vis-à-vis Mauritius was not at issue in *Bancoult* (No. 2).

2.14 In an effort to make out its claim that the islands have “always been an integral part of Mauritius, Mauritius first turns to ‘constitutional, legislative and administrative arrangements’”²⁹.

2.15 Mauritius states that “[t]hroughout the period of French rule, from 1715 to 1810, the Chagos Archipelago was administered as part of Mauritius”³⁰ and that “[t]his continued without interruption throughout the period of British rule, from 1810 until 8 November 1965”³¹. But if one entity is administered as part of another, that does not mean that it forms part of the latter’s territory.

2.16 Mauritius further asserts that “[t]he 1814 Treaty of Paris ... recognised the Chagos Archipelago as part of the territory of Mauritius”³². The Treaty did no such thing. It refers to “the Isle de France [Mauritius] and its dependencies, especially Rodrigues and les Séchelles”³³.

2.17 Mauritius refers to various laws, seeking to show that the islands were part of Mauritius. While, as the United Kingdom explained in the Counter-Memorial³⁴, the islands were included for some purposes within the definition of ‘Colony of Mauritius’, this was done expressly when it was intended that the provisions in question should extend to the Chagos Archipelago. They did not extend automatically, without express provision, as would have been the case if the islands were part of the territory of Mauritius. The legislative power

²⁶ As Mauritius seeks to suggest by emphasising the last five words of the sentence.

²⁷ Emphasis added.

²⁸ UKCM, paras. 2.16-2.39.

²⁹ MR, paras. 2.10-2.17.

³⁰ MR, para. 2.10. No authority is cited for this statement, which on its face looks odd; according to Mauritius, “the French first claimed Diego Garcia in 1769” (MR, para. 2.18).

³¹ *Ibid.*

³² *Ibid.*

³³ Art. VIII of the Treaty of Paris of 1814, UKCM, Annex 1 (emphasis added).

³⁴ UKCM, para. 2.32.

of the Governor of Mauritius over the islands, the extension of laws enacted for Mauritius to the islands, and the appointment of a Stipendiary Magistrate for the islands, were all the subject of express enactment³⁵. This is also apparent from various pieces of legislation cited by Mauritius itself in its Reply³⁶.

2.18 Mauritius' attempt to explain the legislation shows no understanding of United Kingdom constitutional law and practice. For example, Mauritius overlooks the elementary point that the fact that the same person held two offices (magistrate in Mauritius, magistrate in the islands) did not mean that the offices were one and the same, quite the contrary. The person concerned was, in modern parlance, 'double-hatted'³⁷. Nor does the fact that the magistrates had "by and large" the same powers and authority, as Mauritius puts it³⁸, mean that they were the same office holder. The fact that special procedures had to be instituted to enable complaints to be made from the islands to Port Louis³⁹ likewise shows that the islands were not part of the territory of Mauritius. The law in question distinguished between the Stipendiary Magistrate in Port Louis and "the Stipendiary of the said Islands"⁴⁰. It is the same with the 1904 Ordinance referred to by Mauritius⁴¹. It is further to be noted that, as appears from a document annexed by Mauritius, "no part of the Chagos Archipelago [was] included in any electoral constituency for the Legislative Assembly of Mauritius."⁴²

2.19 Mauritius refers to two further Ordinances, saying that these "further demonstrate the close links between the Chagos Archipelago and the main island of Mauritius"⁴³. The Ordinances are far from showing that the islands were part of the territory of Mauritius. In fact, the provision that Mauritius cites from the 1945 Courts Ordinance does not, as Mauritius implies, refer to "Mauritius, including the Chagos Archipelago"⁴⁴; on the contrary, it makes a clear distinction between the Colony and the Dependencies:

³⁵ UKCM, paras. 2.22-2.32.

³⁶ MR, paras. 2.11-2.15. Among others, Mauritius cited the Ordinances of 1852 and 1853 empowering the Governor to *extend* laws and regulations of Mauritius to the islands.

³⁷ MR, para. 2.12.

³⁸ MR, para. 2.13.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ MR, para. 2.14.

⁴² Letter of 2 August 1965 from the Commonwealth Relations Office to the British High Commission, Ottawa: MR, Annex 36.

⁴³ MR, para. 2.15.

⁴⁴ *Ibid.*

“It shall be lawful for the Governor to appoint as many fit and proper persons as may be needed to be Magistrates for Mauritius *and the Dependencies*, and every person so appointed shall by virtue of such appointment have and may exercise jurisdiction as District Magistrate in each and every district of the Colony *and as Magistrate of the Dependencies*, subject to the provisions of section 87.”⁴⁵

2.20 Mauritius concludes its brief account of activities of magistrates from Mauritius in the islands⁴⁶ by stating that:

“The practice adopted by British authorities in Mauritius of assigning Mauritian Magistrates to the Chagos Archipelago from 1872 until 1965 demonstrates the close legal nexus between the Chagos Archipelago and the main island of Mauritius.”⁴⁷

To say that there is a “close legal nexus” between two territories is not to say they are one territory. In any event, it is not accepted that the various laws and practices mentioned by Mauritius get anywhere near to establishing its proposition “that the Chagos Archipelago has always been an integral part of the territory of Mauritius”⁴⁸.

(ii) Economic, cultural and social links

2.21 Mauritius seeks to bolster its idiosyncratic view of the constitutional position of the islands by reference to “the close economic, cultural and social relationship between the Chagos Archipelago and the main island of Mauritius”⁴⁹. It asserts that the United Kingdom did not “directly challenge” its own account of “the early history, which stands unchallenged”⁵⁰. As already noted, in so far as the United Kingdom did not challenge every assertion in the Memorial; that does not mean that such points are accepted - here they are simply irrelevant. The United Kingdom does not consider that “close economic, cultural and social ties”, even if they were as described by Mauritius, would show that the islands were part of the territory of Mauritius. Many places have close cultural and social ties, but this does not mean they come under the same territorial sovereignty.

⁴⁵ Courts Ordinance, 1945 (MR, Annex 7), s. 83 (emphasis added).

⁴⁶ MR, paras. 2.20-2.21.

⁴⁷ MR, para. 2.17.

⁴⁸ MR, para. 2.4: see also paras. 2.8, 2.9 and 2.10.

⁴⁹ MR, para. 2.6.

⁵⁰ *Ibid.*

(iii) United Kingdom actions before the establishment of the BIOT

2.22 Mauritius claims that: “In the two and a half years prior to the detachment, representatives at the highest levels of the British Government considered that the Chagos Archipelago was part of the territory of Mauritius.”⁵¹ This proposition is not borne out by the documents cited. It is not apparent that any of them focused on the position of Chagos islands as a Dependency of Mauritius, or were issued “at the highest levels”. The statements concerned need to be seen in context:

- a. The Colonial Secretary’s note of 27 April 1965⁵² does no more than cite the provisions of the Mauritius (Constitution) Order 1964 and the Mauritius Interpretation and General Clauses Ordinance 1957. It adds nothing to these provisions. It is not disputed that, for certain purposes, the term ‘Mauritius’ included the Chagos Archipelago⁵³.
- b. The Foreign Office telegram to Washington of 30 April 1965⁵⁴ gave a non-legal description of the position, with the evident aim of persuading the Americans to contribute to the generous compensation that was thought necessary.
- c. The sentence extracted from the letter from a Colonial Office official to a Treasury official, of 30 July 1965, adds nothing to the note of 27 April 1965.

2.23 Mauritius asserts that:

“[i]t was to Mauritius that the former inhabitants of the Chagos Archipelago (‘Chagossians’) were taken when they were forcibly removed by the UK from the Archipelago. It was in Mauritius that most Chagossians were resettled. It was with Mauritius that talks were carried on about the future of Chagossians and in respect of which some measure of compensation was paid. There was recognition by the UK that the former inhabitants of the Archipelago were the concern of Mauritius.”⁵⁵

⁵¹ MR, para. 2.25.

⁵² MR, para. 2.25 and Annex 31.

⁵³ The note was prepared following the Cabinet’s Defence and Overseas Policy Committee’s meeting on 12 April 1965 at which the point was made that “[a]lthough these islands were administered by Mauritius and the Seychelles it did not necessarily follow that they had legal sovereignty over them.”: MR, Annex 30, p.11.

⁵⁴ MR, para. 2.25, and MM, Annex 9.

⁵⁵ MR, para. 2.26.

Mauritius also mentions the suggestion made in the Committee of 24 that:

“the United Kingdom Government would not have agreed to pay compensation to the inhabitants of the islands concerned if those islands were not an integral part of Mauritius and the Seychelles.”⁵⁶

2.24 These propositions are unconvincing. The payment of compensation to assist resettlement of Chagossians in Mauritius had no necessary connection with whether the islands were part of the territory of Mauritius. Nor was the payment to Mauritius of compensation for resettlement of Chagossians in Mauritius any indication of the relationship of the Chagos Archipelago to Mauritius.

***(iv) Mauritius asserts ‘recognition’ by ‘the international community’ of
the Chagos Archipelago as part of its territory***

2.25 At the end of Part II of Chapter 2, Mauritius alleges (at least in a heading), that “the international community [has] recognised the Chagos Archipelago as part of the territory of Mauritius”⁵⁷. This adds nothing to Mauritius’ argument; the various Mauritius-inspired political statements cannot in any way have changed, whether retrospectively or not, the position of the islands under United Kingdom constitutional law. Such statements are without legal effect, as was explained in the Counter-Memorial⁵⁸. What is said there applies equally to the further political statements cited in the Reply⁵⁹.

C. Mauritius Council of Ministers agreed to the establishment of the BIOT

2.26 In Part III of Chapter 2 of its Reply, Mauritius repeats the unfounded assertion that the consent of the Mauritius Council of Ministers to the detachment of the BIOT was vitiated by duress⁶⁰. Mauritius continues to assert that “whether or not Mauritius would obtain independence from the UK was conditioned on Mauritius’ agreement to the detachment of

⁵⁶ *Ibid.*

⁵⁷ Heading (d) above para. 2.29.

⁵⁸ UKCM, paras. 7.59-7.60.

⁵⁹ MR, paras. 2.74, 2.83-2.84.

⁶⁰ MR, paras. 2.30, 2.36.

the Chagos Archipelago.”⁶¹ Mauritius does admit, however, that “[p]rior to the detachment of the Chagos Archipelago, the UK consulted the Mauritian Premier and the Council of Ministers,”⁶² but goes on to deny that this consultation was adequate. It does not explain why it was inadequate or the relevance of this statement to its argument⁶³.

2.27 Mauritius ignores the documentary evidence contemporaneous to the events in 1965, much of it annexed to its Memorial and Reply. The documents show that the agreement by the Mauritian Council of Ministers on 5 November 1965 to detachment of the BIOT followed discussions extending over a five-month period, and was not conditioned on independence. It was secured by, *inter alia*, the promise of an external defence agreement and assurance of assistance with internal security on independence⁶⁴. Alongside guarantees for minorities and electoral provisions in the outlined constitutional framework, these were necessary to allay the fears of the representatives of the various political parties and the independents over communal tensions within Mauritius and to secure sufficient support for independence⁶⁵.

(i) Mauritian Ministers supported the use of the Archipelago for defence purposes

2.28 At the first round of UK-US talks on United States’ defence interests on 25-27 February 1964, the United States’ preference for detachment of islands from Mauritius and the Seychelles and direct UK administration was discussed. The United Kingdom agreed to pursue detachment because the United States “made it plain” from the outset “that any islands chosen for military facilities must be free from local pressure which would threaten security of tenure, and in practice this must mean that the islands would be detached from the administration of Mauritius (soon due for independence) and of the Seychelles (where pressure for independence is beginning to be felt)”⁶⁶. The United States continued to reject

⁶¹ MR, para. 1.34.

⁶² MR, para. 2.26.

⁶³ MR, para. 2.26.

⁶⁴ UKCM, para. 2.54 and expanded further below at paras. 2.33-2.47.

⁶⁵ See further paras. 2.33-2.37 below. A note on the Background to the Constitutional Conference, compiled by the Reference Division, Central Office of Information, 20 August 1965, explains that “Although Mauritius has a history of exceptionally harmonious relations between the various communities, the development of political parties has been largely on a communal basis, and with the approach of self-government differences of view about the Colony’s future have emerged and tended to harden along communal lines”. (**Annex 4**)

⁶⁶ Briefing note for Secretary of State’s visit to Washington and New York, 21-24 March 1965, “Defence Interests in the Indian Ocean”, 18 March 1965 (MM, Annex 8), p. 2. See also the joint Ministry of Defence and Foreign Office memorandum to the DOP Committee, MR, Annex 39, p. 2.

the requests by the Mauritians for a long-term lease arrangement rather than detachment for this reason⁶⁷.

2.29 The United Kingdom's interest in the proposal lay in its assessment that it would assist in retaining its ability to intervene and protect its position East of Suez⁶⁸, especially if it withdrew from Aden. The likely loss of the British base in Singapore was also a consideration⁶⁹. The Ministry of Defence and Foreign Office placed increased emphasis on the United Kingdom's own defence interests in pursuing the proposal, including its relationship with the United States, even if it meant detaching the Dependency without the agreement of Mauritian Ministers⁷⁰.

2.30 Mauritian Ministers considered that it was in Mauritius' own interests that facilities were made available to the United States in the Indian Ocean⁷¹. When the Premier, Sir Seewoosagur Ramgoolam, was first consulted by the Governor about the proposal, on 29 June 1964, he was favourably disposed to the defence facilities⁷². The Council of Ministers was informed at that time of the proposed US-UK survey of the islands, and it raised no objection⁷³. At the first meeting in London on 13 September 1965 on "Mauritius – Defence Matters", various ministers expressed support for the proposal because of Mauritius' own defence needs⁷⁴ and, at the second meeting on 20 September, Sir Seewoosagur Ramgoolam "fully understood the desirability of this, not only in the interests of Mauritius, but in those of the whole Commonwealth", a view endorsed by other Ministers⁷⁵. Sir Seewoosagur Ramgoolam further explained to United States officials, at a meeting at the US Embassy on

⁶⁷ **Annex 6.**

⁶⁸ MR, Annex 29, p. 2; MR, Annex 30, p. 11. The United States first suggested that the United States and United Kingdom should hold discussions on the possible use of British islands in the Indian Ocean by the United States in April 1963. The United Kingdom responded positively in July. A formal memorandum stating that the US would like to have further discussions on the "Indian Ocean problems including the Island base question and communications facilities on Diego Garcia was left with the Foreign Office on 11 December 1963 (MM, Annex 3). The United Kingdom understood that the impetus behind the United States' formal approach in late 1963 was China's attack on India in October 1962 (MR, Annex 29; MM, Annex 8).

⁶⁹ As shown by the records of the Defence and Overseas Policy Committee ('DOP', a Cabinet Committee): see MR, Annex 39, p. 2 and the brief for the Secretary of State for Foreign Affairs for the DOP meeting on 31 August 1965 (MR, Annex 40), para. 9; see also paras. 10-11.

⁷⁰ MR, Annex 41.

⁷¹ As acknowledged in MR, para. 2.34.

⁷² MR, Annex 29, p. 2 (although he expressed preference for a lease over detachment).

⁷³ MM, Annex 3.

⁷⁴ MM, Annex 16. Mr Mohamed (leader of the Muslim Committee of Action party) "said he recognised that Mauritius must in her own interests make facilities available...". Mr Paturau (an Independent) "also said he recognised the necessity for defence facilities of this sort and felt that Mauritius should agree; they could not remain in a void in the Indian Ocean..."

⁷⁵ MM, Annex 16.

15 September 1965, that “Mauritius belonged to the free world and was very willing to cooperate in the defence of the free world”⁷⁶.

(ii) *The road to independence*

2.31 Mauritius attempts to refute the proposition that concerns about moving towards independence in 1965 came from Mauritian politicians, not from the United Kingdom Government⁷⁷, by referring to a number of documents in which British officials expressed “doubts about the grant of independence”⁷⁸. It also continues to portray itself as involved in a “struggle for independence” against the United Kingdom⁷⁹. However, the further documents reinforce the conclusion that the difficulties and doubts about reaching a decision to proceed to independence at the Constitutional Conference in September 1965 arose out of differences between Mauritian political parties, as explained in the Counter-Memorial⁸⁰. Any “struggle for independence”⁸¹ of Sir Seewoosagur Ramgoolam and the Mauritian Labour Party was against the other Mauritian political parties, not the British Government.

2.32 These differences were reflected at the Constitutional Conference⁸². The Colonial Secretary concluded that “his view was that it was right that Mauritius should be independent.”⁸³. “[I]t was clear during the Conference that it would fall to the British Government to make a decision as between independence and association and on the question of popular consultation, without the benefit of unanimous advice from the parties at the

⁷⁶ Note of a Meeting held at the Embassy of the U.S.A., London, at 11.30 a.m. on Wednesday, 15th September 1965. (Annex 7)

⁷⁷ MR, para. 2.38, referring to UKCM, para. 2.61.

⁷⁸ A telegram dated May 1965 from the Foreign Office to its embassy in Washington (MR, para. 2.38 and MR, Annex 32); a note from the Colonial Office to the Ministry of Defence dated 11 August 1965 (MR, para. 2.39 and MR, Annex 37) and between Colonial Office officials dated 26 August 1965 (MR, para. 2.40 and MR, Annex 38). The United Kingdom notes that the quote at para. 2.41 from the note dated 16 September 1965 does not support the proposition for which it is cited. The official is not pessimistic about Mauritius achieving independence, but about whether it was possible for the Conference, i.e. British Government representatives together with Mauritian representatives, “to accept a programme by which Mauritius would proceed straightforwardly to independence” (emphasis added). Doubts were expressed by British officials about whether the Constitutional Conference would result in an agreement to proceed to independence (cf. MR, para. 2.44). As discussed below, British policy was to pursue decolonisation (see para. 2.47 and fn. 126).

⁷⁹ MR, para. 2.37.

⁸⁰ UKCM, paras. 2.44, 2.54, 2.61 *fifth* paragraph; see also UKCM, Annex 11, paras. 11-20 and MR, Annex 37.

⁸¹ MR, para. 2.37 and MM, paras. 2.29-2.40.

⁸² *Report on the Mauritius Constitutional Conference 1965*, Cmnd. 2797, UKCM, Annex 11. See esp. paras. 11-20.

⁸³ *Ibid.*, paras. 15-20.

Conference.”⁸⁴ The Colonial Secretary noted that a referendum would only prolong uncertainties and “harden and deepen communal divisions” and was not therefore in the best interests of Mauritius; the two parties in favour of independence⁸⁵ represented 61.5% of the voters and a third party was in favour provided certain conditions in the electoral system were met; that the closer association sought by the Parti Mauricien did not rule out independence; and that the constitution could contain every possible safeguard against abuse of power, which discussions at the Conference had shown would command general acceptance.⁸⁶

(iii) The decision to proceed to independence was not conditional on agreement to detachment

(a) The relationship between the Constitutional Conference and the discussions on Mauritius defence matters

2.33 Mauritius seeks to support its duress claim by the argument that “[i]n the days leading up to the Constitutional Conference, officials in the Colonial Office proposed various tactics and strategies as to how to introduce the subject of the detachment of the Chagos Archipelago” and that a “plan was devised” with the object of reaching a “possible package deal” at the end of the Constitutional Conference and the talks on Mauritius Defence Matters⁸⁷.

2.34 As explained in the Counter-Memorial, the suggestion that the talks on detachment be discussed in London at the 1965 Constitutional Conference came from Mauritian Ministers⁸⁸.

⁸⁴ *Ibid.*, para. 14.

⁸⁵ The Mauritius Labour Party and the Independent Forward Bloc.

⁸⁶ The Muslim Committee of Action, which represented 7.1% of the votes (para. 5 of the *Report on the Mauritius Constitutional Conference 1965*, UKCM, Annex 11).

⁸⁷ MR, para. 2.45.

⁸⁸ UKCM, para. 2.52. The Mauritian delegation at the Constitutional Conference numbered 28: Sir Seewoosagur Ramgoolam, Hon. J. Koenig, Q.C., Hon. S. Bissoondoyal, Hon. A. R. Mohamed, Hon. J. M. Paturau, D.F.C., Hon. J. Ah Chuen, Hon. G. Forget, Hon. V. Ringadoo, Hon. S. Boolell, Hon. H. Walter, Hon. R. Jomadar, Hon. R. Jaypal, Dr. the Hon. L. R. Chaperon, Dr. the Hon. M. Cure, Hon. V. Govinden, M.B.E., Hon. H. Ramnarain, Hon. S. Virah Sawmy, Hon. R. Modun, Hon. G. Duval, Hon. R. Devienne, Hon. J. C. M. Lesage, Hon. H. Rossenkhan, Hon. A. W. Foondun, Hon. D. Basant Rai, Hon. A. Jugnauth, Hon. S. Bappoo, Hon. H. R. Abdool, Hon. A. H. Osman.

The meetings on “Mauritius – Defence Matters” were attended by four or five Mauritian delegates, representing the leaders of the parties in the all-party government: at the meeting on 20 September, Sir Seewoosagur Ramgoolam (Mauritius Labour Party), Mr S. Bissandoyal (The Independent Forward Bloc), Mr J.M. Patarau (independent), Mr A.R. Mohamed (Muslim Committee of Action) and Mr Koenig (Parti Mauricien); at the

British officials repeatedly expressed the preference to keep the matters of independence and negotiations over defence matters separate⁸⁹, but found that they could not be because of the approach to negotiations adopted by the Mauritian politicians⁹⁰.

2.35 The position adopted by Mauritian politicians and the views of British officials in the period July-September 1965 need to be seen against the background of the communal tensions in Mauritius. The Assistant Colonial Secretary expressed concerns about communal tensions between the various communities on the island of Mauritius in his meetings with the leaders of the political parties in Mauritius on his visit to the island between 18 March and 1 April 1963⁹¹. On 14 May 1965 violence broke out between Hindu and Creole communities. A state of emergency was declared by the Governor and a British infantry company was deployed to Mauritius to restore and maintain public order⁹².

2.36 A memorandum of 7 June 1965 from the Commander-in-Chief Middle East to the Ministry of Defence, noted that:

“the atmosphere appears calm and order has been re-stored in a large measure. However, there remains an underlying fear of further threats to security during cane cutting at the end of the month when Pangas [machetes used for sugar cutting] are in daily use and this fear will increase as the time for constitutional talks approaches... The Premier of Mauritius was most grateful for the prompt arrival of the company and is most anxious that it should remain until after the constitutional talks... The Premier and his Ministers now understand the gravity of the situation and appreciate that calls for assistance are speedily met...”⁹³

The state of emergency was not lifted until 1 August 1965⁹⁴. These events were referred to in the briefing note prepared in August for the Constitutional Conference⁹⁵, and formed part of the backdrop to discussions⁹⁶.

meeting on 23 September, Ramgoolam (Mauritius Labour Party), Mr S. Bissandoyal (The Independent Forward Bloc), Mr J.M. Patarau (independent) and Mr A.R. Mohamed (Muslim Committee of Action).

⁸⁹ Note of a meeting with the Colonial Secretary on 3 September 1965 with Lord Taylor, Sir Seewoosagur Ramgoolam and Mr A.J. Fairclough (**Annex 5**). Record of the meeting on “Mauritius - Defence Matters” on 20 September 1965 (MM, Annex 16).

⁹⁰ Record of the meeting on “Defence Facilities in the Indian Ocean” on 23 September 1965 (MM, Annex 20).

⁹¹ **Annex 1**, esp. pp. 4-8.

⁹² Note of 20 August 1965, “Background to Mauritius Constitutional Conference”. (**Annex 4**)

⁹³ Note of 20 August 1965, “Background to Mauritius Constitutional Conference”. (**Annex 4**)

⁹⁴ **Annex 3**.

⁹⁵ Note of 20 August 1965, “Background to Mauritius Constitutional Conference”. (**Annex 4**)

⁹⁶ Note of 20 August 1965, “Background to Mauritius Constitutional Conference”. (**Annex 4**)

2.37 Sir Seewoosagur Ramgoolam and Mauritian Ministers indicated in July 1965 that they would like any agreement over the use of Diego Garcia to provide also for the defence of Mauritius⁹⁷ and an assurance of assistance after independence in the event of any internal unrest⁹⁸. British policy was against such agreements for newly independent former colonies⁹⁹. It was even less in favour of assistance with internal security¹⁰⁰.

2.38 However, in view of the importance to the outcome of the Constitutional Conference, the Colonial Office in a letter of 11 August 1965 sought to persuade the Ministry of Defence that it would be helpful if the Colonial Secretary could say at the Constitutional Conference that the British Government would continue to concern herself with the external defence and internal security of Mauritius¹⁰¹:

“3. We know that whatever the long-term views of the parties, all are deeply concerned about defence and internal security. All fully recognise:

(a) that Mauritius will be virtually unable to provide for its own defence against any determined external attack; and

(b) that, when Mauritius Ministers assume responsibility for internal security, situations may arise in which the Government of the day will need external assistance in the form of troops...

4. We know that Sir Seewoosagur Ramgoolam, the Premier and leader of the Mauritius Labour Party, which wants independence within the Commonwealth, hopes to negotiate a defence treaty with Britain and we must also expect that he will seek an undertaking from Her Majesty's Government to come to the assistance of the Government of Mauritius with British troops in the event of a serious internal threat... [...]

10. If the internal security situation of Mauritius is to be of great concern to Her Majesty's Government for an indefinite period ahead, it would strengthen the argument for a defence agreement. We know, of course, that no such agreements have latterly been made with the independent African states. Moreover, no external threat to Mauritius is yet apparent. But, as indicated above, the Premier has already asked that any agreement over the use of Diego Garcia should also cover the defence of Mauritius, and it must be expected that all parties will want a defence agreement

⁹⁶ The party divisions along communal lines are reflected in the proceedings of the Constitutional Conference: see the *Report of the Mauritius Constitutional Conference 1965*, UKCM, Annex 11, esp. paras. 11-40.

⁹⁷ At the meeting with the Governor on 31 July 1965 (MM, Annex 13).

⁹⁸ By 11 August 1965 the understanding of United Kingdom officials was that Sir Seewoosagur Ramgoolam would also seek an assurance of assistance with internal security after independence, although it is unclear when this was request was first raised (MM, Annex 37).

⁹⁹ MR, Annex 39, p. 3; see also the Report submitted by the Chiefs of Staff on 26 August 1965 for the Constitutional Conference, MR, Annex 38, paras. 12-15.

¹⁰⁰ MR, Annex 39, p. 3; see also the Report submitted by the Chiefs of Staff on 26 August 1965 for the Constitutional Conference, MR, Annex 38, paras. 9-11.

¹⁰¹ MR, Annex 37.

with Britain and that it should contain something about the provision of British troops for an internal security role. We know that one of the parties demanding independence at the same time actually wants a garrison of British troops to be stationed permanently in the island. It seems to us that there is probably no great risk involved in having a defence agreement. Do you agree? What line can we take about this in briefing the Secretary of State?”¹⁰²

The Colonial Secretary was of the opinion “we should not get the bases by consent unless guarantees covering external defence and internal security were given.”¹⁰³ The Foreign Office was of the view that these were undesirable, but “they attached such importance to the detachment of the island bases that, if such agreements were the only means of achieving it, this would be considered a special case.”¹⁰⁴

2.39 The reason why the outcome of the Constitutional Conference should turn on an agreement covering external defence and internal security was spelled out by the Colonial Secretary in his statement to the Defence and Overseas Policy Committee on 31 August 1965 in which he rejected the proposals of the Ministry of Defence and Foreign Office to detach by Order in Council without the agreement of the Ministers¹⁰⁵:

“.... Minority guarantees would be a most important part of the conference and could probably only be satisfactorily resolved by an assurance that we would provide forces for internal security at the request of the Mauritius Government. At least we should therefore agree that a request from the Mauritius Government after independence for assistance in internal security would be considered. Mauritius Ministers would, on this basis, probably accept the detachment of the islands but to threaten to go ahead

¹⁰² A similar submission is made in a memorandum of 26 August 1965 from the Deputy Secretary for Defence and Parliamentary Under-Secretary of State for the Defence and Overseas Policy Committee, for the purposes of securing the Committee’s support for the offer of a defence agreement and assistance with internal security, but this time from the perspective of the importance of the US defence facilities to the United Kingdom’s interests (MR, Annex 39, referred to in MR, para. 2.55(i)). Notably the officials assume that it is up to Mauritius whether to “opt” for independence at the Conference, which supports the conclusion that they did not have independence in mind as one of the terms on which they might “get these islands”. Rather, the “main ingredients” of the possible offer to Mauritian Ministers were explored under the headings “lease”, “sugar”, “finance”, “external defence” and “internal security”. The authors conclude that the terms should be financial compensation, promise of continued British responsibility for the external defence of Mauritius and, only as a last resort, an indication of a willingness to commit the United Kingdom to assist in internal security after full independence (that commitment to be limited to the period of the continued use of the United Kingdom’s existing defence facilities in Mauritius itself and to the protection of those and essential public utilities): MR, Annex 39, para. 6c. See to similar effect the official record from the meeting of the DOP Committee of 7 April 1965, para. 12 (MR, Annex 29) and the brief prepared for the Secretary of State for the DOP Committee meeting of 31 August 1965 (MR, Annex 40).

¹⁰³ MR, Annex 38, minutes of COS 43rd meeting, 24 August 1965, annexed to the Report submitted by the Chiefs of Staff on 26 August 1965 for the Constitutional Conference, MR, Annex 38, p. 6.

¹⁰⁴ *Ibid.*, p. 7.

¹⁰⁵ MR, Annex 41.

with this by Order in Council regardless of their agreement would undoubtedly wreck the conference.”

That is, minorities would not agree to independence without satisfactory assurances of security.

2.40 Thus, the reference in the minute of 3 September 1965¹⁰⁶ to “the object being to link up both [the constitutional talks and the talks on the defence facility] on a possible package deal at the end” is to a package including guarantees for the rights of minorities agreed at the Constitutional Conference together with the assurance of a post-independence defence agreement covering external defence and internal security, to be agreed in the context of the talks on the defence facilities on the Chagos Islands dependency¹⁰⁷.

2.41 Subsequently, during the Constitutional Conference, the Colonial Secretary reported to the Defence and Overseas Policy Committee on 16 September 1965 that:

“... [a] referendum may... be necessary as the balance of opinion at the Conference may make it impossible for H.M.G. to impose a solution in favour of either independence or association¹⁰⁸. It may yet turn out that decision for independence could be made acceptable to an adequate majority in Mauritius with adequate minority safeguards which might involve some commitment by Britain to assist in the maintenance of internal security in some circumstances, as well as look after external defence.”¹⁰⁹

(b) The meeting between the Prime Minister and the Premier of Mauritius

2.42 Mauritius makes much¹¹⁰ of a short note dated 22 September 1965 by the British Prime Minister’s Private Secretary, covering the Colonial Office briefing for the Prime Minister’s meeting the next day with the Premier of Mauritius¹¹¹. Mauritius asserts that the

¹⁰⁶ MR, Annex 42; see also MR, Annex 43.

¹⁰⁷ As it was in that context that Mauritian Ministers had asked for a defence agreement in return for their agreement to detachment or lease of the islands

¹⁰⁸ By the end of the Conference the Colonial Secretary was of the view that, while there was not unanimity, there was sufficient support for independence to proceed on that basis: see para. 2.32 above.

¹⁰⁹ MR, Annex 44.

¹¹⁰ MR, paras. 1.23, 2.30, 2.36, 2.51-2.53.

¹¹¹ MM, Annex 17. The United Kingdom addresses the 1967 documents to which Mauritius refers at para. 2.55 below (see fn. 144).

covering note “shows that the “agreement” of Mauritian Ministers was obtained under conditions of duress”¹¹².

2.43 The note shows no such thing. First, what matters is what transpired at the meeting itself, which was recorded at the time¹¹³ and described in the Counter-Memorial¹¹⁴, not internal briefing that may or may not have been followed by the Prime Minister, still less a Private Secretary’s covering note. The meeting ended with the Premier of Mauritius saying that he was convinced that the question of Diego Garcia was a matter of detail; there was no difficulty in principle¹¹⁵.

2.44 Second, a Private Secretary’s covering note is not usually intended to summarise (still less supersede) considered policy advice, and in this case did not do so. The considered policy advice to the Prime Minister was set out in the minute from the Colonial Secretary¹¹⁶ and the longer brief prepared by the Colonial Office¹¹⁷. From this it is clear that the policy objective was agreement:

- a. The Colonial Secretary’s minute expressly stated that “I hope we shall be as generous as possible and I am sure we should not seem to be trading independence for detachment of the Islands. Agreement is therefore desirable ...the ideal would be for us to be able to announce that the Mauritius Government had agreed”¹¹⁸.

¹¹² MR, para. 1.23.

¹¹³ MM, Annex 18.

¹¹⁴ UKCM, para. 2.55.

¹¹⁵ UKCM, para. 2.55. The Premier did not in fact agree to detachment in that meeting and his agreement to detachment was not what was sought by the Colonial Office. What was sought was the agreement of the Council of Ministers, and this was not forthcoming until 5 November 1965. There was no guarantee that it would be as reflected in a note from the Colonial Office to the Foreign Office of 8 October 1965 which observed that: “The Governor - and Sir S. Ramgoolam and the Ministers who support him – may not find it an easy task to secure the formal concurrence of the Council of Ministers which we required...”(MM, Annex 22). Similarly, the record of the meeting between the United Kingdom and the United States of 24 September 1965 (MM, Annex 20), held after the second meeting on “Mauritius – Defence Matters” on the same day, also records “the position was not yet crystal clear”.

¹¹⁶ MM, Annex 17, p. 2.

¹¹⁷ MM, Annex 17, p. 3.

¹¹⁸ Mauritius also relies on a note of 20 September 1965 to support a claim that what is “evident” from the words of the Colonial Secretary is that the purpose of the meeting was to “*compel* Sir Seewoosagur Ramgoolam to agree to the detachment” (MR, para. 2.48, emphasis added). The record shows nothing of the sort. Rather it suggests that the British Government was trying to make it clear at the highest level that Mauritian Ministers’ demands in return for their agreement to detachment were unrealistic.

- b. The Colonial Office brief likewise emphasises the importance of agreement – “all Departments have accepted the importance of securing consent of the Mauritius Government for detachment.”¹¹⁹ The Colonial Office further observes that:

“The Premier has asked for independence but at the same time has said that he would like a defence treaty, and possibly to be able to call on us in certain circumstances towards maintaining internal security. If the Premier wants us to help him in this way, he must help us over defence facilities, because these are in the long term interests of both Britain and Mauritius. He must play his part as a Commonwealth statesman in helping to provide them.”¹²⁰

It also says that the “Premier should not leave the interview with certainty as to H.M.G.’s decision as regards independence, as during the remaining sessions of the Conference it may be necessary to press him to the limit to accept maximum safeguards for minorities”.

2.45 Mauritian Ministers were successful in securing an understanding that the United Kingdom would enter into negotiations for a defence agreement and that the two governments “would consult together in the event of a difficult internal security situation arising in Mauritius”¹²¹ at the talks on “Mauritius – Defence Matters”, and such agreement was duly entered into upon independence¹²². The Colonial Secretary was successful in securing support for a constitutional framework “which would command the support and respect of all parties and of all sections of the population”, including provisions for safeguarding fundamental rights and freedoms and protection against discrimination¹²³, and an electoral system that the Muslim Committee of Action could support¹²⁴.

¹¹⁹ MM, Annex 17, pp. 5-6. A note from the Colonial Office to Treasury dated 10 May 1965 requesting an allocation of expenditure records “our view that willing acceptance in the two Colonies is essential to our object,” (Annex 2); see also the Memorandum from the Secretary of State for Foreign Affairs and the Secretary of State for Defence to the Defence and Overseas Policy Committee, “Defence Facilities in the Indian Ocean”, 7 April 1965 (MR, Annex 29) and the telegram to the Governor of Mauritius dated 19 July 1965 (MM, Annex 10).

¹²⁰ *Ibid.*

¹²¹ Paragraph 22(i) and (ii) of the Record the Meeting held in Lancaster House on 23 September 1965 (MM, Annex 19).

¹²² An Agreement between the United Kingdom of Great Britain and Northern Island and the Government of Mauritius on Mutual Defence and Assistance, Port Louis, 12 March 1968, which came into effect on that date: *United Nations Treaty Series*, vol. 648, p. 3 (No. I-9267).

¹²³ Paras. 19, 21-22 and Annex D of the *Report of the Mauritius Constitutional Conference 1965*, UKCM, Annex 11.

¹²⁴ *Ibid.*, para. 15. In addition to the Private Secretary’s covering note, Mauritius relies on two other documents in support of its case on duress, both from 1967: a minute dated 14 February 1967 by M.Z. Terry and a statement by the Commonwealth Secretary, Mr Herbert Bowden, to the Defence and Overseas Policy Committee on 25 May 1967 (MM, Annex 57 and MM, Annex 59). Neither Ms Terry nor Mr Bowden were involved in the 1965 negotiations. Ms Terry notes that her account is based on what she has “been told”, and explains that she is still trying to locate the relevant Cabinet papers. Neither account in 1967 is supported by the

2.46 The suggestion that an agreement to move to independence was conditioned on agreement to detach the dependency was categorically rejected in a telegram from the Foreign Office to the United Kingdom’s Mission to the United Nations dated 24 November 1965:

“There is no truth in the suggestion that we made Chagos a pre-condition for independence for Mauritius. Independence has been envisaged for a long time (in fact the 1961 constitutional talks foreshadowed independence as the ultimate goal), but the main stumbling block has always been the question of safeguards for minorities. At the Constitutional Conference in September all delegates except for 3 Parti Mauricien Ministers and 2 Independents were in favour of independence mainly because of decisions giving satisfactory safeguards to minorities. If it is alleged that the Parti Mauricien members walked out because they opposed detachment of Chagos, you should emphasise that their reason was, in fact, that they were opposed to independence.

2. Chagos question was not a factor either way and was not mentioned at the Conference. For your own information discussions about Chagos took place separately and in confidence with Ministers only.”¹²⁵

2.47 Given that there was, six weeks before 5 November 1965, agreement to proceed to independence, and the British Government’s clear policy of decolonisation¹²⁶, it is clear that the independence process would not have come to a halt if Mauritian Ministers had failed to agree to detachment. Nothing Mauritius has said and none of the documents to which it refers (which documents do not address the situation as it was on 5 November 1965¹²⁷ with either foresight or hindsight) detracts from that conclusion. The more likely outcome of a

contemporaneous records of discussions in 1965, including those in the Defence and Overseas Policy Committee, the Constitutional Conference or the talks on “Mauritius – Defence Matters”.

¹²⁵ **Annex 14.**

¹²⁶ The policy of the Conservative Government led by Harold Macmillan following its election victory of 1959 was to speed up decolonisation: after the 1959 election “the colonial empire unravelled instantly and without remission”: R. Hyam and R. Louis, eds., *British Documents on the End of Empire: The Conservative Government and the End of Empire, 1957-1964* (London, 2000), Series A, vol. 4, Part I, ‘High Policy, Political and Constitutional Change’, preface, p. xxviii. The key policy documents from this period are reproduced in the Hyam and Louis volume, and synthesised in the preface to the volume. (**Authority 31**) The Labour Government led by Harold Wilson that came into power after the October 1964 elections continued decolonisation: see D.J. Morgan, *The Official History of Colonial Development* (London, 1980), vol. 5, pp. 218-220 and 343-345. (**Authority 35**)

¹²⁷ That is, a concluded constitutional settlement dated 24 September 1965 and, until 5 November 1965, no affirmation by the Council of Ministers of the terms reached in the meeting at Lancaster House on 23 September and the subsequent correspondence between Sir Seewoosagur Ramgoolam and the Colonial Office on the additional terms included in paragraph 22(viii) (see UKCM, paras. 2.58-2.59).

failure to secure agreement of the Council of Ministers on 5 November 1965 was that detachment would have been made without its agreement¹²⁸.

*(c) The agreement to detachment on 5 November 1965 and subsequent statements in
Mauritius' Legislative Assembly*

2.48 The Mauritius Council of Ministers and Premier viewed the negotiations over detachment as a way of gaining advantages for Mauritius, in particular in respect of compensation via US concessions on Mauritian sugar imports at agreed prices and immigration¹²⁹. As recorded by the Governor of Mauritius in his reports on meetings with the Council of Ministers on 23 and 30 July 1965, Mauritian Ministers were well aware that the project might be used “as [a] bargaining counter for the benefit of Mauritius”¹³⁰, and were reported as “setting sights high in hope of doing the best for Mauritius”¹³¹. This is what they proceeded to do, as a reading of the full records of the meetings in London on “Mauritius – Defence Matters” makes clear¹³². The nature of the islands and their relationship to Mauritius are also relevant factors in any consideration of why the Mauritian leaders negotiating Mauritius’ defence matters in London in September 1965 agreed to detachment subject to the confirmation of the Council of Ministers, and why the majority of the Council of Ministers agreed on 5 November 1965. As explained in the Counter-Memorial and in this Rejoinder, the islands are far removed from Mauritius and were never a source of wealth to it¹³³.

¹²⁸ The Ministry of Defence and Foreign Office urged this route if agreement could not be secured: see, e.g. MR, Annex 39 and MR, Annex 44.

¹²⁹ See MM, Annex 12 and MM, Annex 13, *inter alia* re US sugar and other purchases. At the meetings on “Mauritius – Defence Matters” on 13 and 20 September 1965, the possibility of US sugar quotas were again raised and discussed at some length (**Annex 6** and MM, Annex 16). While in London, Mauritian politicians met with United States officials to press their case for sugar quotas, assistance with trade and/or compensation for Diego Garcia (see **Annex 7**, referred to in MM, Annex 15 and MM, Annex 16). Both Mr Mohamed and Sir Seewoosagur Ramgoolam said they would not contemplate seeking significant compensation from the United Kingdom if only it were involved, but since the United States was as well, they wished for something of substantial benefit. Mr Koenig in particular was keen for trade rather than money payments.

¹³⁰ Telegram from the Governor of Mauritius to the Secretary of State for the Colonies, 23 July 1965 (MM, Annex 12).

¹³¹ MM, Annex 13.

¹³² **Annex 6**, MM, Annex 16 and MM, Annex 19.

¹³³ As noted by the Colonial Secretary at the meeting with Mauritian party leaders on defence matters on 20 September 1965 (MM, Annex 16). The diary notes of the Assistant Colonial Secretary’s visit to Mauritius between 18 March and 1 April 1963 records that, although he cannot be certain, the Acting Governor, Thomas Vickers does not think that Ministers are likely to object to the transfer of the Oil Islands to the Seychelles (**Annex 1**). See also paras. 2.6-2.7, 2.21 and UKCM paras. 2.19-2.32.

2.49 The 5 November 1965 agreement on the detachment of the islands was a rational and reasonable decision for those involved, given that detachment could have been effected without agreement¹³⁴, or the United States might not have gone ahead with the proposal if Mauritius pursued unreasonable demands for compensation. The British Prime Minister had expressly pointed out both these possibilities to Premier Ramgoolam on 23 September 1965¹³⁵. Instead, Mauritius secured important tangible benefits, in particular understandings on external defence and internal security. As regards the preference for a long-term lease of e.g. 99 years in return for various benefits¹³⁶, Ministers secured an understanding that the territory would be ceded to Mauritius when no longer needed for defence purposes¹³⁷. This was given at the initiative of the Premier who suggested it to the Governor on 23 July 1965 as an alternative to a lease¹³⁸, and raised it again at the second meeting on “Mauritius – Defence Matters” on 20 September 1965.

2.50 Mauritius makes extensive reference to Legislative Assembly debates in 1974, 1979 and 1980¹³⁹. As is evident from these debates, the agreement to detach the Chagos Archipelago had become a source of internal political dispute between the Mauritian political parties and eventually led to the Select Committee enquiry in 1982/1983 “to look into the exact nature of the transactions that took place”¹⁴⁰. Shortly after the agreement to detachment given on 5 November 1965, on 12 November 1965 the *Parti Mauricien Social Démocrate* (PMSD) withdrew from the all-party government because it considered that the amount of compensation was too low¹⁴¹. In 1974 Mr G Ollivry, the PMSD member for Rodrigues, accused the Premier and the Mauritius Labour Party of selling Chagos for elections, for independence¹⁴².

¹³⁴ The records do not suggest the Mauritian Ministers were aware that £3 million compensation might have been paid even if the detachment was made without their agreement.

¹³⁵ UKCM, para. 2.55, citing MM, Annex 18.

¹³⁶ As recorded in the telegram from the Governor of Mauritius to the Secretary of State for the Colonies dated 30 July 1965 (MM, Annex 13) and record of the meeting on Mauritius Defence Matters on 20 September 1965 (MM, Annex 16, pp. 2-3).

¹³⁷ Record of the second meeting on “Mauritius – Defence Matters” (MM, Annex 16, p. 11).

¹³⁸ MM, Annex 12.

¹³⁹ MR, paras. 2.59-2.68.

¹⁴⁰ UKCM, Annex 46.

¹⁴¹ The leader, Mr Koenig is reported as having said to *Le Mauricien* that “I wish to state most categorically that the P.M.S.D. is not against the principle of ceding sovereignty over Chagos or against the archipelago becoming a communication centre to facilitate the defence of the West. The P.M.S.D. approves the principle: it is in disagreement over the terms and conditions of cession” (Annex 15). See also UKCM, para. 2.60.

¹⁴² MM, Annex 70.

2.51 In this heated political context, it is nevertheless striking that, as recorded in the Counter-Memorial¹⁴³, Sir Seewoosagur Ramgoolam and Sir Harold Walter either acknowledged or did not deny that Mauritian consent was given to the detachment¹⁴⁴, that some advantage was gained out of it¹⁴⁵, and that independence was not conditional on detachment¹⁴⁶. It is also striking that Mauritius' Select Committee concluded that the detachment was not a unilateral United Kingdom decision but had been agreed by the Council of Ministers on 5 November 1965¹⁴⁷. Notably, in October 1980, shortly after the statements to which Mauritius refers at paragraphs 2.62-2.65 of its Reply, Sir Seewoosagur Ramgoolam was assuring the United Kingdom that "Diego Garcia is not an issue between our two governments. He felt obliged to make public statements on the matter from time to time because the Mauritian opposition is making an election issue out of it."¹⁴⁸

(d) Conclusion

2.52 In light of the above, Mauritius has not and cannot establish that the Council of Ministers were under duress or coerced into agreeing to the detachment of the Chagos Islands dependency from the Colony of Mauritius in return for independence. Taking each of the points in paragraph 2.69 of the Reply in turn:

- a. The Mauritius Council of Ministers (apart from the PMSD) "freely" gave its consent to the detachment of the Chagos Archipelago (with the PMSD agreeable in principle, and only disagreeing on terms);

¹⁴³ UKCM, paras. 2.62-2.66.

¹⁴⁴ 26 June 1974 (MM, Annex 71); 26 June 1980 (UKCM, Annex 35).

¹⁴⁵ 25 November 1980, MM, Annex 96. The United Kingdom notes that in para. 2.61, Mauritius states that in the passage it quotes from the Legislative Assembly records the Prime Minister "reveals that Ministers 'did not want to detach it'". In fact, the exact wording is "Even if we did not want to detach it...", which is not the same thing. The United Kingdom also notes that at paragraph 2.65 Mauritius has cited extracts from the Assembly record of 25 November 1980 out of order. Mr Bérenger's question is based on a on a *Christian Science Monitor* article apparently reporting on an interview with the Prime Minister. Mr Bérenger asked the Prime Minister to confirm this account. His response is "Since my hon. Friend has raised it, let him digest it". This neither confirms the newspaper account nor answers the question and the passage provides no support for Mauritius' argument. In the exchange which follows the Prime Minister affirms that agreement in principle and subject to confirmation by the Council of Ministers was reached by a committee at the meeting on defence matters on 23 September, not Mr Harold Wilson and Sir Seewoosagur Ramgoolam, and that Mauritius gave its agreement because it got £3 million.

¹⁴⁶ 25 November 1980 (MM, Annex 96).

¹⁴⁷ Cf. MR, para. 2.59.

¹⁴⁸ Telegram from the FCO, 29 October 1980 (Annex 25).

- b. In distinguishing between an “inducement” and a “benefit”¹⁴⁹, Mauritius makes a distinction without a difference. In any event it is clear that the Ministers agreed to detachment on 5 November 1965 on the terms set out in the record of the meeting at Lancaster House on 23 September 1965;
- c. Mauritius argues that the Council of Ministers was “not an independent body that could validly give its consent”¹⁵⁰. This argument is without merit, and in any event does not obviate the fact that the Council of Ministers agreed;
- d. The United Kingdom rejects the suggestion in paragraph 2.69(iv) of the Reply that the United Kingdom “exploited” the disagreement between the main Mauritian political parties on whether Mauritius should obtain independence and made the grant of independence conditional on detachment, for the reasons given above.

D. UN resolutions and Mauritian protests

2.53 The present section responds to Part IV of Chapter 2 of Mauritius’ Reply¹⁵¹, in which Mauritius deals with two matters: it refers, once again, to certain UNGA resolutions adopted between 1960 and 1967; and it repeats its references to what Mauritius itself said in the course of the annual UNGA General Debate, starting in 1980 and continuing to the present. Mauritius adds little to the Memorial¹⁵², and it is therefore largely sufficient for the United Kingdom to refer back to its Counter-Memorial¹⁵³.

(i) The UNGA resolutions

2.54 Mauritius once again refers to UN General Assembly resolutions 1514(XV), 2066(XX), 2232(XXI) and 2357(XXII)¹⁵⁴. Mauritius acknowledges that paragraph 4 of

¹⁴⁹ MR, para. 2.69(ii).

¹⁵⁰ MR, para. 2.69 (iii). The Colony’s constitution at this time is described in UKCM, paras. 2.42-2.43.

¹⁵¹ MR, paras. 2.70-2.94.

¹⁵² MM, paras. 6.10-6.22.

¹⁵³ UKCM, paras. 2.67-2.88.

¹⁵⁴ MR, paras. 2.70-2.2.73.

UNGA resolution 1514(XV), upon which it relies so heavily, “is not legally binding”¹⁵⁵. It then asserts, without further explanation, that “this does not deprive it of legal consequences”¹⁵⁶, and goes on to claim that:

“Furthermore, resolution 2066(XX) read alongside resolutions 1514(XV), 2232(XXI), 2357(XXII) and the views expounded by representatives in the Fourth Committee, indicates that the great majority of States regard as legally valid Mauritius’ stand that the Chagos Archipelago has always been, and is, an integral part of Mauritius, and that its excision was unlawful.”¹⁵⁷

2.55 This complicated sentence does not withstand scrutiny. There is nothing in resolution 1514(XV), or in the other resolutions or statements referred to, that affects or could affect the constitutional relationship between the Islands and Mauritius. Neither the General Assembly nor any third State had power to alter United Kingdom constitutional law.

2.56 In its Reply, Mauritius cites internal United Kingdom documents which, it suggests, indicate its strategy vis-à-vis the General Assembly, including its intention to present the General Assembly with a *fait accompli*¹⁵⁸. Even if the documents cited gave an accurate flavour of the United Kingdom’s strategy at the time (and such records as survive rarely do), they do not reveal any illegal or improper tactics. They are the kind of considerations that any responsible State would have in mind when developing strategy and tactics on matters of importance within United Nations fora.

2.57 Mauritius seeks to cast doubt on what is said paragraph 2.69 of the Counter-Memorial about the 16 November 1965 debate in the Fourth Committee. It does so by citing a brief account in a reporting telegram from the United Kingdom Mission in New York, asserting that it “totally contradicts” the account in the Counter-Memorial¹⁵⁹. Yet a reporting telegram is not an official record. Paragraph 2.69 of the Counter-Memorial, on the other hand, was based on a careful reading of the UN Official Record of the 1557th meeting of the Fourth

¹⁵⁵ MR, para. 2.74.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ MR, paras. 2.75-2.78.

¹⁵⁹ MR, paras. 2.79-2.82.

Committee, which was annexed to the Counter-Memorial¹⁶⁰. The United Kingdom stands by what is said in the Counter-Memorial.

(ii) Mauritius' UN statements

2.58 In the Reply, Mauritius seeks to interpret all of its various statements in the General Assembly (beginning in 1980) as containing assertions of present sovereignty over the BIOT, as opposed to a claim to sovereignty and to the 'return' of the Islands¹⁶¹. Such an interpretation is strained, as is apparent from the extracts selected by Mauritius itself¹⁶². But even if the statements could be so interpreted that would change nothing.

2.59 In its Reply, Mauritius continues to overlook the fact that the United Kingdom regularly rejects such statements¹⁶³. For example, it sees fit to inform the Tribunal of its statement in the General Debate on 28 September 2013, citing it at length. It makes no mention of the United Kingdom's rejection of that statement, which was in the following terms:

“The British Government maintains that the British Indian Ocean Territory is British, has been since 1814, and was never part of Mauritius before Independence. It does not recognise the sovereignty claim of the Mauritian Government.

The British Government values its close and constructive co-operation with the Government of Mauritius on a wide range of issues and would like this to include a more constructive dialogue on British Indian Ocean Territory.”¹⁶⁴

2.60 Mauritius devotes no less than five paragraphs of the Reply to explaining why, for reasons of political expediency, it did not raise a sovereignty claim before 1980, that is to say, until some 12 years after Independence in March 1968¹⁶⁵. Its contrived and speculative explanations are unsupported by evidence, and seem to have been devised for the purposes of the present litigation. In any event, Mauritius goes no further than saying that: “In

¹⁶⁰ UMCM, Annex 13.

¹⁶¹ MR, paras. 2.86-2.89.

¹⁶² MR, para 2.88 (i) “the Mauritius claim of sovereignty”; (ii) “the Chagos Archipelago, which belonged to Mauritius, was excised from our territory”; (iii) “will not remain silent until Diego Garcia and the Chagos Archipelago, as well as the Tromelin Island, are returned to us”).

¹⁶³ UKCM, paras. 2.80-2.88.

¹⁶⁴ A/68/528. (**Annex 78**)

¹⁶⁵ MR, paras. 2.90-2.94.

understanding what was - and was not - done during the period from 1968 to 1980, these circumstances have to be taken into account.”¹⁶⁶

2.61 The real explanation is more likely to be that, until 1980, the then Government of Mauritius did not question the obvious fact that at Independence the BIOT was not part of the territory of the Republic of Mauritius¹⁶⁷. Until 1980, the Government of Mauritius was apparently content to rest on the commitment Mauritian Ministers had secured from the British Government to cede the BIOT to Mauritius when it was no longer needed for defence purposes.

2.62 In any event, whatever the reason, and even if the circumstances now set out in the Reply could be established and should be ‘taken into account’, that would be without legal significance. For 12 years Mauritius remained silent. That undisputed fact casts grave doubt on the seriousness of its present position that the BIOT is now and always has been part of its territory. It will likewise be recalled that it was not until 1982, some 14 years after Independence, that Mauritius changed its law to include the Chagos Archipelago within the definition of Mauritius, and not until 1991, some 23 years after Independence, that Mauritius changed its Constitution in the same sense¹⁶⁸.

2.63 Indeed, even thereafter its record has been patchy. For example, in the context of the present proceedings it is worth recalling that Mauritius raised no objection when the United Kingdom extended the 1982 Convention to the BIOT in 1997, either at the time or thereafter.

E. Conclusion

2.64 This Chapter has shown that none of the materials adduced by Mauritius in its Reply cast doubt on the constitutional position of the islands that now form the BIOT as a

¹⁶⁶ MR, para. 2.94.

¹⁶⁷ See the Mauritius Prime Minister statement in the Legislative Assembly on 6 July 1982, cited in UKCM, para. 2.49 and Annex 43 (“those who were in power in this country after independence ... never asserted our sovereignty.”)

¹⁶⁸ UKCM, paras. 2.45-2.49, and para. 2.11 above.

Dependency, or contradict the fact that they had never formed part of the territory of Mauritius.

2.65 Second, it has shown that, contrary to the position asserted by Mauritius in the Reply, Mauritian Ministers agreed in 1965 to the establishment of the BIOT, and there is no basis for the suggestion that they did so under duress or coercion.

2.66 Third, the Chapter responds to Mauritius' attempt, in its Reply, to bolster its claims based on certain UN General Assembly resolutions adopted between 1960 and 1967 and on its own statements in the UN General Assembly (beginning only in 1980). In particular, the Chapter rejects Mauritius' explanation of its silence between 1968 and 1980, and recalls that the United Kingdom routinely rejected Mauritius' statements.

CHAPTER III

THE BIOT MARINE PROTECTED AREA

A. Introduction

3.1 This Chapter responds to Chapter 3 of Mauritius' Reply on the establishment of the MPA, and also to Mauritius' factual contentions regarding "fishing rights" in Chapters 2 and 3 of the Reply. In section B below, the United Kingdom addresses Mauritius' arguments concerning the establishment of the MPA, in particular the consultations and attempts to consult with Mauritius in 2009 and 2010. In section C, the United Kingdom revisits the issues, such as they are, on the scientific case for the BIOT MPA. In section D, the United Kingdom then addresses Mauritius' further factual contentions on alleged "fishing rights", including those made by reference to the United Kingdom internal documents on which such emphasis has been placed in the Reply¹⁶⁹. Given the extent of the materials referred to, which cover a time span of 45 to 50 years, the Appendix to this Rejoinder sets out in some detail the chronology of events by reference to the documentary record. Finally, in section E, the United Kingdom returns to the disputed facts in relation to oil and minerals.

B. The establishment of the MPA: consultations with Mauritius

3.2 This section addresses Mauritius' arguments over the establishment of the MPA¹⁷⁰ in so far as they relate to the United Kingdom's consultations and attempts to consult with Mauritius¹⁷¹ and the timing of the decision to establish the MPA. The United Kingdom described the consultations and attempts to consult with Mauritius in the Counter-

¹⁶⁹ Mauritius' Reply draws from materials disclosed by the Foreign Secretary to the claimant, Mr Bancoult, in judicial review proceedings brought in the Administrative Division of the English High Court in *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin). It is incorrect to say that all these documents were in the "public domain" as a matter of the applicable rules of English civil procedure; cf. MR, para. 3.1. However, that is not a question for the proceedings before this Tribunal.

¹⁷⁰ MR, paras. 3.6-3.74.

¹⁷¹ Mauritius' arguments in these paragraphs and elsewhere in the Reply which concern its "fishing rights", including the understanding of the BIOT officials involved in the consultation for and creation of the MPA (cf. Reply, paras. 3.6-3.10, 3.44-3.45) are dealt with in section D.

Memorial¹⁷². Mauritius' now alleges, largely by reference to United Kingdom internal documents, that the consultation was "manifestly inadequate" and that the decision to establish the MPA was rushed through against the advice of senior officials who considered the consultations and scientific basis of the MPA were inadequate¹⁷³. As will be shown below, none of Mauritius' fresh allegations are correct. The United Kingdom continued in its attempts to consult with Mauritius over the MPA proposal until 26 March 2010. Mauritian officials refused because of their domestic political agenda to engage in consultations after 23 November 2009, unless the public consultation was halted and sovereignty and resettlement were included in the talks on the proposal. This was in spite of repeated assurances from the Foreign Secretary and the British High Commission that the public consultation did not cut across consultations with Mauritius, that United Kingdom policy on sovereignty and resettlement were unaffected by the MPA proposal and that any MPA would be without prejudice to either.

(i) Events before consultations with Mauritius commenced in July 2009

3.3 Mauritius claims that it was not consulted along with "interested stakeholders" in the period up to 5 May 2009 and that "the Pew discussions were allowed to progress [by the BIOT] until they surfaced in the press".¹⁷⁴ It also appears to argue that the January 2009 bilateral talks are relevant to the legal issues before the Tribunal concerning the consultation – or attempts to consult – with Mauritius over the MPA proposal, and that these "must be placed in the context of previous bilateral communications and internal FCO analysis" that followed the meeting between the parties respective Prime Ministers in the margins of CHOGM in 2007¹⁷⁵.

3.4 As explained in the Counter-Memorial, it was not until 7 May 2009, following the submission to the relevant UK Ministers¹⁷⁶, that "Ministers approved the work and asked that it be continued" and "instructed the Directorate to pursue talks with the Governments of

¹⁷² UKCM, paras. 3.62-3.65 and, in the context of the jurisdictional issues under article 283, paras. 5.29-5.31 and 5.43.

¹⁷³ MR, para. 3.2.

¹⁷⁴ MR, paras. 3.11, 3.15.

¹⁷⁵ The letters exchanged between Prime Ministers following tête-a-têtes in the margins of CHOGM and the documents referred to by Mauritius at paragraphs 3.19 to 3.22 and 3.24 to 3.29.

¹⁷⁶ As produced by Mauritius at Annexes 132 and 133 to its Reply.

Mauritius and the United States”¹⁷⁷. The policy to pursue the MPA proposal by, *inter alia*, undertaking consultations with third States and the public by a public consultation was taken by the Foreign Secretary¹⁷⁸, not BIOT officials. Officials would not have engaged in formal consultations with third States, such as Mauritius and the United States, until the decision to pursue the MPA proposal had been adopted as policy by the Foreign Secretary¹⁷⁹.

3.5 Consultations with Mauritius over the MPA proposal began in July 2009¹⁸⁰. It follows that previous communications between Mauritius and the United Kingdom are not relevant to the question of whether Mauritius was consulted over the MPA proposal or whether that consultation was adequate. The significance of the January 2009 talks so far as concerns the fishing rights on which Mauritius now relies is considered in section D and the Appendix below¹⁸¹.

(ii) The July 2009 talks

3.6 As to the July 2009 talks, Mauritius agrees that at this time it “was supportive in principle of the idea of strengthening the protection of the environment in the Chagos Archipelago”¹⁸². There is a point of disagreement between the parties of the significance, in the context of fishing rights, of Mauritius’ failure to raise the existence of such rights at the July 2009 talks. The explanations given are unconvincing¹⁸³, including with respect to the contention that sovereignty concerns somehow impacted on the ability to raise such

¹⁷⁷ **Annex 70**, para 14; see also para. 16 of Colin Roberts’ third witness statement (**Annex 74**).

¹⁷⁸ Mauritius at fn. 282 of its Reply refers to an Information Note dated 28 April 2008 from the BIOT Administrator to Meg Munn (MR, Annex 121), to which it refers in para. 3.14.

¹⁷⁹ The “regional and possibly global environmental significance (especially the marine and coral assets)” was flagged up by BIOT officials in the first round of bilateral talks in January 2009 as an issue to be “borne in mind during the talks” (UKCM, Annex 94; this corresponds to the Mauritian record of the 14 January 2009 talks, at p. 3, further elaborated at p. 23 (MR, Annex 129)). The scoping work was not sufficiently clear to present the issues to the Secretary of State until April 2009 (in the submission of 5 May 2009 annexed by Mauritius to its Reply as Annex 132 (first redacted version) and Annex 133 (second redacted version)), as explained by Colin Roberts in his first witness statement, para. 13 (**Annex 70**).

¹⁸⁰ UKCM, paras. 3.42-3.52, 3.62-3.65. It is for this reason that the UKCM dealt with the January 2009 talks “extremely briefly”: cf. MR, para. 3.23.

¹⁸¹ Section D and the Appendix below also address the issue on fishing rights raised by Mauritius with respect to the July 2009 talks, and the understanding of the BIOT officials around this time. Cf. MR, paras. 3.43-3.49.

¹⁸² MR, para. 3.50. It goes on to state that this “did not translate into Mauritius support for a unilaterally-imposed no-take MPA”, but this is by reference to a document dated many months later, i.e. 23 November 2009 (MM, Annex 155).

¹⁸³ MR, paras. 3.49-3.50.

matters¹⁸⁴, and are considered further in section D and the Appendix below. The key point for present purposes is that the bilateral talks were held under a “sovereignty umbrella”, so there was nothing preventing Mauritius from raising the issue of fishing, mineral or oil rights without prejudice to its sovereignty claim if it had considered that these were issues that would be affected by the proposed MPA. Yet it did not raise such issues, and the obvious inference remains that Mauritius did not then consider that these were material considerations in the discussions then underway.

(iii) The public consultation did not cut across the third round of bilateral talks and Mauritius was consulted prior to the launch of the public consultation

3.7 In its Reply, Mauritius seeks to make the United Kingdom responsible for the failure to hold further rounds of bilateral talks, claiming that the United Kingdom “cut across the bilateral talks by launching a public consultation on the ‘MPA’ proposal”¹⁸⁵. It also claims¹⁸⁶ that in its Memorial it had made clear that “Mauritius did not consider that it had been adequately consulted before the launch of the consultation exercise”, and reference is made in this respect to paragraphs 4.56-4.59 of the Memorial. Neither claim is supported by the evidence, and the documents referred to in paragraphs 4.56-4.59 post-date the launch of the public consultation¹⁸⁷.

3.8 As explained in the Counter-Memorial, the United Kingdom sought to involve Mauritius in the public consultation¹⁸⁸, and it was agreed that the third round of bilateral talks

¹⁸⁴ MR, para. 3.50. It also claims elsewhere that “Mauritius’ overarching position on sovereignty placed limitations on its ability to pursue fishing rights as a separate issue” (MR, para. 3.30) and that, as it had “referred to these matters at the first round of talks, [that] it did not deem it necessary to specifically refer to the undertaking again when the issue of fishing rights was discussed at the July talks” (MR, para. 3.49).

¹⁸⁵ MR, para. 3.50. This is a repeat of the claim at made at para. 3.30 and again at 3.49.

¹⁸⁶ MR, para. 3.55.

¹⁸⁷ The United Kingdom further notes that nowhere in these paragraphs is reference made to the “adequacy” of the consultation with Mauritius.

¹⁸⁸ Mauritius was told on 21 July 2009 that the Foreign Secretary was “minded” to undertake a standard public consultation (UKCM, para 3.45 and Annex 101) and offered Mauritius a role in the public consultation process (UKCM, paras. 3.43 and 3.50). The United Kingdom’s offer of involvement in the public consultation process is further explained by Colin Roberts in his third witness statement, at paras. 20-27 (**Annex 74**). He explains: “I was clear there was no prejudice to our position or risk to our sovereignty by extending an offer of cooperation in the presentation of the international public consultation to Mauritius. We were aware that an offering of public support for the BIOT MPA proposal by the Mauritian Government might receive an unpopular reception in Mauritius if it was perceived as compromising Mauritius’ sovereignty. Involvement in the public consultation was something we could offer Mauritius at no cost to us which we felt could assist the Mauritian Government.”

would be held in about October 2009,¹⁸⁹ which would have facilitated that. The offer of involvement was not made on the basis that the United Kingdom would only go ahead on that basis. The approaches to Mauritius during the period after 21 July to early November 2009 have already been set out in the Counter-Memorial¹⁹⁰. The third round of talks did not take place in October or November 2009, but this was because Mauritius did not respond to the United Kingdom's inquiry of 15 September 2009 as to when Mauritius would like to hold the talks, or its offer, on 1 October 2009 of the dates 4-5 November 2009 (Mauritius did not formally reject this offer until 5 November 2009)¹⁹¹.

3.9 It was explained to Mauritian officials twice in October by the British High Commissioner that the public consultation was likely to go ahead before the third round of talks and could not be delayed¹⁹². As to the meetings of 22 and 23 October 2009 with the British High Commissioner¹⁹³, Mauritius now relies on a letter dated 18 July 2013 by Kailesh Ruhee, Chief of Staff to the Mauritian Prime Minister, who attended these meetings¹⁹⁴. This record, prepared nearly four years after the event, does not correspond to the British High Commissioner's contemporaneous records¹⁹⁵. Furthermore, if the Prime Minister had indeed communicated at the meeting on 22 October his "serious exception to the proposal for the setting up of the MPA" as Mr Ruhee's letter suggests, this position would presumably have been reflected in the Prime Minister's discussion with the Foreign Secretary (by telephone) on 10 November 2009. Yet as appears from the record of this discussion, further discussed below, the principal concerns of Prime Minister Ramgoolam focused on certain language in, and omissions from, the public consultation document¹⁹⁶.

3.10 Mauritius seeks to explain its position, saying it had been clearly stated in the "joint position that the 'MPA' proposal should be discussed through bilateral talks" and so "it is hardly surprising that ... Mauritius declined to participate in a 'consultation exercise' which

¹⁸⁹ UKCM, para. 3.47 and Annex 101.

¹⁹⁰ See UKCM, paras. 3.50 to 3.52. In error Annex 103 was referred to twice in the UKCM (at fns. 236-237) and the record of the meeting between the British High Commissioner and Prime Minister Ramgoolam of 22 October 2009, referred to in para. 3.51, was not annexed. It is now annexed as **Annex 60** to this Rejoinder.

¹⁹¹ MM, Annex 150.

¹⁹² UKCM, paras. 3.50-3.51.

¹⁹³ See UKCM, para. 3.51.

¹⁹⁴ MR, para. 3.56 and Annex 178.

¹⁹⁵ An email from the British High Commissioner to London, dated 22 October 2009 (**Annex 60**).

¹⁹⁶ UKCM, Annex 106.

bypassed those talks to which both parties had agreed”¹⁹⁷. It then refers to a letter of 23 November 2009¹⁹⁸. This explanation does not withstand scrutiny, and appears to be constructed *ex post-facto*:

- a. There was no such agreement. The joint communiqué does not record any agreement that the MPA proposal would only be pursued through the bilateral process with Mauritius. Nor do the minutes of the talks on 21 July 2009 record that this was what was discussed or agreed.
- b. If that was the understanding of the Mauritian officials, they could have been expected to raise this in clear terms before 23 November 2009: they had ample opportunity to do so at any one of the meetings between the British High Commissioner and the Prime Minister and other officials in October 2009, or in writing. They raised no such objection at those meetings. Rather, concern centred on how the MPA consultation would affect the government in light of the upcoming Mauritian elections¹⁹⁹ and how Mauritian support for the consultation could be managed politically locally²⁰⁰.
- c. The official Mauritian response to the launch of the public consultation, the *Note Verbale* of 10 November 2009, would have been the obvious place to voice this protest and make this demand if that had been Mauritius’ position at that time. It did not do so. It requested only the amendment of the Consultation Document²⁰¹.

¹⁹⁷ MR, para. 3.55.

¹⁹⁸ MM, Annex 155.

¹⁹⁹ The British High Commissioner records that, at the meeting with the Foreign Minister, Arvin Boolell on 13 October 2009: “Boolell said the opposition (Bérenger) would seek to portray it [the consultation] as a the UK going ahead with the MPA in the face of Mauritius’ sovereignty over the island. It could become a stick to beat the government with”. (UKCM, Annex 103).

²⁰⁰ UKCM, para. 3.51 and UKCM, Annex 103 and Annex 104, and **Annex 60** to this Rejoinder. The British High Commissioner’s record of the meeting with the Prime Minister on 22 October 2009 (**Annex 60**) records that: “In short, the PM could see the advantages of coming out in support of the consultation. This would, however, require some political footwork locally. He had to be able to present this as something jointly developed. The references in the bilateral communiqué would help, but could the announcement of the consultation wait until after the proposed bilateral meetings at CHOGM end-November? I replied that I thought it unlikely but would ask... I reassured Ramgoolam that, if SoS [Secretary of State] approved the draft consultation, it would not be made public until my return to Mauritius...”. Having received advice from London, the British High Commissioner (as explained in UKCM, para. 3.51) advised the PM’s Chief of Staff, Kailesh Ruhee, that the public consultation could not now be delayed (UKCM, Annex 104).

²⁰¹ MM, Annex 151. See also UKCM, para. 3.62. As to the telephone call between the Foreign Secretary and Prime Minister Ramgoolam on 10 November 2009, see paras. 3.12-3.13 below.

3.11 If it had been understood by United Kingdom officials that Mauritius opposed the public consultation process, this would have been recorded in the submission to the Foreign Secretary of 29 October 2009 recommending the launch of a 3-month public consultation on 10 November 2009. Instead under the heading “Mauritius”, it was said that:

“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 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”.

3.12 During the telephone call with the Foreign Secretary on 10 November 2009, Prime Minister Ramgoolam said he “did not want the consultation to take place outside of the bilateral talks between the UK and Mauritius on Chagos”, not that the public consultation should be withdrawn. The Prime Minister’s position was also evidently being driven by the domestic political agenda. As noted in the record of the discussion:

“PM Ramgoolam said he had a problem with the consultation document saying that the BIOT Commissioner would make the declaration of an MPA. They wanted it to be declared by the UK Government as Mauritius did not recognise BIOT. He pointed out that he had elections next year.”²⁰²

3.13 The Prime Minister did not suggest that Mauritius would only consult through the bilateral process if the public consultation was withdrawn. Rather, he asked “if the subject could be brought up at the next round of bilateral talks”. It follows that Prime Minister Ramgoolam then anticipated there would be a third round of bilateral talks (as did the UK Foreign Secretary), notwithstanding the public consultation. In its *Note Verbale* of 23 November 2009, Mauritius subsequently adopted the position that consultations could only take place through the bilateral process²⁰³. By this time the public consultation had been underway for nearly two weeks.

²⁰² UKCM, Annex 106.

²⁰³ MM, Annex 155.

(iv) Further offers to consult by the United Kingdom

3.14 Mauritius repeats its claim in the Memorial that the United Kingdom went ahead with the MPA proposal in the face of a “clear commitment” by Prime Minister Brown on 27 November 2009 in the margins of CHOGM²⁰⁴, supported by a witness statement from Prime Minister Ramgoolam dated 6 November 2013²⁰⁵. Prime Minister Ramgoolam evidently understood from discussions with Prime Minister Brown in the margins of CHOGM 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”²⁰⁶. As stated in the Counter-Memorial, enquiries were made at the time, in December 2009, and Prime Minister Brown made clear that he had given no undertaking to withdraw the public consultation²⁰⁷. The United Kingdom reiterates its response in the Counter-Memorial²⁰⁸.

3.15 The Foreign Secretary wrote to the Mauritian Foreign Minister on 15 December 2009 in an attempt to clear up the misunderstanding that had arisen²⁰⁹, and reassure Mauritius that the public consultation did not cut across the bilateral intergovernmental dialogue²¹⁰:

“Our ongoing bilateral talks are an excellent forum for your Government to express its views on the MPA. We welcome the prospect of further discussion in the context of these talks, the next round of which now look likely to happen in January...”

3.16 A number of further offers were subsequently made to Mauritius to continue discussions over the MPA under the bilateral framework or otherwise. By *Note Verbale* of 15 February 2010, the United Kingdom asked again when the third round of talks could take place²¹¹.

3.17 On 19 March 2010, there was a further offer of discussion by the British High Commissioner through the bilateral framework or separately, and it was reiterated that the

²⁰⁴ MR, paras. 3.60-3.61.

²⁰⁵ MR, Annex 183, discussed in detail at MR, paras. 3.60-3.61.

²⁰⁶ See the witness statement from Prime Minister Ramgoolam dated 6 November 2013, MR, Annex 183.

²⁰⁷ UKCM, para. 3.63.

²⁰⁸ The UKCM says the allegation arose in “late December” 2009. This should be “early December”.

²⁰⁹ The Foreign Secretary regretted any difficulty that the launch of the public consultation had caused Mr Boolell or the Prime Minister in Port Louis, but hoped they would “recognise that we have been open about the plans and the offer of further talks has been on the table since July” (MM, Annex 156).

²¹⁰ MM, Annex 156.

²¹¹ Annex 64.

“public consultation does not preclude, overtake or bypass these talks”²¹². This offer was repeated by the British High Commissioner again on 26 March 2010²¹³.

3.18 Mauritius contends that the United Kingdom did not genuinely intend the consultation exercise to run alongside the discussions with Mauritius²¹⁴. This is not correct, as is borne out by the evidence of the repeated offers of consultation made to Mauritius. As explained by the Foreign Secretary in his letter of 15 December 2009, the public consultation served a distinct purpose from the consultations sought with Mauritius²¹⁵.

3.19 Mauritius further contends that its position is “underlined by the circumstances in which the ‘MPA’ was hastily declared very shortly after the closure of the consultation exercise, in circumstances in which no further talks had taken place”²¹⁶. The timing of the public consultation had no bearing on the consultations sought with Mauritius²¹⁷. Officials considered that consultations with Mauritius would serve a purpose, even in the later stages of the process: as late as 30 March 2010 the Foreign Secretary wanted to explore, for political reasons, the option of offering consultations to Mauritius under a three-month time limit to see if agreement could be reached on some sort of shared management of the MPA²¹⁸. As the United Kingdom internal documents make abundantly clear, no decision to declare an MPA was taken until 31 March 2010, after this option was explored²¹⁹. In any event the time elapsed between the end of the period of public consultation and the decision taken is neither indicative of whether the decision was genuine, nor whether the offers of consultation were genuine, nor whether any requirements of consultation were met.

²¹² MM, Annex 163.

²¹³ MM, Annex 164.

²¹⁴ MR, para. 5.39.

²¹⁵ He explained that “The purpose of the public consultation is to seek the views of the wider interested community, including scientists, NGOs, those with commercial interests and other stakeholders such as the Chagossians...” (MM, Annex 156). The foreword to the Code on Public Consultation, July 2008 (UKCM, Annex 90) explains that the purpose of public consultations as follows is to allow the Government to make informed decisions on matters of policy, to improve delivery of public services, and to improve the accountability of public bodies.”

²¹⁶ MR, para. 3.59. The United Kingdom also notes in this regard that it did not “seek to present” any kind of picture of the decision as being taken hastily or otherwise, as suggested in MR, para. 3.71. It was irrelevant.

²¹⁷ As explained in the Counter-Memorial, the reason the public consultation (initially scheduled to close on 12 February 2010) closed on 5 March 2010 was because of difficulties in organising the public consultations in Mauritius (UKCM, para. 3.60). The extension in the public consultation brought the end of the consultation closer to the likely election date (the election was called on 6 April 2010).

²¹⁸ MR, Annex 156. See further **Annex 66**.

²¹⁹ As is evident from the submissions to the Foreign Secretary of 30 and 31 March 2010 from BIOT officials: MR, Annex 152 and Annex 158.

(v) BIOT officials considered there was sufficient consultation and scientific support for the MPA consultation

3.20 Mauritius suggests that United Kingdom and BIOT officials considered the period of research and consultation inadequate, leaving the United Kingdom vulnerable to legal challenge by Mauritius. In this respect, it relies on a number of United Kingdom internal documents set out at some length at paragraphs 3.62-3.69 of its Reply. As explained at in chapter VIII below, Mauritius' reliance on United Kingdom internal documents is misplaced, but, in any event, Mauritius reads the documents out of context and out of order, and draws conclusions which are not supported by them.

3.21 The risks that Joanne Yeadon identified in her submission of 30 March 2010 to the Foreign Secretary in respect of Mauritius were political, not legal, as illustrated by her concluding paragraph on Mauritius:

“We do not need Mauritius’ agreement to declare an MPA. ... 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.”²²⁰

There is no reference in the document to any concern over the scientific research supporting the no-take MPA option, or to the consultation with Mauritius being inadequate. Further, in as much as any concern was expressed in the email of the British High Commissioner of 31 March 2010, this related to managing the relationship with Mauritius²²¹.

3.22 The Foreign Secretary then came back to officials again on 31 March 2010, via a telephone call from his Private Secretary, saying he was:

“minded to ask Colin [Roberts] to declare an MPA and go for option 1 (full no-take zone). BUT FINAL DECISION NOT YET TAKEN.

²²⁰ See MR, para. 3.62 and Annex 152. The function of a briefing to Ministers is to provide arguments for and against the options given and identify and explain the risks attached to each option (political, legal, financial, etc.) and options for mitigating those risks.

²²¹ See MR, para. 3.64 and Annex 154. Contrary to Mauritius' statement in para. 3.64, the High Commissioner was not responding to the initial response of the Foreign Secretary of 30 March 2010, set out at MR, para. 3.63. However, little turns on this.

In an ideal world, he would like to go for declaring an MPA and then 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 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.**"²²²

3.23 The initial reaction of BIOT officials, recorded in an email from Joanne Yeadon, was that the Foreign Secretary's suggestion would not work, because "... the Mauritians [redacted] and that 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 and resettlement." It was also noted that a Mauritian election might be called that day, such that it might not be possible for the Mauritians to undertake talks²²³.

3.24 Colin Roberts responded by email saying "I think we need to give the Foreign Secretary a clearer steer on this", and suggested six steps that could be put to the Foreign Secretary as an alternative, including "(i) FS decides now that BIOTA should establish a full no-take MPA in BIOT's EEZ" and then a staged implementation of the MPA (items (iii) and (iv)), including 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" (item (v))²²⁴.

3.25 Andrew Allen, deputy director of the Overseas Territories Directorate responded to Colin Roberts' email rejecting this suggestion, as follows²²⁵:

"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 (iii) 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...

²²² As recorded in an email from Joanne Yeadon in the BIOT Administration to Ewan Ormiston at the British High Commission in Port Louis dated 31 March 2010, (**Annex 66**), bold and capitals in the original.

²²³ *Ibid.*

²²⁴ MR, Annex 156.

²²⁵ MR, Annex 156.

... 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 the risks – which will be with us for years to come.”

Thus, Mr Allen's objections regarding “being seen to decide policy on the hoof... rather than on the basis of expert advice and public consultation” were directed at Colin Robert's suggestions (iii) – (iv), not the establishment of a full no-take MPA. There is no basis in the email for suggesting that Mr Allen did not consider the scientific case for the MPA to be strong²²⁶: Mr Allen saw Mr Robert's proposal at (i) – “FS decides now that BIOTA should establish a full no-take MPA in BIOT's EEZ” – as “essentially what we have already recommended”.

3.26 In his response, the British High Commissioner noted that it was the worst possible timing because the Parliamentary Labour Party was in a closed door meeting and an announcement of elections was expected²²⁷. He explained that:

“to declare the MPA today ... would be seen by the Government here in general, and by PM Ramgoolam, in particular, as exceedingly damaging timing. The opposition MMM (who would be unlikely to win on their own against a Labour-MSM Alliance) would welcome the announcement as an electoral gift. They would push Ramgoolam very hard to commit to taking legal action to challenge the establishment of an MPA. Ramgoolam would greatly resent our timing and we would feel the consequences if he is re-elected as we anticipate.

The ‘three months’ or ‘twelve months’ to hammer out details of management 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 ...”²²⁸

²²⁶ MR, paras. 3.51(ii) and 3.67. In a similar vein, Mauritius makes reference to a statement in the National Oceanographic Centre report to the effect that the decision on the extent of the open ocean no-take zone within a potential MPA would ultimately be a political one, and likewise the issue of Mauritian fishing rights (MR, para. 3.52). It is unclear what this adds. The statement, such as it is, does not as Mauritius claims “make it clear that the workshop delegates did not consider the question of an ‘MPA’ could be resolved without regard to the rights of Mauritius”. The delegates at the workshop were primarily scientists, not lawyers. Further, the underlying factual position is that the United Kingdom did take Mauritius' position into account, as explained in this section and section D, and the Counter-Memorial (UKCM, paras. 3.30-3.52, 3.62-3.73).

²²⁷ MR, Annex 156.

²²⁸ He recommended that “[w]hat might fly here would be the announcement put forward in yesterday's submission to the FS. We think there might be a market for a proposal to work with Mauritius as a privileged partner on management issues etc. prior to finalisation of a decision on an MPA. But talks would have to precede any formal announcement of an MPA.”

3.27 Ms Yeadon drew on this input in her subsequent submission of 31 March 2010 to the Foreign Secretary, explaining that his suggestion would not work²²⁹, and recording the British High Commissioner’s advice that “[i]t would be seen, especially by Ramgoolam, as exceedingly damaging timing and pressure would be on him to commit to taking legal action to challenge the establishment of an MPA ...”²³⁰.

3.28 Thus, albeit that the United Kingdom internal documents reveal concern as to the Mauritian response to the MPA, there is no suggestion that United Kingdom and BIOT officials opposed the MPA or considered that the consultation process had been inadequate or that there was insufficient scientific evidence to support a complete no-take MPA. The problem as perceived concerned political reaction in Mauritius, not the existence of any sound legal case for opposing the MPA.

3.29 Prime Minister Ramgoolam’s response to the Foreign Secretary, when telephoned in advance of the announcement, again affirms that – as highlighted by the British High Commissioner in his email of 31 March 2010 – Mauritius’ position regarding the proposed MPA and the public consultation was informed by its domestic politics: “Ramgoolam... asked if it might be possible to delay the announcement until after the Mauritius elections. It was a controversial issue in Mauritius.”²³¹ The response of the United Kingdom Foreign Minister, in explaining that it would not be possible to delay the announcement, correctly emphasised that “the consultation had been thorough and there had already been an extension to the consultation period”²³². The Foreign Minister nonetheless explained that, in the declaration: “UK would stress that the decision was without prejudice to the legal position of the Chagos Islanders or to discussions with Mauritius on the Territory.” That remains the position today.

²²⁹ MR, Annex 158.

²³⁰ The minute also records the advice that “[o]ur 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”. At this stage the claimant in *Bancoult III* had already indicated that he intended to challenge the public consultation process and any MPA through judicial review proceedings (see para. 16 of the submission of 30 March 2010, MR, Annex 152).

²³¹ UKCM, Annex 114.

²³² Email from Global Response Centre to Joanne Yeadon, 1 April 2010. (**Annex 67**)

(vi) *The Foreign Secretary's decision to establish the MPA*

3.30 Mauritius' claims, by reference to the submissions to the Foreign Secretary of 30 and 31 March 2010 by BIOT officials, that the 'MPA' was created on 1 April 2010 at the "whim" of the then Foreign Secretary David Miliband, and that the decision to create the 'MPA' was not rational or orderly²³³. As demonstrated further in section C below, the MPA is a marine reserve of regional and international importance. In light of this, it cannot seriously be argued that the creation of the MPA was irrational or the result of a whim. As to the contention that the process was "disorderly", this is manifestly incorrect (in so far as this is a relevant standard, which is not accepted). The declaration followed from a three and a half month public consultation following the strict published criteria for public consultations in the UK²³⁴, consultations with other stakeholders (the United States), and repeated attempts at consultation with Mauritius.

3.31 Mauritius also suggests²³⁵, by reference to an internal email from the Foreign Secretary's Private Secretary of 7 May 2009, that the Foreign Secretary had already decided before the consultation to create the MPA. That again is manifestly incorrect, and anyway ignores the contents of the email, i.e. the Foreign Secretary said to press ahead "as you suggest" and engage bilaterally with stakeholders, and devise a public consultation process, which would aim to be launched in the second half of 2009. This is what subsequently took place, as explained in Chapter III, section D of the Counter-Memorial.

3.32 Mauritius' contentions on lack of a rational and orderly process are based on United Kingdom internal documents which show that BIOT officials recommended to the Foreign Secretary on 30 March 2010 that he "stop short of announcing" that he was going to ask the BIOT to declare an MPA²³⁶ and that a further submission was made on 31 March 2010 to similar effect²³⁷.

²³³ MR, para. 1.14; see also para. 3.2.

²³⁴ UKCM, Annex 90. Joanne Yeadon also had a discussion with Mr Alain Talbot (while in Port Louis in July 2009), whose family had been involved in inshore fishing in the BIOT: see Joanne Yeadon's third witness statement (**Annex 73**), para. 15 and John McManus's witness statement (**Annex 75**), para. 24. Unlike other commercial fishing interests, the Talbots did not make any submission to the public consultation.

²³⁵ MR, paras. 3.36-3.37.

²³⁶ See para. 1.14, referring to the submission from Joanne Yeadon, BIOT Administrator, to the Foreign Secretary, 30 March 2010 (MR, Annex 152).

²³⁷ Minute of Joanne Yeadon to the Foreign Secretary, 31 March 2010 (MR, Annex 158).

3.33 As demonstrated above, the BIOT officials did believe there was scientific support for no-take MPA option²³⁸, and did not hold the view that Mauritius’ consent was required before the MPA could be declared²³⁹. The crux of the reasoning behind the recommendation to “stop short” was that “we need more time to manage political stakeholders, such as Mauritius...”, and to allow more time to sort out budgetary questions²⁴⁰.

3.34 The “rationality” of the decision is further reinforced by the fact that the Foreign Secretary of the incoming Conservative Government, William Hague took the decision to pursue the MPA without any slowing down in the process²⁴¹.

3.35 Mauritius asserts on the basis of two internal documents (a submission to Ministers dated 19 July 2010 and a submission to the Foreign Secretary of 1 September 2010²⁴²) that “the UK officials most closely concerned in the process continued to take the view, even after the MPA was announced, that Mauritius had rights in the Chagos Archipelago”²⁴³. As demonstrated in the Appendix, it was not the view of BIOT officials that Mauritius had rights in the Chagos Archipelago that precluded the establishment of a no-take MPA²⁴⁴, or that Mauritius had fishing rights in BIOT waters in the sense that Mauritius now contends for. To the contrary, their advice in the submission to the Foreign Secretary on 30 March 2010 was that the United Kingdom did not need Mauritius’ consent to declare the MPA. This view did not change after the MPA was declared.

3.36 The reason why Ms Yeadon’s submissions to Ministers of 19 July and 1 September 2010 refer to Mauritius “historical fishing rights in BIOT” in some detail, even though that had been previously addressed and resolved during the MPA proposal process, lies in the purpose of submissions to ministers in newly elected governments. It is United Kingdom civil service convention that advice and submissions given to ministers of previous governments may not be shared with a new government. Instead, the background information and advice is presented again to the ministers of the new government. Thus the

²³⁸ Paras. 3.20-3.28. See also the submission from Joanne Yeadon, BIOT Administrator, to the Foreign Secretary, 30 March 2010 (MR, Annex 152) at para. 9.

²³⁹ *Ibid.*, para. 14. The submission was agreed to by, *inter alia*, the FCO’s Legal Advisers: see para. 4.

²⁴⁰ *Ibid.*, para. 19 ‘Conclusion’.

²⁴¹ MR, Annex 162.

²⁴² MR, Annex 162 and Annex 164.

²⁴³ MR, para. 3.74.

²⁴⁴ Para. 3.65 and fn. 213 and Appendix paras. A.103, A.110, A.120, and A.132.

submission of 19 July 2010 summarises the background, including the position regarding “fishing rights” in BIOT.

3.37 The suggestion that “[w]e may have to consider agreeing to any inshore fishing licence requests from Mauritian-flagged vessels in line with historical fishing rights” was made in response to the threat of domestic judicial review proceedings by Chagossian interests²⁴⁵. The internal discussion at the time between UK officials concerned whether the 2007 Fishing Ordinance permitted as a matter of English law a policy that no licences would be issued, or whether such a policy would be susceptible to being overturned on judicial review²⁴⁶. The suggestion was not included in the submission because of any concern on the part of UK officials that Mauritius had legal rights that precluded the MPA. This is emphasised by the fact that the discussion of “Mauritius” is placed under the “Political risks” heading in the 1 September submission. The submission accurately records that Mauritius, during exchanges on the MPA, had never raised the issue of “fishing rights” under the 1965 understanding. However, in light of the fact that Mauritius had, on 23 August 2010, threatened to seek an advisory opinion in the International Court of Justice on its sovereignty claim, it was considered necessary to advise ministers that there was a “slim chance” that it might raise the 1965 understanding on “fishing rights” in the same action. Notably, notwithstanding the identification of this political risk, the preferred option in the 1 September 2010 submission was that ministers agree to pursue a full “no-take” MPA²⁴⁷.

C. The Purpose and Scientific Basis of the BIOT MPA and its implementation

(i) The BIOT MPA is consistent with international practice

3.38 In its Reply, Mauritius has raised issues as to the nature and scientific basis of the MPA.

²⁴⁵ The FCO had by then received the pre-action letter for the *Bancoult III* judicial review proceedings dated 30 April 2010, which is why in the same bullet point it emphasises that “[w]e should make clear the distinction between Mauritius and Chagossian rights”.

²⁴⁶ At the time the fishing licences that had been issued in 2009 for the season ending on 31 October 2010 were still extant.

²⁴⁷ Para. 3. The consideration of a partial no-take (zonal) approach to the MPA related to consideration of whether licensed tuna fishing be allowed to continue because of potential short-falls in funding the enforcement of a complete no-take MPA.

3.39 Mauritius invites the Tribunal to define an MPA by reference to Decision VII/5 adopted by the parties to the Convention on Biological Diversity²⁴⁸. It is to be noted at the outset that there is no reference to “Marine Protected Area” in the 1982 Convention and there is likewise no internationally accepted definition of the term. Marine protected areas have been adopted under the 1992 Convention on Biological Diversity²⁴⁹, but many others are adopted for fisheries conservation purposes in the territorial sea or exclusive economic zone and are unrelated to any international agreement²⁵⁰. Others have been adopted on the high seas under regional fisheries agreements²⁵¹. Fisheries MPAs provide a tool for restoration of commercially valuable fish stocks²⁵².

3.40 In so far as Mauritius seeks to suggest that an MPA cannot be adopted for fisheries conservation purposes, then that is simply wrong. MPAs plainly serve a wide variety of functions, some of which have little or nothing to do with biodiversity or fisheries conservation. Some writers, when discussing MPAs, include within the concept the “special areas” established for pollution purposes by UNCLOS and MARPOL²⁵³, or the “particularly sensitive sea areas” (PSSA) approved for similar purposes by IMO²⁵⁴. Regional seas treaties use the term “specially protected areas” for areas where special measures are required to prevent marine pollution affecting biodiversity and marine ecosystems, including coral reefs²⁵⁵. To date marine pollution has not been a problem in the BIOT and no special measures to deal with it are currently included in the MPA.

²⁴⁸ MR, paras 7.94-95.

²⁴⁹ Articles 2 and 8; COP Decision VII/5 (2004), MM, Annex 107. See R. Abate, ‘Marine Protected Areas as a Mechanism to Promote Marine Mammal Conservation: International and Comparative Law Lessons for the United States’, 88 *Oregon L. Rev.* 255 (2009) (**Authority 19**); A. Rieser, ‘The Papahānaumokuākea Precedent: Ecosystem-scale Marine Protected Areas in the EEZ’, 13 *Asian Pacific Law & Pol J* 210 (2011-12) (**Authority 37**); R. Craig, ‘Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas’, 20 *J. Land Use & Envtl. L.* 333 (2004-5) (**Authority 25**).

²⁵⁰ See R. Craig, ‘Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii’, 34 *McGeorge L. Rev.* 155 (2002-3), pp 167-172 (**Authority 24**).

²⁵¹ E.g the South Orkney Islands Southern Shelf MPA designated in 2009 under the Convention for the Conservation of Antarctic Marine Living Resources. See K. Scott, Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas, 27 *IJMC* 849 (2012), p.852, where other examples are also listed. (**Authority 38**)

²⁵² See R. Craig, ‘Taking Steps Toward Marine Wilderness Protection? Fishing and Coral Reef Marine Reserves in Florida and Hawaii’, 34 *McGeorge L. Rev.* 155 (2002-3), pp 167-172. (**Authority 24**)

²⁵³ UNCLOS Articles 211(6) and 234; MARPOL 1973/78, Annexes 1 and II. See Y. Tanaka, *The International Law of the Sea* (2012), pp. 324-332. (**Authority 40**)

²⁵⁴ Defined as “an area that needs special protection through action by IMO because of its significance for recognised ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities.” IMO Res. A.927(22) and A.982(24) annex, para 1.2.

²⁵⁵ See 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean Sea; 1985 Eastern African Protocol Concerning Specially Protected Areas and Wild Flora and Fauna; 1986 Noumea

3.41 The MPA has not been designated by IMO as an UNCLOS or MARPOL special area, nor is it a PSSA. It is not a specially protected area for the purposes of any regional seas convention. The Convention on Biological Diversity has not been extended to BIOT, so it is not applicable in the present proceedings. The MPA is not a protected area for the purposes of that Convention, although it is intended in part to protect marine biodiversity. The MPA as presently constituted is simply a nationally defined no-take fisheries zone adopted under the powers conferred by the 2007 Fisheries Ordinance for the purpose of conserving and managing the living resources of the BIOT FCMZ, including coral reefs, biodiversity, and fish stocks, as more fully explained in sub-section (ii) below²⁵⁶. It builds on and adds to the Environment (Protection and Preservation) Zone declared in 2003 and the pre-existing laws regulating pollution and marine scientific research in the territorial sea remain in force²⁵⁷. It is anticipated that those laws will be revised and consolidated but this will do no more than exercise the discretionary power of the coastal state to regulate marine pollution, the conservation of living resources, and marine scientific research pursuant to the relevant provisions of UNCLOS.

3.42 Mauritius has no basis to assert that an MPA will necessarily deal with “a wide range of activities that normally constitute a legitimate use of the sea”²⁵⁸. On the contrary, there are other MPAs which, like the BIOT MPA, also restrict or ban fishing but do not have special rules for shipping or interfere with other legitimate marine activities. They include the following:

- The recently designated 500,000-km² no-take area in the Coral Sea (Australia)²⁵⁹;
- Phoenix Islands Protected Area and World Heritage Site, South Pacific (Kiribati)²⁶⁰;
- Marianas Trench Marine National Monument, Western Pacific (US)²⁶¹;

Convention, Article 14; 1989 SE Pacific Protocol for the Conservation and Management of Protected Marine and Coastal Areas; 1990 Kingston Protocol Concerning Specially Protected Areas and Wildlife.

²⁵⁶ At paras. 3.45 – 3.53. It is to be noted that a ban on commercial fishing falls outside the Tribunal’s jurisdiction pursuant to article 297(3) however its purpose is characterised. See further Chapter VI below. In addition, a ban on fishing cannot have any impact on the other rights claimed by Mauritius within the BIOT MPA, as explained in Chapter VIII.

²⁵⁷ See para. 7.22 of this Rejoinder.

²⁵⁸ MR, para. 7.95.

²⁵⁹ <http://www.marinereservescoalition.org/resources/marine-reserves-around-the-world/australias-marine-protected-area-network/>

²⁶⁰ <http://whc.unesco.org/en/list/1325>

²⁶¹ <http://www.fws.gov/marianastrenchmarinemonument/planning.html>;
http://www.fpir.noaa.gov/MNM/mnm_marianas-trench.html

- Sala y Gomez, Motu Motiro Hiva Marine Park, off the Chilean Coast (Chile)²⁶²;
- Pacific Remote Islands Marine National Monument (US)²⁶³;
- Prince Edward Islands MPA (South Africa)²⁶⁴;
- South Orkney Islands Southern Shelf MPA (UK)²⁶⁵.

3.43 Mauritius' attempt to define the scope and content of the MPA by reference to the Convention on Biological Diversity or IUCN Guidelines demonstrates only the potential diversity of MPAs and its own selective approach to issues of definition. Neither the Convention on Biological Diversity nor IUCN determine the content and scope of the MPA, which remains a no-take fishery zone, no different in that respect from many other MPAs²⁶⁶.

3.44 The precedents listed above show that the United Kingdom is entitled to declare a no-take MPA in the BIOT FCMZ, and to define it in whatever way it chooses to do so.

(ii) The scientific basis of the BIOT MPA

3.45 During its discussions with the United Kingdom and the public consultation held prior to the declaration of the MPA, Mauritius did not question the scientific basis for the MPA, nor did it do so in its subsequent protests²⁶⁷. Nowhere in its written pleadings does Mauritius attempt to establish, by reference to a survey of relevant evidence, that there is no scientific justification. It has submitted no expert evidence to question either the utility of the MPA for the purpose of conserving living resources, or the effectiveness of a ban on fishing in conserving biodiversity, coral reefs, endangered species and fish stocks.

3.46 Faced with this silence on the part of Mauritius, and the absence of any evidence to the contrary, it seems safe to conclude that there is no material dispute between the parties about the scientific evidence or the scientific basis of the MPA. The scientific evidence in

²⁶² <http://oceana.org/en/our-work/preserve-special-places/sala-y-gomez-island/overview>

²⁶³ <http://www.fws.gov/pacificremoteislandsmarinemonument/PRIMNM%20brief.pdf>

²⁶⁴ http://awsassets.wwf.org.za/downloads/wwf_pei_mpa_fact_sheet_2013.pdf

²⁶⁵ <http://www.mpatlas.org/mpa/sites/5283/>

²⁶⁶ See paras. 7.24-28 of this Rejoinder.

²⁶⁷ UKCM, paras. 3.42-68.

favour of an MPA and a ban on fishing is substantial²⁶⁸, and more than sufficient to justify the declaration made in 2010, including the ban on fishing. Moreover the exercise of discretionary powers to regulate living resources in the exclusive economic zone is within the margin of appreciation that international law affords States in such matters²⁶⁹.

3.47 The declaration of a no-take MPA is supported in the present case by coherent reasoning and respectable scientific evidence²⁷⁰. That was evidently also the conclusion of the English Administrative Court in the judicial review proceedings which took place in 2013²⁷¹. In these circumstances, it cannot plausibly be argued that the MPA has been adopted in bad faith or in violation of article 300 of UNCLOS.

3.48 The general basis for establishing marine protected areas has been set out at paragraphs 3.20-3.27 of the Counter-Memorial, and does not appear to be in dispute. The argument for such zones is summarised in the literature:

“MPAs, especially those managed as no-take areas, are crucial in helping to maintain a balanced ecosystem structure. These areas achieve this objective both by eliminating the physical damage that fishing gear can cause to marine species and their habitats and preserving sustainable fish populations for marine species to consume.”²⁷²

3.49 The case for a no-take MPA was explained in the report of a scientific workshop held in 2009 at the National Oceanographic Centre, Southampton²⁷³. The report identifies the following reasons for establishing a no-take MPA covering the whole of the BIOT FCMZ/EPPZ.²⁷⁴

²⁶⁸ UKCM, paras 3.42-68.

²⁶⁹ On the margin of appreciation see the WTO Appellate Body which ruled that the power to review national measures under the Agreement on Sanitary and Phytosanitary Measures “is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable”, *US – Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO Appellate Body, WT/DS320/AB/R (16 October 2008), para. 590. (**Authority 15**)

²⁷⁰ *Ibid.*

²⁷¹ *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) (UKCM Authority 43).

²⁷² R. Abate, ‘Marine Protected Areas as a Mechanism to Promote Marine Mammal Conservation: International and Comparative Law Lessons for the United States’, 88 *Oregon L. Rev.* 255 (2009), p. 261. (**Authority 19**)

²⁷³ NOC, *Marine Conservation in British Indian Ocean Territory: Science Issues and Opportunities* (2009), MR, Annex 146 and UKCM, Annex 102.

²⁷⁴ See also UKCM, para 3.54.

- *Large size*: “Many conservation-related benefits of Protected Areas increase non-linearly with size, since smaller areas are much less effective in maintaining viable habitats or populations of threatened species...”²⁷⁵
- *Habitat diversity*: “Whilst most conservation attention has to date focussed on shelf and coastal sea habitats (temperate and tropical), the BIOT area also includes an exceptional diversity of deepwater habitat types.”²⁷⁶
- *Near pristine conditions*: “Human impacts on the BIOT area are minimal, and less than any other tropical island groups in the Indian, Pacific or Atlantic Ocean.”²⁷⁷ BIOT supports “around half the total area of ‘good quality’ coral reefs in the Indian Ocean.”²⁷⁸
- *Control for research and management*: “The health of the marine ecosystems in the BIOT area gives them crucial importance as the ‘control’ for research and management activities elsewhere.”²⁷⁹
- *High resilience of Chagos coral reefs*: “they have recovered more, and faster, than any other known coral reef system.....Whatever the basis for this resilience - currently subject to research attention, and meriting additional effort - it is of global conservation significance.”²⁸⁰
- *Role as a regional stepping stone and re-seeding source*: “A key role for MPAs is their natural export of ‘surplus’ production and reproductive output, providing other areas with biomass and propagules of species important either for commercial exploitation, conservation purposes or more general ecosystem functioning.”²⁸¹

²⁷⁵ NOC, *Marine Conservation in British Indian Ocean Territory: Science Issues and Opportunities* (2009), MR, Annex 146 and UKCM, Annex 102.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

3.50 Mauritius calls into question the United Kingdom’s position, based on this report, that scientific arguments were strongly in favour of a large scale marine protected area²⁸². However, Mauritius has no evidentiary basis for calling into question the scientific arguments favouring the MPA. It is also said by Mauritius that MRAG’s scientific advice was overlooked. This is incorrect²⁸³, albeit that it was also borne in mind that MRAG was potentially conflicted because of its contract to manage BIOTA fisheries²⁸⁴.

3.51 In response to the United Kingdom’s contention that the MPA is a measure aimed at conserving and protecting biodiversity and the marine ecosystem from the impact of harmful fishing practices, Mauritius suggests that there is a lack of evidence as to harmful fishing practices²⁸⁵. This is to mis-construe the point that the United Kingdom was making, which was as to the purpose of the MPA. But in so far as the point is not self-evident, scientific literature points to the harm commercial fishing has caused in and around the BIOT MPA. A paper by Koldewey and others on the “*Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve*”²⁸⁶ focuses in particular on the poor management of Indian Ocean tuna stocks, and the harmful impact of fishery by-catches on species such as sharks, rays, billfish, and lancetfish. Their findings include the following:

- “At present, however, the western Indian Ocean remains a region with some of the most exploited poorly understood and badly enforced and managed coastal and pelagic fisheries in the world”²⁸⁷.
- “For Chagos/BIOT fisheries, incidental, retained catch such as sharks is included in our definition of bycatch. As with most fisheries, bycatch in Chagos/BIOT has been inadequately recorded. Data are based primarily on logbooks and a limited observer programme that was completely absent in some years (e.g. 2004/05 and 2007/08).”²⁸⁸

²⁸² MR, para. 3.51, as to which see UKCM, paras. 3.53-3.54.

²⁸³ **Annex 74**, para. 32.

²⁸⁴ As to MRAG’s role, see the Appendix below at fn. 935, referring to third witness statement of Ms Yeadon at para. 11 (**Annex 73**), and witness statement of Mr McManus at paras. 26-27 (**Annex 75**).

²⁸⁵ MR, para. 7.100.

²⁸⁶ H. Koldewey, D. Curnick, S. Harding, L. Harrison, M. Gollock, ‘Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve’, 60 *Marine Pollution Bulletin* 1906 (2010). (**Annex 63**)

²⁸⁷ *Ibid.*, p. 2.

²⁸⁸ *Ibid.*, p. 4.

- “Landings of species especially vulnerable to population decline as a result of fisheries, such as sharks and rays, have been steadily rising in both the eastern and western Indian Ocean since the 1950s”.²⁸⁹
- “Overexploitation of apex predators has dramatically influenced biological communities by triggering cascading effects down food webs, leading to decreases in diversity and/or productivity, loss of ecosystem services and, in some instances, ecosystem collapse”.²⁹⁰

3.52 Koldewey and her colleagues conclude that the BIOT MPA is ecologically justified for the following reasons:

- Many parameters suggest it will benefit pelagic and migratory species.²⁹¹
- The size is sufficient to protect both site-attached and migratory species and potentially provides an excellent area for the recovery of shark, tuna and other large predators.²⁹²
- The data demonstrate that conservation of tuna stocks can be promoted through effective domestic management policies within the MPA.²⁹³
- No-take marine reserves have been widely reported to increase fish and invertebrate biomass for reef environments within their borders.²⁹⁴
- The absence of fishing pressure is reported as the major factor that allows both the density and individual biomass, and consequently the reproductive capacity, of exploited species to increase.²⁹⁵

²⁸⁹ *Ibid.*, p. 2.

²⁹⁰ *Ibid.*, p. 1.

²⁹¹ *Ibid.*, p. 6.

²⁹² *Ibid.*, pp. 6-7.

²⁹³ *Ibid.*, p. 6.

²⁹⁴ *Ibid.*, p. 7.

²⁹⁵ *Ibid.*, p. 7.

- There remains a critically urgent need for more effective management that conserves remaining coral reefs, particularly those in areas of low anthropogenic pressure and thus likely to be most resilient to climate change impacts.²⁹⁶

3.53 It is clear from reading this study that fisheries management and conservation aims provide a sound scientific basis for the BIOT MPA, and that Mauritius is wrong to suggest that the ban on commercial fishing is not a fisheries conservation measure²⁹⁷.

(iii) Implementation and enforcement of the MPA

3.54 The first stages of the implementation and operation of the MPA and its financing were described in the Counter-Memorial²⁹⁸. Since then the BIOT Administration has commenced a significant piece of work on consolidating its objectives for conservation in the Territory, as well as planning for the next generation of enforcement of the MPA and learning the lessons of its first five years.

3.55 Conservation planning is under way and the BIOT Administration is consulting closely with NGOs, and has also invited Mauritius' comments on its draft objectives. The objective of this phase of the work on the MPA is to clarify and refresh the conservation objectives in the Territory.

3.56 In addition, the BIOT Administration is carrying out detailed analysis of the data that it and other organisations (such as Greenpeace) have collected concerning the problem of illegal fishing in the MPA, to develop understanding of what the BIOT is trying to combat and with a view to guiding a new assessment of surveillance and enforcement options to replace or augment the current BIOT patrol vessel, the Pacific Marlin. This assessment will address how much surveillance is required, whether other forms such as aerial surveillance

²⁹⁶ *Ibid.*, p 7.

²⁹⁷ MR, para. 7.100. Australia has recently introduced an even larger no-take MPA in the Coral Sea. A review of the scientific literature comes to conclusions very similar to those drawn by Koldewey and her collaborators. See D. M. Ceccarelli, *The value of oceanic marine reserves for protecting highly mobile pelagic species: Coral Sea case study* (2011) [Report prepared for the Protect Our Coral Sea campaign] (**Annex 68**). See also G.J. Edgar, et al, "Global conservation outcomes depend on marine protected areas with five key features", *Nature*, vol. 506, 13 February 2014, 216. (**Annex 80**)

²⁹⁸ Paras. 3.69-3.72. See also witness statement of John McManus, paras. 26-30, describing enforcement of the MPA. (**Annex 75**)

should be added to the current provision, as well as the most cost-effective way to combat the threat of illegal fishing and enforce the MPA.

3.57 Over ninety per cent of the BIOT MPA is unexplored and has not been the subject of dedicated scientific research. As part of its conservation planning, the BIOT will be looking at what science is necessary to monitor its conservation objectives in the BIOT and the MPA. It is already encouraging diversification and greater access to BIOT for international scientists, including from Mauritius, where they are appropriately peer reviewed and funded. In order to facilitate this, the BIOT has increased access to the Pacific Marlin for science expeditions from one science expedition in 2013 (an in-kind contribution to the expedition equivalent to around £130,000) to two in 2014 (one in March, and the second taking place in September/October). In the medium term it plans to link the broader science requirements to those for enforcement to find economies between the two, and will as necessary consider the purchase or charter of additional vessels.

3.58 The Pacific Marlin is also carrying out conservation monitoring work while out on patrol by, for example, recording sea cucumber transects during visits to reefs to check for poachers. The BIOT is working hard to ensure all of this information is routinely shared with the scientific community, and is actively working with that community on further work that can be done by the vessel and its crew while on-task with minor additional kit, for example by adding a towed temperature logger and recording bird sightings.

3.59 As regards funding the MPA²⁹⁹, the public-private partnership between the BIOT Administration and private-sector NGOs continues. The current arrangement, which finances the patrol vessel and other aspects of the implementation and enforcement of the MPA, is in place until at least 2015 and sufficient to meet current costs. The BIOT Administration is actively considering additional and new sources of funding from the private and non-profit sector in addition to the funds contributed by the BIOT to support conservation work and enforcement beyond 2015. This work will in due course take into account the assessment of the science, surveillance and enforcement needs of the MPA currently being undertaken.³⁰⁰

²⁹⁹ MR, para. 6.125.

³⁰⁰ See also the more recent *Chagos News*, publication Nos. 43 and 43 which summarise some of the scientific and outreach work being done in relation to the BIOT MPA. (**Annex 77** and **Annex 79**)

D. Mauritius' contentions as to fishing rights

(i) Mauritius' claims as regards the 1965 understanding

3.60 Paragraph 22(vi) of the Lancaster House meeting of 23 September 1965 reads:

*"The British Government would use their good offices with the US 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"*³⁰¹

3.61 Mauritius claims that this understanding is binding under international law³⁰². The correct position (as set out in the Counter-Memorial³⁰³, and considered further in Chapter VIII below) is that the 1965 understanding was not an international agreement, nor could it have been, given that Mauritius was not at this stage a sovereign State. It was a non-binding understanding that the United Kingdom has sought over the years in good faith to give effect to, in circumstances where Mauritius has demonstrated minimal interest in the actual exercise of such "fishing rights". This is clear from the documentary record which is set out in further detail in the Appendix³⁰⁴, the key points of which are summarised at section (ii) below.

3.62 Mauritius also claims that the United Kingdom has misrepresented its position in its Counter-Memorial, and does so by reference to internal documents that were disclosed by the United Kingdom in domestic judicial review proceedings³⁰⁵. This is incorrect. Mauritius fails to explain why the internal documents cited in its Reply are relevant to interpreting the 1965 understanding, as opposed to documents that set out an officially adopted view, were in

³⁰¹ MM, Annex 19.

³⁰² In making this claim, Mauritius advances a most expansive interpretation of the 1965 understanding, which it asserts covers "*all rights relating to fish*" unconfined by the actual fishing practices either in 1965 or arrangements put in place in the subsequent years (MR, para. 6.47). This interpretation is a re-packaging of the claim made by the Mauritius Prime Minister in the early 1970s that the "*verbal agreement*" reached on 23 September 1965 was subject to Mauritius being given "*all sovereign rights relating to...fishing*" and "*...Mauritius reserving to itself (a) fishing rights...*" (MM, Annex 67 and Annex 69). That interpretation was rejected by the United Kingdom at the time as inconsistent with what was in fact agreed (UKCM, Annex 23 and UKCM, Annex 24) and the United Kingdom continues to reject that erroneous interpretation.

³⁰³ Chapter VIII section B.

³⁰⁴ See also Chapter VIII, B (ii) and (iii) below.

³⁰⁵ See MR at para. 1.16. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) was attached to the UKCM at Authority 43. The regrettable accusation that the United Kingdom has made redactions for the "*purpose of suppressing evidence that is unhelpful to it*" (MR, para. 1.20) is dealt with by letter dated 3 March 2014. It is also noted that Mauritius has elected to only disclose five of its own internal documents (see letter dated 3 March 2014).

the public domain and/or were actually communicated to Mauritius³⁰⁶. Even regarding inter-parties correspondence, it may be that a given statement does not reflect that party's position³⁰⁷. Mauritius also appears to have misunderstood the purpose of papers produced by research analysts (which is to provide research and analysis to government departments and which are not officially adopted views)³⁰⁸.

3.63 In any event, the United Kingdom internal documents do not advance Mauritius' case, but only serve to demonstrate a lack of clarity over the years as to the nature and content of the 1965 understanding and, in so far as it was considered, its legal nature. Different interpretations were reached of the material available at the relevant time³⁰⁹.

3.64 For example, Mauritius seeks to make much of the fact that a junior legal adviser³¹⁰ appears (implicitly) to have said in 1971 that the 1965 understandings were binding³¹¹. However this issue was not the subject of detailed legal consideration; the document is only eleven paragraphs long and the focus of the advice was on the issue of resettlement. Nor is his conclusion an officially adopted view. Further, this then junior adviser's assumption can be compared to the different and more tentative views expressed by other individuals in internal documents³¹².

³⁰⁶ As set out above, the 1965 understanding was not an international agreement. However, even if one were to apply, by analogy, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Mauritius has not clarified why such internal documents are relevant (cf. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Rep. 1999, p. 1045 at para. 55 (**Authority 10**), and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p. 12 at para. 224 (**Authority 14**). See also *Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, 114 ILR 1, p. 31, at para. 94 (**Authority 7**). See further under Chapter VIII below.

³⁰⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246 at para.139 (**Authority 4**). See further under Chapter VIII below.

³⁰⁸ For example, several references are also made to an internal research paper dated 11 October 1996 (MR, Annex 101 cited at MR paras. 2.106 to 2.109 and para. 3.7). The relevance of that paper is further undermined by the fact that the paper itself is described as a “*working draft*”, the author of the document highlights that she is “*not confident of my grasp of all of*” of the aspects of the topic and acknowledges that there may be “*obvious errors*” and “*misconceptions*”. It does not feature any detailed consideration of the legal import of the 1965 understanding.

³⁰⁹ For example, in an internal memorandum it was observed that “*Precisely what was intended was never set out in detail*” (MR, Annex 92). See also the views of Mr Wenban-Smith (EAD) in 1984 (**Annex 29**), the description of free licenses as a “*grace and favour agreement*”, a “*gesture of good will*” and issued in the “*spirit of co-operation*” (**Annex 44, Annex 45 and Annex 46**), and a note from Ms Savill of the OTD dated 20 July 2001 observing that “*We interpret this as the granting of free licences for the historical fishing.....The grant of free licences has never meant unconditional fishing....*” (**Annex 57**).

³¹⁰ As noted by Mauritius at MR para. 6.29, he was then a junior adviser.

³¹¹ Minute dated 26 February 1971 from A.I. Aust to Mr. D. Scott, “BIOT Resettlement: Negotiations with the Mauritius Government”: MR, Annex 73.

³¹² See fn. 309 above.

3.65 Great weight is also placed by Mauritius on documents written by Ms Yeadon, yet it is clear that the conclusion she in fact eventually reached was that the 1965 understanding was a political arrangement³¹³.

3.66 As summarised by the United Kingdom Administrative Court (after considering all these internal documents and hearing detailed argument by counsel), all that the contemporaneous documents show is that:

“over the years some British officials believed that there was or might be a legal obligation to allow fishing by Mauritian vessels in BIOT waters, whereas others evidently looked at the question in essentially political terms. What is important, however, is that from Mauritius’ perspective the issue of fishing rights was viewed from an early stage in terms of sovereignty, not as one based on the September 1965 undertaking. In diplomatic exchanges between the two governments and in the stance adopted by Mauritius on the wider international plane it was presented consistently in the context of Mauritius’s claim to sovereignty over the Chagos Archipelago.”³¹⁴

(ii) The true picture as it emerges from the documents

3.67 Detailed consideration of the documentary record, which places the internal documents in their proper context, is set out in the Appendix. The following seven key points emerge.

3.68 **First**, in July 1965, when the Governor of Mauritius opened discussions with Mauritius Ministers on the proposals for the US defence facility and the detachment of the Chagos Archipelago, the Mauritian Premier (Sir Seewoosagur Ramgoolam) proposed “*preference for Mauritius if fishing or agricultural rights were ever granted*”³¹⁵.

³¹³ Third witness statement of Ms Joanne Yeadon at paras. 8, 9 and 25 (**Annex 73**). Mauritius cites part of an email dated July 2009 from Ms Yeadon to Mr Roberts (at MR para. 1.16) as follows “*Mauritian fishing rights were never defined in the Lancaster House side meetings, but what it boils down to is free access to BIOT waters*” (MR, Annex 138). The following sentence in that email states that “*This has translated over the years, to Mauritians being obliged to apply for a permit but getting it free*”. That email should be read in light of Ms Yeadon’s statement that “*I considered Mauritian “fishing rights” under the 1965 undertaking which had in practice taken the form of free licences for Mauritian-flagged vessels to fish in BIOT waters, to be an undertaking of a political not a legal nature*” (**Annex 73** at para. 9). Ms Yeadon was described by the Administrative Court as an “*impressive and truthful witness*” (at para. 61, UKCM Authority 43). See also the third witness statement of Mr Colin Roberts, at para. 19 (**Annex 74**).

³¹⁴ At para. 157 (UKCM, Authority 43).

³¹⁵ MM, Annex 13. See Appendix at para A.5.

3.69 Second, as of 1965, the fishing practiced by Mauritians was extremely limited. It is common ground that it merely consisted of basket and net fishing by the local population for their own consumption, with the occasional use of anchorage facilities³¹⁶.

3.70 Third, the term “fishing rights” set out in the final record, which is self-evidently vague and imprecise, was not the subject of any detailed consideration in 1965³¹⁷. Those two words were inserted by Sir Seewoosagur Ramgoolam from his hotel room a week after the meeting on 23 September 1965³¹⁸; it is a reasonable inference that Sir Seewoosagur Ramgoolam had in mind the proposal of July 1965, namely ensuring preference for Mauritius if fishing rights were ever granted. The express terms of the 1965 understanding were limited to the making of representations to the US Government and ensuring availability of fishing rights “*as far as practicable*”.

3.71 Fourth, Mauritian Ministers were dissatisfied with what they recognised to be “*mere assurances*”³¹⁹. Thus, Mauritius’ Council of Ministers were apparently (and correctly) of the view that the 1965 understanding did not give rise to enforceable legal obligations.

3.72 Fifth, in the subsequent years, the British Government made every effort to ensure preference for Mauritians when fishing rights were granted³²⁰:

- a. References to “traditional”, “historic” or “habitual” fishing rights (which did not feature in the 1965 understanding) appear to have emerged with reference to the United Kingdom’s concerns as to the impact of the developing law of sea and its wish to be able to allow access to Mauritian vessels in preference to those of other states³²¹. It is clear from the exchanges of the mid-1960s that Mauritius did not have established habitual or traditional fishing in the waters around the Chagos Islands, but

³¹⁶ MM, Annex 37. See MR at para. 2.112. “*It is not disputed that hand line fishing was practiced in the waters of the Chagos Archipelago, with some basket and net fishing by the local population for its own consumption*”. See Appendix at paras. A.16 to A.20.

³¹⁷ See Appendix at paras. A.4 to A.15.

³¹⁸ UKCM, Annex 9.

³¹⁹ UKCM, Annex 46 at Appendix O. See the Minutes of Proceedings of the meeting of the Council of Ministers during which it was said that “*the assurance given by the Secretary of State in regards to points (v) and (vi) [was] unsatisfactory*” (UKCM, Annex 46 at Appendix P). See Appendix at para. A.12.

³²⁰ As set out at the third point above (para 3.70), it can be inferred that, when Sir Seewoosagur Ramgoolam inserted the words “fishing rights”, he had in mind the proposal of July 1965, namely ensuring preference for Mauritius if fishing rights were ever granted.

³²¹ See Appendix at paras. A.21 to A.32.

this was a useful description introduced to ensure Mauritius (and the Seychelles) preferential access.

- b. The British Government always informed the Mauritius Government as to new legislation. Whenever the Mauritian Government did raise any objection, this was on grounds of sovereignty as opposed to “fishing rights” pursuant to the 1965 understanding³²².
- c. The practice that evolved was that Mauritian access to BIOT waters was strictly regulated, limited and conditional on having a licence, albeit that there was an arrangement whereby licences would be issued to Mauritian-flagged vessels for free³²³.

3.73 Sixth, over the years, Mauritians have demonstrated minimal interest in the actual exploitation of Mauritius’ “fishing rights”³²⁴.

3.74 Finally, the Mauritius stance during the 2009 talks and in response to the establishment of the MPA rested on its claim for sovereignty³²⁵. Both Mr Roberts and Ms Yeadon of the United Kingdom delegation have made clear that, during the 2009 talks, Mauritians wanted the United Kingdom to consider joint issuing of fishing licences which related to their wish to establish a sovereignty “win”, but did not object to the MPA with reference to allegedly legally enforceable fishing rights pursuant to the 1965 understanding³²⁶. That Mauritius’ stance rested on its claim for sovereignty is clear from the Mauritian Parliamentary Debates in July 2010 during which it was stated (in response to a

³²² See Appendix at paras. A.33 to A.40, A.51 to A.57, A.58 to A.65 and A.95 to A.98. One striking example is when the 1971 Ordinance was introduced. This had the effect that fishing in the 3 mile territorial sea by vessels flagged to foreign States (including Mauritius) were effectively excluded. Yet this did not precipitate any complaint on the part of Mauritius with reference to the 1965 understanding. In fact, because of an oversight, Mauritian fishermen were not in fact even designated to fish in the 3 to 12 nautical miles contiguous zone (see Appendix at paras. A.33(b)).

³²³ See Appendix at paras. A.55 and A.61

³²⁴ See Appendix at paras. A.45 to A.50 and A.79 to A.85.

³²⁵ *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 at para. 156 “*the reality is that Mauritius at no time contended that the effect of the undertaking was to confer fishing rights on Mauritius as a matter of international law.... Mauritius made no complaint that the measures [the introduction of an exclusive 12-mile fisheries zone by the 1971 Ordinance, the extension to a 200-mile zone and the introduction of a full licensing regime by the 1991 Ordinance] were inconsistent with rights enjoyed by it pursuant to the undertaking*” and at para. 158 “*The dispute with Mauritius concerned sovereignty, and that was expressly mentioned in the consultation document*” (UKCM, Authority 43).

³²⁶ See Appendix at paras. A.99 to A.129, citing the evidence before the Administrative Court.

question to the Mauritian Prime Minister, Minister of Defence, Home Affairs and External Communication) that:

“The creation of a MPA 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....”³²⁷

3.75 Mauritius claims that its “*overarching position on sovereignty placed limitations on its ability to pursue fishing rights as a separate issue*”³²⁸. However, its position on sovereignty would not have prevented a robust objection on the separate basis of the 1965 understanding (as it now adopts in its pleadings in these proceedings)³²⁹. Yet the documentary record illustrates that right from the start in its response to the MPA proposal Mauritius has taken its stand on the ground of sovereignty and not with reference to the 1965 understanding.

E. Oil and mineral rights

3.76 In response to paragraphs 2.113-2.116 of the Counter-Memorial, Mauritius contends that the United Kingdom’s “interpretation” of the understanding on mineral rights recorded paragraph 22(viii) of the final record of the Lancaster House discussions was “vehemently contested” by Sir Seewoosagur Ramgoolam at a meeting on 4-5 February 1970 and that he said that “Para. 23 (viii) [sic] of the Record meant that the British Government would not oppose the grant of prospecting right for minerals and oil...”³³⁰, and suggested that Mauritius could grant exploration licences³³¹.

3.77 This interpretation, which reflected Mauritius’ *Note Verbale* of 19 November 1969, does not correspond to the record of what was agreed to in 1965³³², and had already been

³²⁷ MR, Annex 163.

³²⁸ At para. 3.30.

³²⁹ For example, Mauritius could have made cumulative objections, and it could have proposed discussions on a without prejudice basis. It is recalled that discussions in the BMFC and the UK-Mauritius bilateral talks were conducted under the “sovereignty umbrella” (UKCM, fn. 170, para. 5.34 (f)), para. 7.52 and para. 7.56).

³³⁰ MR, para. 2.130, referring to Annex 72.

³³¹ See para. 4 of the record of the meeting on 5 February 1970 (MR, Annex 72).

³³² “the benefit of any minerals or oil discovered... should revert to the Mauritius Government”

rejected in clear terms by the United Kingdom by a *Note Verbale* in December 1969³³³. Nor do the other two Mauritian officials that attended the same February 1970 meeting appear to have agreed with Sir Seewoosagur Ramgoolam's position. Mr Ringadoo, a Mauritian Minister in the Council of Ministers in November 1965³³⁴, "appeared to accept that the Mauritius Government must in 1965 have been informed of and accepted the fact that the British Government would not permit oil prospecting in the Chagos and to appreciate that oil prospecting or production could not be permitted while the islands are required for defence purposes"³³⁵. Mr Teelock "urged that the British Government should allow exploration...", a plea consistent with the United Kingdom's position that Mauritius had no ownership of oil and minerals in the BIOT, nor any right to legislate with respect to them³³⁶.

3.78 Furthermore, the views of Sir Seewoosagur Ramgoolam at the meeting on 5 February 1970 are more ambiguous than Mauritius' argument would suggest. After "averring" that he had no knowledge of the reply by Mr Forget on 21 December 1965, he went onto say that "his interpretation of the Lancaster House discussions was different, but that with the copies of the documents he had been given, he would, on his return to Mauritius, examine the records of the meetings of the Council of Ministers for references to any further discussions on this point and, in particular, to any discussions on Mr. Forget's reply". Mauritius has not produced any subsequent correspondence from Sir Seewoosagur Ramgoolam upon his return to Mauritius, as might have been expected had he found, on his examination of the meetings of the Council of Ministers in 1965, that they supported his recollection five years later. Moreover, it is notable that Sir Seewoogasur Ramgoolam did not insist on his views. According to the record of the meeting: "Sir S. Ramgoolam then said he did not want to have a dispute with the British Government over this matter: if we would not permit the Mauritius Government to issue exploration licences in the Chagos, would not the British Government do so? ... He made a very strong plea that the British Government should permit such exploration...".

3.79 By contrast, the UK position was clear, and also easy to adhere to given that the United Kingdom was not, by contrast, seeking to move away from the understanding reached

³³³ See UKCM, para. 2.115.

³³⁴ See p. 61 of the 1983 Select Committee Report, appendix N of which lists the Ministers attending the meeting on 5 November 1965 (UKCM, Annex 46).

³³⁵ MR, Annex 72, p. 6, para. 6.

³³⁶ See UKCM, para. 2.115.

in 1965. Mr Foley, the United Kingdom representative at the meeting, reiterated the position in the *Note Verbale* of 17 December 1969³³⁷ that “in no circumstances could the British Government agree to the grant of exploration licences until the islands were no longer required for defence purposes”³³⁸.

3.80 Mauritius refers to affirmations of its mineral and oil rights “subsequent” to that meeting, including in correspondence to the United Kingdom. The first cited subsequent affirmation is the *Note Verbale* of 17 November 1969, which actually predates the United Kingdom’s *Note Verbale* of 18 December 1969 and the meeting of 4-5 February 1970. In both, Mauritius’ claim and Sir Seewoosagur Ramgoolam’s interpretation were firmly rejected. The United Kingdom responded to the subsequent claim of 24 March 1974 by the Mauritian Prime Minister in his letter of 3 May 1973³³⁹ reiterating “that there is no change in the undertakings, given on behalf of the British Government and set out in the record, as then agreed, of the meeting at Lancaster House on 23 September 1965”³⁴⁰. The reference to debates in the Mauritius’ Legislative Assembly in the 1970s does not advance Mauritius’ claim to sovereign rights over minerals. Further, the United Kingdom has always protested against any public assertion of a claim by Mauritius to an EEZ around BIOT³⁴¹.

3.81 Finally, under this heading, the United Kingdom has already addressed Mauritius’ claims based on its submission in May 2009 to the UN Commission on the Limits of the

³³⁷ Excerpted in paragraph 2.115 of the Counter-Memorial.

³³⁸ MR, Annex 72, p. 6, para. 5. The *Note Verbale* that Mauritius refers to in paragraph 2.133 as a subsequent affirmation of its mineral rights actually predates the meeting. It is dated 19 November 1969 (MM, Annex 54). The *Note Verbale* dated 17 December 1969 and handed over on 18 December, excerpted at UKCM, para. 2.115 is the United Kingdom’s response to this *Note Verbale*. The meeting on 4-5 February 1970 is a further follow up.

³³⁹ To the “the right of prospection and the benefit of any minerals or oil discovered in or near the Chagos Archipelago reverting to the Mauritius Government” (MM, Annex 69).

³⁴⁰ UKCM, Annex 24.

³⁴¹ MR, para. 2.133 and the references in fn. 269. Sir Seewoosagur Ramgoolam’s statements in the Legislative Assembly of 26 June 1974 (MM, Annex 71) and 10 July 1979 (MM, Annex 86) are expressed in terms which reflect his claims in the *Note Verbale* of 17 November 1969 and his letters of 4 September 1972 and 24 March 1973. This interpretation of the 1965 mineral rights understanding was rejected in clear terms by the United Kingdom at the time, as explained above and at UKCM, para. 2.115. The reference in the debate of 13 November 1979 (MM, Annex 87) does not go so far, and repeats the wording of the Lancaster House record. The record of the legislative debate on 27 November 1979 (MM, Annex 89) makes no express reference to mineral rights and is unclear as to its meaning. In response to a question as to whether “in view of the fact we are still exercising our rights on natural resources, the 200-mile maritime zone, around the island still belongs to Mauritius”, the Prime Minister replies that “I would assume that Sir”. In so far as it may be a reference to Mauritius declaration of an EEZ in 1977, as recorded in the UKCM at fn. 130 the first public claim to an EEZ around the BIOT under the Maritime Zone Act 1977 was in December 1984, and the United Kingdom protested (see UKCM, Annex 50, Annex 51 and Annex 52).

Continental Shelf Preliminary Information concerning the Extended Continental Shelf in paragraphs 7.51-7.58 of its Counter-Memorial³⁴².

³⁴² See also UKCM, fn. 223, in Chapter III.

PART TWO

THE SOVEREIGNTY CLAIM

Part Two sets out the further reasoning, in response to the Reply, for the United Kingdom's submission on the sovereignty dispute, and in particular the absence of jurisdiction under the 1982 Convention to decide the issues submitted by Mauritius.

Chapter IV responds to Mauritius' Reply in so far as it addresses the United Kingdom's position that the Tribunal can have no jurisdiction over Mauritius' sovereignty claim, as the 1982 Convention does not provide for compulsory jurisdiction over questions of territorial sovereignty.

In order to demonstrate the full scope of what Mauritius is asking the Tribunal to decide, **Chapter V** returns briefly to Mauritius' arguments on territorial sovereignty, which involve such matters as the *uti possidetis juris* principle and the evolution and application of the right of self-determination of peoples. It is noted that Mauritius' Reply made no effort to address the main point, that the United Kingdom acquired sovereignty over the islands which now form the BIOT in 1814, by cession from France, and has not subsequently relinquished sovereignty.

CHAPTER IV

THE TRIBUNAL HAS NO JURISDICTION OVER MAURITIUS' SOVEREIGNTY CLAIM

A. Introduction: characterisation of the dispute

4.1 The Parties agree that it is for the Tribunal to characterise the dispute before it³⁴³. The United Kingdom's position on characterisation, as set out at paragraphs 4.3-4.9 of its Counter-Memorial, is that the dispute that Mauritius seeks to put before this Tribunal has as its principal concern the long-standing question of territorial sovereignty over the BIOT.

4.2 The picture that Mauritius seeks to portray in Chapter 7 of its Reply is quite different. There, the dispute over sovereignty is repeatedly characterised as “incidental to” or “ancillary to” or merely one necessary facet of a dispute arising under UNCLOS, and the Tribunal is said to have jurisdiction on that basis³⁴⁴. But Mauritius' characterisation is plainly inaccurate. The diplomatic record demonstrates the existence of a well-established dispute over sovereignty that goes back several decades. With the service of its Notification and Statement of Claim in this case, Mauritius has sought to shoehorn that dispute into the framework of UNCLOS. The sovereignty dispute does not then somehow become incidental to an UNCLOS dispute. On any true characterisation, the sovereignty dispute remains at the very heart of the dispute in the present proceedings.

4.3 Indeed, even on Mauritius' characterisation of its claim, the sovereignty dispute constitutes the foundation of the claim, as opposed to some incidental or ancillary issue. The dispute is said to comprise two essential aspects, of which the first and “most fundamental” is the “entitlement of the UK to proclaim a ‘Marine Protected Area’ around the Chagos Archipelago”³⁴⁵. It is this “most fundamental” issue that is reflected at paragraph 1 of the Relief, where the declaration sought by Mauritius is that: “The United Kingdom is not

³⁴³ See UKCM, paras. 4.1-4.2, and MR, para. 7.6.

³⁴⁴ See e.g. MR, paras. 7.3, 7.8, 7.11, 7.20, 7.24, 7.47.

³⁴⁵ MR, para. 7.7.

entitled to declare an ‘MPA’ or other maritime zones because it is not the ‘coastal State’ within the meaning of inter alia articles 2, 55 and 76 of the Convention” (emphasis added)³⁴⁶.

4.4 And the wording of the declaration sought by Mauritius demonstrates how the purported UNCLOS claim is constructed on the foundation stone of the sovereignty dispute. This declaration is not sought by reference to some alleged breach by the United Kingdom of some provision of UNCLOS in proclaiming the MPA. Rather, it is predicated solely on a determination that the United Kingdom “is not the ‘coastal State’”. The point is inescapable: it does not matter how Mauritius seeks to characterise its claim, or how many times the sovereignty dispute is said to be “incidental” or “ancillary”, the position remains that a determination of the sovereignty dispute is fundamental to the primary relief that Mauritius seeks.

4.5 Put another way, the question must be asked as to what else there is to Mauritius’ case on entitlement to declare an MPA other than determination of the sovereignty issue or, likewise, what law of the sea issues does the Tribunal actually have to decide? No doubt Mauritius can seek to add complexity, but the short answer is nothing/none.

4.6 It follows that even a court or tribunal under Part XV were to have jurisdiction to determine disputed sovereignty over land disputes where such disputes arose incidentally in the context of a maritime delimitation claim (which the United Kingdom does not accept³⁴⁷), and even if such jurisdiction could somehow be extended to a case where such sovereignty disputes arose incidentally in the context of any UNCLOS claim (which is plainly wrong and unsupported by authority³⁴⁸), Mauritius’ claim to jurisdiction over the sovereignty dispute could not succeed. The sovereignty issue is in no sense “incidental”.

4.7 This leads to a second point on characterisation. Mauritius seeks to characterise this dispute as a so-called “mixed dispute”. Yet it is not a mixed dispute (as that term has generally been used and understood in the context of law of the sea disputes). As the Tribunal is well aware, there is a debate as to whether a court or tribunal under Part XV of the Convention can decide mixed disputes, i.e. disputes over maritime boundaries that raise

³⁴⁶ MR, p. 237.

³⁴⁷ UKCM, para. 4.66, and see further paras. 4.39-4.42 below.

³⁴⁸ UKCM, paras. 4.55-4.62, and see further paras. 4.32-4.37 below.

incidental issues of territorial sovereignty. The United Kingdom's position is that the Tribunal need not, and should not, enter into that debate because Mauritius' claim does not give rise to any such mixed dispute³⁴⁹. Mauritius' position in its Reply is that the concept of mixed disputes is not a term of art, and that the concept would comprise a dispute as to sovereignty over a given territory wherever a state exercised rights as a coastal State within UNCLOS³⁵⁰. However:

- a. The jurisdictional debate, however it may be identified, has been concerned with the possibility of determining territorial disputes where these arise in the context of maritime delimitation. It is in this context that the views on which Mauritius relies, e.g. of Judges Rao and Wolfrum, have been voiced (see further at paragraph 4.34 below).
- b. Leaving to one side the differing views that have been espoused in that debate, there has been no hint of any debate as to whether an equivalent jurisdiction could be asserted wherever a coastal State sought to exercise rights granted under the Convention. The simple point is that Mauritius is seeking to give the concept of mixed disputes a new, far wider – and unsupported – scope and meaning.
- c. Moreover, the Mauritian concept of mixed disputes knows no practical limits. It is recalled that numerous (sixty four) articles of UNCLOS use the term “coastal State”³⁵¹. On Mauritius' reasoning, wherever one or more of these provisions is relied on in the context of a given claim, a court or tribunal will have jurisdiction under Part XV to resolve all or any disputes over sovereignty to determine whether State A is indeed the ‘coastal State’, as opposed to State B.

4.8 In its Reply, Mauritius nonetheless contends that “there is ample authority for the proposition that a dispute regarding whether a State is entitled to proclaim an exclusive economic zone may both fall within Part XV and incidentally raise the question of

³⁴⁹ See UKCM, paras. 4.55-4.60.

³⁵⁰ MR, para. 7.20.

³⁵¹ This is without including sub-articles. The articles, limited to substantive provisions of the Convention, are: 2, 5, 6, 7, 14, 16, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 35, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 70, 71, 73, 75, 76, 77, 78, 79, 81, 82, 84, 85, 98, 111, 116, 122, 142, 161, 208, 210, 211, 218, 220, 228, 231, 234, 245, 246, 247, 252, 253, 254, 275. To this may be added the many equivalent references to the coastal State in the 1995 UN Fish Stocks Agreement.

sovereignty over ‘disputed islands’”³⁵². However, only one authority is relied on – a passage from a 1997 paper by Professor Boyle, that appears to have become a mainstay of this aspect of Mauritius’ case³⁵³.

4.9 Given the emphasis placed by Mauritius, the Tribunal is invited to re-read this passage with particular care. Professor Boyle does no more than suggest that, where an invalid claim is made to an EEZ contrary to article 121(3) UNCLOS, a resulting dispute will fall within jurisdiction under Part XV. That does not suggest jurisdiction over a new or greatly expanded category of mixed dispute. Rather, an EEZ cannot be declared around rocks “which cannot sustain human habitation or economic life of their own”. In order to determine whether a given territory falls outside article 121(3), and hence can sustain a claim to an EEZ, a court or tribunal under Part XV would not be called upon to decide any underlying issue as to who has sovereignty over the given territory. It would need merely to determine whether the territory was or was not a rock within article 121(3). This seems to be the approach of the Philippines in its case against China.

4.10 Mauritius also passes over one of the key arguments in favour of jurisdiction over mixed disputes (as the concept is generally understood). As stated by Judge Rao: “If a court or tribunal were to refuse to deal with a mixed dispute on the ground that there are no substantive provisions in the Convention on land sovereignty issues, the result would be to denude the provisions of the Convention relating to sea boundary delimitations of their full effect and of every purpose and reduce them to an empty form.”³⁵⁴ No such argument can be made in support of Mauritius’ radical concept of mixed disputes. The numerous provisions on rights or obligations of coastal States would not somehow be denuded by a failure to recognise Mauritius’ position. To get its argument off the ground, Mauritius would need to point to a provision on coastal States that somehow parallels articles 15, 74 and 83 of the Convention. It cannot do so. There is none.

³⁵² See MR, para. 7.20, referring back to MR, para. 7.7. Reference is also made at MR, para. 7.7, to the 2006 speech of Judge Wolfrum, but this is in support of a different point. It is noted in passing that the Tribunal is not assisted by Mauritius characterising the United Kingdom’s reference to Judge Wolfrum’s speech at UKCM, para. 4.58, as “citing with approval”.

³⁵³ See MR, para. 7.7, referring to Boyle, “Dispute Settlement and the Law of the Convention: Problems of Fragmentation and Jurisdiction”, 46 *ICLQ* 37, at p. 49 (1997). See also MM, para. 5.30. This passage was also heavily relied on by Mauritius in the context of the bifurcation hearing of 11 January 2013.

³⁵⁴ P. Rao, “Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures”, MR, Annex 114, at p. 891.

4.11 Ultimately, the following question must be asked: if Mauritius were correct in its position as to the extent of jurisdiction under Part XV, which contested territorial issue involving some island or mainland with a coastline could not be presented as a claim under UNCLOS whenever (as it inevitably would) a coastal State exercised some form of right falling within one of the numerous articles of UNCLOS that establish the rights of the coastal State?

4.12 The answer, it is submitted, is that all such territorial issues could be so presented. In other words, Part XV of UNCLOS, far from being confined to settlement of “all issues relating to the law of the sea” (as follows from the object and purpose as indicated by the Preamble to UNCLOS³⁵⁵), would in fact establish a system for the compulsory settlement of all territorial disputes over islands or mainland territories with a coastline. That, however, is not what the States Parties to UNCLOS agreed to. Had there been an intention to agree to such a radical and extended jurisdiction, this would inevitably be reflected in the *travaux* to the Convention, its text, abundant commentary, State practice, and also case law. Yet, it is nowhere to be found³⁵⁶.

B. The Basis of the Tribunal’s Jurisdiction under Part XV UNCLOS

(i) Articles 286-288 UNCLOS determine the scope of jurisdiction under Part XV

4.13 The United Kingdom’s case on the meaning of articles 286-288 is set out at paragraphs 4.12-4.20 of its Counter-Memorial. The United Kingdom reiterates its basic position that disputes as to the interpretation or application of the principles and rules on which Mauritius’ sovereignty claim relies – including in particular principles as to self-

³⁵⁵ It is also recalled that land and maritime delimitation are “two distinct areas of the law, to which different factors and considerations apply”. See *Case concerning the Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, at p. 421, para. 238.

³⁵⁶ It is no answer to assert that Mauritius’ case is *sui generis*. Either Part XV establishes the broad jurisdiction that Mauritius contends for or it does not. It is noted, however, that Mauritius mis-characterises the United Kingdom’s position in asserting that: “It [the UK] appears to accept that this case is *sui generis*”. MR, para. 7.48. The United Kingdom has merely noted that any prospective claimant (in relation to e.g. the Diaoyu/Senkaku islands, the Falkland Islands, South Georgia and the South Sandwich Islands, parts of Antarctica, Dok-do/Takeshima, the Spratlys, Paracels or other features in the South China Sea, Belize, Sabah, Tromelin, the Hala’ib Triangle, Abu Musa, Western Sahara, Mbanie Island, Mayotte, Perejil Island) could likewise argue that its claim was *sui generis*. See UKCM, para. 4.61.

determination, territorial integrity and *uti possidetis* – are not disputes concerning the interpretation or application of UNCLOS within article 288(1).

4.14 In its consideration of article 288(1), Mauritius claims that both “essential aspects” of the dispute are properly characterised as falling within this provision i.e. as “concerning the interpretation or application” of the Convention³⁵⁷. As noted in section A above, the first and “most fundamental” such aspect is said to be the “entitlement of the UK to proclaim a ‘Marine Protected Area’ around the Chagos Archipelago”. The second is said to be the “compatibility of that ‘Marine Protected Area’ with the Convention”.

4.15 The jurisdictional issues as to this second aspect – which arise principally by reference to articles 283 and 297 UNCLOS – are considered further in Chapters VI and VII below in light of the issues raised in Mauritius’ Reply. However, the United Kingdom maintains its position that all of the claims made by Mauritius (i.e. including this second aspect) either concern or stem from the claim to sovereignty, which is the real issue in dispute, and hence fall outside article 288(1)³⁵⁸.

4.16 As to the first and “most fundamental” aspect to the dispute, Mauritius makes two points in its consideration of article 288(1).

4.17 First, Mauritius relies on the remarks of Professor Boyle, already considered in section A above, in support of an extended interpretation of article 288(1)³⁵⁹. Those remarks do not support the case on jurisdiction for which Mauritius contends.

4.18 Secondly, the dispute is said to concern rights and obligations under the Convention “albeit that those rights or obligations can only be properly interpreted in light of general rules of international law and specific legal undertakings made by the UK”³⁶⁰. This is not, however, an accurate characterisation of the task that Mauritius is asking this Tribunal to perform. The principal issue in the claim as formulated by Mauritius is not how the term ‘coastal State’ is to be interpreted, but rather who the coastal State is. That issue, in turn, does not turn on the interpretation (or application) of any provision under the Convention, but

³⁵⁷ MR, para. 7.7.

³⁵⁸ See UKCM, paras. 4.1-4.10, 4.78.

³⁵⁹ MM, para. 7.7.

³⁶⁰ MR, para. 7.8.

rather on the interpretation and application of various principles and alleged undertakings wholly unrelated to the law of the sea, including in particular the principle of self-determination.

4.19 Mauritius also criticises the United Kingdom’s reference in its Counter-Memorial to article 288(2) UNCLOS – on the basis that United Kingdom is seeking to turn article 288(2) from a simple conferral of jurisdiction clause into a substantive limitation on the operation of Part XV³⁶¹. The United Kingdom’s argument is, however, misrepresented. The United Kingdom’s position is that (i) jurisdiction in relation to the sovereignty claim (however Mauritius may seek to present it as an UNCLOS claim) cannot be established under article 288(1); and (ii) nor can the claim be fitted within the criteria set by article 288(2)³⁶². Hence, the Tribunal lacks jurisdiction. As to article 288(2), the United Kingdom has simply noted the unarguable fact that jurisdiction cannot be established by reference to this provision.

4.20 In this last respect, it is recalled that article 288(2) only confers jurisdiction where two criteria are met, i.e. it confers jurisdiction only “over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention” (emphasis added), and only then where the agreement in question provides for jurisdiction under Part XV. For present purposes, it is the first of these two criteria that is to be emphasised. Even where parties to a treaty might expressly opt for resolution of any disputes thereunder pursuant to Part XV of UNCLOS, that jurisdictional agreement would be inoperative under Part XV unless the treaty in question “related to the purposes of” UNCLOS.

4.21 In other words, even if principles of self-determination (or the alleged undertakings on which Mauritius relies³⁶³) were codified in a treaty providing for resolution of disputes pursuant to Part XV, a court or tribunal under Part XV would lack jurisdiction. Yet Mauritius argues that such a court or tribunal would nonetheless have such jurisdiction under the Convention-specific wording of article 288(1) (providing of course the dispute was formulated by the given claimant by reference to a provision of UNCLOS concerned with the

³⁶¹ MR, paras. 7.9-7.10.

³⁶² At para 4.18 of the UKCM, the United Kingdom said: “Only if the other rules of international law that Mauritius asserts in Chapter 6 of its Memorial were contained in an agreement that provides for UNCLOS dispute settlement, and if the dispute had been submitted pursuant to that other agreement, would a court or tribunal have the enlarged jurisdiction contemplated by article 288(2). That is not the case here.”

³⁶³ See e.g. MM, paras. 6.37-6.52.

rights or obligations of a coastal State). The United Kingdom considers this to be untenable, and notes that article 288(2) forms part of the relevant context in defining the intended scope of article 288(1).

(ii) Jurisdiction under Part XV is not expanded by article 293(1)

4.22 At paragraphs 4.21-4.29 of its Counter-Memorial, the United Kingdom referred to a number of cases³⁶⁴ in support of the proposition that an applicable law provision (such as article 293(1) UNCLOS) cannot be used to enlarge the scope of a tribunal's jurisdiction as established by a given jurisdictional agreement (such as article 288(1)). The case law referred to is said to be "uncontroversial" in Mauritius' Reply³⁶⁵.

4.23 Mauritius' position would thus now appear to be that, consistent with the cases referred to by the United Kingdom, article 293(1) could in no way extend the scope of jurisdiction as established by article 288(1)³⁶⁶. Indeed, any competing contention would be contrary to the wording of article 293(1), which is predicated on the prior existence of jurisdiction: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention" (emphasis added).³⁶⁷

4.24 At the same time, however, Mauritius' argument on the intended scope of article 288(1) seeks to rely on article 293(1) and the reference in that provision to "other rules of international law not incompatible with this Convention" as potentially applicable law. The argument, put in simple terms, appears to be that Mauritius' interpretation of jurisdiction under article 288(1) so as to include the interpretation and application of e.g. principles of

³⁶⁴ *MOX Plant case*, Order of 24 June 2003, at para. 19 (**Authority 13**); *Eurotunnel (Channel Tunnel Group and France-Manche v. UK and France)*, Partial Award of 30 January 2007, ILR 132, 1, at para. 152; *Case concerning the OSPAR Convention*, Award of 2 July 2003, XXIII RIAA 59, paras. 84-85; *Application of the Genocide Convention, Judgment (Merits)*, ICJ Reports (2007), para. 147.

³⁶⁵ MR, para. 7.17.

³⁶⁶ Cf. the position adopted by Mauritius at MM, paras. 5.32-5.33. There, it was argued specifically by reference to article 293(1) that an Annex VII tribunal can exercise jurisdiction over alleged violations of the UN Charter and obligations derived from General Assembly resolution 1514(XV).

³⁶⁷ See also e.g. the Joint Separate Opinion of Judge Wolfrum and Judge Cot, para. 7, in *The "ARA" Libertad Case (Argentina v. Ghana)*, Order of 15 December 2012. (UKCM, Authority 41)

self-determination is confirmed by article 293 which in turn mandates the application of “other rules of international law”.

4.25 In so far as Mauritius is not in fact seeking to enlarge the scope of a jurisdictional provision by reference to an applicable law provision, it seems to assume that the “other rules of international law” to which article 293(1) refers comprise rules of international law on self-determination etc or the alleged undertakings on which Mauritius seeks to rely. Consistent with the conclusions of the International Court of Justice in the *Bosnian Genocide* case (to which Mauritius now also refers³⁶⁸), the United Kingdom does not accept this. Article 293(1) permits reference to other rules of international law where there is a *renvoi* (see e.g. articles 74 and 83 UNCLOS), or where this follows from jurisdiction established under article 288(2), or so far as concerns secondary rules of general international law such as those on treaty interpretation and the responsibility of States³⁶⁹. While the United Kingdom’s position is that article 293 does not extend to the limits put forward by Mauritius, it is also noted that Mauritius mis-characterises the United Kingdom’s position. It is stated in the Reply that: “Accepting the UK’s argument would mean that *no* principles of international law beyond the Convention could ever be argued before a Court or Tribunal having jurisdiction under Part XV unless those principles were independently contained in an agreement of the type contemplated by Article 288(2)”³⁷⁰. The United Kingdom’s interpretation does not restrict article 293(1) in this way.

4.26 While Mauritius relies on paragraph 155 of the judgment of ITLOS in *MV Saiga* (No. 2), the application in that case of principles on use of force in the arrest of a vessel is in no sense analogous to what is sought in the current case³⁷¹. The 1982 Convention of course deals with the arrest of vessels (unlike, of course, issues of territorial sovereignty). As to the use of force in an arrest, the Convention does not, as the Tribunal stated, contain express provisions. However, the Tribunal was able to have recourse to the principles relevant to the determination of the matter before it given that, as it held, considerations of humanity apply in the law of the sea. Moreover, as appears from paragraph 156 of the judgment, which Mauritius does not cite, the Tribunal made clear that it was applying “principles [that] have

³⁶⁸ *Application of the Genocide Convention*, Judgment (Merits), ICJ Reports (2007), para. 149; at UKCM, para. 4.30; also MM, para. 7.14.

³⁶⁹ UKCM, paras. 4.32-4.35.

³⁷⁰ MM, para. 7.15.

³⁷¹ MM, para. 7.12.

been followed over the years in law enforcement operations at sea” in the context of the arrest of the MV Saiga³⁷². The relevant passage from the judgment is as follows:

“155. In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. “I’m Alone” case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark - United Kingdom, 1962), I.L.R., Vol. 35, p. 485*). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1(f), of the Agreement states:”

4.27 The Tribunal’s reference in *MV Saiga (No. 2)* to considerations of humanity that apply in the law of the sea / principles commonly applied in law enforcement operations at sea in no way supports Mauritius’ reliance on article 293(1) to achieve the application of principles of self-determination etc so as to determine a long-standing dispute over territorial sovereignty.

4.28 Mauritius’s reliance on the arbitral award in *Guyana v. Suriname* is no more apposite³⁷³. As the Annex VII tribunal there made clear, it was having to look at a closely confined issue on use of force in the context of a long-running maritime delimitation dispute, as to which the parties had specific obligations under articles 74(3) and 83(3) UNCLOS with

³⁷² *M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, para. 156. (**Authority 9**)

³⁷³ MM, para. 7.12.

respect to entering into provisional arrangements and likewise “not to jeopardize or hamper the reaching of the final agreement”. Thus, the tribunal explained:

“This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a “border incident” or as “law enforcement activity”, may be considered incidental to the real dispute between the Parties.”³⁷⁴

4.29 In addition, as to Mauritius’ reliance on *Guyana v. Suriname*:

- a. The Annex VII tribunal in its award confirmed its jurisdiction over the alleged unlawful conduct of Suriname by reference to articles 74(3) and 83(3) UNCLOS – an avenue that is evidently not open to the Tribunal in this case³⁷⁵.
- b. The tribunal in *Guyana v. Suriname* was merely following the approach of ITLOS in *MV Saiga (No. 2)* which, as noted above, is of no assistance to Mauritius. Further, Mauritius cannot be contending that the tribunal in *Guyana v. Suriname* sought to define the extent of its jurisdiction by reference to article 293(1), not least because that would be inconsistent with the various cases that the United Kingdom has relied on and that are now characterised by Mauritius as “uncontroversial”³⁷⁶.
- c. When it came to asserting jurisdiction over disputed land sovereignty, i.e. the issue on jurisdiction in the current case, the tribunal in *Guyana v. Suriname* expressly did not address this controversy³⁷⁷.

4.30 Against this backdrop, the United Kingdom returns to the application of article 288(1) in this case, i.e. the question of whether Mauritius’ sovereignty claim falls within the jurisdiction of a court or tribunal under article 288(1).

³⁷⁴ *Maritime Delimitation (Guyana v. Suriname), Jurisdiction and Merits*, Award of 17 September 2007 (2008) 47 ILM 166, at para. 410, and see also para. 406. (UKCM, Authority 27)

³⁷⁵ *Ibid.*, para. 406.

³⁷⁶ *Ibid.*; cf. MR, para. 7.17.

³⁷⁷ *Maritime Delimitation (Guyana v. Suriname), Jurisdiction and Merits*, Award of 17 September 2007 (2008) 47 ILM 166, at para. 308. (UKCM, Authority 27)

C. The absence of jurisdiction over Mauritius' sovereignty claim

(i) The issues that the Tribunal is called upon to determine

4.31 It is clear from Mauritius' Reply that there is no debate between the Parties as to the issues that this Tribunal would have to decide in order to determine the purported UNCLOS claim before it. It is recalled that these comprise claims:

- a. That the detachment of the Chagos Archipelago was contrary to a right of self-determination that Mauritius is entitled to assert vis-à-vis the United Kingdom in respect of events dating from 1965³⁷⁸;
- b. That there was no valid agreement to the detachment of the Chagos Archipelago³⁷⁹;
- c. That Mauritius has continuously asserted its sovereignty over the Chagos Archipelago and that the United Kingdom has recognised that sovereignty in certain respects³⁸⁰;
- d. That Mauritius thus has retained sovereignty over the Chagos Archipelago and is the (or possibly a) coastal State in respect of the Chagos Archipelago³⁸¹;
- e. That the United Kingdom has in any event given a series of binding undertakings that deny to the United Kingdom the entitlement to act as the coastal State within the meaning of the 1982 Convention, and that Mauritius is on this separate ground entitled to avail of itself of the rights of a coastal State³⁸².

³⁷⁸ MM, paras. 6.10-6.24.

³⁷⁹ MM, paras. 6.25-6.30.

³⁸⁰ MM, paras. 6.31-6.34.

³⁸¹ MM, paras. 6.34-6.36.

³⁸² MM, paras. 6.37-6.52.

(ii) Application of article 288(1)

4.32 Mauritius' case on the application of article 288(1) is made almost exclusively by reference to article 298(1)(a)(i) UNCLOS³⁸³. In short, Mauritius puts forward the *a contrario* argument that has been formulated in the context of mixed disputes (i.e. disputes over maritime boundaries that raise incidental issues of territorial sovereignty). It is said that there is, in article 298(1)(a)(i), a specific and limited exclusion of “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory” and that, unless the option under that provision is exercised to exclude such disputes from the scope of Part XV, such disputes otherwise fall within Part XV³⁸⁴.

4.33 There are four points to be made in response.

4.34 First, article 298(1)(a)(i) is not on point. Article 298(1)(a)(i) deals solely with “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles”. This provision, with its subsequent reference to disputes over land territory in the context of conciliation, has led to the *a contrario* interpretation in support of jurisdiction over land disputes where these arise in the context of maritime delimitation as follows:

a. In the words of Judge Wolfrum: “This³⁸⁵ may be further evidenced by a reading *a contrario* of article 298, paragraph 1(a), namely, in the absence of a declaration under article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal.”³⁸⁶

b. In the words of Judge Rao: “Even a mixed dispute, referred to in article 298,

³⁸³ See MR, paras. 7.23-7.47.

³⁸⁴ See e.g. MR, paras. 7.24-7.25.

³⁸⁵ This is a reference to the view that issues of sovereignty or other rights over continental or insular land territory, *which are closely linked or ancillary to maritime delimitation*, concern the interpretation or application of the Convention and therefore fall within its scope.

³⁸⁶ R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, emphasis added. (UKCM, Annex 78)

paragraph 1(a)(i), involves, both by way of implication of what is provided for in the said article and also by way of necessary intendment of the Convention, the interpretation or application of the Convention and attracts, consequently, the procedures under Part XV. Any other view would render articles 15, 74 and 83 ineffective and should be eschewed.”³⁸⁷

- c. In the words of Judge Treves: “It is that the provision [article 298(1)(a)(i)], if read *a contrario sensu*, may be an argument to support the view that, when a declaration excluding delimitation disputes from compulsory jurisdiction has not been made, such disputes are included with the scope of the compulsory jurisdiction of the competent court or tribunal, even when they “necessarily involve” the concurrent consideration of questions of sovereignty.”³⁸⁸

4.35 By contrast, article 298(1)(a) says nothing whatsoever about disputes concerning entitlements deriving from status as a coastal State. There is no equivalent *a contrario* interpretation to be made in respect of such disputes and jurisdiction over land territory disputes that might arise in that context. Mauritius fails to grapple with this basic difficulty. The simple point is that the Tribunal is being encouraged to enter into a highly controversial area that is not germane to the claim being brought.

4.36 Secondly, on a closer look, the *a contrario* argument undermines Mauritius’ case on jurisdiction.

- a. Let it be assumed for the purposes of argument that article 298(1)(a) is correctly interpreted as implying that, where there is no article 298(1)(a) declaration, a court or tribunal may rule on matters of territorial sovereignty that arise incidentally where there is a maritime delimitation dispute. If that is correct (it is not), it would follow that, in general terms, Part XV establishes a broad jurisdiction that encompasses “any unsettled dispute concerning sovereignty or other rights over continental or insular land territory”. If the jurisdiction of Part XV is indeed that broad, then the opt-out

³⁸⁷ P. Rao, “Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures”, MR, Annex 114, at p. 896, emphasis added.

³⁸⁸ T. Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?” in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77, emphasis added. (UKCM, Authority 104)

established by article 298(1)(a) is of critical importance. Without such an opt-out, many key States would not have signed or ratified the Convention³⁸⁹, as they would otherwise have had no option but to agree to Part XV jurisdiction over unsettled territorial disputes that might arise in the context of maritime delimitation.

- b. The key point is that there is no equivalent opt-out with respect to jurisdiction over land territory disputes that might arise in the context of disputes concerning entitlements deriving from status as a coastal State. This can only be because there is no general jurisdiction over land territory disputes that arise in this context (as opposed to the context of maritime delimitation). It is inconceivable that States Parties to the Convention would have agreed to the determination of matters of territorial sovereignty that arose in this broader context without an opt-out provision equivalent to that agreed in relation to maritime boundary disputes.
- c. Further, it is to be emphasised that even if a coastal State had made a declaration under article 298(1)(a), it would still be exposed to a claim that sought the determination of disputed land territory issues in the context of a dispute concerning entitlements deriving from its status as a coastal State. Article 298(1)(a) establishes an opt out with respect to “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitation, or those involving historic bays or titles”, nothing more. The coastal State would still need to make a further opt-out – but could not, because there is no equivalent opt-out provision. The absence of any such provision is a very obvious indicator that the radical jurisdiction that Mauritius contends for was neither intended nor established.

4.37 Mauritius has no answer to this point³⁹⁰. It cannot explain away the truly radical but also compulsory nature of the broad jurisdiction that it advocates. It likewise cannot explain why it is the lone voice (whether in terms of State practice or commentary) in support of such radical but compulsory jurisdiction.

³⁸⁹ See e.g. M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, pp. 87-88, para. 297.1. (UKCM, Authority 85.)

³⁹⁰ Cf. MR, para. 7.38, where it is asserted that: “No broader opt-out was included because no consensus could be reached that such an opt-out was desirable or necessary,” No support of any kind is given for that assertion.

4.38 Thirdly, the proponents of the *a contrario* interpretation and the resultant exercise of jurisdiction in mixed disputes do not appear to suggest that such jurisdiction is unlimited. Thus Judge Treves suggests that it would depend *inter alia* on which aspects were the prevailing ones, and on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention³⁹¹. For example, one might posit a maritime delimitation dispute between Guatemala and Belize. Assuming for the purposes of argument that such a dispute could be brought in principle within Part XV, the proponents of the exercise of jurisdiction in mixed disputes are not understood to say that, assuming the matter could be appropriately pleaded, there would also be Part XV jurisdiction over long-standing claims made by Guatemala to large areas of Belize mainland territory.

4.39 Fourthly, if it were appropriate to enter into the debate on jurisdiction over mixed disputes (and it is not), the reference in article 298(1)(a)(i) to unsettled disputes concerning sovereignty or other rights over continental or insular land territory does not have the marked interpretative impact that the proponents of jurisdiction over mixed disputes have argued for. In this respect, the United Kingdom remains of the view that the proviso to article 298(1)(a)(i) merely clarifies that the general exclusion of unsettled territorial sovereignty disputes from compulsory dispute settlement also applies in the context where such a dispute would fall for consideration (not determination) in the context of mandatory conciliation. It is to be emphasised that the scope of jurisdiction of a conciliation commission to consider matters under Part XV may well be broader than the jurisdiction of a court or arbitral tribunal under Part XV to make binding determinations, as articles 297(2)(b) and 297(3)(b) demonstrate.

4.40 In this respect it is also recalled that, in its earlier versions, article 298(1)(a)(i) (then article 297(1)(a)) provided not for conciliation but rather “a regional or other third-party procedure entailing a binding decision”³⁹². The need for the clarification in such circumstances was all the more evident, given the distance that was being placed between the Part XV procedure and the ultimate regional or other third-party procedure that would provide for resolution of the dispute. The proviso thus clarified that this regional or other

³⁹¹ T. Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?” in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77. (UKCM, Authority 104) See further UKCM, paras. 4.67-4.68.

³⁹² M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p.113, para. 298.9. (MR, Annex 94)

third-party procedure would be subject to the same jurisdictional limits as would otherwise be the case under Part XV³⁹³. This interpretation is also consistent with the complete absence in the Convention of substantive provisions dealing with sovereignty over islands or other land territory (an issue that, in Professor Oxman's words, can hardly be regarded as incidental or ancillary³⁹⁴).

4.41 The doctrinal support for this position cannot be dismissed as "the views of a handful of commentators (many of whom served on national delegations)"³⁹⁵. Indeed, such dismissive language is quite out of step with the views of even those that support jurisdiction over mixed disputes, such as Judge Rao, who notes how the contrary chain of reasoning has its attractions and cannot be dismissed lightly³⁹⁶.

4.42 The United Kingdom remains firmly of the view that this Tribunal need not and should not enter into the debate on mixed disputes to decide this case. However, in so far as this issue does arise for consideration, the United Kingdom relies on the views expressed by Adede (relied on by Mauritius, but without citing the relevant passage of Adede's monograph)³⁹⁷, Churchill³⁹⁸, Elferink³⁹⁹, Guillaume⁴⁰⁰, Gustafson⁴⁰¹, Irwin⁴⁰², Kittichaisaree⁴⁰³, Oxman⁴⁰⁴, Pinto⁴⁰⁵, Smith⁴⁰⁶, Sohn⁴⁰⁷, Talmon⁴⁰⁸, Thomas⁴⁰⁹, Torres Bernárdez⁴¹⁰, Weckel⁴¹¹, and Yee⁴¹².

³⁹³ See also the ICNT at MR, para. 7.30.

³⁹⁴ B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session" (1981) 75 AJIL 211, 233 fn. 109. (UKCM, Authority 86)

³⁹⁵ Cf. MR, paras. 7.19, 7.47.

³⁹⁶ P. Rao, "Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures", MR, Annex 114, at p. 890.

³⁹⁷ A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, pp. 132, 159. (**Authority 20**) Cf. MR, para. 7.4.

³⁹⁸ Churchill, "The Role of the International Court of Justice in Maritime Boundary Delimitation", in Elferink and Rothwell, *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) p. 136. (UKCM, Authority 53)

³⁹⁹ Elferink, "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?" (2001) 32 *Ocean Development & International Law* 169, 172. (**Authority 26**)

⁴⁰⁰ Guillaume, *La Cour internationale de Justice à l'aube du XXIème siècle. Le Regard d'un juge* (2003), pp. 300-301. (UKCM, Authority 67)

⁴⁰¹ L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (1984) 24, UKCM Authority 100. Cf. MR, para. 7.45, referring to – and seeking to make much of – editorial changes in the 2010 edition. The 1984 edition may be taken as reflecting a contemporaneous view by a (if not the) central negotiator of Part XV.

⁴⁰² 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. (UKCM, Authority 73)

⁴⁰³ K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP 1987) 140. (UKCM, Authority 76)

⁴⁰⁴ B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session"

4.43 Mauritius also dwells on some length on the negotiating history of the Convention with a view to supporting its *a contrario* interpretation⁴¹³. However, the negotiating history does no more than confirm that there is no foundation whatsoever for the radical and unwarranted jurisdiction that Mauritius contends for in this case.

- a. The express wording excluding determination of land sovereignty issues (now in article 298(1)(a)(i)) had arisen in the context of a particular fear that, under the guise of a dispute relating to maritime delimitation, a party to a dispute might bring up a dispute involving claims to land territory or an island⁴¹⁴. As noted in the Counter-Memorial⁴¹⁵, as a practical matter, Negotiating Group 7 was focused on the area of delimitation and maritime boundaries and the settlement of disputes thereon, which most obviously brought to the fore issues of territorial sovereignty, and this explains why the point was made explicit in article 298(1)(a). Notwithstanding Mauritius' contentions to the contrary⁴¹⁶, maritime delimitation and dispute settlement were seen as inter-twined issues⁴¹⁷.

(1981) 75 AJIL 211, 233 fn. 109. (UKCM, Authority 86)

⁴⁰⁵ M.C. Pinto, "Maritime Boundary Issues and Their Resolution", in N. Ando et al (eds), *Liber Amicorum Judge Shigeru Oda*, p.1115 at p.1130. (**Authority 36**)

⁴⁰⁶ R.W. Smith, "The Effect of Extended Maritime Jurisdictions", in Koers and Oxman, *The 1982 Convention on the Law of the Sea: Proceedings*, Law of the Sea Institute (1984), at 343. (UKCM, Authority 96)

⁴⁰⁷ L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (1984) 24, UKCM Authority 100; L.B. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" (1983) 46 LCP 195. (UKCM, Authority 99)

⁴⁰⁸ S. Talmon. "The South China Sea Arbitration: Is there a case to answer?", *Bonn Research Papers in International Law*, No. 2/2014, 9 February 2014. (**Authority 39**)

⁴⁰⁹ R.W. Smith and B.L. Thomas, *Maritime Briefing*, vol. 2(4), "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes" (1998). (UKCM, Authority 97)

⁴¹⁰ S. Torres Bernárdez, "Provisional measures and Interventions in Maritime Delimitation Disputes", in Lagoni and Vignes, *Maritime Delimitation* (2006). (UKCM, Authority 103)

⁴¹¹ Weckel, report on the *Juno Trader* case, 2005 *R.G.D.I.P.* 230 : "le Tribunal peut être pénalisé par sa spécialité qui interdit notamment sa saisine au sujet de la possession d'îles". (UKCM, Authority 108)

⁴¹² S. Yee, "Conciliation and the 1982 UN Convention on the Law of the Sea", *ODIL*, 44, 315 at 324. (**Authority 42**).

⁴¹³ MR, paras. 7.28-7.41.

⁴¹⁴ See e.g. M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p.117, para. 298.20.

⁴¹⁵ UKCM, para. 4.66.

⁴¹⁶ MR, para. 7.40.

⁴¹⁷ A/CONF.62/C.2/SR.57, 57th meeting of Second Committee, at para 56 "Mr. LACLETA (Spain), speaking as the co-ordinator of the group of countries which had sponsored document NG7/2, said that..... It should be noted that the three issues still awaiting solution, namely, delimitation criteria, interim measures and the settlement of disputes, were closely interrelated." (**Annex 23**) See also at para 73, "Mr. SAMPER (Colombia) said that.....The three questions dealt with in the report [of the Chairman of Negotiating Group 7] — delimitation criteria, interim measures and the settlement of disputes—constituted a package deal. There was a link between the three issues which could not be broken" (**Annex 23**).

- b. The Tribunal is invited to note that in each and every extract from the *travaux* set out in this section of Mauritius' Reply⁴¹⁸, the topic under consideration was disputes over maritime delimitation (and those involving historic bays or titles). Whatever these extracts are intended to demonstrate, they cannot demonstrate that any delegates had in mind (still less intended) the radical extension of jurisdiction that Mauritius now contends for.
- c. The issue over whether the exclusion at article 298(1)(a)(i) was to be automatic or pursuant to declaration only is not determinative of anything⁴¹⁹. This is partly because, even if the wording that is now at article 298(1)(a)(i) were incorporated at article 297 by way of an automatic exclusion, Mauritius' concept of mixed disputes would be unaffected as this does not concern land sovereignty issues in the context of maritime delimitation. But it is also because there was no clear-cut rejection of an automatic limitation in the way that Mauritius seeks to portray. The President of the Conference merely wished to avoid changes of substance, in particular to what is now article 297, in view of time constraints and the need not to upset the delicate compromises that had been very carefully negotiated in article 297⁴²⁰.
- d. The debates of March-April 1979 that Mauritius highlights focused on whether there should be compulsory dispute settlement in respect of maritime delimitation at all. That fact offers no assistance to Mauritius in its contentions. There was a divergence of views, with certain States being opposed to any such compulsory dispute settlement⁴²¹. According to Mauritius, which highlights views expressed by Chile, "in Chile's view there was an 'ample majority' supporting a compulsory dispute settlement system which: (a) did not allow for the optional exclusion of maritime delimitation disputes; and (b) did cover questions of sovereignty over territory"⁴²². That may have been Chile's perception, but on any analysis this asserted ample majority did not prevail in terms of what it was supporting.

⁴¹⁸ MR, paras. 7.29-7.41.

⁴¹⁹ See e.g. MR, para. 7.33.

⁴²⁰ See the Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, 23 August 1980, paras. 6-7. (UKCM Annex 37)

⁴²¹ See e.g. the summary of the Chairman of Negotiating Group 7 at M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p.122, para. 298.24.

⁴²² MR, para. 7.36.

4.44 The key point is that the negotiating history shows how many States were extremely sensitive to matters relating to sovereignty in the context in which these had arisen, i.e. the context of maritime delimitation disputes. As noted above, it is inconceivable that they would have been willing to agree, or in fact agreed, to the determination of land sovereignty issues in other (and far more pervasive) contexts.

D. Conclusion

4.45 The United Kingdom maintains its position as to the absence of jurisdiction, as set out in Chapter IV of its Counter-Memorial, and recalls the inescapable need for a link between the substantive provisions of a given treaty that is invoked and the dispute as to which jurisdiction is sought⁴²³. That vital link is missing in this claim to sovereignty.

⁴²³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections)*, Judgment, 1 April 2011: Separate Opinion of Judge Koroma, para 7. (UKCM Authority 37)

CHAPTER V

MAURITIUS' CLAIM TO SOVEREIGNTY HAS NO MERIT

A. Introduction

5.1 Mauritius' central motive for initiating these proceedings is its hope that the Tribunal will find "that the UK does not have sovereignty over the Chagos Archipelago and is not the "coastal State" for the purposes of the Convention"⁴²⁴, or that it will in some way cast doubt on United Kingdom sovereignty over the BIOT.

5.2 The reason for including the present Chapter, as was the case with Chapter VII of the Counter-Memorial, is not to encourage the Tribunal to enter upon the question of sovereignty, but rather to show how far beyond the provisions of UNCLOS that question would take the Tribunal, as is apparent from the very nature of the arguments that Mauritius urges this UNCLOS Tribunal to grapple with. The present chapter illustrates the far-reaching scope of the sovereignty issue, as is also clear from Mauritius' written pleadings. In fact, the Tribunal is without jurisdiction over the question of sovereignty, as explained in Chapter IV above and in the Counter-Memorial⁴²⁵. As was the case with Chapter VII of the Counter-Memorial⁴²⁶, inclusion of the present Chapter in the Rejoinder is entirely without prejudice to the United Kingdom's position on jurisdiction. The Chapter is included so that Tribunal will be informed about the basis for the United Kingdom's sovereignty, given the unfounded assertions of Mauritius in this regard.

5.3 The United Kingdom hereby places formally on the record its strong objection to any suggestion that the matters covered by the present Chapter are in any way subject to decision by this Tribunal. On the contrary, in the United Kingdom's respectful submission, it would be wrong in law (and an excess of jurisdiction) for the Tribunal to enter upon these matters.

⁴²⁴ MR, para. 1.43. For some of the many references to sovereignty in the Reply, see MR, paras. 1.6(i); 1.44-1.46; 1.49; 1.50; 4.50; 4.79; 5.1; 5.31; 5.35; 5.38. The Memorial is similarly replete with such references.

⁴²⁵ UKCM, Chapter IV.

⁴²⁶ UKCM, para. 7.1.

5.4 In the Reply, Mauritius now seems to base its claim to sovereignty over the BIOT almost entirely on the application, in 1965 or 1968, of a right of self-determination of the people of Mauritius⁴²⁷. Yet it does not establish that any such right applied on 8 November 1965 (or indeed on 12 March 1968). Nor has it begun to show how, even if there had been a breach of that right, such breach could result in Mauritius having present title when self-evidently no such title was conferred on 12 March 1968. Mauritius no longer (no doubt with good reason) places any weight on the principle *uti possidetis juris*, which in fact supports United Kingdom sovereignty⁴²⁸.

5.5 Chapter 5 of the Reply develops two points. Parts II and III deal with self-determination, while Part III is headed “Mauritius is entitled to the rights of a coastal State based on the undertakings of the United Kingdom”. This reflects an inherent ambiguity running throughout Mauritius’ pleadings. On the one hand, it wants to say that the United Kingdom does not have sovereignty, and that Mauritius does (or at least “co-sovereignty”, whatever that may mean in the present context). On the other hand, it seems to appreciate that the Tribunal has no jurisdiction over the question of sovereignty, and seeks to construct an argument that skirts around the use of the term ‘sovereignty’. The very title of its Chapter 5 avoids the word ‘sovereignty’. But despite Mauritius’ linguistic contortions, there is no getting away from the fact that, the term ‘coastal State’ in UNCLOS means the State with sovereignty over the coastline⁴²⁹.

5.6 This Chapter responds to what little is new in Chapter 5 of Mauritius’ Reply. In addition, it notes some places where the Reply has failed to respond to the Counter-Memorial. It does not repeat the United Kingdom’s basic position on sovereignty, which is set out in the Counter-Memorial⁴³⁰.

⁴²⁷ MR, paras. 1.43-1.46.

⁴²⁸ UKCM, paras. 4.72-4.47.

⁴²⁹ Except as expressly extended to the entities referred to in article 305, paragraph 1(c), (d), (e) and (f).

⁴³⁰ UKCM, Chapter VII.

B. Mauritius has failed to engage with the arguments developed in the Counter-Memorial

5.7 Chapter 5 of the Reply fails to address the main point made by the United Kingdom in the Counter-Memorial, that it acquired sovereignty over the islands which now form the BIOT by cession from France in 1814, and has not subsequently relinquished sovereignty⁴³¹.

5.8 Mauritius likewise fails to respond to the United Kingdom's main arguments concerning the applicable principle of international law, *uti possidetis juris*⁴³². The principle fully supports the United Kingdom's position.

5.9 Instead, in seeking to argue that it has present-day sovereignty over the BIOT, Mauritius relies on the fact that the United Kingdom has undertaken to cede the BIOT to Mauritius under certain circumstances. As explained in the Counter-Memorial⁴³³, this argument has no merit. On the contrary, the United Kingdom's undertaking to cede the territory at some future date, an undertaking that Mauritius has welcomed, presupposes that the United Kingdom currently has sovereignty. Only a sovereign has title that can be ceded. *Nemo dat quod non habet*.

5.10 Mauritius returns repeatedly in the Reply to its reliance upon the supposed non-objection to its submission of *Preliminary Information* to the Commission on the Limits of the Continental Shelf. This was answered fully in the Counter-Memorial⁴³⁴, and Mauritius has made no response. It will be recalled that, among other things, the *Preliminary Information* submitted by Mauritius stated "that the Chagos Archipelago is and always has been part of its territory" and went on "to inform the Commission, however, that a dispute exists between the Republic of Mauritius and the United Kingdom over the Chagos Archipelago"⁴³⁵. There is nothing in the Reply on this matter that requires a further answer from the United Kingdom.

⁴³¹ UKCM, paras. 7.5-7.9.

⁴³² UKCM, paras. 7.42-7.47.

⁴³³ UKCM, paras. 7.48-7.50.

⁴³⁴ UKCM, paras. 7.51-7.58.

⁴³⁵ Para. 6 of the *Preliminary Information*, cited at UKCM, para. 7.55.

5.11 Mauritius gives no explanation for its failure to protest at the extension of many multilateral conventions to the BIOT⁴³⁶. This failure is particularly striking in the case of UNCLOS itself. The United Kingdom's instrument of ratification to UNCLOS, which was deposited with the UN Secretary-General on 25 July 1997, included the BIOT⁴³⁷. At that time Mauritius was already a State party to UNCLOS⁴³⁸. The Secretary-General would have circulated this information to all Member States by a depositary notification; the information also appears in *Multilateral Treaties Deposited with the Secretary-General* and on the UN Treaty website⁴³⁹. No State including Mauritius objected, though it is normal practice for a State claiming sovereignty over territory to do so.

C. Self-determination

5.12 To establish its own sovereignty over the BIOT, Mauritius now relies upon the proposition that the United Kingdom has violated the right of self-determination of the people of Mauritius. This argument too has no merit. But since Mauritius now places such emphasis on it, it seems appropriate to deal in the present section with certain lines of argument developed in the Reply.

5.13 A preliminary issue is the relevant event that, according to Mauritius, breached the right of self-determination. Mauritius, clearly concerned that it may not be able to show that the right was applicable on the date of the establishment of the BIOT (8 November 1965)⁴⁴⁰, seems now to suggest that the relevant event was the Independence of Mauritius (12 March 1968)⁴⁴¹. It was, of course on the earlier date that the BIOT was established; there was no change in the legal status of the BIOT on 12 March 1968.

⁴³⁶ UKCM, para. 7.61.

⁴³⁷ https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec.

⁴³⁸ Having ratified on 4 November 1994.

⁴³⁹ ST/LEG/SER.E/20:

https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec

⁴⁴⁰ MR, para. 5.4(iii): "the UK ... was on record as accepting and applying [the right] in certain circumstances before 1965, and certainly before 1968". See also MR, para 5.5.

⁴⁴¹ MR, para. 5.16.

5.14 Mauritius first seeks to show that “the right to self-determination was clearly established” in 1965. It begins by referring to “the view of some writers” that “the right can be dated back to the coming into force of the Charter”⁴⁴². Only one author is cited in support of this vague proposition (“dated back to”), Professor Oeter in the *Simma Commentary*. Neither the extracts cited by Mauritius⁴⁴³, nor a full reading of the piece⁴⁴⁴, supports the apparent suggestion that a right of self-determination came into being on 24 October 1945. Another author in the same *Commentary* writes that “[t]he principle of self-determination acquired its final shape through the practice of the UN.”⁴⁴⁵

5.15 Throughout Chapter 5 Mauritius cites selectively from numerous UNGA resolutions, without explaining their context or even indicating the votes by which they were adopted or the statements that were made in committee or plenary at the time. For example, Mauritius says that “[a]s long ago as 1950 the UN General Assembly referred to “the right of peoples and nations to self-determination”⁴⁴⁶, without drawing the Tribunal’s attention to the fact that the resolution in question was adopted by an unrecorded vote of 30 in favour and 9 against, with 13 abstentions and without pointing out that the Assembly was merely calling upon the ECOSOC to request the Commission on Human Rights “to study ways and means *which would ensure* the right of peoples and nations to self-determination”⁴⁴⁷. Similarly, Mauritius fails to indicate to the Tribunal that UNGA resolution 545(VI), which it cites at length, was adopted by a non-recorded vote of 42 in favour and 7 against, with 5 abstentions. The publicly available voting record for the various resolutions referred to by Mauritius in appendix 2 to Chapter 5 of its Reply is set out in the appendix to the present chapter. Virtually all of them were adopted by a divided vote, a fact not mentioned by Mauritius. It is not possible to assert the legal significance of such resolutions without much closer study than Mauritius has apparently done.

⁴⁴² MR, para. 5.6.

⁴⁴³ At footnote 464.

⁴⁴⁴ *Simma Commentary*, pp. 313-333. At p. 315, Oeter says “[i]t remains doubtful whether the formula in Art.1(2) of the UN Charter originally intended to codify self-determination as a legal right ...”.

⁴⁴⁵ Wolfrum, *Simma Commentary*, p. 115, MN 25, referring to D. Thürer, T. Burri, “Self-determination” in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012). Chapter 5 of the Reply relies heavily on citations from individual authors. See, for example para. 6.8 (Higgins, Crawford), but – however distinguished they may be – their opinions certainly do not make, and do not necessarily reflect, the existing law.

⁴⁴⁶ MR, para. 5.7.

⁴⁴⁷ UNGA res. 421 D (V) (emphasis added).

5.16 It is thoroughly misleading to suggest that, in the case of the two Covenants of 1966, “[t]he division of opinion between those who saw it as a political principle and those who maintained that it was a legal right were resolved early in the negotiations in favour of the latter.”⁴⁴⁸ That is a distortion and misunderstanding of what was a lengthy and complex treaty negotiating process, that only reached a conclusion with the adoption of the Covenants at the end of 1966 and their entry into force in 1976.

5.17 Mauritius concludes its tendentious account of the resolutions with the assertion that:

“a large number of resolutions, the 1960 Declaration, official statements, and the 1966 Covenants, all of which indicate practice and *opinio juris* that amounts to customary international law by the beginning, or at the very latest, by the middle of the 1960s, on the right of self-determination.”

5.18 This bold and self-serving assertion is built on shaky foundations. The “large number of resolutions”, including the 1960 Declaration, were mostly highly contested. The “official statements” are not further specified. The 1966 Covenants were adopted on 16 December 1966, and entered into force only on 3 January 1976/23 March 1976.

5.19 In the Counter-Memorial the United Kingdom made clear that, whatever the status of the self-determination principle in the 1960s, it did not accept it as a right at that time⁴⁴⁹.

5.20 In reply, Mauritius seeks to demonstrate that the United Kingdom did not “consistently” object to the development of the right. While admitting that the United Kingdom “did from time to time object to the “right” to self-determination while admitting the existence of a principle”⁴⁵⁰, it goes on to suggest that “its practice was inconsistent and its representatives sometimes spoke interchangeably about right and principle”. It suggests that the United Kingdom’s abstention on resolution 1514(XV) “was not an effective way of indicating objection to what was then a widely held view of the law”⁴⁵¹.

5.21 None of this shows that the United Kingdom accepted the principle as a right in the 1960s. What matters is not only the vote, whether abstention or against, or even in favour.

⁴⁴⁸ MR, para. 5.8.

⁴⁴⁹ UKCM, para. 7.17.

⁴⁵⁰ MR, para. 5.11.

⁴⁵¹ *Ibid.*

Statements upon adoption may be important. Even a vote in favour does not mean acceptance of each and every word in a resolution, or that it represents the law. There is nothing, for example, to suggest that the United Kingdom agreed that all the paragraphs of resolution 1514 (XV) reflected, still less created, international law.

5.22 In Part II of Chapter 5 of the Reply, Mauritius purports to show that the establishment of the BIOT “contravened the right of the people of Mauritius to self-determination”⁴⁵². It begins by repeating its mantra that “[t]he Chagos Archipelago has always been part of the territory of Mauritius”⁴⁵³, a proposition of United Kingdom constitutional law that is wrong⁴⁵⁴.

5.23 It then goes on to assert that the people of Mauritius did not “waive” their right to territorial integrity “by a free expression of their wishes”⁴⁵⁵. Mauritius’ attempt to show that Mauritius Council of Ministers’ agreement in November 1965 was vitiated by duress has no basis in fact, as was shown above⁴⁵⁶ and in the Counter-Memorial⁴⁵⁷.

5.24 As explained in Chapter II above, the documents upon which Mauritius relies for this ‘duress’ argument do not support its position. The main document relied upon in Mauritius’ pleadings is a Private Secretary covering note to briefing provided by the Secretary of State to the Prime Minister in advance of the latter’s meeting with the Mauritian Premier on 23 September 1965⁴⁵⁸. In fact, what matters is not that document, but what actually transpired at the meeting between the Prime Minister and Premier⁴⁵⁹.

5.25 There is no evidence whatsoever that the Premier was put under duress by the Prime Minister, certainly not in the sense in which that term is used in domestic or international law⁴⁶⁰. Sir Seewoosagur Ramgoolam may have felt personal political pressure at the time to

⁴⁵² Heading of Chapter 5, Part II.

⁴⁵³ MR, para. 5.22.

⁴⁵⁴ Paras. 2.6-2.25 above, and UKCM, paras. 2.19-2.32.

⁴⁵⁵ MR, paras. 5.23-5.26.

⁴⁵⁶ Paras. 2.26-2.52.

⁴⁵⁷ UKCM, paras. 7.35-7.40.

⁴⁵⁸ Paras. 2.42-2.44 above.

⁴⁵⁹ UKCM, para. 2.55.

⁴⁶⁰ UKCM, paras. 7.35-7.40. “The acts or threats, such as a physical threat to the representative or his or her family, or blackmail (more likely), must affect the representative as an individual, not as the representative of his or her state. Such coercion is therefore unlikely to be used in order to procure ratification”: A. Aust, *Modern Treaty Law and Practice* (Cambridge, 3rd ed., 2012), p. 277. (**Authority 21**) The example most often

come away from the 1965 Constitutional Conference with an agreement on Independence without a referendum because this was his party's policy. If a deployment in negotiations between political leaders of their respective understandings of the domestic political position and ambitions were to amount to duress or coercion for the purposes of international or domestic law, all politics and all negotiations between governments would infringe these principles. This cannot be right, for obvious reasons. Indeed, it is clear from the record of the meeting between the Prime Minister and Premier that the Premier did not agree to detachment in that meeting. Indeed, his agreement was not what was sought by the Colonial Office. What was sought was the agreement of the Council of Ministers, and this was not forthcoming until 5 November 1965.

5.26 In its Reply, Mauritius refers yet again to political statements by what it calls 'the international community'⁴⁶¹, and to its protests at the United Nations and elsewhere⁴⁶². These matters have already been dealt with in the Counter-Memorial⁴⁶³.

5.27 And finally, realizing that the *uti possidetis juris* principle is not on its side, Mauritius can say no more than that "the principle does not stand in the way of an insistence on full implementation of the right of self-determination in the case of Mauritius"⁴⁶⁴. Mauritius overlooks the fact that the territory of Mauritius at the time of independence did not include the BIOT. If Mauritius' arguments were to prevail, and the *uti possidetis juris* principle could be ignored whenever the territory of an entity had been altered at some point in the past, there would be very few new States indeed that would not be vulnerable to demands for territorial change and claims from their neighbours.

cited is the extreme pressure put on the President and Foreign Minister of Czechoslovakia in 1939 to get them to sign the treaty creating a German protectorate over Bohemia and Moravia on 14-15 March 1939 (Aust, loc. cit, p. 277). Another example of suggested coercion, given by the International Law Commission in the commentary to its draft articles on the law of treaties, is a threat to ruin a diplomat's career "by exposing a private indiscretion". (**Authority 32**) The record of the meeting between the Prime Minister and Premier Ramgoolam does not suggest there was any communication between the two that comes even remotely close to such examples.

⁴⁶¹ MR, paras. 5.27-5.30.

⁴⁶² MR, para. 5.31.

⁴⁶³ UKCM, paras. 2.80-2.88, 7.59-7.66.

⁴⁶⁴ MR, para. 5.34.

D. Conclusions

5.28 This Chapter has explained that in its Reply Mauritius added little, if anything, to what it said in the Memorial, and it has failed to respond properly or at all to the points made in Chapter VII of the United Kingdom's Counter-Memorial.

5.29 It is revealing that, at the end of the day, Mauritius cannot explain its position in legal terms. Its 'duress' argument has no basis in fact. It has all but abandoned reliance upon *uti possidetis juris*, the fundamental principle of international law governing title to territory upon independence. It resorts to saying that "[t]he position here is unique and there is no analogy which can be found"⁴⁶⁵. In fact, the opposite is true. The legal position is straightforward. The United Kingdom acquired sovereignty over the islands which now form the BIOT in 1814, by cession from France, and has not relinquished sovereignty. It has, however, undertaken to cede sovereignty to Mauritius if and when certain conditions are met.

⁴⁶⁵ MR, para. 5.36.

Appendix to Chapter V
Voting summary for General Assembly Resolutions referred to in Appendix II to Chapter 5 of
Mauritius' Reply

GA Resolution	Yes	No	Abstaining	Non-Voting	Membership at the time	UK vote
1573 (1960)	63	8	27	1	99	Abstained
1654 (1961)	97	0	4	2	103	
1724 (1961)	62	0	38	4	104	Abstained
1899 (1963)	84	6	17	4	111	No
2063 (1965)	86	1	7	23	117	
2073 (1965)	85	2	19	11	117	
2183 (1966)	96	0	3	23	122	
2230 (1966)	109	0	7	6	122	Abstained
2232 (1966)	93	0	24	5	122	Abstained
2238 (1960)	70	18	28	6	122	No
2302 (1967)	72	1	19	13	122	
2347 (1967)	Adopted without vote					
2353 (1967)	73	19	27	4	123	No
2355 (1967)	111	0	5	7	123	
2357 (1967)	86	0	27	10	123	Abstained
2372 (1968)	96	2	11	8	124	Abstained

PART THREE

JURISDICTION

Part Three responds to Mauritius' Reply as regards the absence of jurisdiction by virtue of articles 283 and 297 of the 1982 Convention.

Chapter VI confirms that the Tribunal has no jurisdiction over any of the claims because Mauritius has not met the requirements of article 283(1) of the 1982 Convention, notwithstanding the contentions in Mauritius' Reply. Mauritius and the United Kingdom never exchanged views "regarding the settlement by negotiation or other peaceful means" of the alleged dispute. The Reply emphasises wholly unconvincing sovereignty impediments to raising claims as to fishing rights in the bilateral consultations.

Chapter VII responds to Mauritius' arguments aimed at establishing that article 297(1)(c) of the 1982 Convention provides a jurisdictional basis for its non-sovereignty claims. In fact, article 297(1)(c) is limited to disputes about contravention of "specified international rules and standards for the protection and preservation of the marine environment", which is not what Mauritius alleges.

Chapter VII also responds to Mauritius' mistaken approach to article 297(3)(a), which excludes from compulsory jurisdiction the ban on commercial fishing within the MPA. Characterising the MPA or the fishing ban as measures intended to protect and preserve the marine environment does not change the ordinary meaning or the application of article 297(3)(a), nor does it bring the dispute within the terms of article 297(1)(c).

CHAPTER VI

THE TRIBUNAL IS WITHOUT JURISDICTION BECAUSE THE REQUIREMENTS OF ARTICLE 283(1) HAVE NOT BEEN MET

A. Introduction

6.1 In Chapter 4 of its Reply, Mauritius repeatedly asserts that it has met the requirements of article 283(1) of the Convention⁴⁶⁶. Mauritius also implies that it attempted to achieve a negotiated solution and that it only commenced proceedings under Part XV when there was no prospect of doing so. None of this is correct.

6.2 Mauritius relies in its Reply largely on the arguments already relied on in its Memorial, Written Observations of 21 November 2012 and at the hearing on bifurcation, adding only an analysis of the case-law on article 283(1). The United Kingdom has already demonstrated in Chapter V of its Counter-Memorial - with detailed reference to the documents relied on by Mauritius - that Mauritius had not established that it had met the requirements of article 283(1) in respect of either its ‘sovereignty’ or its ‘non-sovereignty’ claims⁴⁶⁷.

6.3 So far as concerns what is new in the Reply, this largely comes down to an elaboration of the claim that Mauritius raised a dispute over a lack of appropriate consultation prior to its Notification and Statement of Claim on 20 December 2010. As will be shown below, Mauritius’ complaints over the public consultation process and its refusal to consult any further over the MPA proposal through the bilateral process were never previously raised as disputes, whether under articles 2(3), 56(2), 64, or 66(2) of UNCLOS, or under UNCLOS in general, or as a dispute concerning the subject-matter of UNCLOS.

6.4 Mauritius also raises a substantive dispute concerning sedentary species under article 78 for the first time in its Reply. It need hardly be said that the requirements of article 283(1) are not met in respect of its new claim. Further, Mauritius now makes extensive use of

⁴⁶⁶ MR, paras. 4.1, 4.3(i) and (ii), 4.21, 4.24, 4.31, 4.40, 4.42.

⁴⁶⁷ UKCM, paras. 5.13-5.55.

United Kingdom internal documents disclosed by the Foreign Secretary to the claimant, Mr Bancoult, in the judicial review proceedings in *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin)⁴⁶⁸. In the context of article 283(1), these documents are used by Mauritius to support its argument that the United Kingdom was aware that Mauritius might bring a claim if a marine protected area was declared around the BIOT. As explained below, Mauritius has been threatening for years to bring its sovereignty claim before the United Nations or the International Court of Justice. United Kingdom officials did not in 2009 or 2010 understand that Mauritius had raised a dispute under UNCLOS: Mauritius certainly never said so, and cannot point to any record of having done so.

6.5 Indeed, in Chapter 1 of the Reply, Mauritius appears to admit that it never previously raised the claims it now makes. It there states that “[t]he UK Counter-Memorial offers a first effort by the UK to set out legal arguments and supporting evidence to justify its purported right to create the “MPA” around the Chagos Archipelago” and that “in many respects the arguments are presented for the first time to Mauritius”⁴⁶⁹. It goes on to say that the “UK’s pleading... has served to confirm that this is an environmental dispute, and allows Mauritius to refine its arguments on jurisdiction and on the merits.”⁴⁷⁰ However, raising a dispute in order to enter into an exchange of views “regarding its settlement by negotiation or other peaceful means” is precisely the purpose article 283(1) is intended to serve: it is not the function of the first round pleadings.

6.6 This Chapter responds to Mauritius’ analysis of the article 283(1) case-law in section B. It addresses Mauritius’ application of the law to the facts in section C.

⁴⁶⁸ As noted in Chapter III, the United Kingdom does not accept Mauritius’ assertion that all of these documents were in the “public domain” under the applicable rules of English civil procedure; cf. MR, para. 3.1. However, that is not a question for this Tribunal.

⁴⁶⁹ MR, para. 1.5.

⁴⁷⁰ MR, para. 1.27.

B. The requirements of article 283(1)

(i) The importance and function of article 283(1)

6.7 The importance and function of article 283(1) was stressed by Judge Wolfrum in the *M/V “Louisa”* case:

“27. The Tribunal has emphasized more than once the importance of an exchange of views amongst the parties (see, for example, *Order of 8 October 2003, Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, paragraphs 38 and seq. emphasized in the Separate Opinion by Judge Chandrasekhara Rao, who at paragraph 8 stated that the obligation to exchange views “is not an empty formality, to be dispensed with at the whims of a disputant.”). These negotiations have a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention.

28. As reflected in the jurisprudence of this Tribunal the obligation under article 283 of the Convention is not formality. As Judge Treves points out in his Dissenting Opinion, I had the privilege to read, the inclusion of the obligation to exchange views prior to the institution of proceedings as set out in article 283 of the Convention deviates from the procedural law under general international law. The way this provision has been applied in this case renders it meaningless.”⁴⁷¹

6.8 In the same case, Judge Treves stated:

“10. The requirement set out in article 283 of the Convention was introduced in order to facilitate the settlement of disputes without the need to resort to judicial or arbitral proceedings. It must be taken seriously, as the Tribunal has done in its jurisprudence. Of particular relevance to the present case are the occasions on which the Tribunal has had to decide on the prescription of provisional measures and, consequently, to determine *prima facie* its own jurisdiction or that of an arbitral tribunal duly seized under article 290, paragraph 5, of the Convention. In each of these cases, there had been a previous exchange of views between the parties. Thus, the question addressed in the Orders of the Tribunal was whether these could be deemed sufficient for the Applicant to conclude that all possibilities for reaching an agreement had been exhausted.”⁴⁷²

6.9 Mauritius argues in the introduction to Chapter 4 that it was not obliged by article 283, as properly interpreted, to refer expressly to the 1982 Convention and/or the specific

⁴⁷¹ *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum*, paras. 28-29. (**Authority 16**)

⁴⁷² *Ibid.*, *Dissenting Opinion of Judge Treves*, para. 10. (**Authority 16**)

provisions of the 1982 Convention which form the subject-matter of its claims in this arbitration⁴⁷³. It even appears to suggest that it could have engaged in an exchange of views to settle the dispute prior to invoking the dispute resolution procedures available under Part XV without raising a dispute in regard to the interpretation and application of the 1982 Convention⁴⁷⁴. In its lengthier legal analysis in section IV, Mauritius argues that article 283 “is not an onerous burden”⁴⁷⁵.

6.10 These arguments gloss over the essential point that article 283, in practical terms, requires as a first step communication by one party, received by the other party which results in a shared understanding as to what the dispute or disputes are and likewise that they are under the 1982 Convention. This is implicit from the requirement that the parties exchange views over its peaceful settlement or negotiation: they must have a shared understanding about what they are talking about in order to exchange views on it.

6.11 This is the thrust of the recent ICJ case-law on provisions similar to article 283(1), which the United Kingdom has set out in its Counter-Memorial, and also such case-law as there is directly on article 283(1)⁴⁷⁶ including the treatment of article 283 in *The Arctic Sunrise Case*⁴⁷⁷, and in Judge *ad hoc* Anderson’s Declaration, in which he stressed the importance and function of article 283 in the following terms:

“When a dispute arises concerning the interpretation or application of the Convention, article 283 calls for “an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means”. *The emphasis is more upon the expression of views regarding the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties. The main purpose underlying article 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it.* The Tribunal

⁴⁷³ MR, para. 4.2.

⁴⁷⁴ In its statement in paragraph 4.2 that “the UK maintains that, because Mauritius allegedly did not raise a dispute in regard to the interpretation or application of this Convention, it could not have engaged in an exchange of views to settle the dispute prior to invoking the dispute resolution procedures available under Part XV”.

⁴⁷⁵ MR, para. 4.67, relying.

⁴⁷⁶ UKCM, paras. 5.7-5.10, 5.12.

⁴⁷⁷ *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013 (**Authority 17**) at paras. 73-74. The *Note Verbale* to which the ITLOS refers is set out in full in the Request for the prescription of provisional measures under article 290, paragraph 5 of the United Nations Convention on the Law of the Sea, 21 October 2013, Annex 8. (**Authority 17**) It made express reference to the relevant articles of UNCLOS, the existence of a dispute on the interpretation or application of those articles, the possibility of arbitration and a possible means of settling the dispute (release of the vessel and crew).

has rightly noted in paragraphs 73 and 74 of the Order that there were several diplomatic exchanges between the parties before legal proceedings were instituted. Of particular relevance in this regard was the note verbale dated 3 October 2013 in which the Netherlands expressed the views that “there seems to be merit in submitting this dispute to arbitration under the United Nations Convention on the Law of the Sea” and that the Netherlands was considering the institution of arbitration proceedings “as soon as feasible.” Thus, the underlying purpose of article 283 appears *prima facie* to have been met: the question of admissibility will be for the Annex VII tribunal to determine finally.”⁴⁷⁸

(ii) Case law of the PCIJ and ICJ on the existence of a “dispute” and prior negotiation obligations

6.12 Mauritius invokes a considerable number of cases of the Permanent Court of International Justice and International Court of Justice concerning the existence of a “dispute” in support of the point that “[w]hether there exists an international dispute is a matter for objective determination”⁴⁷⁹, the proposition that it can rely on “the conduct of the Parties ... after the commencement of legal proceedings”⁴⁸⁰, that article 283 does not impose an “onerous burden”, and that it “may suffice that a discussion should have commenced”⁴⁸¹.

⁴⁷⁸ *Arctic Sunrise* judgment, para. 3 (emphasis added). It should be borne in mind that to date much of the case-law under article 283 has arisen in connection with provisional measures, including under article 290(5), when what has to be shown is *prima facie* jurisdiction. This may limit the importance of the findings when it comes to determining jurisdiction in a full case. In so far as any authority is needed for this proposition, see I. V. Karaman, *Dispute Resolution in the Law of the Sea* (2012), p. 130. (**Authority 33**)

⁴⁷⁹ MR, paras. 4.66, referring to *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A), Judgment No. 2, p. 11 (concerning jurisdiction under Article 26 of the Mandate), *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Reports 1950, p. 65, p. 74 (concerning the interpretation and application of the dispute settlement provisions of the treaties with Bulgaria, Hungary and Romania); *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, p. 90, para. 22 (concerning jurisdiction under Article 36(2) of the ICJ Statute); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 9, para. 22 (concerning jurisdiction under Article 14(1) of the Montreal Convention); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, para. 87 (concerning jurisdiction under Article 36(2) of the ICJ Statute); *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment, ICJ Reports 2005, p. 6, para. 24 (concerning jurisdiction under Article 1 of the European Convention for Peaceful Settlement of Disputes); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, para. 90 (concerning jurisdiction under the Article 30 of the Convention Against Torture, Article IX of the Genocide Convention, Article 29 of the Convention on the Elimination of Racial Discrimination, Article 75 of the WHO Convention, Article XIV(2) of the UNESCO Constitution, Article 14(1) of the Montreal Convention, Article 66 of the VCLT and *forum prorogatum*); *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, at p. 328 (concerning jurisdiction under Article 17 of the Mandate for South West Africa and Article 37 of the ICJ Statute).

⁴⁸⁰ MR, para. 4.66, relying on *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432, para. 31 (concerning jurisdiction under Article 36(2) of the ICJ Statute); *Nuclear Tests*

6.13 As to whether there is a “dispute” in existence, the parties agree that “there must be a “disagreement on a point of law or fact, a conflict of legal views or interests”⁴⁸² and that this is a matter for objective determination. To these basic propositions, it may be added that “it must be shown that the claim of one party is positively opposed by the other”⁴⁸³. A further refinement that follows from the reasoning of ITLOS in *MV Louisa* is that, in order for a dispute to exist, there must be some link between the facts advanced and the dispute under UNCLOS⁴⁸⁴. There is evidently no such link so far as concerns the facts advanced in Mauritius’ sovereignty claim and UNCLOS. Further, as is explained elsewhere in this Rejoinder, there are no facts which substantiate Mauritius’ claims under article 63⁴⁸⁵, article 63, 64 or article 7 of the UN Fish Stocks Convention as concerns migrating stocks⁴⁸⁶, article 194(1) and (4)⁴⁸⁷, or its new claim under article 78⁴⁸⁸ and articles 55, 56(2), 61, and 197 have no application to any claim of lack of consultation⁴⁸⁹.

6.14 Furthermore, in terms of whether there has been an exchange of views over a dispute in accordance with article 283(1), the conduct of the parties after the initiation of proceedings cannot, logically, be taken into account. The critical date for these purposes is the date of initiation of the proceedings⁴⁹⁰.

6.15 As to Mauritius’ arguments to the contrary, the PCIJ’s reasoning in the *Mavrommatis Palestine Concessions*, on the prior negotiation requirement in Article 26 of the Mandate for Palestine in fact supports the UK’s arguments:

“The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It

(*Australia v France*), Judgment, ICJ Reports 1974, p. 253, paras. 29-31 (concerning jurisdiction under Article 17 of the General Act for the Pacific Settlement of International Disputes 1928 or Article 36(2) of the ICJ Statute).

⁴⁸¹ MR, para. 4.67, citing *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A), Judgment No. 2, p. 13.

⁴⁸² MR, para. 4.66.

⁴⁸³ *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 328. The ITLOS adopted the definition given by the ICJ in its Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (ITLOS Reports 1999*, p. 280 ff., at paragraph 44) (UKCM, Authority 16).

⁴⁸⁴ Judgment of 30 May 2013, para. 99.

⁴⁸⁵ Paras. 7.12, 7.15.

⁴⁸⁶ Paras. 7.90 a and d, 8.61-8.62, 8.67.

⁴⁸⁷ Paras. 8.47 and 8.56.

⁴⁸⁸ Paras. 7.76, 7.79, 8.44-8.45.

⁴⁸⁹ Paras. 8.31-8.32.

⁴⁹⁰ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, at p. 344: “... it is to be noted that the alleged impossibility of settling the dispute obviously could only refer to the time when the applications were filed”. (**Authority 2**)

recognises, in fact, that before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations.

Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation”.

Reading the quotation in full makes clear what while the views of the States concerned were important, they were not determinative, but one amongst other considerations⁴⁹¹.

6.16 The PCIJ found as a matter of fact that the requirement had been met, through negotiations between the private person concerned and the relevant authorities which had “defined all the points at issue between the two Governments” and did not “require the two Governments to reopen a discussion which has in fact already taken place and on which they rely”⁴⁹². Unlike Greece in the *Mavrommatis Palestine Concessions* case, Mauritius cannot point to any such negotiations with the UK defining all points at issue under UNCLOS in this case, i.e. its ‘non-sovereignty’ disputes under articles 2(3), article 55, 56(2), 62(5), 63(1), 63(2), 64(1), article 7 of the 1995 Fish Stocks Agreement, article 194(1), article 300 of UNCLOS, or its “certain specific rights”, or indeed its alleged ‘sovereignty disputes’ under UNCLOS. Thus Mauritius does not even get to the point in the analysis where it could invoke the arguments that a “short discussion may suffice” or that its political judgement is a relevant “consideration” in establishing the requirements of article 283(1) have been met⁴⁹³.

⁴⁹¹ Cf. MR, para. 4.67. The wording of Article 26 of the Mandate is that “...such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice...” (p. 11):

⁴⁹² Similarly, in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 9, the ICJ found the prior negotiation requirement of Article 14(1) of the Montreal Convention have been met as a matter of fact, in circumstances where Libya had raised a claim under the Montreal Convention and the UK maintained that there was no dispute under the Convention and failed to respond to a letter of 18 January 1982 proposing arbitration under the Convention (para. 21). In *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, the applicants relied on 10 years of negotiations to meet the prior negotiation requirement in Article 7 of the Mandate, the ICJ found that “[e]ven a cursory examination of the views, propositions and argument consistently maintained by the two opposing sides shows that an impasse was reached” (p. 344).

⁴⁹³ MR, para. 4.67.

6.17 The United Kingdom also rejects Mauritius’ reliance on the ICJ’s judgment in *Nicaragua v United States (Preliminary Objections)*⁴⁹⁴, which turns on the wording of a different treaty. As the ITLOS jurisprudence set out above makes clear, a failure to comply with the requirements of article 283(1) goes beyond a “mere defect of form”. It follows from that wording that Mauritius would be required to engage with article 283(1) before it could issue fresh proceedings.

(iii) Alleged utility of exchange of views

6.18 Mauritius then moves on to discuss the jurisprudence on futility of continuing negotiations⁴⁹⁵. It rejects the United Kingdom’s arguments on this point in the Counter-Memorial⁴⁹⁶ on the basis that it did raise the claims it now makes with sufficient clarity even though it did not mention UNCLOS. For the reasons given above and in Chapter V of the Counter-Memorial, the United Kingdom disagrees with Mauritius’ interpretation of article 283. It has already explained in detail in its Counter-Memorial why Mauritius’ communications did not meet the requirements of article 283 and why, *a fortiori*, it cannot establish that further exchanges of views “regarding its settlement by negotiation or other peaceful means” would have been futile.

6.19 Mauritius also claims as a matter of fact in this context that various exchanges had referred to the Convention⁴⁹⁷. The United Kingdom has already explained why the one communication that refers to UNCLOS (a *Note Verbale* of 20 April 2004, well before a large scale marine reserve was even conceived of) does not meet the requirements of article 283(1)⁴⁹⁸.

6.20 The United Kingdom has also explained why the references by Mauritius in *Notes Verbales* and letters after 23 November 2009 concerning the MPA proposal to “access to fisheries resources” did not raise the ‘non-sovereignty disputes’ which Mauritius has now

⁴⁹⁴ MR, para. 4.72, relying on the ICJ’s finding of jurisdiction based on the 1956 Treaty of Friendship, Commerce and Navigation.

⁴⁹⁵ MR, paras. 4.68-4.69.

⁴⁹⁶ UKCM, paras. 5.46-5.50.

⁴⁹⁷ MR, para. 4.70.

⁴⁹⁸ UKCM, paras. 5.35-5.38; see also para. 5.22.

raised as disputes under UNCLOS⁴⁹⁹. Mauritius' objections were formulated as a sovereignty claim, not a dispute under UNCLOS: the *Note Verbale* of 23 November 2009 merely said that the MPA "should address the issues of resettlement, access to fisheries resources, and the economic development of the islands in a matter which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries... would not be compatible with the long-term resolution of... the sovereignty issue."⁵⁰⁰

(iv) The relevant context and subject-matter of the dispute

6.21 The United Kingdom's objection (aside from the fact that the non-sovereignty claims it now raises were not made at all) is not that Mauritius did not refer to specific articles in Part XV such as articles 279 or 301⁵⁰¹, but that it did not refer to UNCLOS and the substantive provisions of UNCLOS, either expressly or with sufficient clarity so that the United Kingdom could understand (i) that a dispute was being raised, (ii) what it was, (iii) that it was under UNCLOS and (iv) that an "exchange of views regarding its settlement by negotiation or other peaceful means" was being sought.

6.22 This context distinguishes the present case from those cited by Mauritius, such as *Guyana v Suriname* where the Tribunal found the "Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary"⁵⁰², which subject-matter obviously falls within UNCLOS.

6.23 Similarly, in *Land Reclamation (Provisional Measures)*, the Tribunal noted that Malaysia had on several occasions prior to the institution of proceedings informed Singapore of its concerns and requested meetings on an urgent basis and that diplomatic notes from

⁴⁹⁹ MR, para. 4.70, referring specifically to this note.

⁵⁰⁰ UKCM, paras. 5.26, 5.29-5.32; see also paras. 3.62-3.63.

⁵⁰¹ Cf. MR, para. 4.74, referring to *Guyana v Suriname*. That Tribunal's finding is, however, confined to the following: "This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can be considered as being subsumed within the main dispute."

⁵⁰² Para. 410.

April and July 2002 referred to the relevant legal rules⁵⁰³, and the related dispute over the maritime boundary⁵⁰⁴. The Tribunal therefore had evidence before it showing that Malaysia had laid out the legal bases for its claims in detail the year prior to its notice of claim, and that at least some of the claims – such as maritime delimitation – were ones that fell, *par excellence*, within UNCLOS. The “circumstances of the present case” also appear to have played an important part in ITLOS’s decision under article 283(1)⁵⁰⁵: Malaysia continued to try to negotiate after issuing the statement of claim and Singapore entered into discussions at that point, but resolution was not forthcoming. Mauritius cannot show that it made any equivalent requests or attempts in this case. Similarly, the *M/V “Louisa”* involved the protest of a flag State over the continued detention of a vessel, a matter which obviously fell within UNCLOS, even if the tribunal subsequently found that there was no link between the facts of the actual case and the treaty articles on which St Vincent and the Grenadines’ claim was based⁵⁰⁶.

⁵⁰³ The Statement of Claim refers to claims that the reclamation would interfere with freedom of navigation; other claims raised were transboundary harm and the obligation to cooperate.

⁵⁰⁴ Para. 39.

⁵⁰⁵ Para. 48. P. Gautier has written that “[t]he case documentation showed that exchanges of diplomatic notes had taken place between the parties, which would seem to indicate the condition had been met.”: (2004) 3 *Chinese Journal of International Law* 241. (**Authority 29**)

⁵⁰⁶ Cf. MR, para. 4.75. It will be recalled that the tribunal took into account that “Saint Vincent and the Grenadines stated that, on several occasions prior to the institution of these proceedings, its maritime administration had requested from the port authorities of Spain further information about the detention of the *M/V “Louisa”* but had not received such information...[and that] by *Note Verbale* dated 26 October 2010, sent to the Permanent Mission of Spain to the United Nations in New York, by the Permanent Mission of Saint Vincent and the Grenadines to the United Nations in New York, the Applicant informed Spain that it “objects to the Kingdom of Spain’s continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*,” and that Spain failed “to notify the flag country of the arrest as required by Spanish and international law” and that in the said *Note Verbale*, Saint Vincent and Grenadines also informed Spain of its “plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ships and settlement of damages incurred as a result of this improper detention” (paras. 59-60). Spain did not reply to the *Note Verbale*. As noted at paras.6.7 and 6.8 above, Judges Treves and Wolfrum dissented on article 283.

C. The application of article 283 in the present case

(i) *The United Kingdom's internal documents relied upon by Mauritius do not show that the requirements of article 283(1) were met*

6.24 Mauritius relies in its Reply on three internal United Kingdom documents to establish that it has met the requirements of article 283⁵⁰⁷, claiming that, by Spring of 2010, “the UK was well aware of the possibility of international litigation proceedings being launched by Mauritius”⁵⁰⁸. Three points can be made in response.

6.25 *First*, as explained in Chapter V of the Counter-Memorial, the records of the actual communications between the United Kingdom and Mauritius over this period do not show that Mauritius raised a dispute under the Convention under article 283, much less exchanged views on it.

6.26 *Second*, the internal documents are not evidence that Mauritius had raised or would raise a dispute concerning the interpretation or application of UNCLOS. Instead, they reflect Mauritius’ periodic statements to the effect that it intended to pursue legal proceedings to vindicate its sovereignty claim. In 1991 the Mauritian Prime Minister, in the Plenary Session of CHOGM, threatened to take its sovereignty claim over BIOT to the United Nations General Assembly. This was understood to mean that Mauritius would seek a General Assembly resolution making a referral to the International Court of Justice for an Advisory Opinion⁵⁰⁹. In November 2000, at a meeting with Peter Hain, FCO Minister of State, the new

⁵⁰⁷ These are (i) an email from Joanne Yeadon, the BIOT Administrator, to Andrew Allen, head of the Overseas Territories Directorate, recording their meeting with Pew representatives on 22 April 2008 (referring to the advice to Pew that “Mauritius and inshore fishing: we explained that Mauritius had some rights but had not exercised them recently. But this was a loophole that would need looking at”, referred to in UKCM, para. 3.33, para. 3.40, and the Appendix to this Rejoinder para. A.103; as explained officials understood that any ‘fishing rights’ under the 1965 understanding would not preclude the establishment of an MPA); (ii) an email from the British High Commissioner to Joanne Yeadon dated 31 March 2010 and (iii) a submission to the Foreign Secretary by Joanne Yeadon dated 31 March 2010 (cautioning that “The opposition MMM... would welcome the announcement as an election gift. They would push Ramgoolam very hard to commit to taking legal action to challenge the establishment of an MPA”); and (iii) a submission to the Foreign Secretary by Joanne Yeadon dated 31 March 2010 (the reference to a “legal action to challenge” in the minute is merely relaying the advice of the British High Commissioner in the email of 31 March 2010).

⁵⁰⁸ See MR, paras. 4.3-4.4.

⁵⁰⁹ The context was a new Government in Mauritius, following the success of the MSM (Militant Socialist Movement) party, led by Sir Anerood Jugnauth, in the 1991 elections and the formation of a coalition Government with the MMM (Mauritian Militant Movement). Paul Bérenger of the MMM became Foreign Minister. The new Government claimed that, with the end of the Cold War and the upcoming date in 2016 for the review of the US lease, “it is no longer a question of the ‘defence of the western world’ and that is why we

Foreign Minister, Mr Gayan⁵¹⁰ said he had reviewed the dealings in 1965, and that, in his view “The deal done then was in his view challengeable in international law. He was examining how such a challenge might be mounted.”⁵¹¹ Later, in January 2001, at a meeting with the Foreign Secretary, Robin Cook, Mr Gayan asked whether the two Governments “could agree to take the issue to the ICJ.”⁵¹² Mauritius in its *Note Verbale* of 2004 in response to the United Kingdom’s deposit of the coordinates for the BIOT EPPZ, highlighted that it might “resort to appropriate legal action for the full enjoyment of its sovereignty over the Chagos Archipelago, should the need so be felt.”⁵¹³ Thus, when Colin Roberts identified the risks of the large scale MPA proposal in his submission to the Foreign Secretary of 5 May 2009, he noted that “Mauritius pursues its claim [to sovereignty over the BIOT] for the most part in a low key, although Mauritius 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.”⁵¹⁴

6.27 Mauritius’ objections to the public consultation on the MPA proposal were formulated on sovereignty grounds⁵¹⁵, and made in light of the failure of the Prime Minister to secure the delay the announcement of the public consultation until after the next election and (later) the withdrawal of the public consultation process to help him with his election campaign⁵¹⁶. Thus, United Kingdom officials had no reason to depart from their view that legal action meant bringing the sovereignty issue before the ICJ.

[Mauritius] feel that great Britain should be prepared now to open a dialogue with Mauritius on the whole issue”, and “‘defence purposes of the western world’ did not mean today what it had meant in 1965” (telegram of 4 December 1991 from British High Commission to the Foreign Office recording a conversation between the Commissioner and the Foreign Minister Paul Bérenger) (**Annex 39**).

⁵¹⁰ Following the September 2000 elections in Mauritius, the coalition Government lead by the MLP’s Mr Navin Ramgoolam was defeated and a new coalition government formed by the MMM-MSM led by Anerood Jugnauth took power.

⁵¹¹ **Annex 39**. A telegram of 4 December 1991 recording a meeting between the British High Commissioner and the Foreign Minister Bérenger records that “[i]n further conversation he repeated that he would consider carefully and precisely whether he would put forward proposals for bilateral discussion/consideration. He realised this would be in the context of bilateral exchanges and if GOM [Government of Mauritius] decided to take the matter to the UN, this route would not be available.”

⁵¹² **Annex 56**. This time the context was the United Kingdom High Court decision in *Bancoult I* [2001] Q.B. 1067; [2001] 2 W.L.R. 1219 of 3 November 2000 and the wish to have the issue resolved before the expiry of the UK-US lease agreement: see **Annex 54**. The Foreign Secretary replied that the “GoM of course had the right to pursue the idea if it wished” and added that “he was confident that the UK’s case was robust”.

⁵¹³ *Note Verbale* dated 20 April 2004, MM, Annex 127, discussed at UKCM, para. 5.35-5.38.

⁵¹⁴ MR, Annex 133.

⁵¹⁵ UKCM, paras. 3.63, 3.65, 3.66, 3.68, 526-5.31.

⁵¹⁶ See further paras. 3.12, 3.14-3.15, 3.29.

6.28 *Third*, the email and minute of 31 March 2010 make no reference to the possibility of litigation under UNCLOS. If Mauritius had raised or threatened a claim under UNCLOS, this possibility would have been raised by the British High Commissioner or Joanne Yeadon in her submission to the Foreign Secretary of 30 March 2010 and the minute of 31 March 2010. That Ms Yeadon did not consider there was any risk of litigation under UNCLOS is confirmed by her later submission of 1 September 2010, in which she says that “[t]he decision to continue with the MPA of itself is unlikely to push Mauritius to seek an Advisory Opinion at the International Court of Justice.”⁵¹⁷

6.29 Mauritius even claims that these three documents support Mauritius claim that it had “a robust exchange of views” with the United Kingdom⁵¹⁸. The short reference in internal United Kingdom documents to the possibility of “legal action”⁵¹⁹, and before the ICJ at that self-evidently does not support that contention.

(ii) *Mauritius did not raise a dispute with the United Kingdom and exchange views over its entitlement as the coastal State to declare maritime zones*

6.30 The United Kingdom dealt in detail at paragraphs 5.35-5.38 of its Counter-Memorial with Mauritius’ argument, made subsequently to its Memorial, that it is entitled to rely on one 2004 communication with the United Kingdom in order to establish it has met the requirements of article 283.

6.31 Mauritius now relies in its Reply on three documents (annexed to its Memorial, but not then relied on) to establish that it met the requirements of article 283(1): the letter dated 7 November 2003 from its Minister of Foreign Affairs to the United Kingdom’s Foreign Secretary⁵¹⁹; a United Kingdom letter to the United Nations Secretary-General dated 19 March 2009 protesting Mauritius’ deposit of coordinates for a EEZ around the BIOT

⁵¹⁷ MR, Annex 164, para. 10. She also records that the Mauritian Foreign Minister warned the British High Commissioner on 23 August 2010 that Mauritius would seek an advisory opinion in the ICJ if there was no progress on sovereignty.

⁵¹⁸ MR, paras. 4.4-4.5.

⁵¹⁹ MR, para. 4.10, referring to MM, Annex 122.

following its Maritime Zones Act 2005; and Mauritius' letter to the United Nations Secretary-General of 9 June 2009 in response⁵²⁰.

6.32 As to the letter dated 7 November 2003, the point has already been made in paragraph 5.34(d) of the Counter-Memorial that nowhere in the letter did Mauritius raise a dispute concerning the interpretation or application of UNCLOS, still less seek an exchange of views. It did not assert that Mauritius was the “coastal State”, but objected to the EPPZ on the basis that the United Kingdom undertook in 1992 not to create an EEZ around the BIOT.

6.33 The Parties' respective letters to the United Nations Secretary-General of 19 March and 9 June 2009 do not assist Mauritius in establishing that it has met the requirements of article 283.

- a. First, Mauritius' letter is addressed to a third person, the UN Secretary-General, not the United Kingdom. The letter therefore cannot be considered to have raised a dispute with the United Kingdom “concerning the interpretation and application of the Convention”.
- b. Second, the letter does not claim that Mauritius is the “coastal State” entitled to declare maritime times under UNCLOS, which is the legal hook it seeks to use to bring its sovereignty claim under UNCLOS in this arbitration. Rather, the letter is formulated in straightforward sovereignty terms: Mauritius asserts its “complete and full sovereignty over the Chagos Archipelago, including maritime zones generated from the Chagos Archipelago”, and that “the Chagos Archipelago forms an integral part of the territory of Mauritius”⁵²¹. As such, Mauritius' statement in its letter was a routine public affirmation of its sovereignty in response to a *Note Verbale* from the United Kingdom to the UN Secretariat⁵²².
- c. Third, Mauritius did not raise a dispute under UNCLOS with the United Kingdom in June 2009 on the basis that the United Kingdom was not entitled to create maritime zones around the BIOT or because it was not the “coastal State”.

⁵²⁰ MR, paras. 4.9-4.15.

⁵²¹ MM, Annex 147.

⁵²² MM, Annex 141. The same point was made in UKCM, para. 5.37 in respect of Mauritius' *Note Verbale* of 20 April 2004.

- d. Fourth, and *a fortiori*, Mauritius did not invite the United Kingdom to engage in an exchange of views.

6.34 If Mauritius had been seeking to formulate its sovereignty claim as a dispute concerning the interpretation or application of UNCLOS on the basis that Mauritius was the “coastal State”, not the United Kingdom, that would have been a novel and unexpected claim. In these circumstances, assuming in Mauritius’ favour that there could somehow be a dispute under UNCLOS (*quod non*), the obligation under article 283(1) would have called for an explicit and precise formulation of the dispute. Thus it would have been for Mauritius to make an express statement that it was raising its sovereignty claim as one concerning the interpretation or application of UNCLOS, on the basis that it was the “coastal State”, and that an exchange of views was being sought on that basis. That did not happen⁵²³.

(iii) Documents relied on by Mauritius do not show that it has met the requirements of article 283 in respect of its dispute over the MPA

(a) Communications between 2005 and 2008

6.35 At paragraphs 4.17 to 4.22 of the Reply, Mauritius seeks to rely on communications between 2005 and 2008 to establish that it has engaged in an exchange of views over the incompatibility of the MPA with Mauritius’ rights under the 1982 Convention. Given that these communications pre-date the MPA proposal, and even the ideas of Pew and the Chagos Conservation Trust for large-scale marine park in the BIOT⁵²⁴, a dispute about the MPA proposal or the MPA could not have been raised. Mauritius is seeking to stitch an article 283 case together by invoking references to “fishing rights” in communications that it made before the MPA proposal.

6.36 Furthermore, none of the communications that Mauritius refers to in fact raise a dispute over “fishing rights” in BIOT waters, much less a dispute concerning the

⁵²³ Cf. MR, para. 4.16.

⁵²⁴ Pew did not identify the BIOT as a candidate for a large scale marine park until 2007 and did not approach the BIOT Administration until April 2008 (UKCM, paras. 3.30-3.31).

interpretation or application of the Convention⁵²⁵. The communications thus have no relevance to Mauritius' position under article 283(1).

(b) Mauritius did not raise any dispute concerning the interpretation or application of UNCLOS in connection with the January 2009 bilateral talks

6.37 Mauritius relies on a number of documents at paragraphs 4.22-4.41 of its Reply, including United Kingdom internal documents, in connection with the 2009 bilateral talks. None establishes that Mauritius has met the requirements of article 283. This is plain on the face of the documents.

6.38 Moreover, communications that precede the Foreign Secretary's decision of 7 May 2009 to pursue the MPA proposal (i.e. the 14 January 2009 bilateral talks and the internal and bilateral documents that relate to them⁵²⁶) are evidently of limited assistance to Mauritius. The content and decision to pursue the MPA proposal had not been adopted and Mauritius did not at that time have any information as to what the content of the proposal might be, so Mauritius could not have raised a dispute over the compatibility of the proposed MPA with the 1982 Convention. For example, there could not possibly have been a dispute at that time over whether the MPA proposal or MPA breached the obligation in article 7 of the UN Fish Stocks Agreement to "make every effort to agree on compatible conservation and management measures within a reasonable time". The same point applies *mutatis mutandis* to Mauritius' claims under articles 2(3), 55, 56(2), 62(2), 63(1), 64(1), 194(1) and article 300. The communications concerning Mauritius' response to the proposed MPA and the MPA,

⁵²⁵ BIOT officials considered the question of Mauritius "fishing rights" stemming from the 1965 understanding in the context of the MPA proposal, and set out Mauritius' responses to the MPA proposal and the MPA: UKCM, para. 3.33, 3.40-3.52, 3.62-3.68, 5.25-5.45. See further Chapter III, section D of this Rejoinder and the Appendix.

⁵²⁶ The internal email from Andrew Allen of 31 December 2008 (MR, para. 4.23) and the joint communiqué and the delegations' respective records of the talks (MR, para. 4.24-4.29).

The view expressed internally by a Foreign Office official that "We clearly need a lawyer present" for the 14 January 2009 talks is irrelevant to Mauritius' article 283 case. In any event, it clearly does not support the proposition that there was an understanding that the discussions could lead to legal proceedings, much less is a dispute under UNCLOS over an MPA proposal that was in its early scoping stages, was not yet a matter of policy and was not intended to be tabled (cf. MR, para. 4.23). It is perfectly usual for a party in any discussions with another to consider "lawyering up" in response to the other party's decision or request to do so, especially when the lawyer in question is external counsel and a senior QC. In the event, it was decided that the United Kingdom would not include external counsel in its delegation.

The United Kingdom notes that, contrary to MR, paras. 4.26-4.27, Sir Ian Brownlie's Legal Opinion was received by the FCO on 10 January, prior to the talks held on 14 January, not in the talks.

and whether it raised a dispute under article 283 of the 1982 Convention for the purposes of the claims it now makes, are those from July 2009 onwards. The United Kingdom explained in detail in its Counter-Memorial that those communications fail to meet the requirements of article 283⁵²⁷.

6.39 In so far as Mauritius is suggesting that it raised other legal disputes under the 1982 Convention in the January 2009 bilateral talks concerning, e.g. wrongfully requiring Mauritians to obtain licences from the BIOT⁵²⁸, this could only be relevant to a distinct claim under the 1982 Convention, which Mauritius has not brought.

6.40 Furthermore, it is evident from the internal records of the 14 January 2009 bilateral talks prepared by each delegation, as well as the joint communiqué and Sir Ian Brownlie's Legal Opinion, that Mauritius did not raise a dispute in the sense in which article 283 requires. Mauritius did not mention or raise a dispute in respect of the "fishing rights" as now claimed; "fishing rights" were merely discussed in terms of Mauritius 'sovereignty claims', although Mauritius did not raise a dispute in this context, did not mention UNCLOS in this context⁵²⁹, and nor did it seek an exchange of views under UNCLOS⁵³⁰. There is in short no evidentiary basis for its claim that it had expressly invoked its rights under the Convention only weeks before *The Independent's* article of 9 February 2009⁵³¹.

6.41 For the same reason as set out in paragraphs 6.40-6.43 above the arguments made in paragraphs 4.28-4.37 of the Reply, based on internal United Kingdom documents pre-dating the United Kingdom's tabling of the MPA proposal with Mauritius in July 2009, do not support a case that Mauritius has met the requirements of article 283.

6.42 Mauritius has a further fundamental timeline problem with its reliance on these documents: it does not assist its case on article 283 to point to internal United Kingdom documents from 22 April 2008⁵³², 31 December 2008⁵³³, 5 May 2009⁵³⁴, because when BIOT

⁵²⁷ UKCM, paras. 5.23-5.32, 5.39-5.45.

⁵²⁸ MR, para. 4.24.

⁵²⁹ The only reference to UNCLOS in any of the documents referred to is recorded in Mauritius' record of the meeting and refers to the explanation given by an FCO legal adviser of the maritime zones around BIOT.

⁵³⁰ Cf. MR, paras. 4.25-4.26.

⁵³¹ MR, para. 4.31.

⁵³² Joanne Yeadon's email of 22 April 2008 recording the discussion with Pew.

officials actually raised the proposal with Mauritius in July 2009, Mauritius did not say the MPA proposal was irreconcilable with Mauritius' rights or "unlawful". The point of consultation was to find out what Mauritius' position was: Mauritius did not raise the claims that it now does⁵³⁵.

(c) Mauritius did not raise any dispute concerning the interpretation or application of UNCLOS in connection with the July 2009 bilateral talks

6.43 The United Kingdom has considered the three talks held on 21 July 2009 in some detail at paragraphs 3.42-3.49 and 5.29(a) of its Counter-Memorial, and has annexed the United Kingdom's records of these talks dated 21 July 2009 and 24 July 2009⁵³⁶. Mauritius' own record of the main formal talks on 21 July 2009 (dated 12 August 2009) is largely consistent with the United Kingdom's account⁵³⁷. The Mauritian record does not show any dispute being raised by Mauritius, under UNCLOS or otherwise.

6.44 Mauritius' assertion that the second round of bilateral talks "left the UK with no doubt that Mauritius considered the proposed 'MPA' to violate its package of rights in the waters of the Chagos Archipelago"⁵³⁸ is not credible, in light of the contemporaneous documents and the evidence of the officials involved. To the contrary, it was concluded in the United Kingdom's record of the meetings (in the "comment" section) that it was a "surprisingly positive meeting" and that: "Much remains to talk about as far as a marine protected area is

⁵³³ Andrew Allen's email suggests that Pew's ideas would be introduced at the 14 January 2009 in idea if not name. In the event, further environmental protection was flagged up in only very general terms by Colin Roberts.

⁵³⁴ Colin Robert's submission to the Foreign Secretary of 5 May 2009, "British Indian Ocean Territory: The world's largest marine reserve" (MR, Annex 132).

⁵³⁵ As explained above, [para. 3.2], Mauritius communications with the United Kingdom over the MPA proposal and MPA were detailed in the Counter-Memorial. The United Kingdom rejects Mauritius' claims that knew it would amount to a repudiation of Mauritius rights (MR, para. 4.27), "the UK understood the necessary implication was Mauritius would view the proposed MPA as unlawful" (MR, para. 4.29), or were aware that an MPA was "irreconcilable" with Mauritius' position (MR, para. 4.32). The evolution of BIOT officials' understanding and how Mauritius' responses informed that understanding, is further outlined in Chapter III, Section D and the Appendix.

The role of MRAG and the relevance of its input and how it was considered is discussed above at para. 3.50 and fns. 935 and 992 of the Appendix (cf. MR, paras. 4.35-4.37).

⁵³⁶ UKCM, Annex 99 and Annex 101. The 21 July 2009 talks are described in further detail by Colin Roberts in his third witness statement, paras. 21-28. (**Annex 74**) Joanne Yeadon affirms the account of meetings that she attended at paras. 4 and 14. (**Annex 73**)

⁵³⁷ MR, Annex 144.

⁵³⁸ MR, para. 4.42.

concerned ... But we did not get a rebuff on sovereignty grounds and a way forward on this issue and that of a eCS [*extended continental shelf*] appears to be possible”⁵³⁹.

(d) Mauritius also cannot show it meets the requirements of article 283 from events following the 2009 bilateral talks

6.45 The United Kingdom has already addressed communications between 21 July and 27 November 2009 in its Counter-Memorial⁵⁴⁰ and explained that Mauritius has not and cannot establish that any one of these communications taken singly or together meet the requirements of article 283 in respect of either the ‘sovereignty claims’ or ‘non-sovereignty claims’.

6.46 The reference to the NCOS workshop report and earlier drafts of it neither support the assertions by Mauritius at paragraphs 4.42-4.43 of the Reply, nor make out that the requirements of article 283 have been met⁵⁴¹.

6.47 Mauritius’ further evidence annexed to its Reply concerning the meeting that took place between the Prime Ministers on 27 November 2009 in the margins of CHOGM is addressed in Chapter III of this Rejoinder⁵⁴². For the purposes of article 283, the United Kingdom notes that nowhere in the record of the meeting, as referred to by Prime Minister Ramgoolam in his witness statement dated 6 November 2013, is there any express or implicit reference to raising a dispute under UNCLOS or the subject matter of UNCLOS in respect of the proposed MPA (either with regard to Mauritius’ ‘sovereignty’ or ‘non-sovereignty’ claims).

6.48 It is not accepted that, when Prime Minister Ramgoolam said “You must put a stop to it”, there “could have been no doubt [he] was referring to the proposed ‘marine protected area’”. This version of events is not supported by the subsequent correspondence from Mauritius over the proposed MPA, nor the record of the Prime Minister’s statement to

⁵³⁹ UKCM, Annex 101.

⁵⁴⁰ MR, para. 4.45; see UKCM, paras. 3.50-3.52, 3.60-3.65, 5.29 (b) and (c), 5.30-5.31.

⁵⁴¹ Joanne Yeaton explains her involvement in earlier drafts of the NCOS report at paras. 16-17 of her third witness statement (**Annex 73**), which also explains her understanding that the “fishing rights” understanding was a political not legal obligation.

⁵⁴² See paras. 3.14-3.15; cf. MR, paras 4.46-4.47.

Parliament dated 18 January 2010⁵⁴³. Both make clear that what was being sought by Mauritius at the time was the withdrawal of the public consultation process, on the basis that the MPA proposal could only be pursued bilaterally with Mauritius⁵⁴⁴.

*(e) Exchanges during the remainder of 2009 and 2010
before and after the announcement of the MPA*

6.49 As to the exchanges in 2009 and 2010 before and after the announcement of the MPA on 1 April 2010⁵⁴⁵, nothing that Mauritius has added in paragraphs 4.48 to 4.62 of its Reply establishes that it met the requirements of article 283 in these communications. Nor is there anything new in Mauritius' Reply on these communications, except in so far as Mauritius seeks to rely on them as evidence that it raised a dispute under UNCLOS about the consultation process for the purposes of article 283. There is not, however, any reference in these documents to Mauritius claiming that the consultation process was in breach of UNCLOS or the law of the sea and inviting an exchange of views thereon.

6.50 In so far as Mauritius relies on new documents in its Reply covering this period, it does not establish that article 283 has been met:

- a. The references in the internal email from the British High Commissioner and the subsequent submission by Joanne Yeadon to the Foreign Secretary do not support Mauritius' article 283 argument. The reference in the submission to the Foreign Secretary dated 30 March 2010 to Mauritius "remaining unhappy with what they see as a unilateral consultation", while being a fair reflection of Mauritius' position as it had emerged since the end of November 2009, cannot be read as an "acknowledge[ment] that Mauritius was in dispute with the UK in regard to the adequacy of the consultation process"⁵⁴⁶, much less that the dispute was being raised under UNCLOS or the law of the sea. If that were the case, and the understanding of Joanne Yeadon, the submission to the Foreign Secretary would have said so;

⁵⁴³ MR, Annex 151.

⁵⁴⁴ As is clear from Mauritius own account of the subsequent correspondence in 2009, at MR, paras. 4.48-5.50.

⁵⁴⁵ UKCM, paras. 5.29 e and f, paras. 5.30-5.31 and 5.43 (before the announcement of the MPA on 1 April 2010) and paras. 3.66-3.68, 5.19, 5.39-5.45 (after the announcement).

⁵⁴⁶ Cf. MR, para. 4.53.

- b. The letters of 8 April 2010 from the Foreign Minister, Arvin Boolell to Edward Davey, the Liberal Democrat spokesperson for foreign affairs,⁵⁴⁷ and William Hague, the Conservative spokesperson for foreign affairs⁵⁴⁸, and an extract from an information paper to cabinet on the official visit to France and the United Kingdom of 9 June 2010⁵⁴⁹ do not add anything in terms of content to Mauritius' *Note Verbale* of 2 April 2010. The same points made by the United Kingdom in respect of that document apply to these documents⁵⁵⁰. Moreover, the first two of these documents are not even addressed to the United Kingdom Government. They were clearly designed to lobby opposition Members of Parliament who might take power following the May 2010 elections;
- c. The statements by Prime Minister Ramgoolam in the Mauritian Parliament on 27 July 2010 and 9 November 2010⁵⁵¹ prove nothing for the purposes of establishing Mauritius met the requirements of article 283. They were not made to the United Kingdom; references to Mauritius' objection to the MPA are made on sovereignty grounds (it "impedes the use of fisheries and other marine resources of the ocean around the Chagos archipelago in the exercise of its sovereignty rights"⁵⁵²); they make no reference to Mauritius' 'non-sovereignty' claims in these proceedings and no reference to UNCLOS or the law of the sea.

6.51 In fact, the reference in the Prime Minister's statement to the Mauritian Parliament on 27 July 2010 to seeking legal advice "on the way forward" suggests that Mauritius did not at that stage even conceive of its complaints as giving rise to a dispute under UNCLOS and the law of the sea. This still appeared to be the case on 9 November 2010⁵⁵³, shortly before Mauritius filed its Notification and Statement of Claim on 20 December 2010. The statement of that date concludes by saying that, "In the circumstances [the indication given by new United Kingdom' Government that it did not hold a different view on the MPA or on the sovereignty of the Chagos Archipelago], the Government of Mauritius is now considering

⁵⁴⁷ MR, Annex 159.

⁵⁴⁸ MR, Annex 160.

⁵⁴⁹ MR, Annex 161.

⁵⁵⁰ UKCM, para. 5.39.

⁵⁵¹ MR, Annexes 163 and 165.

⁵⁵² See to the same effect the response to Parliament dated 8 November 2010, at p. 127 (MR, Annex 165).

⁵⁵³ MR, Annex 165. As noted above (fn. 517), Mauritius was threatening ICJ proceedings in August 2010.

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 sovereignty over the Chagos Archipelago”. Even if a statement to a State’s own Parliament could constitute the raising of a dispute for the purposes of article 283 (which it cannot), this statement would not meet the requirements of article 283.

D. Conclusion

6.52 It is not sufficient to meet the requirements of article 283(1) simply to point to a stream of communications with the respondent State, even if they refer to an existing long-standing sovereignty claim. Article 283 requires more than this: what is required is that Mauritius had raised with the United Kingdom, prior to issuing these proceedings under UNCLOS, the dispute or disputes that it now raises before this Tribunal and also made it clear, either expressly or by obvious inference, that it was raising these disputes under this Convention, in order “to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. Where there is a pre-existing claim which is not within the subject-matter of the treaty, it is even more incumbent on the State raising the dispute to make it clear that it is raising a dispute under that treaty and to explain how it falls within that treaty. Mauritius failed to do any of these things prior to the issue of proceedings. None of the additional points made by Mauritius in Chapter 4 of its Reply change this.

6.53 The context and subject-matter of these proceedings in this case are particularly relevant. At any time after July 2009 Mauritius could have said, to the United Kingdom something to the effect that “you have not met the requirements of UNCLOS article 64(1) in the proposed MPA by failing to cooperate directly or through appropriate sub-regional or regional associations to agree on measures necessary for the conservation of straddling stocks”, or “in performing your rights and duties in the EEZ as regards the MPA you have breached your obligations to have due regard to Mauritius’ in respect of non-living resources”, or “the proposed MPA is inconsistent with the practice of issuing inshore fishing licences to Mauritian-flagged vessels”, and so on. If it had, the parties could have identified whether there were disputes and exchanged views over their peaceful settlement through the MPA consultations or the bilateral talks, the purpose of which, after all, were to allow for

such concerns to be raised and taken into account in the policy-making process. Alternatively, they could at least have been raised after 1 April 2010 with a view to exchanging views regarding settlement or negotiation by other peaceful means. Mauritius did not do that. It now seeks to unravel the decision to declare an MPA on grounds under UNCLOS that it had every opportunity to raise at the time but did not. This is very thing that article 283 is designed to prevent.

6.54 Mauritius has at no stage sought to exchange views "regarding [the] settlement [of the dispute] by negotiation or other peaceful means". As Judge ad hoc Anderson made clear in his Declaration in the *Arctic Sunrise* case, cited at paragraph 6.11 above, the key question for the purposes of Article 283(1) is whether a party to a dispute has engaged with the other party to the dispute about how it should be settled, not just about the substance of the dispute. If (which the United Kingdom does not accept) Mauritius ever raised with the United Kingdom a dispute about UNCLOS, at no point did Mauritius raise with the United Kingdom the question of the means by which any alleged dispute under UNCLOS should be settled; and indeed there is nothing in Mauritius's Memorial or Reply which would suggest to the contrary. It is thus all the more clear that Mauritius has not met its obligation under Article 283, nor therefore the pre-conditions for recourse to the procedures in section 2 of Part XV of UNCLOS.

6.55 The International Court of Justice observed in *Georgia v Russia* that "[a]n express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice"⁵⁵⁴. It is Mauritius, not the United Kingdom, who should bear the burden of Mauritius' failure to spell out its dispute or disputes under the Convention, at all or with sufficient clarity, prior to its commencement of proceedings on 20 December 2010 and its Memorial. As stated in the Counter-Memorial, to find otherwise would be tantamount to rendering the important precondition to jurisdiction in article 283(1) a nullity⁵⁵⁵.

⁵⁵⁴ UKCM, para. 5.8.

⁵⁵⁵ UKCM, para. 5.51.

CHAPTER VII

THE TRIBUNAL DOES NOT HAVE JURISDICTION TO DETERMINE THAT THE MPA IS INCOMPATIBLE WITH THE CONVENTION

A. Introduction

7.1 In Section III of Chapter 7 of the Reply Mauritius argues that the Tribunal has jurisdiction to determine whether the BIOT MPA is compatible with the Convention. On the one hand it says that jurisdiction is conferred by article 297(1)(c). On the other it argues that jurisdiction is not excluded by article 297(3).

7.2 This Chapter is divided into eight sections, plus conclusions. Section B identifies the principal matters on which the parties do not agree. Section C responds to Mauritius' characterisation of the MPA and the ban on commercial fishing as environmental measures, not fisheries conservation and management measures. Section D sets out the United Kingdom's view on the relationship between protection and preservation of the marine environment and conservation of living resources in article 297. Section E explains why the tribunal has no jurisdiction over fishing in the territorial sea. Sections F and G explain why it also has no jurisdiction over disputes relating to the exercise of sovereign rights in the EEZ and continental shelf. Section H reiterates the United Kingdom's arguments on jurisdiction over the alleged contravention of Article 300. Section I responds to Mauritius' arguments on articles 281 and 282. Section J sets out the conclusions.

B. Principal areas of disagreement

7.3 To assist the Tribunal, the United Kingdom identifies in this section the key areas of disagreement over this aspect of the Tribunal's jurisdiction. In so far as appropriate, the issues are developed in sections C-I.

7.4 First, the United Kingdom does not accept that it has "mischaracterised" the MPA in order to bring itself within the article 297(3) exception. This is not a dispute about the

creation of a nature reserve, as Mauritius claims⁵⁵⁶. On the contrary, as explained more fully in section C below⁵⁵⁷, the MPA as presently conceived involves management and conservation of marine living resources, including coral reefs, biodiversity, and fish stocks based on existing legislation that predates the declaration of the MPA. The United Kingdom will in due course enact revised and consolidated legislation with respect to the MPA. Inter alia this will cover marine scientific research, conservation of living resources, the prohibition of fishing, pollution, and the mooring of vessels within the MPA, but that legislation is still in the process of preparation. The only new element introduced by the declaration of the MPA, however, is the decision not to licence further commercial fishing within the FCMZ. As such this part of the dispute falls within the ordinary meaning of article 297(3). In so far as Mauritius tries to suggest that the MPA has other elements it is in effect seeking the Tribunal's advice on a hypothetical dispute, not a real one.

7.5 Second, in any event, even accepting that the MPA has in the broadest sense the declared purpose of protecting the marine environment, and even if that purpose were to make a ban on fishing an “environmental” dispute rather than a fisheries dispute (which it does not), this would still not bring the dispute within compulsory jurisdiction under article 297(1)(c). To do so it must relate to “contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal state and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention”⁵⁵⁸. A ban on fishing cannot fall within this wording, whatever its purpose may be.

7.6 It is wrong to say that, if a ban on fishing is “properly characterised” as a measure “to protect and preserve the marine environment”, it then falls within Part XV compulsory jurisdiction and is not excluded by Section 3, as Mauritius argues⁵⁵⁹. That is not what article 297(1)(c) provides for. Article 297(1)(c) is not a catch-all environmental provision of broad scope: it is and was intended to be a narrowly focused provision limited to the contravention of “specified” rules and standards relating to marine pollution: i.e. to the IMO conventions

⁵⁵⁶ MR, para. 7.85.

⁵⁵⁷ Paras. 7.20 - 7.28 of this Rejoinder.

⁵⁵⁸ Article 297(1)(c).

⁵⁵⁹ MR, paras. 7.64, 7.100, 7.101.

referred to in articles 207-212⁵⁶⁰. It has nothing whatever to do with fishing, or conservation of biodiversity and other living resources. This point is addressed more fully in section D below.

7.7 Third, the United Kingdom has not misunderstood Section 3 of Part XV, as Mauritius alleges⁵⁶¹. The *Southern Bluefin Tuna Case* was not concerned with fishing in the EEZ of a coastal state, but with fishing for a highly migratory species on the high seas pursuant to article 64 of UNCLOS and a regional fisheries convention⁵⁶². High seas fisheries disputes are not subject to the limitations on jurisdiction in section 3 of Part XV, as Sir Kenneth Keith observed in that case⁵⁶³.

7.8 The present case is not a high seas fisheries dispute: it is a dispute about conservation and management of living resources located in the BIOT FCMZ to which Mauritius demands access: in other words these resources fall within the EEZ regime, not the high seas regime. That is precisely the kind of dispute which article 297(3)(a) was intended to exclude from compulsory jurisdiction⁵⁶⁴, and those coastal States which at UNCLOS III insisted on that exclusion would not have accepted the argument Mauritius is now making⁵⁶⁵. Indeed Mauritius was one of the States which opposed compulsory jurisdiction for disputes relating to the exercise of sovereign rights in the exclusive economic zone⁵⁶⁶.

⁵⁶⁰ Paras. 7.25-7.31 of this Rejoinder.

⁵⁶¹ MR, paras. 7.62-65.

⁵⁶² *Southern Bluefin Tuna Award*, Decision of Annex VII Arbitral Tribunal, 4 August 2000, *RIAA*, Vol. XXIII p.1. (UKCM, Authority 16)

⁵⁶³ *Southern Bluefin Tuna Award*, para. 22, as cited in MR, para. 7.62.

⁵⁶⁴ See M. Nordquist (ed), *UNCLOS 1982: A Commentary* (1989), V, p.105 (UKCM, Authority 85): “this text of article 297 aims at balancing the interests of the coastal states and those of the States with major navigational interests....Disputes relating to marine scientific research and fisheries were divided into three categories: those that would remain subject to adjudication (namely those that do not fall into the other two categories), those that would be completely excluded from adjudication....and those that would be subject to compulsory resort to conciliation. To the second group belong primarily disputes relating to the exercise by a coastal State of those powers with respect to which the substantive provisions of the Convention granted such State complete discretion.”

⁵⁶⁵ See e.g. statement by Ambassador Andersen (Iceland): “the decisions of the coastal State with regard to the resources within the exclusive economic zone must be considered final” (UNCLOS III, 60th meeting, para. 67, V Off. Rec. 28), and by the Kenyan delegate: “the coastal state might be subjected to constant harassment by having to appear before international tribunals at considerable loss of time and money” (61st meeting, para. 49, V Off. Rec. 34). See M. Nordquist (ed), *UNCLOS 1982: A Commentary* (1989), V, p.93. (UKCM Authority 85)

⁵⁶⁶ Mauritius argued that compulsory jurisdiction would lead to “needless tension and bad feeling” among neighbouring states and the reasons against it were “overwhelming”. (62nd meeting, para. 10, V Off. Rec. 36-7). See M. Nordquist (ed), *UNCLOS 1982: A Commentary* (1989), V, p.93. (UKCM, Authority 85)

7.9 Fourth, the United Kingdom does not accept Mauritius' limited reading of article 297(3)(a)⁵⁶⁷. Mauritius' arguments would sweep away that exclusion:

- By reinterpreting article 297(1)(c) to confer general jurisdiction over disputes relating to the marine environment, including the conservation of fish stocks and marine biodiversity;
- By narrowing article 297(3) to exclude measures which Mauritius characterises as having environmental purposes, including the conservation of fish stocks and marine biodiversity.

7.10 Nothing the United Kingdom has said would have the effect, as Mauritius argues, of “interpreting article 297(3)(a) so widely as to vacate article 297(1)(a)-(c) of its content”⁵⁶⁸. But Mauritius' argument would indeed vacate article 297(3) of its content. This point is fundamental to the case now pleaded by Mauritius. It is developed more fully in section D below. Further, the exclusion of jurisdiction over living resources in the EEZ is not somehow undermined by the existence of jurisdiction in respect of the territorial sea, which is the unlikely result that Mauritius contends for. Exceptionally, there may within any agreement with respect to fisheries in the territorial sea be a specific agreement to Part XV jurisdiction consistent with article 288(2) of the Convention. That is not the case here. Absent such a specific agreement, there is no jurisdiction over living resources in the territorial sea. This point is developed more fully in section E below.

7.11 Fifth, and finally, the United Kingdom does not agree that articles 63 or 64 have any relevance to the present dispute⁵⁶⁹. There are several reasons. Article 63 applies only where “the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal states”⁵⁷⁰, or where “the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone”⁵⁷¹.

7.12 On its own terms, which are unambiguous, article 63(1) is not applicable to this case. BIOT and Mauritius are nowhere near each other and their respective FCMZ and exclusive

⁵⁶⁷ MR, paras. 7.103-7.107.

⁵⁶⁸ MR, para. 7.106.

⁵⁶⁹ MR, para. 7.63.

⁵⁷⁰ Article 63(1).

⁵⁷¹ Article 63(2).

economic zones do not adjoin⁵⁷². The geographical context is thus entirely different from the obvious proximity of Barbados and Trinidad and Tobago, whose EEZs not only adjoin each other, they overlapped, and the task of the arbitrators in the *Barbados/Trinidad Case* was to delimit a boundary between them.

7.13 But even if adjacency is not essential to the application of article 63(1), being able to point to shared fish stocks is essential. It was “common ground between the Parties that the flying fish migrate through the waters of both Barbados and Trinidad and Tobago”⁵⁷³. That was why article 63(1) applied in that case. It is not common ground in the present case that stocks found in the BIOT FCMZ also migrate through the Mauritius EEZ.

7.14 Nor is it accepted that Mauritian vessels fish in waters “beyond and adjacent to” the BIOT FCMZ. Article 63(2) is for that reason equally inapplicable. As explained in Chapter VIII,⁵⁷⁴ Mauritius provides no evidence to prove that its vessels fish anywhere near the BIOT FCMZ. Indeed the evidence it supplied to the IOTC contradicts its own claims in these proceedings. Its only declared fishing takes place in areas many hundreds of miles southwest of the BIOT FCMZ.

7.15 The reef fish previously taken within the BIOT FCMZ by Mauritian vessels (in notably limited numbers) are not migratory, and highly migratory fish stocks are subject to their own special regime in article 64. The comments of the arbitral tribunal in the *Barbados/Trinidad and Tobago Case* regarding coordination of fisheries conservation and management measures are thus of no relevance to the present dispute. Even if they were relevant to a dispute under article 64, Mauritius is not a State “whose nationals fish in the region,” so that article too is not applicable to this dispute, for reasons elaborated in Chapter VIII⁵⁷⁵.

⁵⁷² See the map reproduced as Figure 2.2 at p. 49 of the UKCM. Almost 500 nautical miles separate the two zones.

⁵⁷³ *Barbados/Trinidad Award*, Decision of the Annex VII Arbitral Tribunal, 11 April 2006, *RIAA*, Vol. XXVII, p.149, at para. 285 (UKCM, Authority 24). It should be noted that although they migrate between Barbados and the Orinoco Delta, flying fish are not listed in UNCLOS Annex I as a highly migratory species for the purposes of article 64 of UNCLOS.

⁵⁷⁴ See paras. 8.57-8.61 of this Rejoinder.

⁵⁷⁵ *Ibid.*

7.16 The arbitrators' remarks in *Barbados/Trinidad* on the negotiation of an agreement for access to fisheries within the EEZ of Trinidad and Tobago are equally irrelevant. The tribunal's references to such an agreement arose out of their finding – which Trinidad and Tobago had not disputed – that Trinidad and Tobago had committed itself to negotiating such an agreement⁵⁷⁶. That commitment did not arise out of any provision of UNCLOS. By contrast, the United Kingdom has made no commitment to negotiate a fisheries access agreement with Mauritius. Whatever rights Mauritius might have to fish in the BIOT FCMZ could derive only from the understanding reached in 1965. But, as identified in Chapter VIII of the Counter-Memorial and as is developed further in Chapter VIII below, the understanding in respect of fishing rights created no binding obligations.

7.17 And Mauritius is wrong to say that the tribunal's views on jurisdiction in the *Barbados/Trinidad Case* are obiter: the issue was argued by the parties⁵⁷⁷, and on four separate occasions in their judgment the tribunal found that EEZ fisheries' disputes were outside their jurisdiction because of article 297(3). Paragraph 276 is merely the longest of the four:

“Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal “any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone”, and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal”⁵⁷⁸.

C. Mauritius' characterisation of the BIOT MPA

7.18 The purpose of this section is to respond to Mauritius' characterisation of the BIOT MPA. Mauritius asks the Tribunal to declare that the United Kingdom's “purported” MPA is incompatible with UNCLOS⁵⁷⁹, but its conception of that MPA is fundamentally different from the United Kingdom's. First, Mauritius says that the MPA was adopted in order to

⁵⁷⁶ Paras. 291-2.

⁵⁷⁷ See para. 79: “Moreover, *Trinidad and Tobago argues*, Article 297(3)(a) of the Convention, which states in relevant part that “coastal states shall not be obliged to accept the submission to . . . settlement [in accordance with Section 2 of Part XV] of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise”, makes clear that the Tribunal has no jurisdiction to hear such a claim.” See also para. 258 which indicates that Trinidad was responding to arguments made by Barbados.

⁵⁷⁸ Para. 276. See also paras. 216, 258 and 283.

⁵⁷⁹ MR, Relief, para 3.

protect and preserve the marine environment, and that the ban on commercial fishing in the MPA is therefore an environmental measure, not a fisheries conservation and management measure. This characterisation, it claims, brings that part of the dispute within compulsory jurisdiction under article 297(1)(c)⁵⁸⁰.

7.19 Second, in order to establish that the MPA violates other UNCLOS rights (other than the claimed right to fish within the MPA), Mauritius has to show that those rights are in some way interfered with by the declaration of an MPA. To do so, Mauritius argues that the MPA is much more than a no-take fishing zone, and that “the legislation or other effective means to establish an MPA will necessarily affect a wide range of activities that normally constitute a legitimate use of the sea”⁵⁸¹.

(i) *The broad environmental purpose of the BIOT MPA does not somehow establish the jurisdiction of the Tribunal*

7.20 Mauritius argues in its Reply that the “international understanding of the meaning and purpose” of the term “Marine Protected Area” is “environmental”⁵⁸². It says that the BIOT MPA “has been established to “protect and preserve” the marine environment of the Chagos Archipelago”⁵⁸³.

7.21 The United Kingdom does not dispute that the purpose of the BIOT MPA is “environmental” if that term is understood to encompass conservation and management of the living resources, ecosystems, and biodiversity of coral reefs and their surrounding seas. However, nothing flows from any such labelling: the “MPA” concept has no agreed or generally accepted content. Nothing Mauritius says in the Reply alters the reality that the BIOT MPA as presently constituted simply combines existing legislation with a ban on commercial fishing.

7.22 Mauritius makes no reference in its pleadings to the legislation which governs protection of the environment within the MPA. There are four relevant ordinances, all of

⁵⁸⁰ MR, paras. 3.72-4, 7.84-7.107.

⁵⁸¹ MR, para. 7.95.

⁵⁸² MR, para. 3.73.

⁵⁸³ MR, para. 7.90.

which predate the declaration of the MPA, and three of which were already in force when the Environment (Protection and Preservation) Zone (EPPZ) was declared in 2003:

- 1988 Environment Protection (Overseas Territories) Order⁵⁸⁴. This prohibits “the deposit of articles and substanceseither in the sea or under the sea bed” by UK vessels anywhere and by other vessels in the Territorial sea boundary and any declared “fisheries zone”. The BIOT fisheries conservation and management zone is identical to the EEPZ.
- 1994 Prevention of Oil Pollution Ordinance⁵⁸⁵. This regulates the discharge of oil from vessels or pipelines in the internal waters and territorial sea of BIOT.
- 1997 Regulation of Activities by Vessels Ordinance⁵⁸⁶. This regulates “any form of exploration or survey of, or research into, any aspect of the waters of the Territory or the seabed or subsoil beneath those waters or the living or non-living resources of those waters or of that seabed or subsoil, whether such exploration or survey or research is conducted for reward or in pursuit of scientific knowledge or for pleasure or for any other purpose whatever.” (s.2(3)). It applies only in the internal waters and territorial sea of BIOT.
- 2007 Fisheries Conservation and Management Ordinance⁵⁸⁷. This prohibits fishing in the internal waters, territorial sea and 200 mile fisheries conservation and management zone of BIOT unless carried out in accordance with a licence (s.7) and makes other provision for the regulation thereof.

7.23 Mauritius does not argue that any of these ordinances are incompatible with UNCLOS or with the rights Mauritius claims in these proceedings. It follows that Mauritius’ request for a declaration that the BIOT MPA is incompatible with UNCLOS can amount to no more than a request for a declaration that the ban on commercial fishing for conservation and management reasons is incompatible with UNCLOS. To ask the Tribunal to do more would

⁵⁸⁴ Annex 31.

⁵⁸⁵ Annex 42.

⁵⁸⁶ Annex 50.

⁵⁸⁷ Annex 59.

be to invite it to write an advisory opinion on MPAs and their compatibility with UNCLOS in general. The Tribunal has no jurisdiction to give such an opinion, nor has it heard reasoned argument from Mauritius on the matter.

7.24 The content of an MPA is determined by the coastal State. In trying to broaden the content and scope of the MPA, Mauritius cannot derive assistance from decisions of the parties to the Convention on Biological Diversity or the Guidelines on Marine Protected Areas adopted by the IUCN to which it refers. The compatibility of the BIOT MPA with UNCLOS has to be judged by reference to the MPA as it exists today, in the form elaborated by the United Kingdom, not by reference to some alternative conception envisaged by Mauritius or by international agencies, nor by reference to whatever additional measures the United Kingdom may in the exercise of its sovereign rights introduce at some time in the future.

7.25 Mauritius nonetheless cites the IUCN Guidelines on Marine Protected Areas⁵⁸⁸, and the definition of “marine and coastal protected area” adopted by Decision VII/5 of the Conference of the Parties to the Convention on Biological Diversity for the proposition that “an MPA is directed to the protection of biodiversity, not the conservation of fisheries”⁵⁸⁹. On the basis of these sources, Mauritius concludes that: “The total ban on all fishing activity in the “MPA” is not a fisheries measure, as it is not intended to conserve fisheries for their future exploitation. It is a biodiversity conservation measure, intended to protect and preserve the marine environment.”⁵⁹⁰

7.26 The Convention on Biological Diversity does not apply to BIOT, so the practice of the parties thereto is not relevant to BIOT. That said, the United Kingdom does not dispute that both the BIOT MPA and the ban on commercial fishing will further the protection of biodiversity. As explained in the Counter-Memorial,⁵⁹¹ the coral reef system of the Chagos Archipelago is one of the most extensive and important in the world, and its pristine state and remoteness from human impact give it real importance for scientific research on the conservation and management of coral reefs and other marine living resources. Like other

⁵⁸⁸ MR, para 7.97.

⁵⁸⁹ MR, paras 7.94-7.96.

⁵⁹⁰ MR, para 7.101.

⁵⁹¹ UKCM, paras 3.6-3.18.

coral reefs, it supports a large population of fish and other living creatures, and is therefore rich in biodiversity.⁵⁹²

7.27 As the scientific evidence set out in Chapter III shows⁵⁹³, fish stocks, coral reefs and biodiversity are all threatened by harmful fishing activity. Fishing methods used in the Indian Ocean entail significant by-catches of sharks, an endangered species. The ban on commercial fishing in the BIOT MPA thus contributes directly to the elimination of by-catches, the conservation of biodiversity, and the continued health of the coral reef system and the fish stocks which it supports. It was not adopted simply to “build up and maintain reserve stocks for fishing in the future”, so Mauritius’ quotation from the IUCN’s Guidelines is irrelevant.⁵⁹⁴ Nevertheless, as the evidence reviewed in Chapter III demonstrates, a no-take MPA reduces pressure on fish stocks throughout the MPA and allows the biomass, and consequently the reproductive capacity, of exploited species to increase.

7.28 The conclusion that protection of coral reefs, marine biodiversity and endangered species is intended to protect and preserve the marine environment does not assist Mauritius. The mechanism by which the MPA currently achieves its objectives is the ban on all commercial fishing within the MPA, but even if the relevant provisions of existing or future ordinances are taken into account, the question Mauritius has to address is why the purpose of the MPA should affect the interpretation and application of articles 297(1)(c) or 297(3)(a). The ordinary meaning of those provisions is unambiguous and straightforward, as further explained in section D below. The first does not confer jurisdiction over the declaration of the MPA, while the second excludes jurisdiction over conservation and management of the living resources of the EEZ, including coral reefs, biodiversity and fish stocks.

(ii) The BIOT MPA currently affects only commercial fishing

7.29 Mauritius claims that “Decision VII/5 also confirms that the legislation or other effective means to establish an MPA will necessarily affect a wide range of activities that

⁵⁹² See citations in paras. 3.47 – 3.49.

⁵⁹³ Paras. 3.52-3.55

⁵⁹⁴ MR, para. 7.97.

normally constitute a legitimate use of the sea”⁵⁹⁵. The implication is that the declaration of the BIOT MPA necessarily impacts on other non-fishing rights which Mauritius claims. These include oil and mineral rights in the subsoil of the seabed and the harvesting of sedentary species on the seabed.

7.30 The simple answer to this argument is again that the only new measure introduced by the MPA as presently constituted is the ban on commercial fishing. Mauritius points to no other legislation which will necessarily affect any activity in the EEZ other than fishing and it does not challenge the existing ordinances listed above in paragraph 7.22. It nowhere explains how the existence of an MPA, however defined, would or could interfere with the other non-fishing rights to which it lays claim within the BIOT FCMZ. Nor in its written pleadings does it argue that the earlier declaration of an Environmental Protection and Preservation Zone in 2003 is incompatible with UNCLOS (apart from its claim to be the coastal state), and it must therefore be assumed that its claimed rights are unaffected by that declaration.⁵⁹⁶ Although Mauritius protested at the establishment of the BIOT EPPZ in 2003, its protest does not allege interference with any of its claimed UNCLOS rights⁵⁹⁷.

7.31 Chapter VIII sets out more fully why the declaration of the MPA and the ban on commercial fishing can have no impact on the other rights claimed by Mauritius⁵⁹⁸, even if those rights did exist, which they do not. In so far as Mauritius makes claims about the purpose and potential future content of legislation concerning the MPA its case is merely hypothetical.

D. The relationship between protection and preservation of the marine environment and conservation of living resources in article 297

7.32 As explained in the previous section, Mauritius is asking the Tribunal to characterise the ban on fishing as an environmental protection measure allegedly within its jurisdiction under article 297(1)(c), and not as a conservation and management measure excluded from jurisdiction by article 297(3)(a). This is the core of Mauritius’ case with respect to

⁵⁹⁵ MR, para. 7.95.

⁵⁹⁶ BIOT Proclamation No 1 of 2003. (MM, Annex 121)

⁵⁹⁷ MM, paras 4.14-28.

⁵⁹⁸ Paras. 8.47-8.56.

jurisdiction over alleged breaches concerning the MPA. It follows that if Mauritius is wrong with respect to article 297(1)(c) then article 297(3) will apply to this aspect of the dispute and the tribunal will have no jurisdiction to determine whether a no-take MPA contravenes any provision of UNCLOS.

7.33 For reasons set out in the previous section, the United Kingdom takes the view that, whatever its purpose, a ban on fishing in the FCMZ is necessarily a conservation and management measure relating to the United Kingdom’s “sovereign rights with respect to the living resources in the exclusive economic zone”. In this section it develops the argument that a dispute relating to that fishing ban is necessarily excluded from jurisdiction by article 297(3).

7.34 Although article 297(3) starts by stating that disputes “with regard to fisheries shall be settled in accordance with section 2”, it then goes on to exclude from compulsory jurisdiction “any” dispute “relating to its sovereign rights with respect to living resources” in the EEZ, “or their exercise”, including “the terms and conditions established in its conservation and management laws.” The wording of the *exclusion* (living resources) is noticeably broader than the category of disputes *included* (fisheries) within compulsory settlement by the opening line of article 297(3).

7.35 The exclusion of “any” disputes with respect to “living resources” is broad and includes conservation and management of biodiversity, coral reefs, and endangered by-catch species, as well as commercial fish stocks.⁵⁹⁹ All of these are “living resources”⁶⁰⁰, whose “conservation and management” fall within the “sovereign rights” and “discretionary powers” of the “coastal State”, i.e. the United Kingdom. As such a ban on fishing aimed in part at conservation of fish stocks and in part at protecting other living resources falls squarely within the exclusion provided by article 297(3)(a) and the fact that it may have “environmental” purposes is irrelevant: most fisheries conservation measures do. This point is further addressed below.

⁵⁹⁹ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO WT/DS58/AB/R (1998), paras. 130-131, where turtles and biological resources are treated as “living resources”. (**Authority 8**) See also S. Lyster, *International Wildlife Law* (2nd ed, 2010), p.128. (**Authority 34**)

⁶⁰⁰ 1982 UNCLOS, article 56; 1992 Convention on Biological Diversity, preamble, articles 1 and 2.

7.36 The wording of article 297(3)(a) is also broad enough to cover disputes about entitlement to sovereign rights (“relating to its sovereign rights”), including for this purpose the question whether the United Kingdom is the relevant “coastal state”. To dispute, as Mauritius does, that the United Kingdom has any entitlement to sovereign rights in the BIOT FCMZ or continental shelf is to promote a dispute “relating to its sovereign rights”.

7.37 A dispute can be said to “relate to” sovereign rights when there is a direct or legally significant connection between the dispute and the existence, scope, or exercise of the sovereign rights in question.⁶⁰¹ In the present case the question is therefore whether the dispute has a direct or legally significant connection with the conservation of fisheries or other living resources. Given that Mauritius is challenging both the United Kingdom’s entitlement to sovereign rights over living resources in the BIOT MPA, and its exercise of those rights, the conclusion is unavoidable: this is a dispute which “relates to” sovereign rights over living resources of the EEZ. As such it plainly falls within the terms of article 297(3)(a) and is thereby excluded from jurisdiction.

7.38 As it is clear that the language of article 297(3) excludes jurisdiction over disputes relating to biodiversity and other living resources in the EEZ, it is equally clear that conservation and management measures taken for the purpose of protecting marine biodiversity and other marine living resources do not come within article 297(1)(c).

7.39 Nowhere in the Rejoinder does Mauritius seriously address the fundamental problem with its attempt to rely on article 297(1)(c). Beyond citing other articles of the Convention on which it wishes to rely, it identifies no “specified international rules and standards for the protection and preservation of the marine environment” which the fishing ban violates, despite being invited to do so by the United Kingdom⁶⁰². But to argue that articles 55, 56, 63, 64, and 194 are “specified international rules and standards” for the purposes of article

⁶⁰¹ *Methanex v USA (Partial Award)* (2002), para. 147, in the context of the phrase “relating to” in Article 1101(1) NAFTA: “We decide that the phrase “relating to” in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them, as the USA contends. Pursuant to the rules of interpretation contained in Article 31(1) of the Vienna Convention, we base that decision upon the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose in NAFTA’s Chapter 11.” (**Authority 12**) See also *United States - Standards for Reformulated and Conventional Gasoline*, WTO, WT/DS2/AB/R (1996), pp.14-19. (**Authority 6**)

⁶⁰² UKCM, para. 6.7.

297(1)(c) is to seek to import into that article every provision of UNCLOS on which Mauritius wishes to rely, thereby recasting the entire case as a marine environmental dispute.

7.40 In this respect, Mauritius’ argument contradicts the ordinary meaning of the term “international rules and standards for the protection and preservation of the marine environment”, which, as the United Kingdom pointed out in the Counter-Memorial, is generally understood as a reference to rules and standards adopted by IMO for the purpose of controlling marine pollution⁶⁰³. Article 297(1)(c) refers to “specified” international rules and standards “which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention”⁶⁰⁴. This must mean “specified” in the text of the 1982 Convention. The only place in the 1982 Convention where such rules and standards are “specified” is in Part XII, section 5, i.e. articles 207-212. All of these articles are directed at protecting the marine environment from pollution: they have nothing to do with fisheries.

7.41 Mauritius has the same problem with its attempt to invoke article 194(1)⁶⁰⁵. If the intention of the drafters had been to refer to “contravention of other provisions of the convention” they would surely have said so in those terms, rather than by reference to “specified international rules and standards for protection and preservation of the marine environment”. Articles 55, 56, 63, 64 and 194 do not fit the terminology of article 297(1)(c) and Mauritius cannot establish jurisdiction over a dispute about conservation of marine living resources on this basis.

7.42 Further, Mauritius’ argument ignores the obvious point that jurisdiction over disputes relating to fisheries is established, expressly, by the opening lines of article 297(3), not by article 297(1). Mauritius does not explain why, or how, article 297(1) would have any role at this point, including how this provision could place back into compulsory jurisdiction disputes over living resources which the text of article 297(3) has excluded.

⁶⁰³ UKCM, paras. 6.28-31.

⁶⁰⁴ Cf. the broader language used in Annex VIII, art. 1, of the Convention, concerning disputes to be determined by a special arbitral tribunal (see art. 287(1)(d)). Art. 1 of Annex VIII distinguishes between disputes “relating to (1) fisheries, (2) protection and preservation of the marine environment ...”.

⁶⁰⁵ Paras. 8.47 – 8.56 of this Rejoinder.

7.43 Even if one were to assume, for the sake of argument, that Mauritius is correct in its implausibly broad interpretation of article 297(1)(c), that would still not explain how disputes about the conservation and management of EEZ marine living resources are not then excluded from compulsory jurisdiction by article 297(3). If article 297(1) represents the general principle, then article 297(3)(a) represents the exception. And if disputes concerning conservation and management of EEZ living resources are within the exception provided by article 297(3)(a) then Mauritius' argument with respect to article 297(1) gets it nowhere.

7.44 Of course, Mauritius argues that the purpose of the MPA is environmental, so the purpose of the ban on fishing must be environmental, and therefore it is not within the article 297(3) exclusion but instead is brought within jurisdiction by article 297(1)(c)⁶⁰⁶. But this is to rewrite article 297(1)(c) as a more general inclusion of disputes that can be characterised as “environmental”, whatever else they may also be about. To do so is textually unwarranted: the provision does not apply to disputes concerning “protection and preservation of the marine environment” but to disputes concerning “specified international rules and standards for the protection and preservation of the marine environment”. For all the reasons explained above, a ban on fishing does not fall into that category, whatever its purpose.

7.45 Moreover, it must be asked why the purpose of the fishing ban would remove the dispute from the exclusion provided by article 297(3)(a), even if that purpose is one of protecting and preserving the marine environment. Conservation and management of fish stocks has several purposes, including maintaining a sustainable food supply and its equitable allocation. Sustaining a resource whose abundance is inherently difficult to measure, whose productivity is uncertain, and whose response to climatic and other environmental factors may be unknown, requires conservation measures that are sufficiently conservative – i.e. a precautionary approach.

7.46 If the logic of Mauritius' argument were correct, any dispute concerning precautionary measures to ensure the sustainability of fish stocks risks being characterised as “environmental”, and therefore within jurisdiction under article 297(1)(c), rather than within the article 297(3) exclusion. Nothing would remain of the exclusion of disputes over

⁶⁰⁶ MR, paras. 7.63-64.

fisheries conservation and management in these circumstances. In effect, the more effort a State puts into fisheries conservation measures, the more likely it would be to render itself open to challenge via article 297(1)(c).

7.47 Conservation and management of fish, like other living resources, also has other purposes that can be described as environmental. Fish represent part of the biological diversity of the oceans; they are an essential component of marine ecosystems, both because they provide a source of food for other species, and for each other. The methods used to catch fish may also be environmentally harmful. It is difficult, for example, to avoid unwanted by-catches of other species. Sharks are one such species, and by-catches from fishing in the Indian Ocean, including in the waters of BIOT, represent a real threat to the survival of shark species⁶⁰⁷.

7.48 There are good reasons therefore for regulating fishing when it proves unacceptably harmful to other marine living resources and unsustainable in the longer term. All of these environmental objectives fall comfortably within the ordinary meaning of the terms “conservation and management” and “living resources” when employed in article 297(3)(a). They do not fall comfortably or at all within the terms of article 297(1)(c).

7.49 To characterise the ban on fishing in the FCMZ as “environmental” therefore ignores the context: that its purpose is to control environmentally harmful fishing practices. It does not follow that it therefore ceases to be about conservation and management of living resources, or that the environmental purpose prevails over the conservation and management purpose for jurisdictional purposes, or that it falls outside the very broad terms of article 297(3)(a) as explained above. On the contrary, almost any modern fisheries conservation and management measure in any fishery will serve the multiple objectives described above.

7.50 That point is also obvious if one considers the 1995 UN Fish Stocks Agreement. The UNFSA retains the wording of UNCLOS article 119, but places maximum sustainable yield within the context of a pro-active, precautionary and more environmentally focused approach to

⁶⁰⁷ H. Koldewey, D. Curnick, S. Harding, L. Harrison, M. Gollock, ‘Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve,’ 60 *Marine Pollution Bulletin* 1906 (2010). (**Annex 63**) See para. 3.51 of this Rejoinder.

conservation and sustainable use⁶⁰⁸. In giving effect to their duty to conserve marine living resources, states are required by Article 5 to adopt measures designed to ensure ‘long-term sustainability.... and optimum utilisation’ of straddling and highly migratory fish stocks. These include preventing over-fishing and removing excess capacity, as well as using more selective, environmentally safe and cost effective fishing gear. Conservation measures must protect not only the fish, but also their associated ecosystems and marine biodiversity. Measures must also be taken to minimise pollution, waste, and catches of other non-target stocks or species.

7.51 If Mauritius’ argument is correct, the purpose of most fisheries conservation and management measures adopted by coastal states implementing their obligations under the UN Fish Stocks Agreement will now be “environmental”⁶⁰⁹, and EEZ fisheries disputes will be subject to compulsory dispute settlement under article 297(1)(c). That would mean that a radical but unforeseen change in fisheries dispute settlement arrangements occurred when the UN Fish Stocks Agreement entered into force.

7.52 Mauritius argues that many states at the UNCLOS III negotiations supported a restrictive reading of the exceptions to jurisdiction in article 297. At paragraph 7.105 of the Reply it cites comments made by various States in 1976, but these do not provide any support for Mauritius’ expansive reading of article 297(1)(c) or its evisceration of article 297(3). There are four reasons for discounting this reliance on the *travaux préparatoires*.

7.53 First, and most obviously, the *travaux préparatoires* are relevant only when the ordinary meaning is “ambiguous or obscure”, or when the ordinary meaning would produce a result which is “manifestly absurd or unreasonable”⁶¹⁰. On its face there is nothing ambiguous or obscure about the ordinary meaning of article 297(3), nor is the continued exclusion from jurisdiction of disputes relating to living resources manifestly absurd or unreasonable.

7.54 Second, there is no merit in counting the numbers of States arguing for or against any particular position. The references cited by Mauritius merely show that different States took

⁶⁰⁸ Articles 5 and 6. See FAO Fisheries Circ. 898, *Structure and Process of the UN Conference on Straddling Fish stocks and Highly Migratory Fish Stocks* (Rome, 1995). (UKCM, Annex 67)

⁶⁰⁹ The UNFSA has been described as the first treaty to adopt an ‘environmental perspective’ on fisheries conservation: see D. Freestone and Z. Makuch, ‘The New International Environmental Law of Fisheries: The 1995 UN Straddling Stocks Convention’ (1996) 7 *Ybk Int Env L* 3. (**Authority 28**)

⁶¹⁰ 1969 Vienna Convention on the Law of Treaties, Article 32.

different positions on the scope of compulsory dispute settlement: some opposed exceptions, while others strongly supported them, including Mauritius⁶¹¹. Even if they are consulted, *travaux préparatoires* of this kind do not confirm any particular position⁶¹². Such material is useful only if it provides clear confirmation of the meaning of the text⁶¹³. The material on which Mauritius relies does not do so.

7.55 Third, the circumstances in which UNCLOS was concluded also have to be taken into account⁶¹⁴. The text was negotiated by consensus as a package deal⁶¹⁵. To secure that consensus many States, sometimes a majority, had to compromise and accept drafts they might well have opposed but without which no consensus would have materialised. To start reinterpreting UNCLOS by reference to the views of some States rather than by reference to the ordinary meaning of the consensus text would quickly unravel the whole Convention.

7.56 Fourth, there is nothing in the wording or the negotiating history of the UNFSA which demonstrates any intention to transfer jurisdiction over EEZ fisheries disputes from the excluded category into the included category⁶¹⁶.

7.57 The jurisdictional argument made by Mauritius is not tenable. It is not consistent with the ordinary meaning of the text. It is not confirmed by *travaux préparatoires*. It ignores the circumstances in which the Convention was concluded. The only plausible reading of articles 297(1)(c) and (3)(a) is that a ban on fishing remains a conservation and management measure taken by the coastal State exercising its discretionary powers with respect to the living resources of the EEZ, even if its purpose in a broader sense is environmental and even if it is

⁶¹¹ See also the references cited at paragraph 7.8 above.

⁶¹² "...their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that that they were assented to by the other parties." Sir H Waldock, "3rd Report on the Law of Treaties" [1964] *ILC Yearbook*, vol II, p.58, para 21. (**Authority 41**)

⁶¹³ See *Maritime Dispute (Peru/Chile)*, Judgment, I.C.J. Reports 2014, paras.65-66 (**Authority 18**); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 653 (**Authority 11**), para. 53; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 21 (**Authority 5**), para. 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 27, para. 55) (UKCM, Authority 12).

⁶¹⁴ VCLT, article 32.

⁶¹⁵ UN, *Official Texts of the UN Convention of the Law of the Sea of 10 December 1982* (New York, 1997), 'Introduction', p.3. (UKCM, Annex 74)

⁶¹⁶ See FAO Fisheries Circ. 898, *Structure and Process of the UN Conference on Straddling Fish stocks and Highly Migratory Fish Stocks* (Rome, 1995) (UKCM, Annex 67); D. Balton, Strengthening the Law of the Sea: The New Agreement on Straddling Stocks and Highly Migratory Fish Stocks, 27 *ODIL* (1996) 125. (UKCM, Authority 46)

also aimed at conservation and management of biodiversity and other living resources in addition to the fish. As such it remains excluded from compulsory jurisdiction by article 297(3)(a).

E. Alleged contravention of article 2(3): jurisdiction over fishing in the territorial sea

7.58 Mauritius' response to the United Kingdom's position so far as concerns jurisdiction over fishing in the territorial sea of BIOT is brief, and does little more than reiterate its earlier position.

7.59 It is correct that article 297(3) does not expressly apply to fisheries disputes in the territorial sea. But it remains the case that Mauritius cannot invoke any specifically UNCLOS rights in order to sustain its argument for continued access to territorial sea fish stocks. It can do so only by relying on the non-binding understanding of 1965, and incorporation of alleged rights into article 2(3). However, the Tribunal's jurisdiction cannot be established this way. There would have been little point in negotiating a complex and balanced fisheries regime for the EEZ, with specific rules as to jurisdiction, if that regime could then be undermined from within via claims to fish in the territorial sea.

7.60 Not surprisingly, there is no express provision of the Convention which regulates foreign fishing in the territorial sea or excludes disputes with respect to conservation and management of fish stocks in the territorial sea. On the face of it, there is no need for such provisions: the coastal State has sovereignty in the territorial sea, subject only to a right of innocent passage, and foreign fishing vessels have no right of access to fish stocks save by agreement of the coastal State.

7.61 A dispute concerning access by foreign fishing vessels to an EEZ fishery would be excluded from compulsory jurisdiction by article 297(3)(a), unless there was an agreement between the parties that made specific provision to the contrary⁶¹⁷. In that case, article 288(2) would apply and the dispute would be within UNCLOS Part XV jurisdiction "in accordance with the agreement".

⁶¹⁷ See above paras. 4.20 and 7.10.

7.62 That the Convention says nothing comparable about disputes relating to fisheries in the territorial sea cannot be an oversight, especially when it is recalled that agreement had been reached at UNCLOS III on extending the territorial sea to twelve miles (article 3). The Convention reaffirms the sovereignty of the coastal State over the territorial sea and by implication its absolute right to control fishing in the territorial sea. However, there was no need to make special provision for disputes concerning access to fish stocks in the territorial sea, given that access could only be by agreement and article 288(2) would apply where States wished to secure Part XV jurisdiction over such disputes. Thus, if another State does have the right to fish in the territorial sea by agreement, then a dispute will be subject to compulsory jurisdiction if, but only if, it is submitted to a tribunal in accordance with that agreement, as provided for by article 288(2). In the instant case, however, the 1965 understanding on which Mauritius relies makes no provision for dispute settlement, whether pursuant to the terms of article 288(2) or otherwise (consistently with the fact that it was not intended to give rise to binding obligations). That is fatal to Mauritius' case for jurisdiction over its alleged fishing rights in the territorial sea.

7.63 Mauritius seeks to evade this simple point by incorporating its alleged agreement within article 2(3) and then inviting the tribunal to interpret and apply that version of article 2(3). But whether the understanding is viewed separately from article 2(3) or as part of article 2(3) it must still satisfy the requirements of article 288(2) in order to fall within Part XV jurisdiction. Mauritius and the United Kingdom never agreed any mechanism to settle disputes with respect to Mauritian fishing in the territorial sea. UNCLOS Part XV cannot now be invoked to solve that omission. That conclusion is consistent with the terms of section 2 of part XV, and it ensures coherence and consistency between the treatment of territorial sea and EEZ fishery disputes⁶¹⁸. In both cases, a Part XV court or tribunal will have jurisdiction over that dispute only in so far as the parties to the access agreement have provided accordingly.

7.64 By contrast, if Mauritius were correct in its reading of article 2(3), any State whose fishing vessels found themselves arrested for illegal fishing in the territorial sea could then freely initiate Part XV proceedings to challenge the arrest on the quite possibly dubious ground that there was some understanding or agreement, or that its vessels had traditionally

⁶¹⁸ A point made in relation to innocent passage by R. Wolfrum, *Handbuch des Seerechts* (2006), p. 473, para. 33 (UKCM, Authority 109), but equally relevant in this context.

fished there. Given the attitude of coastal states to EEZ fishing disputes during UNCLOS III, one has only to pose the question to see that the interpretation offered by Mauritius is untenable.

F. Sovereign rights in the EEZ

(i) Jurisdiction with respect to alleged contravention of articles 55 and 56(2)

7.65 Mauritius adds nothing to its earlier argument with respect to these articles. It claims that by exercising the jurisdiction conferred by articles 55 and 56 the United Kingdom has violated the rights of Mauritius in the BIOT FCMZ with respect to minerals, fisheries and other resources, cooperation and consultation⁶¹⁹. It then says that article 56(2) is covered by the phrase “specified international rules and standards for the protection and preservation of the marine environment” in article 297(1)(c), and that it is not a dispute “relating to sovereign rights with respect to living resources in the [EEZ]”⁶²⁰. For these reasons it says the dispute is within article 297(1)(c) and is not excluded by article 297(3).

7.66 The defects in this argument have already been identified and dealt with in section D above. First, as a straightforward matter of textual interpretation, a ban on fishing falls within the ordinary meaning of article 297(3)(a). It is plainly a dispute “relating to sovereign rights with respect to living resources... in the exclusive economic zone.” Second, a ban on fishing remains a ban on fishing despite having an environmental purpose. Third, the reference in article 297(1) to “specified international rules and standards for the protection and preservation of the marine environment” is not a reference to articles 55 or 56.

7.67 However formulated, and on whatever basis, any challenge to the legality of the ban on fishing in the BIOT FCMZ is excluded from compulsory jurisdiction by article 297(3)(a). It makes no difference to that conclusion whether the articles allegedly contravened by the ban are articles 55, 56, 63, 194 or every other provision of UNCLOS and the UNFSA combined. Article 297(3)(a) will cover that dispute. A dispute concerning mineral resources is not covered by article 297(3)(a). This will be dealt with below (in section G on article 78).

⁶¹⁹ MR, paras. 7.71-7.73.

⁶²⁰ *Ibid.*

(ii) Jurisdiction over alleged contravention of articles 63(1), 63(2), 64 and article 7 UNFSA

7.68 As follows from the above, Mauritius' arguments on jurisdiction with respect to its claims under articles 63(1), 63(2), 64 and article 7 UNFSA fail. Article 297(3)(a) covers these claims. As also follows from section B above, nothing said in *Barbados/Trinidad* affects that conclusion. Indeed, the decision of the arbitrators entirely supports the obvious conclusion that a dispute about management and conservation measures is excluded from jurisdiction by article 297(3) whether the claim is based on article 63(1), 63(2), 64 or article 7 UNFSA⁶²¹.

7.69 With respect to the last three lines of paragraph 7.111 of the Reply, the United Kingdom notes that Mauritius does not claim that the dispute relates to "living resources in the EEZ of the UK". If Mauritius means to refer to the BIOT FCMZ, then it makes no difference whether the dispute relates to procedural obligations or is not exclusively about sovereign rights over living resources in the EEZ. Article 297(3)(a) still applies to the extent that the dispute is about sovereign rights over living resources in the EEZ.

(iii) Jurisdiction over alleged contravention of article 194(1) and (4)

7.70 As pointed out in the Counter-Memorial⁶²² and again in Chapter VIII below, article 194 deals with the regulation of marine pollution, not with fishing. It provides no basis on which to regulate conservation and management of living resources and no basis on which to challenge a ban on fishing in the FCMZ. A ban on fishing has no relevance to the regulation of marine pollution.

7.71 The United Kingdom does regulate marine pollution in the BIOT EPPZ⁶²³, but these regulations long predate the declaration of an MPA. Mauritius makes no reference to the EPPZ legislation, nor does it seek to challenge its conformity with UNCLOS. Its case is that the declaration of an MPA is intended to protect and preserve the marine environment and

⁶²¹ *Barbados/Trinidad*, paras. 216, 258, 276 and 283. (UKCM, Authority 24)

⁶²² UKCM, paras. 6.20-22; 8.49.

⁶²³ See para. 7.22 above.

that it contravenes the rights Mauritius claims under article 194 because article 194 deals with the marine environment.

7.72 The United Kingdom's response to the merits of this argument is set out in Chapter VIII at paragraphs 8.47 – 8.53. As explained there, this part of Mauritius' case has not been pleaded in a way that would allow the tribunal to determine a "dispute" between the parties; it is in essence a hypothetical case or a request for advice that should be dismissed for that reason. In particular, Mauritius offers no explanation of how the regulation of pollution could interfere with the rights it claims in the EEZ. The United Kingdom's argument is not circular, as Mauritius alleges. Unless Mauritius can explain how a ban on fishing interferes with any of the rights claimed by Mauritius under article 194 there is no dispute for the tribunal to determine.

7.73 But even if a ban on fishing were somehow or other to contravene article 194, the tribunal would still have no jurisdiction because, as explained earlier, however formulated, and on whatever basis, any challenge to the legality of the ban on fishing in the BIOT FCMZ is excluded from compulsory jurisdiction by article 297(3)(a).

G. Continental shelf rights: jurisdiction over alleged contravention of article 78

7.74 Mauritius claims mineral rights and the right to harvest sedentary species on the BIOT continental shelf. For that purpose it relies on article 78 of the Convention⁶²⁴. It says that this part of the dispute is not excluded by article 297(3) and that it falls within the jurisdiction of the tribunal under article 297(1)(c). However, a dispute about mineral rights cannot be characterised as an environmental dispute. And if article 297(1)(c) provides no jurisdictional basis for a claim to extract seabed minerals from the continental shelf of BIOT - and it plainly does not - then there is no jurisdictional basis for this part of the case. No other provision of article 297(1) confers jurisdiction over such a dispute.

⁶²⁴ MR, para. 7.74.

7.75 Moreover, as pointed out in the Counter-Memorial, there is no dispute between the parties with respect to seabed minerals. Mauritius has not even attempted to set out a case that shows how the MPA in any way interferes with its asserted rights. A ban on fishing is not a ban on mineral resource extraction. The Tribunal is not asked to decide whether Mauritius has rights over seabed minerals: it is asked to decide whether the MPA violates the rights claimed by Mauritius over those minerals.

7.76 The United Kingdom has made clear that it has no intention of permitting mineral resource exploration or exploitation on the continental shelf⁶²⁵, but that position long predates the declaration of an MPA, and there is no necessary relationship between the two. The question of the lawfulness of the MPA under UNCLOS would not affect the United Kingdom's unwillingness to permit mineral resource exploration or exploitation on the continental shelf since that unwillingness is not an element of the MPA. This part of Mauritius' case has not been pleaded in a way that would allow the Tribunal to determine a "dispute" between the parties; it is in essence a hypothetical case or a request for advice that should be dismissed for that reason.

7.77 Mauritius accepts that a dispute about sedentary species could be characterised as a "fisheries dispute" excluded from compulsory jurisdiction by article 297(3).⁶²⁶ It would be more accurate to say that it is a dispute about "living resources in the exclusive economic zone", to use the actual terminology of article 297(3), but the conclusion remains the same. The Tribunal has no jurisdiction with respect to sedentary species within the MPA.

7.78 Further, as pointed out in Chapter VIII of this Rejoinder, Mauritius has not established that there is a dispute over sedentary species. This is a new element of the case, never previously referred to in negotiations between the parties or in the Memorial. With limited exceptions such species have never been harvested by Mauritius or anyone else⁶²⁷. Again, this part of Mauritius' case has not been pleaded in a way that would allow the tribunal to determine a "dispute" between the parties.

⁶²⁵ UKCM, paras. 2.112-116.

⁶²⁶ MR, para. 7.74.

⁶²⁷ Apart from illegal harvesting of sea cucumbers: see Chapter VIII, para. 8.45 of this Rejoinder.

H. Abuse of rights: jurisdiction over alleged contravention of article 300

7.79 Mauritius does not respond to the United Kingdom's arguments with respect to jurisdiction over this part of its case. The four short paragraphs are entirely devoted to reiterating the merits of its case on abuse of rights and making further allegations of bad faith⁶²⁸. The United Kingdom reaffirms the arguments on jurisdiction with respect to article 300 which it set out in the Counter-Memorial.

I. Availability of other procedures: articles 281 and 282

7.80 Mauritius argues that article 282 of UNCLOS and article XXIII of the IOTC Agreement are irrelevant because its case is founded only on articles 63 and 64 of UNCLOS. It also argues that article 281 is inapplicable and that the *Southern Bluefin Tuna Award* was wrongly decided⁶²⁹. Mauritius relies elsewhere on articles 2(3) and 56(2) of UNCLOS to claim that the United Kingdom is "subject to" or must have "due regard to" the rights which Mauritius claims in the territorial sea and FCMZ of BIOT. It also argues that the law relating to self-determination is applicable in these proceedings via article 293.

7.81 Both Mauritius and the United Kingdom are parties to the IOTC Agreement. That agreement is not incompatible with UNCLOS. On the contrary, it implements the obligation of parties under article 64 to cooperate with respect to highly migratory fish stocks. It also implements the obligation of parties to the UN Fish Stocks Agreement to cooperate for the same purpose. It provides for the settlement of disputes by conciliation, failing which a dispute may be referred to the ICJ⁶³⁰.

7.82 Mauritius argues that the United Kingdom has not fulfilled its obligation to cooperate under article 64. The United Kingdom does not accept that it has any obligation to cooperate because, according to the IOTC, Mauritian vessels do not fish for migratory fish stocks in the same region.⁶³¹ If that is correct there is no dispute between the parties regarding article 64.

⁶²⁸ MR, paras. 7.79-7.82.

⁶²⁹ MR, paras. 7.121-124

⁶³⁰ Article XXIII. See UKCM, paras. 6.52-6.54, 9.21-9.25.

⁶³¹ Chapter VIII, paras. 8.58 – 8.61 of this Rejoinder.

The United Kingdom also argues that it has fulfilled any obligation it may have to cooperate by doing so through the IOTC.⁶³²

7.83 If there is a dispute about cooperation under article 64, that dispute is one which bears directly on the participation and conduct of both states in the IOTC. Indeed Mauritius even complains that the United Kingdom has not consulted the IOTC⁶³³. On the logic of its own argument, the IOTC Agreement would be applicable law in these proceedings in accordance with article 293. By the same logic, Mauritius and the United Kingdom are required to exercise their respective rights and responsibilities in the territorial sea and FCMZ “subject to” or “with due regard to” the rights of other States, including the rights of all parties to the IOTC Agreement.

7.84 Mauritius cannot say that the dispute concerns only articles 63 and 64 of UNCLOS because, on the logic of its own argument, the IOTC Agreement is applicable law and the parties’ rights and obligations under UNCLOS are subject to that agreement or must be exercised with due regard for it. If that is correct then it cannot be the case that the dispute is only an UNCLOS dispute: it is also a dispute under the IOTC Agreement. If it is a dispute under the IOTC Agreement, then it is also subject to settlement in accordance with article XXIII of that Agreement.

7.85 UNCLOS dispute settlement is residual in character; that is it defers to any other method of dispute settlement chosen by the parties. In accordance with articles 281 and 282 an Annex VII tribunal constituted under Part XV will have no jurisdiction if the terms of those articles are satisfied. That is why the United Kingdom argues that, in so far as article 64 is concerned, the dispute must be settled under article XXIII of the IOTC Agreement. Whether that conclusion is supported by reference to articles 281 or 282 is immaterial.

7.86 For the avoidance of doubt, even if the United Kingdom were wrong to invoke articles 281 and 282, the Tribunal would have no jurisdiction as the asserted dispute falls within the article 297(3) exclusion.

⁶³² UKCM, paras. 9.21-25.

⁶³³ MM, para.7.69.

J. Conclusions

7.87 The Tribunal has no jurisdiction to determine that the BIOT MPA is incompatible with the 1982 Convention. Article 297(1)(c) does not confer general jurisdiction over disputes relating to the marine environment, nor does it apply to the conservation and management of marine living resources in the exclusive economic zone. It is limited to disputes about contravention of specified international rules and standards for the prevention of marine pollution. This does not comprise the asserted dispute over articles 55, 56, 63, 64 or 194 of the 1982 Convention or article 7 of the UNFSA. Moreover, that dispute falls plainly within the ordinary meaning of article 297(3), while a dispute about sedentary species is also excluded from compulsory jurisdiction by article 297(3).

7.88 In addition:

- a. Separate to the objection raised by reference to article 283, there is no dispute with respect to articles 63 and 64, or article 7 UNFSA. In so far as article 64 is concerned, if there is a dispute, it must be settled under article XXIII of the IOTC Agreement.
- b. Article 297(1)(c) provides no jurisdictional basis for a claim to extract seabed minerals from the continental shelf of BIOT.
- c. Even if the 1965 understanding could be regarded as an agreement to allow fishing in the territorial sea of BIOT, it makes no provision for dispute settlement pursuant to the terms of article 288(2). The Tribunal has no jurisdiction in accordance with that article.
- d. Mauritius cannot explain how a ban on fishing interferes with any of the rights claimed by Mauritius under article 194, and there is no dispute for the tribunal to determine with respect to that article.
- e. The United Kingdom reaffirms the arguments on jurisdiction with respect to article 300 as set out in the Counter-Memorial.

PART FOUR

THE MERITS

Part Four considers the merits of Mauritius' Application so far as concerns the alleged incompatibility of the MPA with the 1982 Convention. This is without prejudice to the United Kingdom's principal submission that the Tribunal is without jurisdiction.

The Part consists of a single chapter, **Chapter VIII**, which responds to what Mauritius says in its Reply on fishing rights and consultation, including United Kingdom internal documents. The chapter confirms that Mauritius does not have the rights alleged in the territorial sea, fisheries conservation and management zone, environmental (protection and preservation) zone or continental shelf of BIOT, and has not established that the declaration of an MPA violated the rights claimed by Mauritius under the 1982 Convention or any other agreement.

The fact that the United Kingdom, for policy reasons, has sought over the years to act consistently with, and even beyond, the 1965 understanding with respect to fishing rights does not mean that the understanding gave rise to enforceable obligations owed to Mauritius on the international plane.

CHAPTER VIII

THE MPA DOES NOT VIOLATE THE RIGHTS OF MAURITIUS UNDER UNCLOS

A. Introduction

8.1 In this Chapter, the United Kingdom responds to the points made in Chapter 6 of Mauritius' Reply. The following issues are considered in turn: alleged breach of article 2(3) of the Convention (section B); alleged breaches of article 56(2) alongside articles 55, 61 and 197 (section C); alleged breaches of articles 63-64, 78 and 194, and of other Agreements (section D); the alleged abuse of rights (section E).

B. Article 2(3)

(i) Article 2(3) does not impose relevant obligations

8.2 The parties' respective positions on the correct interpretation of article 2(3), in particular as to whether this establishes an independent obligation to comply with "other rules of international law" and as to the meaning of that formulation, are now well-established. There is accordingly little in paragraphs 6.5-6.19 of the Reply that calls for a response on the part of the United Kingdom, which relies on its position as set out at paragraphs 8.4-8.8 of its Counter-Memorial.

8.3 Mauritius relies on the ILC's Commentary to the articles concerning the law of the sea (1956) as making clear that the intention behind what was then draft article 1(2) was to "require States to respect such 'other rules of international law'"⁶³⁴. Mauritius' argument of course assumes that the 1965 understanding constitutes a 'rule of international law', which is incorrect given that Mauritius was not a State in 1965, and likewise assumes that somehow international law applies to the understanding. In any event, nowhere does the Commentary

⁶³⁴ MR, para. 6.9.

suggest that draft article 1(2)⁶³⁵ was intended to establish any such ‘requirement’ to respect ‘other rules of international law’. The relevant passage is set out in full below:

“(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.

(4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why ‘other rules of international law’ are mentioned in addition to the provisions contained in the present articles.

(5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.”

8.4 Paragraph (3) of the Commentary is a statement of the underlying legal position. It does not suggest that article 1(2) imposes of itself an obligation of compliance. Paragraph (4) of the Commentary then explains that the obligations of compliance are imposed, if not exhaustively, “in the present articles”, which is evidently a reference to the articles that follow in the draft Convention. Hence, as is consistent with the United Kingdom’s interpretation, the actual obligations of compliance are to be found elsewhere.

8.5 There is then an explanation of why “other rules of international law” are “mentioned”, and again there is no suggestion that this was to ensure a free-standing obligation of compliance, while it is recalled that these are only intended as a reference to “general rules of international law”. That theme is continued into paragraph (5) of the Commentary. This explains how States may enter into specific agreements but, notwithstanding the attempts of Mauritius to read this passage of the Commentary to the contrary, those are evidently seen as outside the scope of “other rules of international law” that are referred to in article 1(2). There is no intention to limit rights under such agreements,

⁶³⁵ Draft article 1(2) provided: “This sovereignty is exercised subject to the conditions prescribed in these articles and by other rules of international law.”

as the Commentary explains, but that is quite a different matter to saying that the intention was to give effect to these, as Mauritius contends⁶³⁶.

8.6 The 1956 Commentary thus strongly supports the position that the identical wording of article 2(3) (“is exercised subject to”) is descriptive as opposed to intended to establish a free-standing obligation; whilst, even if it were otherwise, the bilateral understandings or alleged ‘traditional fishing’ on which Mauritius relies fall outside the scope of the formulation “other rules of international law”⁶³⁷. This is all the more so in the case of the 1965 understanding on fishing rights, as this was not even an understanding reached between States i.e. at the international level. It could not conceivably amount to a rule of international law, general or otherwise.

8.7 Mauritius refers to other language texts of the Convention (French, Spanish and Russian), but these use a formulation equivalent to the English text, and merely raise the same issue of interpretation⁶³⁸. The United Kingdom maintains its position that, had there been an intention to establish an obligation within article 2(3), the drafters would at least have employed the language of obligation – “shall be exercised” – as used elsewhere in the Convention. Mauritius has sought to make something of this, noting that “shall be exercised” in article 56(3) appears as “*s’exercer*” in the French text, i.e. the same term as used in the French text of article 2(3)⁶³⁹. However, the point made by the United Kingdom was a general one, and each provision of the Convention must be interpreted to see what if any obligation is established thereby⁶⁴⁰. Thus the United Kingdom also referred to article 19(1) of the Convention⁶⁴¹. This establishes in relevant part that innocent passage “shall take place in conformity with this Convention and with other rules of international law”. In that context, a reference to the French text is instructive, as the equivalent provision appears as “*doit s’effectuer en conformité avec les dispositions de la Convention et les autres règles du droit international*”. Hence, there can be little doubt as to the intention to establish an obligation

⁶³⁶ Cf. MR, paras. 6.15-6.17.

⁶³⁷ The reference to conservatory conventions in Birnie, Boyle and Redgewell, *International Law and the Environment* (3rd ed.), p. 716, in no sense suggests otherwise (**Authority 22**). Cf. MR, para. 6.17. Nor can the alleged obligations to which Mauritius seeks to give effect be repackaged as general rules of international law, e.g. as obligations of good faith. Cf. MR, para. 6.18.

⁶³⁸ Cf. MR, paras. 6.10-6.12.

⁶³⁹ MR, para. 6.12.

⁶⁴⁰ As applies e.g. with respect to the comparison that Mauritius seeks to effect between articles 95 and 96 of the Convention. See MR, para. 6.14.

⁶⁴¹ UKCM, para. 8.5(d), fn. 627.

given the language used in the French text of article 19(1). Notably, however, no equivalent formulation is used in the French text of article 2(3).

(ii) Article 2(3): no breach of the alleged undertaking, in any event

8.8 The first part of Mauritius' argument on the understanding on fishing rights reached in 1965 consists in saying that this was frequently referred to in United Kingdom internal memoranda and communications as "undertakings" or in language otherwise taken by Mauritius to indicate the existing of binding commitments⁶⁴².

8.9 The 1965 understanding has been referred to in varying different ways in the internal United Kingdom documentation to which Mauritius has had access – sometimes as an understanding⁶⁴³, sometimes as an undertaking⁶⁴⁴, sometimes in language that may on Mauritius' case imply a certain individual's belief in the existence of a binding commitment⁶⁴⁵. The various internal documents on which Mauritius relies are considered in some detail, in their context, in the Appendix to this Rejoinder, and the Tribunal is respectfully requested to work through this – alongside the actual documents – at a convenient stage. If the documentation were relevant, it would not undermine the United Kingdom's position that the 1965 understanding did not give rise to binding obligations with respect to fishing rights as now claimed by Mauritius. This is because the documentation merely shows a variety of different views, expressed mainly at a junior level or by non-lawyers, and generally without evidence of any detailed consideration⁶⁴⁶.

8.10 The central point, however, is that this internal documentation is not relevant. It is for this Tribunal to interpret the 1965 understanding (or whatever Mauritius wishes to call it) and to determine whether they establish legal obligations on the United Kingdom and, if so, what

⁶⁴² MR, paras. 6.21-6.34.

⁶⁴³ Cf. MM, Annexes 54, 55, 63, 64, 78; MR, Annex 97. See also Submission dated 17 May 1991. (**Annex 33**) See also letter of 22 February 1978 from Ward to the Mauritian Prime Minister. (**Annex 21**)

⁶⁴⁴ Cf. documents relied on at MR, paras. 6.25-6.33.

⁶⁴⁵ Cf. MR, paras. 6.30, 6.34.

⁶⁴⁶ See in this respect, *Eritrea/Yemen*, Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), 9 October 1998, 114 ILR 1, para. 94: "internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made". (**Authority 7**)

those obligations are. As a general matter, limited weight is to be accorded to what a given instrument is called; and the descriptors employed in subsequent internal communications of one party can only be immaterial. What matters in this, as in any case, is whether there was the requisite intent to be bound so as to establish legal obligations. Mauritius relies on the *Nuclear Tests* cases to support a generalized proposition that undertakings are binding⁶⁴⁷. That is not a tenable characterization, even leaving to one side the point that Mauritius was not a State in 1965. As is clear from the passage of *Nuclear Tests* to which Mauritius refers⁶⁴⁸, what is determinative is the existence of the intention to be bound. It is only as a result of such an intention that a declaration becomes “a legal undertaking” (to use the Court’s phraseology).

8.11 In performing its interpretative exercise, the Tribunal may wish to look at the subsequent practice of the parties in the sense of their exchanges over the decades from 1965, in particular with a view to establishing whether any binding commitment was given, or agreement was reached, as between States in the period subsequent to the independence of Mauritius. In so far as the Vienna Convention on the Law of Treaties is to be looked at by way of analogy (it is emphasized that, in considering the 1965 understanding, the Tribunal is not interpreting an agreement reached or statement made at the international level), such practice would fall to be taken into account to the extent that it establishes the agreement of the parties.

8.12 As to this, the Tribunal will not be assisted by varied views expressed at one time or another as part of the internal workings of one party, and all the more so in circumstances where the Tribunal has had no equivalent access to the internal workings of the other party. Such internal workings do not feature within the scheme of Articles 31-32 of the Vienna Convention, and this is so for obvious reasons.

- a. Internally expressed views cannot be used to establish the agreement of the parties within Article 31(3)(b), although the possibility is noted of a communication of one party being acceded to (at an appropriately high level) in the internal

⁶⁴⁷ MR, para. 6.25 and fn. 570. The PCIJ decision in the *Eastern Greenland* case, 1933 PCIJ Ser. A/B, No. 53, 71 (**Authority 1**), which Mauritius also refers to in its fn. 570, cannot be taken as detracting from the appropriate legal test as expounded in the *Nuclear Tests* cases.

⁶⁴⁸ *Nuclear Tests Case (Australia v. France)* at para. 43 (UKCM, Authority 8); see also *Nuclear Tests Case (New Zealand v. France)* at para. 46 (UKCM, Authority 7).

communications of the other party. The Tribunal need not enter into the question of whether an agreement might thus be formed, given that the internal documentation in this case shows precisely the absence of agreement. Mauritius relies on letters from its Prime Minister to the British High Commissioner sent after the enactment of the 1971 Ordinance, referring to “the verbal agreement giving this country all sovereign rights relating to ... fishing” and pursuant to which Mauritius was “reserving to itself fishing rights”⁶⁴⁹. As recorded in the relevant UK internal memorandum, this did not reflect what had been agreed:

“The Prime Minister’s recollection of the meeting at Lancaster House does not agree with the official record. Our undertakings in regard to ... fishing rights ... were much less definite than his version indicates. The true form of these undertakings was set out in the agreed record of the Lancaster House meeting of 23 September, a copy of which is attached. The Prime Minister may be modifying these undertakings in the hope of establishing his new version on the record for subsequent use, or he may simply be relying on his memory and the written note which he sent to Trafford Smith of the Colonial Office on 1 October 1965.”⁶⁵⁰

- b. Where the allegedly contradictory views of individual officials are being relied on (by Mauritius in this case), it necessarily follows that such views did not reflect the concluded position of the other litigating party (the United Kingdom in this case) – unless the position taken in international proceedings is in fact being put forward in bad faith. Mauritius is not understood to make that allegation. Nor could it: as appears from the UK internal documentation on which such emphasis is placed by Mauritius, the concluded view of those UK officials involved in consultations with Mauritius in 2009 was that there was no binding obligation on the United Kingdom with respect to fishing rights⁶⁵¹.
- c. Accordingly, as a general matter, internally expressed views could only ever be of very limited significance, even if apparently contradictory to a view taken in international proceedings at a later stage⁶⁵². Stepping back, the question must be

⁶⁴⁹ See MR para. 6.35, referring to MM, Annexes 67 and 69.

⁶⁵⁰ UKCM, Annex 23. See further Appendix at para. A.40. See also *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I. C. J. Reports 1999, p. 1045 at para. 55 (**Authority 10**).

⁶⁵¹ See Appendix at paras. A.103 and A.120.

⁶⁵² See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, in relation to Malaysia’s reliance on internal documents which it said indicated the absence of any conviction on Singapore’s part that the islands were part of its territory. See at para. 197, and at para. 224, where the Court stated: “As already indicated, the Court has given

asked as to what conceivable weight in international proceedings is to be placed on the internal views of e.g. the then very young Mr Aust, who in 1971 was focusing on a quite different issue to that now before this Tribunal⁶⁵³. The answer is none⁶⁵⁴.

8.13 It is also to be noted that international courts and tribunals have been reluctant to accord great probative value even to statements in open correspondence of governmental officials where these did not reflect the concluded view of the given State. The *Gulf of Maine* case provides a well-known example. The Court stated that:

“...the terms of the ‘Hoffman letter’ cannot be invoked against the United States Government. It is true that Mr. Hoffman’s reservation, that he was not authorized to commit the United States, only concerned the location of a median line; the use of a median line as a method of delimitation did not seem to be in issue, but there is nothing to show that that method had been adopted at government level. Mr. Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudice his country’s position in subsequent negotiations between governments. This situation, however, being a matter of United States internal administration, does not authorise Canada to rely on the contents of a letter from an official of the Bureau of Land Management of the Department of the Interior, which concerns a technical matter, as though it were an official declaration of the United States Government on that country’s international maritime boundaries”⁶⁵⁵.

its primary attention in considering the 1953 correspondence to those matters of which both Parties had notice at the time — the Singapore request, the interim reply and the final Johor response. The steps taken by the Singapore authorities in reaction to the final response were not known to the Johor authorities and have limited significance for the Court’s assessment of any evolving understanding shared by the Parties.” (**Authority 14**)

⁶⁵³ Cf. MR, para. 6.29. The same question must be asked e.g. re the nuances in the language of (then) Mr Watts, or of language as to ‘honouring commitments’, which says nothing as to whether the commitments are legal or political in nature. Cf. MR. paras. 6.30 and 6.34. Reference may also be had to Mr Aust’s subsequent views as to intention and as to the distinction to be drawn between language such as that used in the 1965 understanding and language used to denote agreement at the international level. See A. Aust, *Modern Treaty law and Practice*, 3rd ed. at p.30: “... intention must be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention”. In discussing the terminology deployed by a State to manifest its intention, Aust observes that “when they do not intend to conclude a treaty, but rather an MOU, instead of ‘shall’ they use a less mandatory term such as ‘will’...”. (**Authority 21**)

⁶⁵⁴ As a separate and more general matter, it is noted that officials working within government should be able to express all relevant considerations and their doubts and views on a matter of policy clearly, without fear that in doing so the State will as a result be found in breach by an international court or tribunal because of what becomes to be viewed as some kind of admission.

⁶⁵⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246 at para.139. (**Authority 4**)

8.14 As to its own practice, Mauritius claims that it has “consistently reminded the United Kingdom of the binding nature of the 1965 undertakings”⁶⁵⁶. That is not correct, and the documents to which Mauritius refers do not support the proposition made⁶⁵⁷. The practice of Mauritius in fact undermines its case on the binding nature of the 1965 understandings. What is striking is how, at key junctures when access to waters around the BIOT has been restricted or the number of licenses available reduced, Mauritius has not protested/asserted the existence of obligations on the United Kingdom with respect to fishing rights under the 1965 understanding⁶⁵⁸.

8.15 Mauritius also relies on the UK internal documentation with a view to showing that the 1965 understanding was not restricted to use of “good offices” with the US Government, and was not limited to the fishing as practised in 1965⁶⁵⁹. The points made above with respect to reliance on internal documentation are repeated. It is further noted:

- a. The starting point so far as concerns the understanding reached in late 1965 is the position as of July 1965 of the Mauritian Premier (Sir Seewoosagur Ramgoolam), who sought “preference for Mauritius if fishing or agricultural rights were ever granted”⁶⁶⁰.
- b. The understanding reached on 5 November 1965, following agreement by the Mauritian Council of Ministers, was that: “(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; ...”⁶⁶¹.
- c. In any analysis of a claim that the United Kingdom was entering into some form of binding commitment in 1965, the reference to “good offices” cannot be wished away (likewise the absence of the language of commitment such as “shall use”). The UK communications with the USA show that what was intended by the reference to

⁶⁵⁶ MR, para. 6.35.

⁶⁵⁷ See Appendix, fn. 849.

⁶⁵⁸ See UKCM, para. 8.15; para. 3.72 above; and see Appendix, paras A.33 to A.40, A.51 to A.57, A.58 to A.65 and A.95 to A.98.

⁶⁵⁹ MR, paras. 6.37-6.44.

⁶⁶⁰ MM, Annex 13. See Appendix at para A.5.

⁶⁶¹ MM Annex 19, para. 22(vi).

“fishing rights” in the 1965 understanding was access to fish, so far as practicable⁶⁶². The fact that, after the event, the United Kingdom practice evolved so as to privilege access for Mauritius flagged vessels to BIOT waters in waters that would have been considered high seas as of 1965⁶⁶³ does not re-define what (if anything) might have been accepted by way of a binding commitment⁶⁶⁴. Rather, Mauritian fishermen applied for the relevant licences, and were granted these free of charge.

- d. The UK internal documentation relied on does not, in any event, assist Mauritius. In each case, the understanding is characterised as qualified by reference to what was “practicable”⁶⁶⁵. That admittedly is not always clear from the text of Mauritius’ Reply, where the relevant words from internal documentation may be omitted as inconvenient to Mauritius’ case. Thus Mauritius includes in its Reply reference to the understanding in a memorandum of legal advisers dated 1 July 1977, omitting the words as now underlined⁶⁶⁶: “First of all it seems to me that the obligation was to ensure that fishing rights remained available. In order to remain available I do not think that all or any of such rights can be handed to a third party. In my opinion we are bound not to give the rights or any part of them to a third party. However, that obligation is weakened by the words ‘so far as practicable’.” Further, the United Kingdom has not acted inconsistently with this 1977 characterisation in declaring the MPA. It has not given rights to fish to any third party.
- e. The extent (or absence thereof) of Mauritian fishing in BIOT waters as of 1965 is plainly of relevance to the contents of the understanding⁶⁶⁷. That the United Kingdom should, in good faith, wish to respond to the expanding population of Mauritius in terms of access to BIOT waters, and to grant licences to Mauritian fishermen when these were applied for, does not establish the existence of a binding obligation in this respect⁶⁶⁸. In any event, interpreting the 1965 understanding by reference to Mauritius’ future development does not assist Mauritius. Sir

⁶⁶² **Annex 12**, and see Appendix at para. A.13 and see also A.21 to A.32 .

⁶⁶³ See e.g. MR, paras. 6.41-6.42.

⁶⁶⁴ Moreover, as is clear e.g. from MR, Annex 66, to which Mauritius refers at MR, para. 6.37, fishing zones were still subject to defence arrangements, i.e. what could be agreed with the USA.

⁶⁶⁵ See MR, para. 6.37, referring to MR, Annex 66; MR para. 6.38, referring to MR Annex 79.

⁶⁶⁶ See MR, para. 6.38, referring to MR, Annex 79. To similar effect, see MR, para. 6.42, referring to MR, Annex 164.

⁶⁶⁷ Cf. MR, para. 6.43.

⁶⁶⁸ Cf. MR, para. 6.44; and see Appendix at paras. A.20(c) and A.55.

Seewoosagur Ramgoolam merely sought “preference for Mauritius if fishing or agricultural rights were ever granted”⁶⁶⁹. As to what then happened, Mauritius was indeed accorded privileged access fishing rights (in the form of licences) where these were granted. The position has now changed in that fishing rights are no longer being granted. There is thus no longer any question of according preference to Mauritius, and no basis for alleging some form of breach of the 1965 understanding.

(iii) Legal issues with respect to the alleged undertaking

8.16 So far as concerns the applicable legal tests in respect of unilateral declarations of a State, the Mauritian Reply takes as its starting point the *Nuclear Tests* cases, and portrays this as an area of agreement between the parties⁶⁷⁰. But while the *Nuclear Tests* cases offer an obvious starting point in relation to declarations made at the international level (alongside the ILC Guiding Principles), Mauritius refers to *Nuclear Tests* as if Mauritius existed as a State as of autumn 1965, whereas this is not the case. The 1965 understanding was an understanding reached between the Government of the United Kingdom and the Council of Ministers of the then Colony of Mauritius. It was not an international agreement (this is not contended for), nor was it a unilateral declaration made by one State to another (cf. Mauritius’ reliance on *Nuclear Tests*). It was not intended to be and was not legally binding. As explained by Hendry and Dickson:

“It is not possible for overseas territories to conclude an agreement binding under international law with another overseas territory or for one or more overseas territories to conclude such an agreement with the United Kingdom. This is because internationally the territories are not legal entities separate from each other or from the United Kingdom. Therefore where an instrument is to be signed between territories themselves or between territories and the United Kingdom it is better practice for it to be drafted in language which makes clear that it is a memorandum of understanding or an arrangement rather than in treaty language which could lead to confusion.”⁶⁷¹

⁶⁶⁹ MM, Annex 13. See Appendix at para. A.5.

⁶⁷⁰ MR, para. 6.45.

⁶⁷¹ See Hendry and Dickson, *British Overseas Territories Law*, p. 261. (Authority 30)

8.17 These basic propositions cannot be bypassed by characterising the 1965 understanding as a unilateral declaration. It is for Mauritius to identify how an understanding reached between a State and a (then) colony is correctly treated as operating at the level of international law as opposed to domestic i.e. English law⁶⁷², and likewise how it might then be seen as binding in circumstances that are evidently not analogous to *Nuclear Tests*. Mauritius has not, however, engaged in that necessary exercise. It has no case that the understanding is somehow binding as a matter of domestic law (and in any event such a case would not assist with respect to Mauritius' reliance on Article 2(3)).

8.18 In any event, assuming international law was somehow applicable, Mauritius could not meet the tests set out in *Nuclear Tests* and the ILC Guiding Principles so far as concerns the 1965 understanding⁶⁷³. As to the further points made in the Reply:

- a. *Absence of clear and specific terms*: Mauritius contends that the meaning of the understanding is clear, and was clear to the United Kingdom until the commencement of this arbitration⁶⁷⁴. That is a reference to the supposed clarity of the position taken by UK officials within the UK internal documentation on which Mauritius relies. In fact, the internal documentation amply demonstrates the absence of clarity, and also that the view ultimately taken was that the 1965 understanding did not give rise to any binding commitment with respect to fishing rights⁶⁷⁵. Mauritius asserts that the reference to “fishing rights” was intended to cover all rights relating to fish and sedentary species, as is consistent with the historical evidence as to how the United Kingdom has interpreted the understanding⁶⁷⁶. That assertion is again not reflected in the record. For example, in introducing the 1971 Ordinance, the United Kingdom evidently did not understand Mauritius as having a right to fish even in the 3-mile territorial sea (which was the only area in which there had been fishing as of 1965)⁶⁷⁷. To similar effect, Mauritius' claim in the early 1970s to “all sovereign rights relating to fishing” was not accepted by the United Kingdom⁶⁷⁸. Ultimately, the most that can

⁶⁷² As to the applicable principles of English law in relation to contractual intention and certainty of terms, see extracts of Chitty on Contracts, 31st ed. (**Authority 23**)

⁶⁷³ See UKCM, paras. 8.19-8.25.

⁶⁷⁴ MR, para. 6.46.

⁶⁷⁵ See Appendix at paras. A.103 and A.120, including with respect to the views of Ms Yeadon at paras. A.103.

⁶⁷⁶ MR, para. 6.47.

⁶⁷⁷ Appendix at para. A.33(b) and A.35.

⁶⁷⁸ MM, Annex 67, and see Appendix at para. A.40.

safely be inferred is that the understanding reached reflected what Sir Seewoosagur Ramgoolam had been seeking, i.e. “preference for Mauritius if fishing or agricultural rights were ever granted”⁶⁷⁹. Thus in so far as there is sufficient clarity, it is counter to Mauritius’ current case.

- b. *Absence of intent to be bound*: again, Mauritius relies on the UK internal documentation, including in particular what was said by Mr Aust⁶⁸⁰, as to which the United Kingdom position is as stated above⁶⁸¹. Mauritius also seeks to make something of the fact that the understanding in respect of fishing rights was referred to as a “mere assurance”, arguing that this was the characterisation of a British official and that an assurance is anyway correctly regarded as a pledge or guarantee⁶⁸². The position is as follows. On 5 November 1965, the Governor of Mauritius reported on the agreement of the Mauritian Council of Ministers to the detachment of the Chagos Archipelago, and reported on the meeting that had taken place. Of relevance for current purposes, he reported:

“Ministers said they were not opposed in principle to the establishment of [defence] facilities and detachment of Chagos but considered compensation inadequate, especially the absence of (sugar) quota and negotiations should have been pursued and pressed more strongly. There were also dissatisfied with mere assurances about (v) and (vi).”

The reference to (v) and (vi) is a reference to sub-paragraphs 22(v) and (vi) of the Minutes of 23 September 1965, dealing respectively with use of Mauritian labour and materials in construction (sub (v)) and fishing rights (sub (vi), which also dealt with navigational and meteorological facilities and use of an air strip). It is evident that the Council of Ministers was “dissatisfied”. This was because they did not consider that they had received anything that could be regarded as a binding commitment – they were dissatisfied with “mere assurances”. There is no magic to use of the term assurance⁶⁸³. The point is that, had the Council understood that a binding

⁶⁷⁹ MM, Annex 13. See Appendix at para. A.5.

⁶⁸⁰ MR, para. 6.48.

⁶⁸¹ See further Chapter III at paras. 3.62 to 3.66.

⁶⁸² MR, paras. 6.49-6.50.

⁶⁸³ In the context of *Nuclear Tests*, as referred to by Mauritius at MR, para. 6.49, assurances given amounted to commitments. That says nothing in general terms about different assurances given in different circumstances.

commitment had been given, they would not have been dissatisfied⁶⁸⁴. To similar effect, reference may be had to the letter of the Governor of Mauritius dated 12 November 1965. He was seeking further consideration as “will enable categorical assurances to be given”⁶⁸⁵. Yet, and there is no suggestion by Mauritius to the contrary, no further assurances were given – as indeed is consistent with the fact that fishing access was of very limited concern to Mauritius.

It is noted that the United Kingdom is taken to task for failing to “cite any Mauritian source”⁶⁸⁶. It is recalled that Mauritius has elected not to put its internal documentation before this Tribunal, despite the use it has sought to make of United Kingdom internal documentation.

- c. *The factual circumstances*: it is said that the United Kingdom misses the point, and that the relevant factual circumstances are to be found in the broader context in which the understanding was reached, not the extent of Mauritian fishing as of 1965⁶⁸⁷. There are certainly different elements to consider. The fact that there was no Mauritian fishing off Chagos is one key factor. Another is the fact that the Mauritian Premier was merely seeking preference for Mauritius if fishing rights were ever granted⁶⁸⁸. The broader context of what else was being considered in 1965 may also be relevant, but it could not transform the understanding reached in relation to fishing into a concrete right for Mauritius to fish in whatever future maritime zones might be declared around the Chagos Islands when such was not sought, was not discussed, is not reflected in the language used, and would have been radically inconsistent with the importance to Mauritius of fishing rights as of 1965 (and indeed in subsequent decades).

⁶⁸⁴ See also Fawcett, ‘The Legal Character of International Agreements’ (1953) 30 *B.Y.I.L.* 381, at 391-392, in particular with respect to wording equivalent to “as far as practicable”: “It is doubtful whether undertakings ‘to use best endeavours’ or ‘take all possible measures’ can in most cases amount to more than declarations of policy, or of goodwill towards the objects of the agreement.” In so far as in any given case a best endeavours type provision is correctly construed as giving rise to a binding obligation, evidently that would merely be an obligation of conduct, not result. (**Authority 27**)

⁶⁸⁵ **Annex 13**. See Appendix at para. A.14.

⁶⁸⁶ MR, para. 6.49.

⁶⁸⁷ MR, para. 6.51.

⁶⁸⁸ MM, Annex 13. See Appendix at para. A.5.

Further, in this context, Mauritius seeks to give the impression that careful consideration was given to the issue of fishing rights⁶⁸⁹. That is simply incorrect. The reference to fishing rights was a last-minute addition, made at the instigation of Sir Seewoosagur Ramgoolam, and as to which there appears to have been no material discussion⁶⁹⁰.

- d. *Restrictive interpretation*: this principle is to be borne in mind. Mauritius does not contest the principle. It merely takes no account of it, asserting the absence of any scope for doubt⁶⁹¹.
- e. *Estoppel*: Mauritius has not repeatedly asserted its fishing rights based on the 1965 understanding⁶⁹². The position is as set out in the Counter-Memorial, Chapter 3 above and the Appendix⁶⁹³. The position taken by Mauritius that the United Kingdom is precluded from the position that the 1965 understanding is not binding because of the varying views expressed in the UK internal documentation is not seriously arguable⁶⁹⁴.
- f. *Revocation*: Mauritius takes the position that the United Kingdom has not terminated the understanding on fishing rights, and that the criteria for termination have in any event not been met. If the United Kingdom is wrong, i.e. it has made a declaration that has binding force on the international plane, then it is entitled to revoke that declaration, and impliedly did so through announcement of the MPA. The key criterion is one of arbitrariness, as the parties appear to agree⁶⁹⁵. The declaration of the MPA, together with any resultant revocation, could not correctly be seen as arbitrary, in particular in circumstances where actual fishing by Mauritian-flagged vessels was minimal and in some years non-existent, the declaration followed on consultation with Mauritius and other interested parties, while the MPA is ultimately to the benefit of Mauritius and all States.

⁶⁸⁹ MR, para. 6.51.

⁶⁹⁰ See Appendix at para. A.7.

⁶⁹¹ MR, para. 6.52.

⁶⁹² Cf. MR, para. 6.53.

⁶⁹³ See for example Appendix at paras A.62, A.93 and A.126.

⁶⁹⁴ Cf. MR, para. 6.53, referring to the *Argentina-Chile Frontier* case and various other cases in which a party's position in litigation contradicts that reflected in prior public statements.

⁶⁹⁵ Cf. MR, para. 6.54.

8.19 Ultimately, the true position is that the United Kingdom has sought across the decades to act consistently with, and even beyond, the 1965 understanding with respect to fishing rights. However, that does not mean that the understanding gives rise to enforceable obligations owed to Mauritius on the international plane.

(iv) Alleged traditional fishing rights

8.20 As noted in Chapter 3 above, there are certainly various references in the record post-1965 to “traditional”, “historic” or “habitual” fishing rights. However, as a matter of the actual facts, Mauritian fishermen did not traditionally fish off the Chagos Archipelago as of 1965, and Mauritius has been unable to establish anything to the contrary⁶⁹⁶. Fishing as of 1965 was limited to fishing in internal waters by the local population, as the United Kingdom has described⁶⁹⁷. That is scarcely surprising given the distances involved. It follows that the claim to traditional fishing rights cannot be traced back to 1965, and it is nowhere mentioned in the 1965 understanding⁶⁹⁸.

8.21 Following on from 1965, fishing by Mauritius in the Chagos waters was as permitted by the United Kingdom (and later BIOT), most recently through the issue of licences. In circumstances where fishing was under licence, and there was no guarantee as to the number of licences that would be issued or as to the areas open to licensed fishing, no traditional fishing rights could accrue so as to render redundant the licensing scheme. Fishing was simply as permitted. References to traditional fishing emerged subsequent to 1965 with reference to the United Kingdom’s concerns as to the impact of the developing law of sea and its wish to be able to allow access to Mauritian vessels in preference to those of other States⁶⁹⁹.

8.22 Such references reveal how the United Kingdom wished to maintain preferential access for Mauritius in circumstances where the law of the sea appeared to be evolving at a pace. But they did not establish for Mauritius vis-à-vis the United Kingdom a suite of new

⁶⁹⁶ In fact, Mauritius expressly concedes that “*It is not disputed that hand line fishing was practiced in the waters of the Chagos Archipelago, with some basket and net fishing by the local population for its own consumption*” (MR, para 2.112).

⁶⁹⁷ See UKCM, paras. 8.11(d) and 8.32, and Annex 15 and Annex 17.

⁶⁹⁸ Cf. the interpretation of the 1965 understanding at MR, para. 6.61.

⁶⁹⁹ See Appendix at paras. A.22(b) and A.23 to A.32.

and unsubstantiated traditional fishing rights that were independent of the right to fish pursuant to licence. Indeed, had there been any valid claim to traditional fishing rights, it may be presumed that Mauritius would have asserted such a claim when BIOT legislation excluded (*inter alia*) Mauritian vessels from waters within 3 miles of BIOT through the 1971 Ordinance⁷⁰⁰. Yet it did not do so.

8.23 It is correct that, as of 2010, Mauritian-flagged vessels had been fishing in BIOT waters for many years, but such fishing was (i) sporadic, (ii) at a very low level such that there can be no question of any form of dependence, and (iii) pursuant to licence. The United Kingdom's position therefore remains that the authorities cited by Mauritius do not assist it⁷⁰¹. Further, the claim that traditional fishing rights are maintained through the reference in article 2(3) of the Convention to "other rules of international law" is unsubstantiated⁷⁰². If that had been the intention, no doubt the drafters would have included within article 2(3), or elsewhere in Section 2 of the Convention, wording equivalent to article 51(1). They did not do so, and there is no suggestion that they intended to do so.

(v) *Alleged commitment given by Gordon Brown*

8.24 Mauritius relies on Prime Minister Ramgoolam's belief that Prime Minister Brown said that the MPA would be put on hold⁷⁰³. Prime Minister Brown has explained that he did not say that⁷⁰⁴. The United Kingdom's position is thus that there was no commitment of any sort, as a matter of fact. As a matter of law, the relevant tests are as set out in the *Nuclear Tests* cases and the ILC's Guiding Principles⁷⁰⁵. The alleged undertaking was not made publicly, and there is no basis on which to establish the requisite intention to be bound. Moreover, the alleged facts are not remotely analogous to either *Nuclear Tests* or the *Eastern Greenland* case on which Mauritius relies⁷⁰⁶. Finally, there would be no basis for interpreting

⁷⁰⁰ See Appendix at para. A.33.

⁷⁰¹ See UKCM, paras. 8.32-8.33; cf. MR, paras. 6.60-6.62.

⁷⁰² See UKCM, paras. 8.32-8.33; cf. MR, paras. 6.60-6.62.

⁷⁰³ See the witness statement from Prime Minister Ramgoolam dated 6 November 2013, MR, Annex 183.

⁷⁰⁴ UKCM, para. 3.63.

⁷⁰⁵ See above, and see UKCM, paras. 8.19-8.20. See also the ILC's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, as considered at UKCM, paras. 8.24-8.25.

⁷⁰⁶ Cf. MR, paras. 6.65-6.66; and see the *Eastern Greenland* case, 1933 PCIJ Ser. A/B, No. 53, at 69-71, not just 71 (the passage to which Mauritius refers). (**Authority 1**)

the alleged statement as meaning that the MPA would be put on hold indefinitely, which is the meaning for which Mauritius implicitly contends⁷⁰⁷.

(vi) Article 2(3): alleged general obligation to consult

8.25 Mauritius alleges a breach of article 2(3) on the basis of breach of an obligation under general international law to consult with interested States in relation to matters that affect their rights⁷⁰⁸. The allegation fails on the facts: as follows from Chapter 3 of the Counter-Memorial and Chapter 3 above, the United Kingdom did engage Mauritius in bilateral meetings over the MPA, whereas Mauritius brought these to a premature end⁷⁰⁹. The allegation also fails on the law. No general international rule on consultation can be shoehorned into article 2(3) which, as already noted above, does not in any event establish independent obligations to comply with the panoply of international law that may apply in the context of exercise of sovereignty over the territorial sea.

8.26 Further, it is difficult to see what this alleged obligation adds to Mauritius' case on fishing rights. The applicability of the alleged general obligation to consult is predicated on the existence of an absolute right to fish in the territorial sea, which the United Kingdom does not accept. If the United Kingdom is correct in its position on the alleged fishing rights, inevitably the allegation in respect of consultation falls away too. If the United Kingdom is wrong, then there is anyway a breach in denying fishing rights (on Mauritius' analysis of article 2(3)), and the alleged failure to consult would not appear to add materially to this.

8.27 In this respect, it is noted that the two cases that Mauritius relies on to establish a general obligation to consult concern cases of shared natural resources, i.e. fish (in the *Fisheries Jurisdiction* case) and an international watercourse (in *Lac Lanoux*). It follows from these cases that, in certain circumstances, international courts and tribunals have considered that there was an obligation of negotiation or consultation where there were

⁷⁰⁷ The need for clear and specific terms is recalled, and likewise the principle of restrictive interpretation. See Principle 7 of the ILC Guiding Principles.

⁷⁰⁸ MR, paras. 6.68-6.72.

⁷⁰⁹ See also UKCM, paras. 8.51-8.54.

conflicting rights or specially protected interests in play⁷¹⁰. They do not support a more general obligation to consult wherever a coastal State legislates with respect to fishing in the territorial sea and this, in turn, may impact upon other States whose vessels fish there. Such a general obligation would either be found within the Convention, or not at all (as is the case).

C. Alleged breaches of article 56(2)

8.28 Mauritius contests the United Kingdom's position that article 56(2) stops well short of an obligation to give effect to the rights and duties of other States (assuming these exist), and contends that this provision establishes a positive obligation to respect the rights of other States in the EEZ⁷¹¹. This is an attempt to re-write article 56(2), which states that "the coastal State shall have due regard to the rights and duties of other States", not "the coastal State shall give effect to the rights and duties of other States".

8.29 Mauritius seeks to find support for its position in commentary to article 2 of the 1958 Convention on the High Seas and the *Fisheries Jurisdiction* cases. Neither assists it.

- a. Article 2 concerned the materially different situation of a balancing of interests in the high sea, i.e. maritime areas as to which no State could assert its sovereignty, and all had freedom of access. In this context, article 2 established that the freedom of the high sea was to be "exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas". By contrast, in the EEZ, the coastal State does have sovereignty to the extent established by the Convention. Although the coastal State "shall have due regard to the rights and duties of other States", that does not mean that its own rights are positively curtailed to the extent that other States may have rights, which is the interpretation that Mauritius contends for.

⁷¹⁰ See e.g. the explanation in *Fisheries Jurisdiction (United Kingdom v Iceland)*, Judgment, at para. 74, identifying how the obligation to negotiate flows from the specific rights at issue: "It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights, as was already recognized in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, which constituted the starting point of the law on the subject." (**Authority 3**)

⁷¹¹ MR, paras. 6.76-6.79.

- b. The *Fisheries Jurisdiction* cases were concerned with the impact of “preferential rights” of Iceland arising out of its unique dependence on fishing, i.e. again a situation that is materially different from the question of how any rights of a non-coastal State may impact on the rights of the coastal State under the Convention. Further, even in this context of preferential rights, the Court’s conclusion was merely that: “The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds.” It continued: “Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the Applicant’s fishing vessels from all fishing activity in the waters beyond the limits agreed to ...”⁷¹². Mauritius does not have traditional or other rights to fish in the FCMZ/EPPZ, and even if it were otherwise it could not begin to show any form of economic dependence on fishing in those zones. Further, the determination of the Court was ultimately that the competing sets of rights had in the circumstances to be reconciled, not that rights of the United Kingdom should prevail⁷¹³, which is the result that Mauritius implicitly contends for.

8.30 As to the issue of whether Mauritius does have traditional or other rights to fish in the FCMZ/EPPZ, the parties’ positions are now well-established. Again, in this context, Mauritius relies on the UK internal documentation, and the United Kingdom merely repeats what it has said above⁷¹⁴. There is a minor factual issue as to Mauritius’ protest in response to the declaration of a 200 mile fishing zone in 1991, and perplexingly it is said that the United Kingdom has denied that any protest was made⁷¹⁵. That is wrong. The United Kingdom merely made the point in its Counter-Memorial, which it reiterates, that the protest was made by Mauritius only on the basis of its claim to sovereignty, not by reference to any alleged traditional or other rights to fish in the FCMZ⁷¹⁶.

8.31 As to the question of whether article 56(2) contains an obligation to consult, the parties’ positions are again well-established⁷¹⁷. An obligation to consult could have been

⁷¹² *Fisheries Jurisdiction (United Kingdom v Iceland)*, Judgment, at para. 62.

⁷¹³ *Ibid.*, para. 69.

⁷¹⁴ MR, paras. 6.80, 6.83.

⁷¹⁵ MR, para. 6.81 and fn. 671, which mistakenly refers to UKCM, para. 8.38 instead of UKCM, paras. 2.108 and 5.34.

⁷¹⁶ MR, Annex 98.

⁷¹⁷ MR, paras. 6.84-6.85; cf. UKCM, para. 8.45.

included in article 56(2), just as it was in e.g. article 66(2), but the drafters of the 1982 Convention did not do so. Moreover, the rule relevant to this issue is at article 62(5) of the 1982 Convention, pursuant to which a coastal State is obliged to give due notice of conservation and management laws and regulations. There is no obligation of consultation.

8.32 Likewise, the United Kingdom maintains its position that article 197 is irrelevant⁷¹⁸, as is article 61⁷¹⁹, whilst article 55 adds nothing to Mauritius' claim⁷²⁰.

8.33 The United Kingdom also maintains the position that it did, in any event, consult with Mauritius, and in this respect it relies on paragraphs 8.51-8.54 of its Counter Memorial, and Chapter III above.

D. Alleged breaches of articles 63, 64, 78 and 194 and of other agreements

8.34 This section responds to the arguments Mauritius makes at paragraphs 6.89 – 113 of its Reply. It deals in turn with: (a) alleged rights under Part VI to minerals and sedentary species; (b) marine pollution and alleged rights under Part XII; (c) alleged breaches of Part V of the Convention and the Fish Stocks Agreement with regard to straddling and highly migratory fish stocks; before turning to (d) conclusions.

(a) Alleged violation of Part VI: continental shelf rights

8.35 In its Reply, Mauritius makes two arguments with respect to the continental shelf of BIOT. First, it reiterates its claim “that Mauritius possesses rights in the continental shelf of the Chagos Archipelago”⁷²¹. Second, it claims that the United Kingdom “in breach of its obligations under Part VI of the Convention, has prohibited Mauritius from harvesting the sedentary species found on the Archipelago’s continental shelf”⁷²². The first of these claims

⁷¹⁸ UKCM, para. 8.46; cf. MR, para. 6.86.

⁷¹⁹ Cf. MR, para. 6.87.

⁷²⁰ UKCM, para. 8.39; cf. MR, para. 6.88.

⁷²¹ MR, para. 6.90.

⁷²² MR, para. 6.91.

has already been fully answered by the United Kingdom in its Counter-Memorial⁷²³. Mauritius' Reply adds nothing by way of response. The second claim is new, and unsupported by any evidence.

8.36 The United Kingdom reiterates its position that the understanding reached in 1965 to the effect that “the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government”⁷²⁴ means precisely that: it is an assurance that “the Government of Mauritius should receive the benefit of any minerals and oil discovered in or near the Chagos Archipelago”⁷²⁵. The understanding reached during independence negotiations was not a transfer of those rights to Mauritius at that point, and to say that it contradicts the ordinary meaning of the words used and the negotiating record⁷²⁶. Nothing has happened since 1965 to change the nature of that understanding. There have been no subsequent undertakings relating to continental shelf rights and Mauritius does not say that there have been. Its claim to exercise continental shelf rights stands or falls by what was said in 1965. For the reasons given in the Counter-Memorial⁷²⁷, this claim fails in its entirety.

8.37 Mauritius attempts to strengthen its case by reference to CLCS submissions. The Reply says nothing new on this point. The United Kingdom has made no submission to the CLCS with respect to the outer limits of the BIOT continental shelf, although it discussed with Mauritius the possibility of doing so jointly⁷²⁸. Article 76 of the Convention requires the coastal State to make such a submission only where it has delineated a continental shelf extending beyond 200 nautical miles⁷²⁹.

8.38 The United Kingdom has not delineated a continental shelf extending beyond 200 nautical miles from BIOT. Its failure to do so cannot affect its sovereign rights as a coastal state over the continental shelf of BIOT within 200 nautical miles. Those rights exist *ipso facto*: they do not depend on occupation, effective or notional, or on any express

⁷²³ UKCM, paras 2.112-2.116; 7.51-7.58.

⁷²⁴ MR, para. 6.90; MM, Annex 19.

⁷²⁵ See the text of the *Note Verbale* to Mauritius at para. 2.115 UKCM.

⁷²⁶ UKCM, paras 2.83-85; 2.112-115.

⁷²⁷ *Ibid.*

⁷²⁸ BIOT: UK/Mauritius Talks, 14 January 2009, MR, Annex 185, section 6, p.207; UK/Mauritius Talks, 21 July 2009, MR, Annex 185, p. 229.

⁷²⁹ Articles 76(7) and (8).

proclamation⁷³⁰. Nor do they depend on making a submission to the CLCS⁷³¹. They remain inherently an attribute of United Kingdom sovereignty over BIOT unless and until the islands themselves are transferred to some other State.

8.39 As pointed out in the Counter-Memorial, Mauritius cannot alter the status of the BIOT continental shelf by making its own submission to the CLCS with respect to BIOT⁷³². It has only submitted preliminary information, and in that submission it acknowledges that there exists a sovereignty dispute with the United Kingdom over land territory⁷³³. The status of the continental shelf beyond 200 nautical miles would be no different if Mauritius had made a full submission to the CLCS. In accordance with the terms of article 76(7), only the coastal State may delineate the outer limits of the continental shelf. In accordance with article 76(8), only the coastal State may submit information to the CLCS on the limits of the shelf beyond 200 nautical miles. Mauritius is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to BIOT.

8.40 That position does not change merely because the United Kingdom has made no submission to the CLCS and has not protested at Mauritius' actions in submitting preliminary information⁷³⁴. A failure by the coastal State to extend the outer limit of its continental shelf beyond 200 miles does not and cannot mean that any other State is then free to lay claim to the shelf beyond that limit. Articles 76(7) and 76(8) still apply. The area in question cannot become the continental shelf of any other State unless that State is also the coastal State. To that extent Mauritius is correct to say that "the continental shelf is indivisible"⁷³⁵.

8.41 The principle that the continental shelf is indivisible cannot, however, have the effect alleged by Mauritius of transferring to Mauritius the entire BIOT continental shelf (or any part thereof) merely because Mauritius rather than the United Kingdom has submitted preliminary information to the CLCS⁷³⁶. For the reasons given in the previous three paragraphs, the entire shelf exists *ipso facto* as an attribute of the sovereignty of the coastal

⁷³⁰ UNCLOS, article 77(3).

⁷³¹ *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS No 16 (2012), paras. 408-9. (UKCM, Authority 36)

⁷³² UKCM, paras. 7.51-58.

⁷³³ UKCM, para. 7.54.

⁷³⁴ UKCM, paras 7.57-58.

⁷³⁵ MR, para. 6.90.

⁷³⁶ MR, para. 6.90.

State over its land territory. In the present case the United Kingdom is the coastal State. If the shelf is indeed indivisible as Mauritius alleges then it will continue to exist even if no submission is ever made to the CLCS by the United Kingdom. What will be in doubt is the outer limit of that shelf, not the legal status of the shelf itself.

8.42 But even if that were wrong and the coastal State's rights beyond 200 nautical miles were somehow lost if no submission is made to the CLCS, that part of the shelf would by default then become part of the Deep Seabed Area, subject to the common heritage regime in Part XI. It could not, for the reasons already indicated, become the continental shelf of Mauritius, even if Mauritius could supply the necessary geomorphological data. To benefit from continental shelf rights within or beyond 200 nautical miles from BIOT, Mauritius must first secure a transfer of sovereignty over the Chagos Archipelago. Without that transfer it can have no sovereign rights to the resources of the BIOT continental shelf, whether within or beyond 200 nautical miles.

8.43 Mauritius then says that the United Kingdom has violated Part VI of the Convention by prohibiting Mauritius from harvesting the sedentary species found on the Archipelago's continental shelf⁷³⁷. It claims that the harvesting of sedentary species was included in the traditional fisheries undertaking given by the United Kingdom in 1965 and that a ban on harvesting these species therefore contravenes its rights under article 78(2) of the 1982 Convention.

8.44 This argument does not merit extensive rebuttal. Mauritius provides no evidence that sedentary species have ever been exploited by Mauritius or by anyone else. The Counter-Memorial sets out the position as it existed in 1965: the fishing that had taken place until then was "mainly hand line with some basket and net fishing by the local population for own consumption"⁷³⁸. None of that fishing took place on the continental shelf or for sedentary species. In those circumstances, it follows that the understanding reached in 1965 with respect to fishing rights cannot have been intended to cover sedentary species.

8.45 The claim that Mauritius has "traditional fishing rights" with respect to sedentary species thus has no merit unless Mauritius can show that such a fishery existed in or before

⁷³⁷ MR, para. 6.91.

⁷³⁸ UKCM, para. 2.94, quoting the Governor of Mauritius (MM, Annex 37).

1965. It has made no attempt to do so. Moreover, it remains the case that since 1965 no licences to take sedentary species have ever been issued to vessels from Mauritius or from anywhere else⁷³⁹. Apart from sea cucumbers taken illegally by Sri Lankan boats, there is no evidence of any sedentary species being harvested in the BIOT FCMZ. If the right did exist in 1965, *quod non*, it has evidently been abandoned or lost through almost half a century of non-use.

8.46 It should also be recalled that the sovereign rights of the coastal State to manage access to sedentary species on the continental shelf are even more exclusive than their rights with respect to fisheries in the EEZ. The point is explained by Burke:

“Sovereign rights over sedentary species are for the purpose of exploring and exploiting those species. This formulation differs from article 56, which includes conserving and managing. The omission of any reference to conserving and managing functions seems insignificant because the concept of sovereign rights over the shelf resources is, if anything, even broader than the rights given in article 56. The coastal State is free to prohibit any foreign exploitation, even if it declares a surplus, and it may manage these sedentary species as it pleases. None of the provisions for protecting against over-exploitation, safeguarding associated/dependent species, allocation of surplus, or arrangements for landlocked and geographically disadvantaged States are obligations of the coastal State in regulating use of sedentary species”⁷⁴⁰.

This is the legal context in which Mauritius now seeks unprecedented access to an exclusive coastal State resource which it has never before exploited or sought to exploit, and which may not even exist.

(b) Alleged rights under Part XII: marine pollution

8.47 Mauritius alleges that the United Kingdom has violated articles 194(1) and 194(4) of the Convention⁷⁴¹. The United Kingdom responded to the first of these allegations in the Counter-Memorial by pointing out that the MPA introduces no new pollution controls and

⁷³⁹ See the record of fishing in BIOT waters by vessels from Mauritius set out in UKCM at paras. 2.99-2.111.

⁷⁴⁰ W. Burke, ‘The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction,’ 63 *Oregon LR* (1984), p.74 at p. 116. Footnotes omitted. (UKCM, Authority 49)

⁷⁴¹ MR, paras. 6.98-6.102.

that article 194(1) is inapplicable in the circumstances of this case⁷⁴². Mauritius says this is incorrect and asserts that “The “MPA”, like all other MPAs of comparable size and scope, is intended to address a range of matters, including marine pollution”⁷⁴³. It goes on to claim that “in so far as the “MPA” purports to regulate marine pollution, it has done so without the UK having engaged in any attempt to harmonise its policies with Mauritius”⁷⁴⁴.

8.48 The United Kingdom can only reiterate its previous explanation. The MPA introduces a ban on commercial fishing in the BIOT FCMZ. Pollution controls have been in place since before the adoption of the Environmental (Protection and Preservation) Zone in 2003⁷⁴⁵. The declaration of an MPA does not change the longstanding regulation of marine pollution, which is based on and consistent with internationally agreed rules and standards established by IMO.

8.49 The United Kingdom is a party to relevant IMO Conventions that constitute generally accepted international rules and standards with respect to marine pollution from ships. Like any other coastal State, it is entitled pursuant to articles 210, 211 and 212 of the 1982 Convention to apply those standards to all ships navigating within 200 nautical miles of its shores. The 1972 London Dumping Convention was in fact extended to BIOT on 17 November 1975, i.e. long before the MPA was introduced.

8.50 What other MPAs or IUCN Guidelines may say with respect to environmental protection or pollution control is neither here nor there: as pointed out in Chapter VII of this Rejoinder, an MPA has no defined content in international law, and there is no consistent practice on the part of States establishing such zones⁷⁴⁶. The BIOT MPA covers what it covers and no more. That is what matters and that is what Mauritius is now challenging. Reference to anything else leads merely to hypothetical assumptions.

8.51 Nor can article 194(1) be read as requiring a coastal State to consult other States before applying IMO pollution conventions to ships navigating in waters over which it has jurisdiction. In so far as article 194(1) requires states to endeavour to harmonise their

⁷⁴² UKCM, paras. 6.20-21.

⁷⁴³ MR, para. 6.100.

⁷⁴⁴ MR, para. 6.100.

⁷⁴⁵ See para. 7.22 of this Rejoinder where the applicable ordinances are listed.

⁷⁴⁶ See paras. 3.39 – 3.43 of this Rejoinder.

policies with respect to pollution of the marine environment the United Kingdom has given effect to that obligation in the same way that Mauritius has done so – through its participation in IMO and its co-operation in the negotiation and implementation of IMO Conventions with respect to marine pollution. That is all that article 194(1) can reasonably be interpreted to require.

8.52 Mauritius’ interpretation of article 194(1), if accepted, would severely constrain the ability of coastal states to implement IMO conventions that have achieved the status of generally accepted international rules and standards within the meaning of articles 210 - 212 of the Convention. Mauritius itself is a party to IMO Conventions. It cannot now object to their application by the United Kingdom in BIOT waters.

8.53 Mauritius’ second argument is that, by exercising pollution jurisdiction in the MPA, the United Kingdom has violated its obligation under article 194(4) to “refrain from unjustifiable interference with activities carried out by other states in the exercise of their rights and in pursuance of their duties in conformity with this Convention.” It claims that: “Since the ‘MPA’ is intended to provide comprehensive environmental protection for the waters of the Chagos Archipelago, Article 194(4) is applicable. Accordingly, any measures to ‘prevent, reduce or control marine pollution’ may not unjustifiably interfere with Mauritius’ rights ... [including] historically acquired rights to the natural resources of the Chagos Archipelago, as well as the rights that the UK has undertaken to respect”⁷⁴⁷.

8.54 Once again, Mauritius is attributing to the MPA more than is actually there. The only new measure introduced by the MPA as presently constituted is the ban on commercial fishing. Mauritius points to no legislation on pollution which will necessarily affect any activity in the EEZ. It has not even tried to explain how the regulation of pollution might constitute “unjustifiable interference” with the rights that Mauritius now claims under UNCLOS. Is Mauritius implying some pre-existing right to pollute the oceans which the MPA interferes with?

8.55 As pointed out in Chapter III, in its written pleadings Mauritius does not argue that the earlier declaration of an Environmental Protection and Preservation Zone in 2003 is

⁷⁴⁷ MR, para. 6.103.

incompatible with UNCLOS (apart from its claim to be the coastal State), and it must therefore be assumed that its claimed rights are unaffected by that declaration⁷⁴⁸. Although Mauritius protested at the establishment of the BIOT EPPZ in 2003, its protest does not allege interference with any of its claimed UNCLOS rights.⁷⁴⁹

8.56 It is not for the United Kingdom to speculate on how the regulation of marine pollution from ships or fishing boats might otherwise interfere with the fishing or other rights to which Mauritius lays claim. Mauritius has failed to particularise its claim, and no more need be said on this spurious argument.

(c) Alleged breaches of Part V of the Convention and the Fish Stocks Agreement

8.57 Mauritius responds briefly to the United Kingdom's arguments on consultation and cooperation with respect to fishing on the high seas. First, it claims that it is "(a) a State fishing in the area adjacent to the EEZ within the meaning of Article 63(2), and (b) a State whose nationals fish in the region for the highly migratory species within the meaning of Article 64"⁷⁵⁰.

8.58 The United Kingdom's response to this argument is straightforward: it is contradicted by the evidence. The Counter-Memorial set out the evidence that Mauritius is not a fishing State for the purposes of articles 63 and 64. That evidence comes authoritatively from an unimpeachable and independent source: the IOTC⁷⁵¹. Mauritius' own national report to the IOTC in 2011 indicated that there were four national fishing vessels targeting swordfish and tuna between latitudes 12° south and 23° south and longitudes 52° east and 63° east⁷⁵². Those co-ordinates are far to the southwest of the BIOT MPA, mainly in Mauritius' own EEZ.

8.59 Either Mauritius has failed to report its tuna catches to the IOTC accurately, or else the claim it now makes to be a fishing State in the areas adjacent to the MPA or in the same

⁷⁴⁸ BIOT Proclamation No 1 of 2003. (MM, Annex 121)

⁷⁴⁹ MM, paras. 4.14-28.

⁷⁵⁰ MR, para. 6.105.

⁷⁵¹ IOTC 14th Report of the Scientific Committee, 2011, p. 54; UKCM, para. 9.6.

⁷⁵² IOTC, *Mauritius National Report to the Scientific Committee of the Indian Ocean Tuna Commission*, 2012, IOTC-2012-SC15-NR18 Rev 1, Executive Summary, p.2. (UKCM, Annex 130) The report notes that Mauritius concentrates on fish processing and issues licences for foreign boats to fish in its EEZ.

region cannot be correct. Its own evidence in the Reply consists of a list of “catches by Mauritian fishing vessels in Chagos Archipelago” between 1977 and 2009⁷⁵³. The only source given is the Ministry of Fisheries.

8.60 Without further explanation and verification this information is of no probative value. If it relates to tuna catches, the question must be asked as to why the information was not given to the IOTC. If it relates only to fishing within the Chagos Archipelago, then it is irrelevant to Mauritius’ case under articles 63 and 64. The evidence required for those articles is evidence that Mauritian vessels fish in areas adjacent to the BIOT FCMZ or in the same region. The question must be asked as to why Mauritius has not produced such evidence. The answer that can safely be inferred is that there is no such evidence – because its vessels do not fish in those waters.

8.61 The United Kingdom therefore stands by its original response: Mauritius is not a State whose vessels or nationals fish in waters adjacent to the BIOT FCMZ, or in the same region, for the purpose of articles 63 and 64 respectively. On the data supplied to the IOTC by Mauritius these articles are inapplicable in this case. The same is true of article 7 of the UNFSA.

8.62 Secondly, Mauritius denies that the United Kingdom has cooperated with the IOTC or with Mauritius. It claims that “the UK’s engagement with the IOTC in relation to the “MPA” was simply to inform the IOTC that the “MPA” was contemplated and that it “could have implications” for the organisation, without explaining them or seeking input from the IOTC or its member states”⁷⁵⁴. Given that articles 63 and 64 of UNCLOS and article 7 of the UNFSA do not apply to Mauritius for the reasons explained in the preceding paragraph, the simple answer to its claims under these articles is that the United Kingdom has no obligation to cooperate with Mauritius under either article.

8.63 If any of these articles does somehow apply, then the United Kingdom’s answer is that it has fulfilled its obligations thereunder. Consultation is not a unilateral process: it requires others to respond to an initial communication. Having notified the IOTC and its member states about the MPA, the United Kingdom had set in motion the process of

⁷⁵³ MR, para. 2.124.

⁷⁵⁴ MR, para. 6.106.

consultation. It was open to the IOTC or its members to come back with a request for more information or to seek further dialogue had they wanted to do so. They did not do so.

8.64 Nor did Mauritius raise any objections in the IOTC beyond asserting its sovereignty over BIOT⁷⁵⁵. Indeed, it would be difficult for Mauritius to claim that BIOT is part of Mauritius and at the same time demand that the real coastal State (the United Kingdom) must co-operate with Mauritius in the management of high seas fish stocks in waters adjacent to BIOT. That was presumably why Mauritius allowed the British/Mauritian Fisheries Commission to lapse⁷⁵⁶. Mauritius cannot then complain of non-consultation by the United Kingdom when its own position on sovereignty necessarily rules out meaningful co-operation on fisheries management with the United Kingdom.

8.65 Even accepting that Mauritius may not have felt it prudent to discuss BIOT fisheries management in the IOTC, there was nevertheless nothing to inhibit Mauritius from asking the United Kingdom to discuss fisheries management in the context of the bilateral British/Mauritian Fishing Commission, or in direct negotiations. The first meeting of the bilateral Commission took place in 1994, and the last in 1999⁷⁵⁷. The substance of its meetings is recorded in joint communiqués reproduced as Annexes 63 and 64 of the United Kingdom Counter-Memorial. The Commission did not meet thereafter, and Mauritius did not request a meeting of that Commission to discuss the MPA in 2009 or 2010.

8.66 Had Mauritius wanted to engage in consultations with the United Kingdom on fisheries management issues without compromising its position on sovereignty then the bilateral fisheries commission was the ideal forum in which to do so – a forum in which the parties had already agreed to set aside their differences on sovereignty⁷⁵⁸. To complain now that the United Kingdom made no effort to co-operate directly with Mauritius on fisheries begs the obvious question as to why did Mauritius not engage in the matter itself in the bilateral commission.

⁷⁵⁵ UKCM, para. 9.24.

⁷⁵⁶ BIOT: UK/Mauritius Talks, 14 January 2009, MR, Vol V, Annex 185, section 6, p. 206.

⁷⁵⁷ UKCM, para. 3.14 and fn. 170.

⁷⁵⁸ *Joint Statement on the Conservation of Fisheries under a 'sovereignty umbrella'*, 27 January 1994. (UKCM, Annex 62)

8.67 Mauritius did discuss the MPA and its impact on fishing in direct talks with the United Kingdom in 2009. The details are set out at paragraphs 4.22 – 4.45 of Mauritius’ Reply, and in Annex 185 thereto⁷⁵⁹. Chapter III of the Counter-Memorial also sets out in detail the steps taken by the United Kingdom to consult Mauritius before establishing the MPA, and the issue is re-visited in this Rejoinder⁷⁶⁰. Ultimately, Mauritius cannot have it both ways: if the consultations with the United Kingdom on fisheries management were sufficient to satisfy the requirements of article 283, as Mauritius claims⁷⁶¹, then the starting point is that there have been exchanges, and there has been no explanation on Mauritius’ part as to why such exchanges do not also meet whatever consultation requirements there might be under articles 63 and 64 of UNCLOS, and Article 7 of the Fish Stocks Agreement.

8.68 If there really are matters of substance to discuss relating to the MPA and fisheries management in adjacent waters, there was and there remains nothing to prevent Mauritius from raising them in the IOTC or requesting a meeting of the bilateral Fisheries Commission. Even if it were assumed that there was some failure by the United Kingdom to consult Mauritius in 2010, the requirements of articles 63 and 64 are ongoing and any failure to comply with them is easily rectified. Mauritius has offered no evidence that it has at any time ever requested a meeting of either body for the purpose of discussing the MPA. That is fatal to its position on co-operation. By contrast the United Kingdom has always been open to cooperation and dialogue on fisheries conservation and management, as its willingness to negotiate with Mauritius in 2009 demonstrates.

8.69 The underlying reality, it appears, is that Mauritius had no real interest in being consulted on fisheries management, for two reasons. First, its own vessels did not fish in the adjacent high seas areas or even in the same region. Second, any attempt at meaningful consultation would have compelled Mauritius to deal with the United Kingdom as the appropriate coastal State for BIOT, and this it was not prepared to do.

8.70 The remainder of Mauritius’ response on fisheries cooperation adds nothing to its earlier case. It denies that Article 116 of UNCLOS, Article 7(2) of the 1995 Fish Stocks Agreement or Article XVI of the IOTC Agreement give any priority to coastal State

⁷⁵⁹ BIOT: UK/Mauritius Talks, 14 January 2009, MR, Annex 185, (UKCM Annex 94), section 6, p. 207; UK/Mauritius Talks, 21 July 2009, MR, Annex 185, p. 229 (UKCM Annex 101).

⁷⁶⁰ Paras. 3.5-3.19 of this Rejoinder.

⁷⁶¹ MR, Chapter IV.

conservation and management measures over the claims of high seas fishing States. It provides no authority for its interpretation of any of these articles – no reference to *travaux préparatoires* or academic literature, and no reasoned rebuttal of the case made by the United Kingdom in its Counter-Memorial⁷⁶².

8.71 But even if Mauritius were right that coastal State conservation measures have no priority over the rights of high seas fishing States – an extraordinary reversion to the claims of the major high seas fishing States in the 1958 Geneva Conference and one that no other developing State attempting to secure its coastal fish stocks would countenance – it is still wrong to say that the United Kingdom has violated obligations of consultation and cooperation, whatever their legal basis.

8.72 For all the reasons set out earlier it is evident (i) that the United Kingdom informed the IOTC and Mauritius of its intentions with respect to the MPA, and (ii) that there were ample opportunities for Mauritius to enter into a dialogue with the United Kingdom, either multilaterally through the IOTC, or bilaterally through the British/Mauritius Fisheries Commission, or directly. The onus is on Mauritius to show why it could not have availed itself of any of those opportunities, and why the discussions which took place in 2009 do not constitute ‘consultation’.

8.73 In these circumstances the United Kingdom has satisfied whatever obligations of consultation and cooperation there may be with respect to the management of fish stocks in BIOT’s 200-mile FCMZ.

8.74 Before leaving this issue, however, it is appropriate to draw attention to the broader implications of what Mauritius is arguing. The large distant water fishing States whose fleets make up a significant proportion of those fishing in the Indian Ocean and in African waters often negotiate access rights to EEZ fisheries and they also fish in adjacent areas. Mauritius’ position on consultation would give distant water fishing states a battering ram to use against poorly resourced coastal states seeking to control conservation and management of their own natural resources.

⁷⁶² UKCM, paras. 9.13-9.20.

8.75 Mauritius says that disputes between coastal and distant water fishing States should be settled by arbitration, but for most coastal fishing States that is both expensive and burdensome. Conciliation, as provided for in article 297(3)(b), was perceived as a better option. That is why disputes relating to conservation and management of living resources in the EEZ were excluded from compulsory dispute settlement in the first place. It is also why Mauritius' arguments about consultation and cooperation should be rejected.

E. Alleged abuse of rights

8.76 Mauritius' allegation of abuse of rights is regrettable, and the section in the Reply on abuse of rights merely brings together a number of allegations of fact that are disputed by the United Kingdom, which evidently also does not accept Mauritius' characterisations of what constitutes an abuse of rights for the purpose of article 300 of the Convention⁷⁶³. As to the facts:

- a. Reliance is placed on a 5 May 2009 briefing paper to the UK Foreign Secretary with a view to suggesting that the MPA was motivated by a desire to prevent resettlement of the islands⁷⁶⁴. The paper does not establish any such motivation and what matters in any event is the purpose behind the declaration of the MPA in April 2010, not what was said in a briefing paper many months before.
- b. It is said that the declaration was made in the full knowledge that Mauritius possessed rights to the natural resources of the Chagos Archipelago, and "in the face of decades of legal advice from the UK's international lawyers about Mauritius' rights"⁷⁶⁵. That is not accurate either as to the existence of rights or as to the characterisation of advice: see section B above and the Appendix below.
- c. It is said to be "plain" that there was no scientific or environmental justification to support the creation of the MPA⁷⁶⁶, and reliance is placed on views of MRAG⁷⁶⁷. It is

⁷⁶³ Cf. MR, para. 6.115.

⁷⁶⁴ MR, para. 6.116.

⁷⁶⁵ MR, para. 6.117.

⁷⁶⁶ MR, para. 6.118.

⁷⁶⁷ MR, paras. 6.119-6.121.

remarkable that such a position can be taken in the absence of any expert evidence tendered in support. The position is untenable: see further paragraphs 3.45-3.53 above as to the scientific basis for the MPA.

- d. As to alleged failures to consult, said to accentuate “the abusive nature of the UK’s actions”, and also the making of the declaration in April 2010⁷⁶⁸, the Tribunal is referred to paragraphs 8.51-8.54 of its Counter Memorial and paragraphs 3.3-3.29 above.
- e. As to the alleged failing with respect to promulgating new laws and regulations⁷⁶⁹, the MPA is currently implemented through existing legislation on fisheries and the ban on commercial fishing. That is sufficient for immediate purposes, and further implementing legislation is being prepared. This is another complete non-issue.
- f. As to the points on financing see paragraph 3.54.
- g. As to allowing non-commercial fishing by yachtsmen for personal consumption ‘recreational fishing off Diego Garcia’⁷⁷⁰, the UK has nothing to add to its Counter-Memorial, save to make clear that fishing in the lagoon off Diego Garcia does not fall within the no-fishing regime of the MPA.⁷⁷¹

8.77 It is striking that an abuse of rights argument has been mounted on such a flimsy series of points.

⁷⁶⁸ MR, paras. 6.123-6.124.

⁷⁶⁹ MR, para. 6.125.

⁷⁷⁰ MR, paras. 6.126-6.127.

⁷⁷¹ The United Kingdom also notes the alleged ‘silence’ to which reference is made at MR, para. 1.25, concerning reported remarks said to have been made at a meeting held at the US Embassy on 12 May 2009. Mauritius no longer appears to make any point with regard to the asserted remarks in the context of its article 300 claim. As to MR, para. 1.25, the United Kingdom repeats the points made at UKCM, para. 8.64. It is noted that Mauritius has annexed the transcript of Colin Roberts’ witness evidence in the *Bancoult* judicial review, but not the transcript of the evidence of Ms Yeadon, as to which see **Annex 76**. See also the first witnesses statement of Mr Roberts (**Annex 70**), at paras. 16-17 and the second witness statement of Mr Roberts dated 16 July 2012 (**Annex 72**) and the first witness statement of Ms Yeadon (**Annex 69**), at paras. 2 and 23, and the second witness statement of Ms Yeadon dated 12 July 2012 (**Annex 71**).

SUBMISSIONS

For the reasons set out in this Rejoinder and in its Counter-Memorial, the United Kingdom of Great Britain and Northern Ireland respectfully requests the Tribunal:

- (i) to find that it is without jurisdiction over each of the claims of Mauritius;
- (ii) in the alternative, to dismiss the claims of Mauritius.

In addition, the United Kingdom of Great Britain and Northern Ireland requests the Tribunal to determine that the costs incurred by the United Kingdom in presenting its case (including in respect of the Challenge to an Arbitrator) shall be borne by Mauritius, and that Mauritius shall reimburse the United Kingdom for its share of the expenses of the Tribunal.



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APPENDIX

Introduction

A.1 This Appendix sets out a detailed account of the documentary record as regards the 1965 understanding in relation to fishing rights⁷⁷².

A.2 This account is necessary given the extent of the materials referred to by Mauritius (spanning some 45 to 50 years), including its contentions made by reference to United Kingdom internal documents. This Appendix shows that the 1965 understanding was a non-binding understanding that the United Kingdom has sought over the years in good faith to give effect to, in circumstances where Mauritius has demonstrated minimal interest in the actual exploitation of its “fishing rights”. The British Government always informed the Mauritius Government as to new legislation, and whenever the Mauritian Government did raise any objection, this was on grounds of sovereignty as opposed to “fishing rights” pursuant to the 1965 understanding. Furthermore, for the reasons set out in the Rejoinder at paragraphs 8.12 to 8.15, the internal documentation relied upon by Mauritius is irrelevant. In any event, this Appendix shows that those internal documents do not undermine the United Kingdom’s position that the 1965 understanding did not give rise to binding obligations with respect to fishing rights; they merely show a variety of different views, expressed mainly at a junior level or by non-lawyers, and generally without evidence of any detailed consideration.

A.3 This detailed account of the documentary record is divided into the following sections:

- a. 1965: events leading to the 1965 understanding⁷⁷³;
- b. 1965: fishing practised at the time of the 1965 understanding⁷⁷⁴;
- c. 1966-1968: representations to the United States Government and discussion of fishing limits⁷⁷⁵;

⁷⁷² The 1965 understanding is set out at paragraph 3.60 of the Rejoinder. A summary of the key points that emerge from the documentary record is provided at paragraphs 3.68 to 3.75 of the Rejoinder.

⁷⁷³ See paras. A.4 to A.15 below.

⁷⁷⁴ See paras. A.16 to A.20 below.

⁷⁷⁵ See paras. A.21 to A.32 below.

- d. 1969: the establishment of a 12 mile fishery zone⁷⁷⁶;
- e. 1970s: minimal fishing practiced⁷⁷⁷;
- f. 1984: enactment of the licensing regime⁷⁷⁸ (including assessment of the fishing practiced pursuant to the 1984 regime⁷⁷⁹);
- g. 1991: extension of limits to 200 nautical miles⁷⁸⁰ (including assessment of fishing practiced from 1991 onwards⁷⁸¹);
- h. 1994-1999: the British Mauritius Fisheries Commission (BMFC)⁷⁸²;
- i. 2000/2001: Mauritius' stance on the Chagos Archipelago⁷⁸³;
- j. 2003: closed marine protected areas⁷⁸⁴ and the Environmental (Protection and Preservation) Zone⁷⁸⁵;
- k. 2009: bilateral discussions⁷⁸⁶;
- l. 2010: Mauritius' response to the establishment of the MPA⁷⁸⁷;
- m. Conclusion⁷⁸⁸.

1965: events leading to the 1965 understanding⁷⁸⁹

A.4 This section addresses the key events leading to the 1965 understanding. It is evident from those events, set out at paragraphs A.5 to A.15 below, that:

- a. The words “fishing rights” set out in the final record, were inserted following the handwritten amendments proposed by Sir Seewoosagur Ramgoolam from his hotel room⁷⁹⁰; they were not the subject of any detailed consideration⁷⁹¹. It is a reasonable

⁷⁷⁶ See paras. A.33 to A.39 below.

⁷⁷⁷ See paras. A.45 to A.50 below.

⁷⁷⁸ See paras. A.51 to A.56 below.

⁷⁷⁹ See para. A.57 below.

⁷⁸⁰ See paras. A.58 to A.78 below.

⁷⁸¹ See paras. A.79 to A.85 below.

⁷⁸² See paras. A.86 to A.92 below.

⁷⁸³ See para. A.93 below.

⁷⁸⁴ See para. A.94 below.

⁷⁸⁵ See paras. A.95 to A.98 below.

⁷⁸⁶ See paras. A.99 to A.132 below.

⁷⁸⁷ See para. A.133 below.

⁷⁸⁸ See paras. A.134 to A.135 below.

⁷⁸⁹ See also paras. 2.50 to 2.60 of the UKCM.

⁷⁹⁰ See UKCM, Annex 9, discussed below.

⁷⁹¹ This has been commented on at various points over the following years, both by the Mauritians and the United Kingdom. For example, the June Select Committee Report noted that the document dated 6 October 1965 referred to at paragraph A.8 below “*does not give any definite character to the proposals which Dr the*

inference that when inserting the two words “fishing rights”, Sir Seewoosagur Ramgoolam had in mind his earlier proposal of July 1965 which was to ensure preference for Mauritius if fishing rights were ever granted⁷⁹².

- b. Both the Mauritius Council of Ministers and the British Colonial Office as at this date (November 1965) understood that the 1965 understanding was limited to making representations to the United States Government⁷⁹³.
- c. The Mauritian Ministers were dissatisfied with mere assurances⁷⁹⁴. Thus, at the time the 1965 understanding was formed, Mauritius’ Council of Ministers were apparently (and correctly) of the view that this did not give rise to enforceable legal obligations.

A.5 Turning to the detail of the key events leading to the 1965 understanding, in July 1965 the Governor of Mauritius opened discussions with Mauritius Ministers on the proposals for the United States defence facility and the detachment of the Chagos Archipelago⁷⁹⁵. The Mauritian Premier (Sir Seewoosagur Ramgoolam) raised the question of “*mineral or other valuable rights that might arise in future[sic]*”⁷⁹⁶. The following week, Sir Seewoosagur speaking for the Ministers as a whole said that they were “*sympathetically disposed to the request*” but as detachment “*would be unacceptable to public opinion*” they wished also that provision should be made for “*ensuring preference for Mauritius if fishing or agricultural rights were ever granted*”⁷⁹⁷.

A.6 At a meeting held at 2.30 p.m. on 23 September 1965, attended by the Secretary of State, the Premier (Sir Seewoosagur Ramgoolan) and Messrs Bissoondoyal, Paturau and Mohamed, provisional agreement to detachment was reached on the understanding that the

Honourable S Ramgoolam had undertaken to carry to the approval of his colleagues in the Council of Ministers” (UKCM, Annex 46 at para. 39). Similarly, in an internal memorandum cited by Mauritius in its Reply, it was observed that “*Precisely what was intended was never set out in detail*” (“Conservation of Fish Stocks in the British Indian Ocean Territory: The Need for a Buffer Zone”: MR, Annex 92).

⁷⁹² See MM, Annex 12 and MM, Annex 13, discussed below.

⁷⁹³ See also Mr Vickers (Chief Secretary for the Mauritian Council of Ministers) understanding that the British Government would simply make appropriate representations to the United States government, as set out at paragraph A.11 below (UKCM, Annex 46 at appendix M). The record of the meeting also stated that the British Government would use its good office in support of Mauritius’ request for concessions over sugar imports and supply of wheat and other commodities, but these matters do not appear to have been pursued.

⁷⁹⁴ See UKCM, Annex 46 at Appendix O discussed below.

⁷⁹⁵ MR, Annex 87 at para. 2.

⁷⁹⁶ MM, Annex 12.

⁷⁹⁷ MM, Annex 13.

Secretary of State would recommend certain conditions⁷⁹⁸. These did not include “fishing rights”.

A.7 Subsequently, on 1 October 1965, Sir Seewoosagur made some handwritten amendments to the list of conditions recorded in an earlier draft record of the meeting in his hotel⁷⁹⁹. His note stated that had Mr Mohamed (the leader of the Muslim Committee of Action, the Labour party’s political ally) wished “*to point out the amendments that should be effected*”. This included the insertion of “*(viii) fishing rights*”. That amendment became paragraph 22(vi) in the final record of the meeting of 23 September 1965⁸⁰⁰.

A.8 On 6 October 1965, a copy of the final record was sent by the Colonial Office to the Governor of Mauritius seeking his confirmation that the Mauritius Government was willing to agree that Britain should now take the necessary legal steps to detach the Chagos Archipelago on the conditions enumerated. It stated that:

*“as regards points (iv), (v) and (vi) the British Government will make appropriate representations to the American Government as soon as possible”*⁸⁰¹.

A.9 Two days later, on 8 October 1965, the Colonial Office wrote to the Foreign Office enclosing the final record of the 23 September 1965 meeting⁸⁰². It referred to paragraph 22(vi), stating that “*we shall be considering how best to take these up with the Americans*”. It observed that “*neither we nor Sir S Ramgoolam and his colleagues immediately concerned have any hope of extracting concessions from the Americans*” but that “*at all events we shall have to go through the motions with the Americans but not everybody will be very surprised if, on some issues, they achieve no results*”.

⁷⁹⁸ Listed at UKCM para. 2.56 as follows (i) negotiations for a defence agreement between Britain and Mauritius; (ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius; (iii) compensation totalling up to £3 million should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands; (iv) the British Government would use their good offices with the United States Government in support of Mauritius’ request for concessions over sugar imports and the supply of wheat and other commodities; (v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands. See **Annex 8**.

⁷⁹⁹ **Annex 8**.

⁸⁰⁰ MM, Annex 19. This record is a twenty nine paragraph-long document which includes a series of understandings.

⁸⁰¹ MM, Annex 21.

⁸⁰² MM, Annex 22.

A.10 On 25 October 1965, it was agreed that the Foreign Office “*should ask the US Government to make available to Mauritius navigational and meteorological facilities, fishing rights and the emergency use of an air-strip in the Chagos Archipelago*”⁸⁰³.

A.11 On 4 November 1965, the proposals were relayed by the Chief Secretary to the Council of Ministers⁸⁰⁴. As regards point (vi) it was recorded by Mr Vickers (Chief Secretary for the Mauritian Council of Ministers) that:

*“the British government will make appropriate representations to the US government and will keep the Mauritius government fully informed of progress in the matter”*⁸⁰⁵.

A.12 The following day, on 5 November 1965, in telegram No 247 from Mauritius to the Secretary of State for the Colonies, the Council of Ministers confirmed its agreement to the detachment of Chagos Archipelago⁸⁰⁶. As regards the reference to “*fishing rights*” it was simply noted (at paragraph 3) that the Ministers were “*dissatisfied with mere assurances*”⁸⁰⁷.

A.13 On 8 November 1965, in a telegram from the Secretary of State for the Colonies to Mauritius responding to telegram No 247, it was stated that:

*“with regard to the other points mentioned in your paragraph 3, the US government has been warned that they will be raised with them and as you aware some discussions have already been held with officials in London”*⁸⁰⁸.

A.14 On 12 November 1965 the Governor asked to what extent Mauritius Ministers could make reference in public to the points in paragraph 22⁸⁰⁹. The Governor “*added in this connection I trust further consideration promised....will enable categorical assurances to be given*”.

⁸⁰³ **Annex 10.** It was agreed that it would suffice “*to speak informally to a member of the US Embassy*”. Two days later, on 27 October 1965, it was confirmed that these issues were raised with Mr Barringer at the United States embassy. (**Annex 11**)

⁸⁰⁴ UKCM, Annex 46 at Appendix M.

⁸⁰⁵ UKCM, Annex 46 at Appendix M. Mr Vickers title is listed at Appendix N.

⁸⁰⁶ UKCM, Annex 46 at Appendix O. Also at MM, Annex 25.

⁸⁰⁷ UKCM, Annex 46 at Appendix O. See the Minutes of Proceedings of the meeting of the Council of Ministers during which it was said that “*the assurance given by the Secretary of State in regards to points (v) and (vi) [was] unsatisfactory*” (UKCM, Annex 46 at Appendix P).

⁸⁰⁸ **Annex 12.**

⁸⁰⁹ **Annex 13** (internal note at para. 5).

A.15 In the response of 19 November 1965, the Secretary of State for the Colonies stated that “*It may well be some time before we can give final answers regarding points (iv), (v) and (vi) of paragraph 22*”⁸¹⁰.

1965: fishing practised at the time of the 1965 understanding⁸¹¹

A.16 This section addresses the nature of the fishing practiced at the time of the 1965 understanding. It is apparent from the documents set out in this section that:

- a. British officials proceeded on the basis that representations to the United States Government would be with reference to current fishing practices.
- b. At the time that the 1965 understanding was reached, the fishing carried out in the Chagos Archipelago was extremely limited, consisting of basket and net fishing by the local population for their own consumption, with the occasional use of anchorage facilities.

A.17 Turning to the relevant documents, following the 1965 understanding, British officials sought to clarify the fishing carried out at that time⁸¹². Information was sought as to the current fishing practices because British officials wanted to be clear as to the nature of the fishing rights regarding which they had agreed in the 1965 understanding to make representations to the United States Government. It was concerned with the preservation of current, pre-existing fishing practices as far as practicable⁸¹³.

⁸¹⁰ UKCM, Annex 92 at p. 9. See also the internal telegram dated 17 November 1965 from the Colonial Office which stated that “As regards points Nos. (iv), (v) and (vi) of the record of the meeting held at Lancaster House on the 23rd September, you will note that we do not propose to be very forthcoming. It would nonetheless be most helpful if we could offer Mauritius Ministers some comfort in respect of these matters as soon as possible, and I should be glad if they could be pursued with the Americans accordingly. Even if we do not succeed in persuading them to accept all the proposals, it would help if they would meet us over some”.

⁸¹¹ See also paras 2.93 to 2.96 of the UKCM.

⁸¹² Colonial Office Telegram No. 305 to Mauritius and Seychelles, 10 November 1965: MM, Annex 34. At the time that the Mauritian Council of Ministers agreed to the detachment of the Chagos Archipelago, a territorial sea of 3 nautical miles was claimed with respect to the Chagos Archipelago. Waters outside the 3 nautical miles were international waters open to any fishermen. An FCO legal adviser later queried whether “Since the agreement was made in 1965 it could presumably not have any bearing beyond the 3 mile territorial sea?”: MR, Annex 77.

⁸¹³ This is apparent from a letter from the United Kingdom Commonwealth Office to the Governor of Mauritius which stated that “*the enquiry in our telegram No 305 related to the undertaking given to Mauritius Minister....that we would use our good offices with the US Government to ensure that fishing rights remained available to the Mauritius government as far as practicable in the Chagos Archipelago*” (MM, Annex 50). See also the letter from the Colonial Office to the Foreign Office dated 8 February 1966, which observed that a

A.18 The Governor of Mauritius replied on 17 November 1965, as follows⁸¹⁴:

*“(a) nature of the fishing practised: mainly hand line with some basket and net fishing by local population for own consumption;
(b) use made of international waters: nil, though vessels from Seychelles and occasionally Mauritius use anchorage facilities;
[...]
(d) Value as source of fish: ... Fishable area roughly 2,433 square miles. Available potential: fish 95,000 tons, shark 147,000 tons.”*⁸¹⁵.

A.19 On 21 December 1965, in a reply given in the Mauritius Legislative Assembly to the question of what “*obligations have definitely been undertaken*” and whether “*all fishing facilities round Diego will be safeguarded*”, Mr Forget replied on behalf of the Mauritian Premier that:

*“So far as I am aware, the only fishing that now takes place in the territorial waters of Diego Garcia is casual fishing by those employed there and as the Hon Member is aware, they will be resettled elsewhere”*⁸¹⁶.

A.20 Mauritius has made various assertions regarding the fishing practiced at the time of the 1965 understanding. Those assertions are misplaced for the following reasons:

previous request for “*details of present fishing rights and practice in the Chagos Archipelago*” was sought “*as a basis for discussions with the Americans on maintaining the access of Mauritian fishermen to the islands*”: MM, Annex 41. See also MM, para. 3.90 which observed that “*On 12 July 1967 the Commonwealth Office wrote to Governor Rennie about the preservation of the fishing rights of Mauritius in the Chagos Archipelago*” (emphasis added).

⁸¹⁴ MM, Annex 37.

⁸¹⁵ The Governor of the Seychelles did not disagree with that account, and merely added with respect to international waters at subparagraph (b) that “*I understand from Moulinine that Japanese and Formosan vessels have sometimes been seen fishing in these waters*”. (Annex 16). (Chagos Agalega Company Limited was formed in 1992 in the Seychelles. One of its main shareholders was a Mr Paul Moulinie (Chagos Islands v Attorney General [2003] EWHC 2222 (QB) per Lord Justice Ouseley at para. 13, UKCM, Authority 22).) On 25 April 1966, the Governor of Mauritius confirmed that: “*My own information agrees with Moulinie’s statement to Lloyd that the only fishing in the Archipelago at present is casual fishing for local consumption*” (UKCM, Annex 17). See also para. 216 of Chagos Islands v Attorney General [2003] EWHC 2222 (QB) per Lord Justice Ouseley, UKCM, Authority 22 cited at UKCM fn. 116 as follows: “*There was no evidence, nor even a suggestion, that people came to the islands other than to work for the plantation company or its staff, or on the Meteorological station. There were no independent traders or craftsmen, farmers or fishermen. Although people went fishing and built boats and houses, this was not an independent means of existence*”.

⁸¹⁶ UKCM, Annex 15. See also Despatch dated 2 July 1971 from M. Elliott, United Kingdom Foreign and Commonwealth Office to R. G. Giddens, British High Commission, Port Louis, FCO 31/2763 on 2 July 1971, MM, Annex 63 referring to section 4 of the 1971 Ordinance “*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, although Mr Forget’s reply to Mr Duval’s question in the Mauritius Legislative Assembly on 21 December 1965 would seem to indicate that nothing very much is at stake.*”

- a. Mauritius asserts that “*the UK attempts to minimize Mauritius’ historical fishing rights by falsely suggesting they were exercised only on a de minimis scale*”⁸¹⁷. However, in the subsequent paragraphs of its Reply Mauritius expressly accepts that the fishing practiced in the waters of the Chagos Archipelago was only hand line fishing with some basket and net fishing by the local population for its own consumption⁸¹⁸. There is therefore nothing inaccurate or false about the submission that fishing rights were only exercised on a de minimis scale at the material time.
- b. Mauritius also highlights the fact that Mr Forget’s reply of 21 December 1965 expressly referred to Diego Garcia only⁸¹⁹. This was already clear from paragraph 2.95 of the Counter-Memorial which set out the terms of his reply in full. This fact does not detract from the other documents relied upon by the United Kingdom that show the fishing that was carried out was very limited, nor the fact that Mr Forget did not refer to any more expansive rights during the course of those debates in 1965⁸²⁰.
- c. Mauritius cites a few documentary references discussing how Mauritian fishing might develop in the future⁸²¹. However, this does not change the nature of the understanding as agreed in September 1965, nor the limited nature of fishing carried out at the time⁸²². A note from the Commonwealth Office to Mr Seller demonstrates a concern as to safeguarding future fishing rights with respect to both Mauritius and the

⁸¹⁷ MR, para. 2.110.

⁸¹⁸ MR, para 2.112. “*It is not disputed that hand line fishing was practiced in the waters of the Chagos Archipelago, with some basket and net fishing by the local population for its own consumption*”.

⁸¹⁹ MR, para 2.112.

⁸²⁰ In addition, Mauritius highlights that when the Governor stated that not one Mauritius fishing venture fished in the waters of the Chagos Archipelago, he caveated this statement with the words “*so far as I know*” (UKCM, Annex 17 cited at UKCM para 2.96). The Governor’s statement was annexed in full to the Counter-Memorial. In any event, Mauritius does not provide any evidence to show that the Governor’s knowledge was flawed. To the contrary, his conclusions were consistent with the statements of both the owner of the Chagos Agalega Company and to the BIOT Commissioner (UKCM, Annex 17 and Annex 18 cited at UKCM para 2.96).

⁸²¹ MR paras 2.113 to 2.115.

⁸²² Furthermore, the Minute by Mr Fairclough of the Colonial Office dated 15 March 1966 (to which the letter cited in the Reply at paragraph 2.113 is responding) illustrates that consideration of how fishing may develop in the future was with a view to ensuring that the United States Government was receptive to representations regarding safeguarding current fishing practices. He stated that “*obviously the greater the importance of the Archipelago from the point of view of feeding the population of Mauritius, the stronger is the case that we can make to the Americans for an understanding approach on this matter.....Peter Lloyd, who has recently been here from Seychelles, quoted Moulinie as saying that the only fishing in the Archipelago at present is for local consumption. If this is so and we cannot show that the industry is at present of considerable economic value to Mauritius, then clearly the Americans might be less inclined to be forthcoming*” (UKCM, Annex 16).

Seychelles⁸²³. It therefore appears to be a good faith concern flowing from wider policy considerations (rather than any specific understanding as regards Mauritius). To the extent that there was a concern regarding Mauritius future fishing rights, it appears to be to ensure preference for Mauritius if fishing rights were ever granted⁸²⁴. In any event, as set out at paragraphs A.45 to A.50 and A.79 to A.85 below, there was not any great development in Mauritius' fishing practices; Mauritius-flagged vessels have continued to exercise "fishing rights" on a limited scale.

1966-1968: representations to the United States Government and discussion of fishing limits⁸²⁵

A.21 Between 1966 and 1967, there were internal discussions about two issues:

- a. First, the representations to be made to the United States Government with respect to Mauritian fishing in the BIOT⁸²⁶ waters.
- b. Secondly, the issue of fishery limits (in particular the extension of United Kingdom law to the BIOT waters and the protection of "traditional" or "habitual" fishing rights in accordance with the 1958 Territorial Sea Convention).

A.22 Those discussions are set out below, at paragraphs A.23 to A.32, and show that:

- a. The United Kingdom continued to proceed on the basis that the 1965 understanding required it to make representations to the United States Government.
- b. References to "traditional", "historic" or "habitual" fishing rights (which did not feature in the 1965 understanding) appears to have emerged with reference to the United Kingdom's concerns as to the impact of the developing law of sea and its wish to be able to allow access to Mauritian vessels in preference to those of other states.

⁸²³ **Annex 18.** See also UKCM, Annex 18 (minute to BIOT Commissioner dated 1967) which stated that it is "*too early to foresee how the fishing potential of Chagos will be developed on until its apparent that the area is potentially right and that we should safeguard the future interests of Mauritius and Seychelles in whatever development takes place.....*".

⁸²⁴ See para. A.4(a) above.

⁸²⁵ See also paras. 2.93 to 2.96 of the UKCM.

⁸²⁶ The BIOT was established on 8 November 1965.

- c. It was understood that if a 12 mile limit was established, HMG would exercise exclusive control and it would decide who should be permitted to fish in the area. Access “*might*” be given to Mauritian vessels regarding which there was a concern to do what could “*reasonably be done*” in order “*to preserve*” its current fishing practices⁸²⁷.
- d. As noted at paragraphs A.16 to A.20 above, there was in reality hardly any fishing being carried out at all at this time, and much of what there was by a company in the Seychelles (the Diego Agalega).

A.23 Turning to the documentary record of the relevant discussions, on 9 March 1966 the United Kingdom Ministry of Defence in a letter to the Colonial Office expressed concern about the terms on which fishing in the waters might be permitted before it was clear what type of defence facilities may be needed. It stated that:

*“Although some fishing might be allowed in practice, in our view we ought to keep the right to exclude it firmly in our hands – not only geographically but in time....I imagine that the Americans too would prefer to be cautious about the terms of any commitment at this stage”*⁸²⁸.

A.24 This letter also flagged that more thought needed to be given to the “*related questions of territorial waters and fishing limits*”, noting that if current United Kingdom law were extended to the BIOT the effect would be that the Territory would adopt a twelve mile fishery limit “*granting “habitual fishing rights” between the six and twelve lines to Mauritius and to any other states whose vessels had fished in the area during the preceding ten years*” and would retain a three mile territorial sea limit. It went on to observe that:

“we should remember that any fishing limits which we accept with Mauritius primarily in mind would apply to other counties too....It would thus be convenient to be able to base any undertaking to Mauritius on habitual or traditional fishing arrangements....”

A.25 On 15 March 1966, in a minute of Mr Fairclough to the Colonial Office concerning the 1965 understanding, he set out the “*reasonable case to put to the Americans*” regarding

⁸²⁷ MR, Annex 52, discussed below.

⁸²⁸ Letter dated 9 March 1966 from P.H. Moberly, United Kingdom Ministry of Defence to K.W.S. Mackenzie, Colonial Office. (MR, Annex 51)

maintaining access of Mauritian fishing vessels to islands not excluded for defence purposes⁸²⁹. He noted that:

*“[t]here must obviously 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 have been developed on any of the islands of, the Chagos Archipelago but as we see it, these need not necessarily be such as to deny fishing rights altogether”*⁸³⁰.

A.26 This letter also referred to the “*related questions of territorial waters and fishing limits*”, and set out the position if current United Kingdom law were extended to the Chagos Archipelago as per paragraph A.24 above. It reiterated the concern that “*any fishing limits which we accept with Mauritius primarily in mind would apply to other countries too*”.

A.27 A handwritten note of the Governor/BIOT Commissioner dated 18 April 1966, noted that the Seychelles:

*“claim to habitual fishing rights in those [chagos] waters must be extremely tenuous. However if a Mauritius claim to these were to be based on the limited fishing activities of the Diego-Agalega Company or its employees it is arguable that the Seychelles claim is at least equally strong since the Company concerned is a Seychelles Company”*⁸³¹.

A.28 The Governor of Mauritius confirmed on 25 April 1966 that he thought the proposed arrangements set out in the letter of 15 March would be acceptable, and also that:

*“My own information agrees with Moulinie’s statement to Lloyd that the only fishing in the Archipelago at present is casual fishing for local consumption”*⁸³².

A.29 A few days later, on 29 April 1966, the Foreign Office wrote to the Colonial Office confirming that the proposed arrangements were acceptable⁸³³. With respect to the extension

⁸²⁹ Mr Fairclough is not stating that the reasonable case as set out must be secured in order to fulfil the 1965 understanding but that representations to that effect would be made.

⁸³⁰ UKCM, Annex 16.

⁸³¹ **Annex 17.** See also the Minute addressed to the BIOT Commissioner dated 1967 which stated that “*The present petition in Chagos is that fishing is regularly carried out by the Chagos Agalega Company but is limited to providing a fish ration for the company’s employees*” (UKCM, Annex 18).

⁸³² UKCM, Annex 17.

⁸³³ MR, Annex 52.

of United Kingdom law to the BIOT, it referred to the alternative possibility of declaring an exclusive fishing zone of up to 9 miles beyond the 3 mile territorial sea. It stated that:

“within that zone Her Majesty’s Government would retain control of the exercise of fishing rights. It would then be for Her Majesty’s Government to decide who should be permitted to fish in the area. The rights might be given exclusively to fisherman of Mauritius or the Seychelles or to any other country from which fishermen had operated in the area before the establishment of the exclusive fishing zone...I assume that you will consider it necessary to do all that can reasonably be done to preserve the traditional rights of fishermen from Mauritius (and perhaps of the Seychelles) to fish in the area.”

A.30 On 12 July 1967, the United Kingdom Commonwealth Office wrote to the Governor of Mauritius confirming the arrangement it proposed to put to the Americans regarding access to islands not excluded for defence purposes⁸³⁴. It also set out the position if current United Kingdom law were extended to the BIOT as per paragraph A.24 above, noting that it was also possible that an exclusive fishing zone of up to 9 miles beyond the 3 mile territorial sea could be declared, with HMG exercising “*exclusive fishing rights in this zone*”. In view of the “*uncertainty of the position over fishing limits*”, it reiterated that it was therefore:

“convenient to be able to base any special arrangements made for Mauritius (and Seychelles) on habitual or traditional fishing arrangements provided that no other country can claim similar use in the past”.

A.31 The exchanges above show that Mauritius did not have established habitual or traditional fishing practices, but that this was a useful description introduced to ensure Mauritius (and the Seychelles) preferential access.

A.32 As regards the issue of fishery limits, there was further discussion of the possibility of enacting legislation to create a 12 mile fishery zone⁸³⁵ and, as set out in the following section, a 12 mile fishery zone was subsequently established.

⁸³⁴ MM, Annex 50.

⁸³⁵ For example, in a memorandum from the General and Migration Department dated 24 April 1968 (at MR, Annex 66) it referred to the extension of fishery limits around the BIOT noting that it was also necessary to consider what concession should be granted to foreign governments, although “*there is so little information about fishing foreign vessels which might have established ‘habitual fishing rights’*”. It went on to refer to a phasing out period for all foreign fishing but stated that in light of the 1965 understanding and the rights claimed for Seychelles vessels in this area phase out rights would “*seem inappropriate to either Seychelles or Mauritian vessels*”. It therefore suggested an inner six mile zone open on a restricted access basis following defence arrangements and an outer six mile zone, open to foreign vessels for a phase out period. It observed that these proposals are “*slightly more restrictive than those previously considered by the Americans and over which they*

1969: establishment of a 9 mile fishery zone contiguous to the territorial sea⁸³⁶

A.33 This section addresses the establishment of a 9 mile fishery zone contiguous to the territorial sea pursuant to Proclamation No 1 of 1969. With reference to the events set out at paragraphs A.34 to A.44 below, it is apparent that:

- a. The British Government was always careful to inform the Mauritius Government as to new legislation.
- b. The effect of the 1971 Ordinance (implementing Proclamation No 1 of 1969) was that (i) fishing in the 3 mile territorial sea by vessels flagged to foreign States (including Mauritius) was effectively excluded⁸³⁷ - this did not precipitate any complaint on the part of Mauritius with reference to the 1965 understanding and (ii) because of an oversight, Mauritian fishermen were not in fact even designated to fish in the 3 to 12 nautical miles contiguous zone.
- c. The United Kingdom considered that by designating Mauritian fishermen under section 4 of the 1971 Ordinance, the 1965 understanding was given sufficient effect⁸³⁸.
- d. The Mauritian Government, which was informed of the legislation, did not protest with reference to the 1965 understanding.
- e. It is therefore evident that neither the United Kingdom nor Mauritius understood that Mauritius was accorded or entitled to an absolute right to fish in the BIOT waters.

A.34 Turning to the relevant events, by Proclamation No 1 of 1969⁸³⁹ a fisheries zone contiguous to the territorial sea of the BIOT was established, extending the outer margin of the 3 nautical mile territorial sea to 12 nautical miles from shore (“the contiguous zone”).

saw no problem and we do not therefore foresee any difficulties over them”. The substance of this document was then reiterated in a note from the Foreign Office to the British Embassy in the United States on 6 September 1968 (**Annex 19**) and also to Todd (Administrator BIOT) on 28 April 1969 (MM, Annex 52).

⁸³⁶ See also paras. 2.97 to 2.98 of the UKCM.

⁸³⁷ See also the minute from the Foreign Office to Legal Advisers dated 19 January 1982 at MR, Annex 85 which stated that “*My understanding therefore is that (a) BIOT has exclusive fishing rights over the territorial sea together with the contiguous zone (12 nautical miles limits) and (b) the Mauritians have traditional fishing rights within the contiguous zone (3-12 nautical miles)*”.

⁸³⁸ This was subsequently commented on in a telegram from the Foreign Office to the British High Commission which stated that “*Article 4 of BIOT Ordinance No 2 of 1971 made provision for this undertaking by enabling traditional fishing to carry on in the contiguous zone*”: MR, Annex 82.

⁸³⁹ MM, Annex 53.

A.35 It was implemented by the Fisheries Limit Ordinance No2 of 1971⁸⁴⁰. As set out in the Counter-Memorial at paragraph 2.97, Article 3 made it an offence to fish in the fisheries limits defined as the “*territorial sea of the Territory together with the contiguous zone*”, without a research or sporting licence, but Article 4 enabled the Commissioner by order to designate any country “*for the purpose of enabling fishing traditionally carried on in any area within the contiguous zone*”, thereby enabling vessels registered in that country to fish in the contiguous zone (but not the territorial sea)⁸⁴¹.

A.36 By telegram dated 5 June 1970, the Defence Department noted that the proposed BIOT regime was complicated and that Mauritius should be forewarned “*as we undertook at the Lancaster House conference in Sept 1965 to use our good offices to protect Mauritian fishing interests in Chagos waters*”⁸⁴². This is an imperfect short-hand of what was in fact set out in the record of the meeting dated 23 September 1965, but it demonstrates the concern of British officials to ensure Mauritius was fully informed of legislation that might impact on Mauritian fishing⁸⁴³.

A.37 It was the intention that the Commissioner would use his discretion under section 4 to enable Mauritian fishing boats to fish in the contiguous zone⁸⁴⁴.

⁸⁴⁰ MM, Annex 60.

⁸⁴¹ MR at para 2.97 challenges UKCM para. 2.97 which observed that the limitation to fishing in the contiguous zone reflected the defence and security preferences of the United States and section 4 of the 1971 ordinance prohibiting any person from entering or remaining in the territory without a permit. The contemporaneous records confirm that defence interests influenced the form of fishery regime that was established under the 1971 legislation. The proposed legislation had made a distinction between an inner 6 mile zone open to Mauritius and the Seychelles subject to defence interests and an outer 6 mile zone open to fishing vessels from other countries (MR, Annex 68). The United States considered reference to defence interests served no defence need because of the control of the coastal State over its territorial sea and requested that references to defence arrangements and security requirements be omitted from any public notice or legislation (MR, Annex 69). Thus it appears that in order to meet this request, the final form the legislation took was a contiguous fishing zone adjacent to the territorial sea in which third countries such as Mauritius and the Seychelles might be designated to fish. No legislative provision was made for fishing vessels from Mauritius or the Seychelles to fish in the territorial sea and lagoons.

⁸⁴² MM, Annex 59.

⁸⁴³ In a despatch dated 24 March 1970 from A. F. Knight, Foreign and Commonwealth Office to J. R. Todd, “BIOT” Administrator it was relayed that “*no general international notification was required, only notification of those foreign fishing vessels habitually or frequently fishing in the 12-mile limits*”: MM, Annex 57.

⁸⁴⁴ As confirmed in a despatch dated 16 June 1971 from F.R.J. Williams, Seychelles to the FCO (MM, Annex 62, responding to an enquiry dated 3 June 1971: MM, Annex 61). The despatch also said that there should be consultations on the “*best method of conveying this information to the Mauritians*”. It noted that it was doubtful if foreign countries could claim traditional or other fishing rights in the territorial waters. Mauritius refers at MR para. 3.8 to the fact that Japanese fishing companies were told that only Mauritian fishermen could fish within the fishing limits. A Despatch dated 26 May 1972 from J. R. Todd, “BIOT” Administrator to P. J. Walker, UK Foreign and Commonwealth Office, FCO 31/2763 explained that so far as the BIOT was concerned, reducing inshore traffic to the minimum was desirable, and that so far as the Seychelles was concerned, Japanese fishing within the area would affect the interests of local fishermen and give rise to considerable ill feelings and protest.

A.38 In a letter from the FCO to the British High Commission dated 2 July 1971, the FCO referred to the confirmation that the Commissioner's powers under section 4 of the 1971 ordinance would be used to enable Mauritius fishing boats to continue fishing in the 9 mile contiguous zone, and stated that *"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, although Mr Forget's reply to Mr Duval's question in the Mauritius Legislative Assembly on 21 December 1965 would seem to indicate that nothing very much is at stake"*⁸⁴⁵. It asked *"if you would inform Mauritius of the foregoing"*⁸⁴⁶.

A.39 Mauritius was duly informed that *"bearing in mind the understanding on fishing rights reached with the Mauritian Government at the time of the Lancaster House Conference in 1965"* it was the Commissioner's intention to use his powers under section 4 to enable Mauritian fishing boats to continue to fish in the 9 mile contiguous zone of the Chagos Archipelago⁸⁴⁷. In fact, by oversight, Mauritius was not designated under section 4 as a country whose fishing boats could fish in the contiguous zone⁸⁴⁸.

A.40 As highlighted by Mauritius in its Reply (and referred to at paragraph 8.12(a) and fn. 302 above), it is the case that shortly after the enactment of the 1971 Ordinance the Prime Minister of Mauritius wrote on two occasions to the British High Commissioner referring to *"the verbal agreement giving this country all sovereign rights relating to...fishing"*⁸⁴⁹ and pursuant to which Mauritius was *"reserving to itself fishing rights"*⁸⁵⁰. However:

It referred to the danger of over fishing should Japanese's interests increase which was exactly what the Ordinance was enacted to prevent (MM, Annex 65).

⁸⁴⁵ MM, Annex 63.

⁸⁴⁶ It also refers to the dispatch of 16 June 1971 observing that it was unlikely that Japan or Taiwan could claim traditional fishing rights within the new fishing zone (MM, Annex 62).

⁸⁴⁷ Note from R. G. Giddens, British High Commission, Port Louis, 15 July 1971: MM, Annex 64. A dispatch from J. R. Todd, BIOT Administrator to P. J. Walker, UK Foreign and Commonwealth Office dated 26 May 1972 stated that *"Mauritians have been declared as traditional fishermen in BIOT as the islands formerly formed part of Mauritius."* (MM, Annex 65).

⁸⁴⁸ Note from R. G. Giddens, British High Commission, Port Louis, 15 July 1971: MM, Annex 64. A dispatch from J. R. Todd, BIOT Administrator to P. J. Walker, UK Foreign and Commonwealth Office dated 26 May 1972 stated that *"Mauritians have been declared as traditional fishermen in BIOT as the islands formerly formed part of Mauritius."* (MM, Annex 65).

⁸⁴⁹ MM, Annex 67.

⁸⁵⁰ MM, Annex 69. MM, Annex 67 and MM, Annex 69 are the two documents relied upon at MR fn. 209 (cross-referring to MM, para 3.97) as supporting the submission that *"Mauritius has consistently reminded the UK of its undertaking to preserve the fishing rights of Mauritius in the waters of the Chagos Archipelago"*. These two documents (dated 1972 and 1973) do not demonstrate that Mauritius has "consistently" referred to the 1965 understanding, and as set out below, those two documents did not in any event accurately reflect the substance of the 1965 understanding. Only two other statements are cited at MM, para. 3.97, both quotations before the legislative assembly in the 1970s. The first (MM, Annex 83) as discussed at paragraph A.43 below

- a. The letters were not written in response to notification of the new fishing regime. In both instances, Mauritius was accepting the payment of a sum to meet the costs of the resettlement of persons displaced. It was in that context that it was claiming that the alleged “*verbal agreement*” remained in place.
- b. The United Kingdom did not accept the characterization of the 1965 understanding⁸⁵¹.
- c. The author of the two letters (Sir Seewoosagar Ramgoolam) when providing his testimony to the Select Committee of the Mauritius Assembly on the Excision of the Chagos Archipelago in 1983 recalled that at the 1965 meeting “*all rights connected with fishing....should be preserved*” but that “*no records were communicated to him*”⁸⁵². So to the extent that the Prime Minister in and around the time of the Select Committee enquiry was asserting the nature of the fishing rights in such expansive terms, this appears to be in a highly-charged political context, and on the basis of his recollection of a conversation many years previously rather than with reference to the actual written record as agreed. It is that written record to which the United Kingdom referred in its response and which formed the basis for its rejection of the Prime Minister’s expansive characterization of the “fishing rights” (as set out at paragraph 8.12(b) and fn. 850 above).

was another inaccurate characterization of the true position. The second (MM, Annex 84) simply serves to confirm that one Mauritian fishing vessel was operating in the waters in 1978.

⁸⁵¹ An internal memorandum stated that: “*The Prime Minister’s recollection of the meeting at Lancaster House does not agree with the official record. Our undertakings in regard to.....fishing rights....were much less definite than his version indicates...The true form of these undertakings was set out in the agreed record of the Lancaster House meeting of 23 September....*” (UKCM, Annex 23). Accordingly a letter was written to Mauritius affirming that the understanding was as set out in the agreed record of the Lancaster House meeting of 23 September (UKCM, Annex 24). A legal opinion dated 1 July 1977 at MR, Annex 79 stated that the letter of 24 March 1972 did not override the record of the meeting. Similarly, in a bilateral exchange in 1969, Mauritius’ erroneous characterisation of the understanding as to mineral rights was corrected: on 19 November 1969, the Mauritius Prime Minister wrote to the British High Commission referring to the understanding that the benefit of any minerals/oils discovered would revert to Mauritius, and that it would introduce legislation vesting ownership accordingly and issue licences for exploration and prospecting of mineral and oil in offshore areas of Chagos Archipelago (MM, Annex 54). Mauritius did not refer to fishing rights. In the response on 18 December, it was explained that Mauritius has misconstrued the understanding which was only to the effect that Mauritius would receive the benefit not that ownership would be vested (MM, Annex 55).

⁸⁵² MM, Annex 97 and UKCM, Annex 46 (although his testimony was inconsistent with the record of 5 November 1965 at p. 63 of UKCM Annex 46).

Mauritius' Maritime Zones Bill⁸⁵³

A.41 Some six years after the 1971 Ordinance was passed, the Maritime Zones Bill was introduced to the Mauritius Legislative Assembly⁸⁵⁴. This bill was designed to assert sovereignty over maritime spaces⁸⁵⁵. It was therefore an assertion of sovereignty rather than an extension based on any fishing rights pursuant to the 1965 understanding⁸⁵⁶.

A.42 Before the Legislative Assembly, the Mauritian Prime Minister asserted that “*we have reserved for whatever that is worth our mineral prospecting and fishing rights over the island, around the island to the extent we can assert*” and that “*as far as our fishing rights are concerned the fact is the Government of the BIOT has accepted them*”⁸⁵⁷. This echoes the language the Mauritian Prime Minister used in the letters referred to at paragraph A.40 above, and it is clear that those claims were rejected by the United Kingdom and were considered by the United Kingdom to be an inaccurate account of the 1965 understanding.

A.43 There is a further example where Mauritius presented an inaccurate account of the true position. On 29 November 1977, the Prime Minister confirmed before the Mauritius Legislative Assembly that “[t]he British Government has since July 1971 recognised the jurisdiction of Mauritius over the waters surrounding Diego Garcia”⁸⁵⁸. The United Kingdom raised this matter with the Prime Minister’s Office; the letter set out section 4 of the

⁸⁵³ See para 2.102 of the UKCM.

⁸⁵⁴ Second Reading of Maritime Zones Bill (No. XVII of 1977), 31 May 1977. (MR, Annex 78)

⁸⁵⁵ MR, Annex 78: “*the time has come for us to assert our sovereignty over maritime spaces surrounding our various islands*” (at col 2759); “*This legislation aims, Sir, aims at extending the sovereignty of our State and should be welcome by one and all*” (at col 2761).

⁸⁵⁶ The same applies to subsequent legislation which sought to establish a licensing regime with reference to the purported fishing limits in the Maritime Zones Act 1977 (see for example the Mauritius Fisheries Act 1980 which cross-refers to the 1977 Act in section 2: MM, Annex 91 cited at MR fn. 210). With respect to the licensing regime set out in that legislation, vessels in fact applied for licences from the BIOT Commissioner pursuant to the UK 1984 legislation (see paragraphs A.79 to A.83 below [and the Submission dated 17 September 1990 from East African Department, United Kingdom Foreign and Commonwealth Office at MR, Annex 97 at para. 4 which observed that despite the fact Mauritius had proclaimed a 200-mile EEZ in 1984, “*Mauritian fishermen have applied for licences to fish through the British High Commission in Port Louis*”). Mauritius subsequently suggested the joint issuing of fishing licences for BIOT waters (for example at the talks in July 2009; see UKCM Annex 99 referred to at paragraphs A.124 below).

⁸⁵⁷ MR, Annex 78. In similar terms Hansard records the Prime Minister as asserting “*Mauritius has reserved its...fishing rights....and certain other things that go to complete, in other words, some of the sovereignty which obtained before on that island*” (MM, Annex 71).

⁸⁵⁸ MM, Annex 83 at p. 3513. This claim was considered by the East African Department on 5 January 1978 (Annex 20). The Department concluded that the Mauritian Prime Minister must be referring to the decision to designate Mauritius under section 4 of the 1971 Ordinance, the effect of which “*was to allow Mauritian fishing boats to continue their activities within the newly established fishing zone*” but that “*in no way does this rightgive Mauritius jurisdiction over the waters surrounding Diego Garcia*”.

1971 Ordinance, described as an exemption which stemmed from the 1965 understanding, and stated that it was “*against this background*” that it was assumed the Prime Minister’s statement had been given⁸⁵⁹. The Prime Minister’s Office “*admitted that there was some confusion*” and confirmed that the statement intended to refer to fishing rights in, and not to jurisdiction over, the waters surrounding Diego Garcia⁸⁶⁰.

A.44 The Prime Minister subsequently asserted in the Legislative Assembly on 26 and 28 June 1980 that fishing rights were preserved in 1965⁸⁶¹. These were political statements in which he was seeking to justify to the electorate the conduct of Mauritian ministers in 1965. In a confidential memorandum two days later a Foreign Office civil servant discussed how to address “*the continuing escalation of the campaign for the return of Chagos*” and how to “*bolster Ram’s political standing*”, suggesting that a 200 mile limit could be declared in which only the United Kingdom and Mauritius would have fishing rights⁸⁶². That suggestion was not made with reference to any perceived legal obligation pursuant to the 1965 understanding but appears to be a political concession with a view to improving Sir Seewoosagur Ramgoolam’s domestic political position.

1970s: minimal fishing practiced

A.45 As set out at paragraph 2.99 of the Counter-Memorial it is apparent that only limited fishing was in fact carried out by Mauritian fishing vessels in the 1970s⁸⁶³.

A.46 Mauritius challenges the “*factual assertion*” in the Counter-Memorial that “*after the creation of the “BIOT”[in 1965] there was little desire from Mauritian fishing companies to*

⁸⁵⁹ **Annex 21.**

⁸⁶⁰ **Annex 22.**

⁸⁶¹ UKCM, Annex 35 and UKCM, Annex 36.

⁸⁶² **Annex 24.**

⁸⁶³ The UKCM notes that the Mauritian Minister of Fisheries in a parliamentary debate of 5 July 1978 referred to fishing in the Chagos by “*one of our fishing vessels the Nazareth*”, but then went on to say that, as the fish from BIOT waters were not consumed by Mauritians “*the proprietors of our companies are not interested in catching the fish which are found in abundance there*” (MM, Annex 84 at col. 3116). It also refers to the parliamentary debate on the second reading of the Mauritian Fisheries Bill on 13 May 1980 which suggested there was only one modern fully-equipped Mauritian vessel, the Lady Sushil (a tuna purse seining vessel), that could take advantage of tuna fishing opportunities in the area on a par with vessels from elsewhere although its recent trip was described as not that successful (MM, Annex 90: col. 942-943 (Mr Jugnauth, Leader of the Opposition); see also col. 945 (Mr Bérenger)). During the course of those 1980 parliamentary debates, the Mauritian fishing industry was described as “*stagnant*” and it was observed that it had been so for “*many years*” (MM, Annex 90 at col. 942).

fish in the Chagos Archipelago”⁸⁶⁴. It cites paragraphs 2.98 – 2.99 of the Counter-Memorial⁸⁶⁵, and claims that this assertion is “*not accurate*”⁸⁶⁶ and based on a “*selective reading of the evidence*”⁸⁶⁷.

A.47 In an attempt to counter the United Kingdom’s account as to the scale of fishing practiced at this time, Mauritius refers to data compiled by the Ministry of Fisheries of Mauritius “*as described below*”⁸⁶⁸. That data is set out at paragraph 2.124 of the Reply. It shows that there was a catch of 32 tons in 1977, and zero catch for the years 1978, 1979 and 1980⁸⁶⁹. This is entirely consistent with the United Kingdom’s account at paragraph 2.99 of the Counter-Memorial which relies upon documents that do evidence that at this time Mauritian fishing companies were fishing on a very limited scale. As expressly stated by the Mauritian Minister of Fisheries “*the proprietors of our companies are not interested in catching the fish*”⁸⁷⁰.

A.48 Mauritius also asserts that the statement of the Mauritian Minister of Fisheries in a parliamentary debate of 5 July 1978 (cited at footnote 862 above) “*does not support the United Kingdom’s position because it acknowledges that at least one vessel registered in Mauritius was fishing in the waters of the Chagos Archipelago prior to 1978*”⁸⁷¹. However, the fact that one vessel registered in Mauritius (the MZ Nazareth) was fishing in the waters (i) was expressly referred to at paragraph 2.99 of the Counter-Memorial and (ii) is entirely consistent with the position advanced by the United Kingdom; the fact that the Mauritian Minister of Fisheries referred to only one Mauritian vessel demonstrates that there was only very limited fishing being practiced by Mauritians. Similarly, the Minister’s reference to just “*a few tons*” of fish being salted supports the accuracy of the United Kingdom’s position.

⁸⁶⁴ MR, para 2.110 (ii).

⁸⁶⁵ MR, fn. 239. This factual assertion cited by Mauritius does not in fact appear in paragraph 2.98 or paragraph 2.99 of the Counter-Memorial. Para. 2.98 refers to the designation of Mauritian vessels under section 4 and para. 2.99 simply relays the documentary record as to fishing practices in 1978-1980 as summarised below.

⁸⁶⁶ MR, para 2.117.

⁸⁶⁷ MR, para 2.119.

⁸⁶⁸ MR, para 2.117.

⁸⁶⁹ As stated in the Counter Memorial at para 2.99 “*The record of fishing by vessels from Mauritius in the BIOT contiguous fisheries zone in the 1970s is slight. There is catch data for 1977 only, and none again until 1981*”.

⁸⁷⁰ See MM, Annex 84 at col. 3116.

⁸⁷¹ MR, para. 2.118.

A.49 Mauritius has not responded with any data or evidence to demonstrate that fishing at this time was in fact practiced on a greater scale, or that Mauritian fishermen demonstrated any great desire to fish in the Chagos Archipelago.

A.50 By contrast, additional documents can be cited to support the position advanced by the United Kingdom in the Counter-Memorial. For example, that only limited fishing was being practiced at this time aligns with the note from the East African Department dated 29 September 1980 which relayed that “*as far as we are aware the Mauritians have only one boat suitable for fishing in the water of the Chagos Archipelago.....and have made little use of their rights*”⁸⁷². Similarly, the East African Department observed on 13 July 1983, that remedying the oversight in not designating Mauritius under section 4 of the 1971 Ordinance “*in practical terms*” would not make much difference as “*there has been little or no inshore fishing in the Chagos waters by Mauritian fishermen*”⁸⁷³.

1984: enactment of the licensing regime⁸⁷⁴

A.51 The legislation governing access of Mauritian fishing vessels to the BIOT waters came under consideration again in the early 1980s and a restrictive licensing regime was proposed⁸⁷⁵. This section addresses the enactment of that regime, including the fact that the United Kingdom Government was careful to inform Mauritius as the proposed regime.

⁸⁷² UKCM, Annex 41.

⁸⁷³ MR, Annex 86.

⁸⁷⁴ See also paras. 2.100 to 2.101 of the UKCM.

⁸⁷⁵ An internal note from the East African Department to the Defence Department on 20 September 1983, recorded that 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, to collect coconuts on Peros Banhos and the other to fish in the adjacent territorial sea.....agreed that we should review our policy on Mauritian access to BIOT land and territorial sea*”. In reviewing the relevant background, the note referred to the 1965 understanding; in its paraphrase of the 1965 understanding it did not cite the express terms regarding the use of good offices with the United States Government, but it did cite the caveat “*as far as practicable*” (at para 3). Its conclusion was that Mauritian vessels should be allowed a “*limited and conditional access to outer islands of BIOT*” including territorial waters both for fishing and coconut collecting provided that “*permission is obtained in advance on each occasion*” (at para. 2). It also recommended that the Mauritian Foreign Minister should be informed (at para 2) (MR, Annex 185 (at page marked p. 165)). In a subsequent note dated 22 September 1983 the East African Department reiterated the recommendation for a restrictive licensing scheme (MR, Annex 185 at p. 171) and also that Mauritian Ministers should be informed that arrangements were being made to ensure their vessels a reasonable degree of access. Again, when paraphrasing the 1965 understanding this note did not refer to the use of good offices with the United States Government, but it did cite the caveat “*as far as practicable*”. Regarding the risk of attracting more vessels to BIOT waters, it reported that “*Our High Commission thinks that Mauritius has very few vessels capable of making the voyage involved, whose economics are rather uncertain*”.

A.52 When the Mauritius Government was informed of the proposed arrangements for a licensing regime, Mauritius was not reported as having raised any concerns regarding their consistency with the 1965 understanding; it was reported as basing its objection on its claim to sovereignty⁸⁷⁶.

A.53 On 12 August 1984 the new fisheries Ordinance came into effect establishing a licensing system which required all fishing boats to hold a licence to fish within the territorial waters and the contiguous zone⁸⁷⁷. How many, if any, licences to issue was a matter for the BIOT administration.

A.54 As set out in the Counter-Memorial at paragraph 2.100, “*Foreign fishing boats*”, defined as boats other than a British fishing boat, i.e. including Mauritian-flagged vessels, would only be granted licences if they were from a country designated under section 4.

A.55 On 21 February 1985 the Commissioner, acting under section 4 of the 1984 Ordinance, designated Mauritius “*for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius*”⁸⁷⁸. There was a fee payable, but the policy was to not charge Mauritian-flagged vessels.

A.56 Both British officials and the Mauritian Government proceeded on the basis that this regime, providing for strictly regulated and conditional access to the waters, was consistent with the 1965 understanding⁸⁷⁹.

⁸⁷⁶The British High Commission relayed to the East African Department that Mauritius’ response to the proposals was “*legalistic*” and that if an application for a licence would have to be made, the Mauritius Government would have to make a “*public statement asserting their sovereignty etc*” (Annex 27). The Mauritius Government did in 1984 announce a 200 nautical mile EEZ which included the BIOT but the United Kingdom protested that claim in unambiguous terms, stating that it did not “*accept the implications of the schedule as to sovereignty over the Chagos Archipelago*” and that “*Maritime rights and jurisdiction in respect of the Chagos Archipelago are enjoyed and exercised by the United Kingdom in accordance with applicable legislation and the rules of international law*”: see UKCM Annex 50, Annex 51 and Annex 52. See also MR, Annex 96 (speaking note) “*Access by fishing boats to within the 12 mile limit is strictly confined by the BIOT authorities to Mauritian traditional fishing boats. The United Kingdom does not recognize the Exclusive Economic Zone around the [BIOT] which the Mauritian authorities purported to declare in 1984...The United Kingdom authorities are therefore concerned to learn that certain foreign vessels have been prosecuted in the Mauritian Courts for fishing within 200 miles of the [BIOT]*”. See UKCM at para. 2.101.

⁸⁷⁷ Proclamation No.8 of 1984, 15 November 1984, Official Gazette [1984] (UKCM, Annex 48), replacing the 1969 Proclamation and establishing an exclusive fisheries zone in the contiguous zone. This was implemented by the BIOT Fishery Limits Ordinance No.11 of 1984 Official Gazette [1984]: UKCM, Annex 49.

⁸⁷⁸ MM, Annex 98.

⁸⁷⁹ A memorandum noted that “*licences are granted to Mauritians to satisfy a general undertaking given in 1965..... Precisely what was intended was never set out in detail. Since the creation of BIOT, Mauritian*

A.57 With respect to fishing practiced at this time, the Counter-Memorial⁸⁸⁰ explains that BIOT records indicate that by early 1985 only two Mauritian vessels, the MV Nazareth and the MV Piranha, had applied for and been granted licences to fish in BIOT waters⁸⁸¹, in 1990 fishing in lagoons was expressly prohibited⁸⁸² and the number of fishing licenses issued under the 1984 Ordinance to Mauritian-flagged vessels for the 1991 season was halved because of a decline in fish catches⁸⁸³.

1991: extension of limits to 200 nautical miles⁸⁸⁴

A.58 Following discussions of whether BIOT fisheries limits should be extended, in 1991 new legislation was promulgated extending the limit to 200 nautical miles. The events summarised in this section show that:

- a. The United Kingdom continued to ensure that Mauritius was informed of any new legislation, and to give effect to the 1965 understanding through the provision of free licences;
- b. Mauritius did not protest the new legislation with reference to the 1965 understanding (despite the fact that Mauritius vessels would require a licence, and that it was informed that only a “*limited number*” would be issued free of charge). Its protest was advanced with reference to its sovereignty claim;

fisherman have applied and been granted licences to fish in the BIOT. This is certainly with the knowledge of the Mauritian Government” (MR, Annex 92).

⁸⁸⁰ UKCM at para 2.103

⁸⁸¹ **Annex 30.** It appears a third vessel *Perle III* had also applied for and been granted a licence in 1984, but did not use it. The type of fishing carried out was a mothership/dory operation, which targeted high-value bottom (demersal) fish varieties, like snapper and grouper, using lines and hooks in shallow water banks. The *Lady Sushil* (a tuna purse seiner vessel flagged to and operating out of Mauritius) was also licensed to fish in BIOT waters. When the *Lady Sushil* approached the BIOT in late 1983 requesting permission to fish for tuna in BIOT waters, there was some debate within the BIOT authorities as to whether to issue a licence as it might fall outside the background of traditional Mauritian fishing activities in BIOT waters; see **Annex 28** of 3 November 1983 which relays that Mr Wenban-Smith said that the arrangements for Mauritius vessels to fish in BIOT waters was against the background of traditional activities, and that on these circumstances the *Lady Sushil* should not purse-seine within the 12 miles limit. On receiving advice that tuna stocks were unlikely to suffer overexploitation and it was unlikely to interfere with fish stocks of the inshore fishery, approval was given (see MR, Annex 101 at paras. 6 to 7).

⁸⁸² UKCM, para 2.101. See UKCM, Annex 76 at p. 42 says “*Tuna vessels may not operate within 12 nm of land, and nearshore commercial vessels are not permitted to fish in the lagoons of the islanded atolls*” and at p. 43 it states that “*Fishing is prohibited within any lagoons*”. See UKCM, Annex 56.

⁸⁸³ UKCM, fn. 133. See **Annex 33** at para 4.

⁸⁸⁴ See also para 2.104 of the UKCM.

- c. Strictly regulated and conditional access to the waters therefore continued to be treated by both the United Kingdom and Mauritius to be consistent with the 1965 understanding.

A.59 Turning to the relevant documents, on 17 September 1990 the East African Department recommended that the fisheries limits be extended to 200 nautical miles⁸⁸⁵. It noted that fishing within the twelve mile zone was limited to Mauritian fishermen who had access following the 1965 understanding whereby the United Kingdom undertook to permit access to “*Mauritians who had traditionally fished in the area, so far as was practicable*”. It also observed that despite the fact Mauritius had proclaimed a 200-mile EEZ in 1984, “*Mauritian fishermen have applied for licences to fish through the British High Commission in Port Louis*”.

A.60 The possibility of a negative Mauritius reaction was flagged, but the protest was anticipated to be based on its sovereignty claims (“*in order to avoid weakening its own claim to sovereignty*”⁸⁸⁶) rather than with reference to any fishing rights under the 1965 understanding. It was therefore recommended that it would be “*prudent to continue to license Mauritian fishermen on the same basis as hitherto, ie without costs and to extend their access to BIOT waters in the new 200 limit*”, and that it “*would be important to give the Mauritians advance warning of our intention to declare a 200 mile limit*”⁸⁸⁷.

⁸⁸⁵ MR, Annex 97. UKCM, para. 2.104 notes that there was an increasing interest shown by third country vessels in the waters of the BIOT at this time and growing concern about the depletion of Indian Ocean fish stock: see Submission dated 17 September 1990 from East African Department, United Kingdom Foreign and Commonwealth Office to the Private Secretary to Mr. Waldegrave, “British Indian Ocean Territory (BIOT) Fisheries Limit”, MR, Annex 97. This submission also noted that a 200 nautical mile limit was recognized to be in line with international practice of all other states and territories in the region which had limits of 200 miles.

⁸⁸⁶ MR, Annex 97 at para. 8. See also at para. 12 “*The declaration of a 200 mile fisheries limit could exacerbate bilateral problems with Mauritius given its claim to the Chagos Archipelago which they have threatened to take to the UN from time to time.*”

⁸⁸⁷ MR, Annex 97 at para. 12. In similar terms, a submission dated 17 May 1991 also recommended an extension of BIOT fishery limits to 200 mile. (**Annex 33**) It also observed that fishing within the twelve mile limit (apart from around Diego Garcia which is a military exclusion zone) was restricted to Mauritian fishermen who have access “*following an understanding with the Mauritians Government in 1965 which allowed, as far as practicable, the continuance of traditional Mauritius fishing in BIOT waters*”. It stated that declaring a 200 mile fishing limit would “*enable the BIOT to limit fishing access by a licensing regime*”, but that a “*necessary concession*” would be to continue to license Mauritian fisherman without costs and extend present access to BIOT inshore waters in the new 200 mile limit. It similarly observed that a negative Mauritius reaction would be based on its sovereignty claims “*given its claim to the Chagos*” (at para. 10).

A.61 Mauritius was duly notified of the intention to extend the fishery limits to 200 nautical miles. In a *Note Verbale* from the High Commission to the Mauritian Government, it stated that:

*“in view of the traditional fishing rights of Mauritius in the waters surrounding British Indian Ocean Territory, a limited number of licenses free of charge have been offered to artisanal fishing companies for inshore fishing. We shall continue to offer a limited number of licences free of charge on this basis”*⁸⁸⁸.

A.62 Mauritius responded on 7 August 1991, stating that it would not accept the declaration extending fishery limit to 200 miles. This protest was on the basis that the Chagos Archipelago “*is an integral part of the territory of Mauritius*”⁸⁸⁹. It concluded that “*in the light of the above, the Government of Mauritius does not ipso facto accept the validity of the offer of free licences for inshore fishing*”⁸⁹⁰. No reference was made to the 1965 understanding; Mauritius’ stance is with reference to its sovereignty claim⁸⁹¹.

A.63 On 1 October 1991, the BIOT proclaimed a 200 nautical mile Fisheries (Conservation and Management) Zone (FCMZ)⁸⁹². Section 4 of Ordinance No 1 of 1991 prohibited fishing in the internal waters, territorial sea and FCMZ without a licence⁸⁹³.

⁸⁸⁸ *Note Verbale* from British High Commission, Port Louis to Government of Mauritius dated 23 July 1991 (MM, Annex 99). See also the *Note Verbale* sent to the Mauritius High Commission dated 5 August 1991 and the declaration of intent issued by the BIOT on 7 August 1991 at UKCM, Annex 54.

⁸⁸⁹ MM, Annex 100; MR, Annex 98.

⁸⁹⁰ Internally, the assertion that Mauritius did not ipso facto accept the validity of the offer of free licences for inshore fishing was described as “*unclear, especially as especially as Mauritian fishing companies have applied for and received such licences for years*” (MR, Annex 99).

⁸⁹¹ At paras. 2.102-2.104 of its Reply, Mauritius has cited this document (specifically its express reference to the rejection of the validity of the offer of free licences) to counter para. 2.108 of the UKCM which stated that that Mauritius protested the creation of the FMCZ on the grounds of Mauritian sovereignty over the Chagos Archipelago but did not refer to the 1965 fishing rights understanding or the practice of issuing licenses free of charge to Mauritian vessels. The point that was being made in the UKCM was that Mauritius rejected the offer of free licences because it considered acceptance to be inconsistent with its position on sovereignty. What Mauritius did not say (or refer to) was that it rejected the offer of free licences because it had fishing rights as a result of the 1965 understanding or that it had fishing rights because of the BIOT practice, since 1984, of issuing licences free of charge to Mauritius-flagged fishing vessels to fish in the BIOT waters. See also the Bancoult judgment at para 123 “*By a note verbale in response, dated 7 August 1991, the Mauritius Government protested on grounds of sovereignty*” (UKCM, Authority 43).

⁸⁹² Proclamation No. 1 of 1991 “*There is established for the British Indian Ocean Territory a fisheries zone, to be known as the Fisheries Conservation and Management Zone, contiguous to the territorial sea of the British Indian Ocean Territory. 2. The said fisheries zone has as its inner boundary the outer limits of the territorial sea of the British Indian Ocean Territory and as its seaward boundary a line drawn so that each point on the line is two hundred nautical miles from the nearest point on the low-water line on the coast or other baseline from which the territorial sea is measured or, unless another line is declared by Proclamation, the median line where this is less than two hundred nautical miles from the baseline*”: MM, Annex 101.

⁸⁹³ MM, Annex 102. (Conservation and Management) Ordinance 1991, No. 1 of 1991 was amended by BIOT Ordinance No 1 of 1993 (UKCM, Annex 59), Ordinance No. 5 of 1993 (UKCM, Annex 60), Ordinance No. 2 of 1995 (UKCM, Annex 65), Ordinance No. 4 of 1995 (UKCM, Annex 66), Ordinance No. 2 of 1997 (UKCM,

A.64 On 27 November 1991, the Mauritius Ministry of External Affairs, in objecting to the arrest of MV Jabeda in the August, reiterated its claim of sovereignty⁸⁹⁴. No reference was made to any fishing rights or to the 1965 understanding.

A.65 Before the Mauritius Legislative Assembly in 1994, Dr Kasenally observed that *“if we try to accept the fact that the British Authorities are entitled to give licensing rights in our territorial waters this weakens our position on the sovereignty issue”*⁸⁹⁵. No reference was made to fishing rights or to the 1965 understanding. Mr Bérenger responded stating that *“if there has been such giving of fishing licence, if there has been seizure and fining of a fishing vessels in our territory and if there is no protest on our part on record this would amount to admitting their right to deliver licenses and to fine seized vessels”*. Mr Bérenger observed *“Sir as usual blablabla, but the Minister is confirming that there has been no protest to date concerning the seizure and fining of fishing vessels”*.

New commercial licenses and the issue of charging for licences⁸⁹⁶

A.66 This section addresses in further detail the new licensing system pursuant to which free licences continued to be issued to all Mauritian-flagged vessels.

Three types of fishing licences

A.67 Three types of commercial fishing licence were issued at this time:

- a. First, there was an existing fishing licence for mothership/dory fishing within 12 nautical miles was renamed an “inshore fishing licence”⁸⁹⁷.
- b. Secondly, there was a new commercial licence for tuna fishing by long line⁸⁹⁸.

Annex 68), and Ordinance No. 5 of 2007 (UKCM, Annex 79). The 1991 Ordinance and its amendments were consolidated in Ordinance No. 4 of 1998, Official Gazette [1998 issues 2 & 3] (UKCM, Annex 69). Fisheries Regulations under s. 21 of the Ordinance were passed in 1993 (SI No. 3 of 1993) (UKCM, Annex 58), and later replaced by the Fishing Regulations 2007 (SI No. 4 of 2007), Official Gazette [2008 issues 1 & 2] (UKCM, Annex 80).

⁸⁹⁴ **Annex 38.**

⁸⁹⁵ **Annex 43.**

⁸⁹⁶ See also paras. 2.105 to 2.109 of the UKCM.

⁸⁹⁷ UKCM, para. 2.106. These were issued for the fishing carried out using lines and hooks in the shallower waters in and around the islands for demersal species such as snapper (Witness statement of John McManus at para. 19 (**Annex 75**)).

- c. Thirdly, there was also a new commercial licence for tuna fishing by purse seine net⁸⁹⁹.

Discussions regarding fees for tuna fishing licences

A.68 The following documents (set out at paragraphs A.69 to A.75 below) show that there were initially some internal discussions as to whether Mauritian-flagged vessels should be charged for the tuna fishing licences. The Mauritius Tuna Fishing and Canning Enterprises Ltd (MTFCE) was pressing to send 3 fishing boats to northern BIOT waters in November 1991⁹⁰⁰. As recorded in a letter to MRAG of 15 November 1991, it was eventually decided to give them free licences for the interim phase of the new fisheries management regime, but that, subject to legal advice, fees would be charged from, 1 April 1992⁹⁰¹.

A.69 An internal telegram from the FCO to Port Louis dated November 1991 set out concerns about vessels choosing to operate under the Mauritius flag⁹⁰². Noting that “*The Mauritians seem to have rejected the idea of free licenses anyway*”, it expressed the preliminary view that Mauritius companies should pay for licenses.

A.70 In a response from Port Louis to the Foreign Office, Mr Howell expressed his view that Mauritius companies should not be charged for licences, stating that although “*our undertaking was to use our good offices with the US government*” and noting that “*gratis availability was not specified*”, it “*lay a moral obligation upon us*”⁹⁰³.

A.71 Similarly, in a separate telegram to the FCO it was stated that to charge Mauritian vessels to fish in BIOT waters on the same basis as all other vessels risked “*making ourselves look rather shabby*”, and would be “*against the spirit*” of the 1965 understanding⁹⁰⁴. He asked “*if we have offered inshore licenses free of charge in recognition of traditional fishing*

⁸⁹⁸ The Chagos Conservation Management Plan at UKCM, Annex 76 explains that “*This fishery targets larger, higher value individuals of yellowfin and bigeye tuna, but there is a broad by-catch*”(at p. 20).

⁸⁹⁹ The Chagos Conservation Management Plan at UKCM, Annex 76 explains that purse-seining “*targets schools containing immature or young fish, has much greater impact on recruitment to the adult population*”(at p. 19).

⁹⁰⁰ Annex 35.

⁹⁰¹ Annex 37.

⁹⁰² Annex 34.

⁹⁰³ Annex 36.

⁹⁰⁴ MR, Annex 100.

interests of Mauritius in the waters surrounding BIOT why not outshore (if that is the correct term)?”

A.72 It was ultimately decided that free licences would continue to be issued to all Mauritian-flagged vessels⁹⁰⁵. A telegram from the FCO informing Port Louis of the decision of 3 April 1992⁹⁰⁶ explains that *“I can confirm that we have decided that we will not (repeat not) charge for fishing licences issued to Mauritian vessels. We have accepted that our undertakings in the past preclude us from doing so, in spirit if not strictly in law.”* Similarly a document dated 5 May 1992 from the BIOT Commissioner to MRAG stated that:

*“I confirm that we do intend to issue free licences to Mauritian vessels. You were right, this was not my original intention, I was very conscious of your advice on this issue but further research into the informal commitment made to the Mauritians in 1965 make it very difficult for us to come to any other decision. . It would have exacerbated an already difficult decision”*⁹⁰⁷.

A.73 A letter dated 1 July 1992 from the British High Commissioner to the Mauritian Prime Minister, confirmed that:

*“the British Government has honoured the commitments entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practice. It has issued free licences for Mauritian fishing vessels to enter both the original 12 mile fishing zone of the territory and now the wider waters of the exclusive fishing zone. It will continue to do so, provided that the Mauritius vessels respect the licence conditions laid down to ensure proper conservation of local fishing resources”*⁹⁰⁸.

A.74 In an internal note from the BIOT Director of Fisheries to Port Louis dated 2 June 1994 the extension of free licences to tuna fishing was described as a *“grace and favour agreement”*⁹⁰⁹. It noted that *“In the past we have issued free licences on a six monthly basis*

⁹⁰⁵ Note from African Department dated 5 May 1994 *“we have a long-standing agreement which allows Mauritius artisanal fishing vessels free licenced access to our waters. This was extended to include the tuna fishery”* (MR, Annex 185).

⁹⁰⁶ See **Annex 40**. Note from African Department dated 5 May 1994 *“we have a long-standing agreement which allows Mauritius artisanal fishing vessels free licenced access to our waters. This was extended to include the tuna fishery”* (MR, Annex 185).

⁹⁰⁷ **Annex 41**. The relevant backdrop was the incident in the Commonwealth Heads of Government Meeting in 1991 when Prime Minister Jugnauth launched an unexpected attack on Britain in full plenary session, in breach of the conventions governing such interventions at Commonwealth meetings. This document is consistent with the 1965 understanding as a political arrangement.

⁹⁰⁸ MM, Annex 103.

⁹⁰⁹ **Annex 44**.

for the three Mauritius vessels (MV Cirne, Lady Sushil Lady Sushil II). This “favour” was an extension of an old agreement with Mauritius whereby we would continue to allow free licenced access to artisanal fishing (ie inshore)”. Referring to the fact that one vessel was actually part of a joint venture with the Japanese it stated that “Clearly this was not the intention of the original grace and favour agreement with the Mauritians”.

A.75 In another internal note from the Foreign Office to Port Louis dated November 1994, the issuing of free licences to Mauritian fishing companies was described as “*a gesture of good will*”⁹¹⁰. In another document (dated 1995) free licences to Mauritian vessels was described as issued “*in the spirit of co-operation*”⁹¹¹.

Characterization of the reasons why tuna fishing licences were issued for free

A.76 It is against this backdrop (see paragraphs A.69 to A.75 above) that the United Kingdom in the Counter-Memorial at para 2.109 stated that in the end it was decided in May 1992 that, for political reasons and because it was unlikely to be a particular burden (there were only three Mauritian-flagged tuna fishing vessels), commercial tuna fishing licences would also be issued free of charge to Mauritian-flagged vessels that applied for them.⁹¹²

A.77 The Administrative Court in the domestic judicial review proceedings stated that:

*“The minutes relating to the decision show a concern that the declaration of a 200-mile fisheries limit might exacerbate bilateral problems with Mauritius, given Mauritius's claim to the Chagos Archipelago. It was considered prudent to license Mauritian vessels without cost, so as to defuse criticism....There ensued a debate within the FCO as to whether, for reasons of viability of the fisheries regime, charges should be imposed for licences even in respect of Mauritian vessels. The argument against such a course was that it was “clearly against the spirit” of the September 1965 undertaking to impose such a charge and that it would look shabby and greedy to do so (British High Commission minute of 15 November 1991). That argument prevailed.”*⁹¹³

A.78 Mauritius has objected to the characterization in the Counter-Memorial of the reasons why the decision was taken to issue commercial tuna fishing licences free of charge, with

⁹¹⁰ Annex 45.

⁹¹¹ Annex 46.

⁹¹² The decision was taken in April not May 1992.

⁹¹³ At paras. 122 and 124. (UKCM, Authority 43)

reference to a 1996 research paper⁹¹⁴. In fact, it is other documentation (as set out above) which formed the basis for this characterization. The irrelevance of the 1996 paper, prepared by a research analyst at the African Research Group (and not setting out an officially adopted view)⁹¹⁵, is further illustrated by the fact that the paper itself is described as a “*working draft*” and the author of the document highlights that she is “*not confident of my grasp of all of*” certain aspects of the topic which were “*new*” to the researcher, acknowledging that there may be “*obvious errors*” and “*misconceptions*”. The researcher does refer to the 1965 understanding, but this does not feature any detailed consideration of its legal import, and her treatment of the 1965 understanding is consistent with it being interpreted as imposing only political obligations.

Fishing practiced from 1991 onwards⁹¹⁶

A.79 As set out above, from 1991 onwards there were three types of licences issued: inshore, long line and purse seine. This section addresses the extent of fishing practiced by Mauritian-flagged vessels pursuant to that licensing regime.

A.80 As regards long line fishing, no Mauritius-flagged vessel ever fished using the long line method⁹¹⁷.

A.81 As regards purse seine fishing, three Mauritius-flagged vessels fished for tuna in BIOT waters under purse seine licences⁹¹⁸. One of those vessels subsequently re-flagged to France, leaving just the Lady Sushil I and II. Licenses issued were for 3 months at a time. After 1999 no purse seine fishing was undertaken by Mauritian-flagged vessels.

A.82 As regards inshore fishing, the number of licences issued between 1991 and 1997 ranged between 4 per year (at its lowest) to 8 per year (at its highest). The number of licenses

⁹¹⁴ MR paras 2.105-2.106.

⁹¹⁵ Research Analysts provide research and analysis to government departments. Most are members of the Diplomatic Service, others are on loan from MOD, Cabinet Office, universities or elsewhere.

⁹¹⁶ See also para. 2.110 and Figure 2.4 at p. 51 of the UKCM.

⁹¹⁷ UKCM, para. 2.110. See 2003 Conservation Management Plan UKCM, Annex 76 (at p. 20) “*Dominated by vessels operating out of Taiwan RoC (though some under flags of convenience), since 1997/8 about 20% of licences are now taken by Japanese vessels.*”

⁹¹⁸ UKCM, para. 2.110. See 2003 Conservation Management Plan UKCM, Annex 76 (at p. 20) “*This is dominated by Spanish and French vessels, with others from Seychelles and Mauritius, some under flags of convenience.*”

issued to Mauritian-flagged vessels each year from 1997 onwards as follows⁹¹⁹: 1997 (5), 1998 (3), 1999 (3), 2000 (2), 2001 (4), 2002 (2), 2003 (2), 2004 (3), 2005 (0), 2006 (0⁹²⁰), 2007 (0⁹²¹), 2008(0), in 2009 (2).

A.83 With respect to the figures from 1999, in that year Mauritius was informed of the decision to reduce the number of inshore fishing licences that could be issued from six to four. This was to conserve the fishery, following a coral bleaching event⁹²². It was also observed that in any event the six fishing licences were not taken up every year by Mauritian vessels⁹²³. Mauritius responded by reaffirming “*the position of the Government that sovereignty over the Chagos Archipelago rests with the Republic of Mauritius*”⁹²⁴. There was no reference to the 1965 understanding in this document.

A.84 Based on the figures summarized at paragraph A.82 above, the United Kingdom in its Counter-Memorial stated that “*the take-up of commercial fishing licences by Mauritian-flagged vessels was very low in some years nil*”⁹²⁵.

A.85 Mauritius challenges this factual assertion⁹²⁶. However, it does not provide any evidence or data to show that this assertion was inaccurate. Mauritius sets out a table of how

⁹¹⁹These figures are set out in the chart at p.51 of UKCM (Figure 2-4). These figures were provided by MRAG. MRAG received and assessed applications for fishing licences and kept the BIOT administration’s records on licences (see the third witness statement of Ms Yeadon at para 11, **Annex 73**).

⁹²⁰ One licence was issued to the Talbot fishing company; this was a Mauritian company but it had reflagged to Madagascar and Comoros.

⁹²¹ One licence was issued to the Talbot fishing company; this was a Mauritian company but it had reflagged to Madagascar and Comoros.

⁹²²*Note Verbale* dated 13 April 1999 from the British High Commission to the Mauritian Ministry of Foreign Affairs and International Trade (MM, Annex 107). See also UKCM, Annex 76 at p.8 referring to “*the responses to the 1998 mass coral mortality when the number of fishing licences was reduced*”.

⁹²³Speaking Note at MM, Annex 107.

⁹²⁴MM, Annex 109.

⁹²⁵UKCM, para. 2.111. The United Kingdom in its Counter-Memorial also stated that “*the number of Mauritian-flagged vessels applying for inshore fishing licences fell sharply after 1996*” (UKCM, para. 2.106). With reference to the figures set out at Figure 2-4 of the UKCM, this should have stated that the number fell “*after 1997*”.

⁹²⁶MR, paras. 2.120 and 2.125. It also states that the United Kingdom does not explain how a decrease in the number of licences has an impact on Mauritius’ fishing rights (MR paras. 2.120 and 2.127). This in fact is explained at UKCM para. 8.27 and paras. 8.28 to 8.30. See also para. 155 of the Bancoult judgment “*The issue therefore comes down to whether there was a sufficient argument concerning the existence of Mauritian fishing rights in respect of BIOT waters as to require mention to be made of it in the consultation document if the consultation was to be lawful. In our judgement, the claimant’s case attaches a wholly disproportionate significance to that point. The number of Mauritian-flagged vessels licensed to fish in BIOT waters and affected by the no-take MPA had been extremely small for many years—none in the period 2005–2008, and just two in 2009. Save in the context of the separate dispute over sovereignty, Mauritius did not suggest that it had any special rights to fish in BIOT; nor was that suggestion made by the operators of the Mauritian-flagged vessels*”.

many tons of fish were caught each year⁹²⁷ claiming that “*the figures above do not support the United Kingdom’s conclusion that.....“the take-up of commercial fishing licences by Mauritian-flagged vessels was very low in some years nil”.*”⁹²⁸ It is not clear how this data was collected⁹²⁹. However and in any event the figures for catch in tons is a different point to the number of licences. And as illustrated by the figures reiterated at paragraph A.82 above (regarding which Mauritius does not provide any counter figures), it is a factually correct that the take-up of commercial fishing licences by Mauritian-flagged vessels was low in some years nil⁹³⁰.

1994-1999: the British-Mauritian Fisheries Commission (BMFC)

A.86 In 1994 the BMFC was established⁹³¹. The records of the meetings of the BMFC, set out at paragraphs A.87 to A.92 below, show that:

- a. “Access” of Mauritian vessels was discussed with reference to the licensing process.
- b. Mauritius did not advance any objection to the licensing regime with reference to the 1965 understanding. What Mauritius did advance was a proposal to share in the licence fees.
- c. Closed area management marine protected areas was an agenda item of the BMFC since 1996⁹³².

themselves. The earlier history, through which we were taken at such length, does not serve to give the issue a significance that it lacked in current practice” (UKCM, Authority 43).

⁹²⁷ At p. 61.

⁹²⁸ At para. 2.125.

⁹²⁹ It is not clear if the reference to “catches by Mauritian fishing vessels” at MR para. 2.124 is to Mauritian flagged vessels (or includes Mauritian owned vessels that are flagged to other States). Further, depending on the process for collation of data, it may not be clear that the fish was actually caught within the relevant waters. It is also not clear whether the data relates to dory catch or also includes direct landings to the mother vessels.

⁹³⁰ Mr John McManus (formerly BIOT Administrator and Head of the BIOT section) in his witness statement in the judicial review proceedings explains (at para. 20) that “*I understand that the reason for the reduction in the numbers of Mauritian vessels was economic. The boats were aged and the Mauritian bank fishery did not produce enough to make it economically viable*”. (Annex 75) See also a Background Paper prepared for the British/Seychelles Fisheries Commission (2010) which states the “*natural attrition of old vessels has seen the number of mother-vessels decline*” (p. 3). (Annex 62) This reason was cited at para. 2.10 of the UKCM. It is common ground that Mauritius also considered that the issuing of licences impacted on their position on sovereignty. For example see UKCM at para. 3.46 and para. A.69 above. See MR, para.2.126.

⁹³¹ In 1999, Mauritius withdrew from the Commission; it was understood that this was because they considered it inconsistent with their position on sovereignty over BIOT: third witness statement of Mr Roberts, para 8. (Annex 74)

⁹³² See also letter dated 8 July 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London: MM, Annex 119.

A.87 The purpose of the BMFC was set out in the Joint Statement on the Conservation of Fisheries dated 27 January 1994 as follows:

*“In order to contribute to the conservation of fish stocks, the two Governments agree to open the way for cooperation in this field on an ad hoc basis by means of the establishment of the British-Mauritian Fisheries Commission, composed of delegations from both States, to promote, facilitate and co-ordinate conservation and scientific research in the maritime area covered by this Statement”*⁹³³.

A.88 The BMFC held its first meeting in London between 26 and 28 April 1994⁹³⁴. The confidential minute of this meeting stated under the heading *“Access of Mauritian vessels to British Indian Ocean Territory”* that *“the British delegation indicated that access of inshore vessels would continue. However, to ensure the conservation of the stocks this fishery would be subject to an observer programme. It was agreed that this should be a condition of licensing...”*⁹³⁵. No reference was made to the 1965 understanding under that heading; *“access”* of Mauritian vessels was discussed with reference to the licensing process.

A.89 The second meeting of the BMFC was held on 16-17 March 1995⁹³⁶. The Commission agreed on the need for appropriate conservation and management measures for the fishery resources. The confidential minute of that meeting addressed the licensing arrangements⁹³⁷.

⁹³³ UKCM, Annex 62, at para. 2. Referred to in UKCM, fn. 170. The Statement also specified that the Commission would meet at least once annually, would receive available information from the parties on the operation of fishing fleets, appropriate catch and effort statistics and analysis of the stocks of the most significant off-shore species, would assess the information provided by both Governments and submit recommendations for the conservation of the most significant off-shore species including co-ordinated measures where applicable, propose joint scientific work and recommend possible actions for the conservation of straddling and migrating stocks in international waters.

⁹³⁴ Joint communiqué, 28 April 1994: UKCM, Annex 63. In accordance with its recommendation, a Scientific Subcommittee was established to meet in conjunction with the meetings of the BMFC and make recommendations to the BMFC on appropriate measures to enhance the conservation of stock.

⁹³⁵ See UKCM, Annex 63 at final page. An observer programme on Mauritian-flagged vessels operating in the inshore fishery in BIOT waters was established run by MRAG Ltd. MRAG is a consultancy firm which specializes in designing and implementing resource management systems in marine environments. It had since 1991 contracted with the BIOT administration to run the BIOT fisheries because the BIOT administration did not have the capacity or in-house expertise (see the third witness statement of Ms Yeadon at para. 11, **Annex 73**, and witness statement of Mr McManus at paras. 26-27, **Annex 75**).

⁹³⁶ UKCM, Annex 64.

⁹³⁷ It was agreed that the duration of inshore licences would be extended to 80 days, that the number of vessels would be determined by the needs of conservation and that the current arrangements for the licensing of the Lady Sushil and Lady Sushil II would continue for the time being (**Annex 47**). See also **Annex 46**.

A.90 The third meeting was held on 19 March 1996⁹³⁸. Regarding inshore fisheries, it was noted that “*not all vessels seeking a license actually use it, making planning difficult*”⁹³⁹. The notes of that meeting also record that:

*“The UK delegation reported that the BIOT Authorities were considering implementing marine protected areas (MPA’s) around the islands of Peros Banhos, Egmont and Salomons. The Scientific Sub-committee agreed there was merit in this....The potential value of experimental closed areas on the Great Bank was raised by the British Delegation. It was considered that additional information was required before the precise location of any closed area could be determined”*⁹⁴⁰.

A.91 A fourth meeting was held on March 1997⁹⁴¹. The United Kingdom delegation informed the Commission that plans to introduce a system of MPAs were at an early stage. The Mauritian delegation suggested establishing MPAs through licensing arrangements rather than legislation⁹⁴². The Mauritian delegation also proposed the sharing of licensing fees⁹⁴³.

A.92 A meeting was also held in June 1998⁹⁴⁴. The agenda included discussion of licensing arrangements. It was noted that “*Marine Protected Areas have not yet been introduced*”⁹⁴⁵ and an appendix setting out the discussions so far on MPAs was produced⁹⁴⁶.

2000/2001: Mauritius’ stance on the Chagos Archipelago

A.93 The following events in the period 2000 to 2001 illustrate that Mauritius’ stance on the Chagos Archipelago continued to focus on its claim to sovereignty, and was not based on asserting any fishing rights under the 1965 understanding:

⁹³⁸ **Annex 48.** See also **Annex 49.**

⁹³⁹ **Annex 48** at para. 7.3.

⁹⁴⁰ **Annex 48** at paras. 8.1 and 8.2. See also para. 7 of the Joint Communiqué at **Annex 49** “*The Commission noted the intention of the BIOT Authorities to introduce a system of marine protected areas (MPAs) for BIOT (Chagos Archipelago). The Mauritian Delegation would be kept fully informed of progress on this*”.

⁹⁴¹ **Annex 51.**

⁹⁴² **Annex 51** at para. 6.

⁹⁴³ **Annex 51** at para. 15.

⁹⁴⁴ **Annex 52.**

⁹⁴⁵ **Annex 52** at para. 6.2.

⁹⁴⁶ **Annex 52** at appendix 6.

- a. On 23 February 2000, Mauritius protested against the United Kingdom Agreement for Implementation of Provisions of the UNCLOS relating to conservation and management of straddling fish stocks⁹⁴⁷. Its objection was with reference to its sovereignty claim. No reference was made to fishing rights under the 1965 understanding.
- b. On 14 November 2000, the Mauritian Minister of Foreign Affairs and Regional Cooperation made a statement to the National Assembly of Mauritius identifying the “*stand of Mauritius on the Chagos Archipelago*” with reference to 12 points⁹⁴⁸. The “*issue of sovereignty*” was raised. No reference was made to fishing rights under the 1965 understanding.
- c. In December 2000, a record of a phone call between the Mr Hain and the Mauritian High Commissioner stated that “*Mauritius wanted a say in control of the fisheries surrounding the islands*”⁹⁴⁹.
- d. On 13 November 2001, the Mr Bérenger (The Ag. Prime Minister) stated that “*As far as this issue is concerned, the Chagos Archipelago issue, we all know that there are three dimensions. There is sovereignty dimension, there is the human dimension, that is the fate of the Ilois community and thirdly the military dimension the existence and activities of the base*”⁹⁵⁰. Fishing rights under the 1965 understanding was not identified as one of the dimensions to the Chagos Archipelago issue.

2003: closed marine protected areas⁹⁵¹

A.94 As noted above, the issue of closed marine protected areas was already one that was under discussion. There were two further developments in this respect in 2003:

- a. In July 2003, a closed marine protected area was established to protect spawning grouper⁹⁵². There is no documentary evidence of any protest by Mauritius with reference to the 1965 understanding⁹⁵³.

⁹⁴⁷ **Annex 53.**

⁹⁴⁸ MM, Annex 114.

⁹⁴⁹ **Annex 55.**

⁹⁵⁰ **Annex 58** at p.14.

⁹⁵¹ See also para. 3.18 of the UKCM.

⁹⁵² Letter dated 8 July 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London: MM, Annex 119.

- b. In October 2003, the Chagos Conservation Management Plan recommended the establishment of fully protected areas covering at least one third of BIOT waters⁹⁵⁴.

2003: Environmental (Protection and Preservation) Zone⁹⁵⁵

A.95 In August 2003, the Foreign and Commonwealth Office informed the Mauritian High Commission that it intended to establish an Environmental (Protection and Preservation) Zone (EPPZ)⁹⁵⁶. This covered the same geographical extent as the FCMZ and was intended to help preserve and protect the environment of the Great Chagos Bank.

A.96 On 17 September 2003 the EPPZ was duly established⁹⁵⁷, and a copy of its coordinates deposited with the United Nations⁹⁵⁸.

A.97 It was not until the 7 November 2003 that Mauritius responded to the notification of August 2003⁹⁵⁹. It referred to its sovereignty claim. No reference was made to the 1965 understanding or to fishing rights⁹⁶⁰.

A.98 Similarly in a letter the following year Mauritius asserted that the Environment (Protection and Preservation Zone) “*implicitly amounts to the exercise by the UK of sovereign rights and jurisdiction within an Exclusive Economic Zone*”, but no reference was made to the 1965 understanding or to fishing rights⁹⁶¹.

⁹⁵³ UKCM para. 8.26.

⁹⁵⁴ UKCM, Annex 76, at p. 2.

⁹⁵⁵ See also para. 3.16 of the UKCM.

⁹⁵⁶ MM, Annex 120 (a letter from the FCO dated 13 August 2003); UKCM, Annex 75 (a letter from the British High Commission dated 20 August 2003).

⁹⁵⁷ MM, Annex 121.

⁹⁵⁸ On 12 March 2004 (UKCM, para. 3.16).

⁹⁵⁹ MM, Annex 122. In the response of 12 December 2003 from the FCO it stated that “*in the case of the FCMZ, as you know, we have enacted legislation to regulate fishing activities within that Zone whilst protecting traditional Mauritian fishing rights there*” (MM, Annex 124).

⁹⁶⁰ See the Bancoult judgment at para. 126 “*Once more it prompted objections from the Mauritius Government on sovereignty grounds*” (UKCM, Authority 43).

⁹⁶¹ MM, Annex 127.

2009: bilateral discussions

A.99 In the context of Mauritius asserting its sovereignty over the Chagos Archipelago, bilateral discussions were held. This section sets out the course of those bilateral discussions, in particular the fact that Mauritius' stance rested on its claim to sovereignty and that any references to "fishing rights" were understood to be linked to that claim.

Bilateral discussions prior to the meeting in January 2009

A.100 In the course of the bilateral exchanges, it was agreed by both Mauritian and United Kingdom officials that the "*question of fishing rights*" would be discussed⁹⁶².

A.101 On 13 December 2007, the Mauritian Prime Minister wrote to the United Kingdom Prime Minister citing the issue of sovereignty and concluding by stating that "*During our meeting I also raised with you the question of our fishing rights in the waters of Chagos Archipelago excluding of course the immediate vicinity of Diego Garcia*"⁹⁶³. There is no reference by Mauritius to the 1965 understanding in that letter.

A.102 Following the observation that in responding to that letter an effort should be made to be a "*little more positive by mentioning fishing as Ramg mentions in his letter*"⁹⁶⁴ the United Kingdom Prime Minister replied confirming that whilst the United Kingdom had no doubt over its sovereignty over the BIOT, there "*are certainly many other issues relating to the British Indian Ocean Territory that we can discuss such as fishing*"⁹⁶⁵.

⁹⁶² On 1 December 2005 the Mauritius Prime Minister wrote to the United Kingdom Prime Minister stating that "*I look forward to discussing with you in the near future the important issue of fishing rights in Mauritius in the Chagos waters. This has become particularly important in view of the plans of my Government to turn Mauritius in to as seafood hub*" (MM, Annex 132); on 4 January 2006, the Prime Minister agreed that "*The question of fishing rights in the Archipelago and its implications needs to be talked through*" (MM, Annex 133); in 2007 in a Commonwealth Heads of Government meeting the Mauritian Prime Minister recorded that he "*brought up the question of the exercise of our fishing rights over the Chagos waters.....excluding Diego Garcia....*" (MR, Annex 115); in an email exchange dated November 2007 between MRAG, BIOT Commissioner and the FCO the head of the BIOT noted that "*Ramgoolan also wants to revive Mauritius claims to rights on the fishing permits in BIOT*" and "*resurrect*" the BMFC (MR, Annex 116 at p. 550).

⁹⁶³ MM, Annex 135. This letter was sent following their meeting in the margins of the Commonwealth Heads of Government Meeting in Kampala, Uganda (MR, para. 3.16).

⁹⁶⁴ MR, Annex 117.

⁹⁶⁵ Letter dated 7 February 2008 at MR, Annex 118. This was reiterated subsequently internally, for example on 10 April 2008 in a letter from United Kingdom PM to Baroness Amos, MR Annex 119. See also internal emails from Ms Yeadon: on 31 October 2008 stating "*What we are willing to discuss are fishing rights and a potential Treaty on sovereignty*" (MR, Annex 122), on 5 November 2008 stating "*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*

A.103 Mauritius refers to an email (cited in the Counter-Memorial) dated 22 April 2008 which stated “*Mauritius and inshore fishing: we explained Mauritius did have some rights but had not exercised them recently. But this was a loophole that would need looking at*”⁹⁶⁶. Ms Yeadon explains that she was “*mindful that the 1965 understanding was something that would need to be looked into if the MPA proposal was developed any further*” and that after she had looked into that matter she was of the clear view that:

*“Mauritian ‘fishing rights’ under the 1965 understanding, which had in practice taken the form of free licences for Mauritian-flagged vessels to fish in BIOT waters to be an undertaking of a political not legal nature”*⁹⁶⁷.

A.104 Having agreed to establish a bilateral talks framework with Mauritius on matters relating to the BIOT/Chagos Archipelago under a ‘sovereignty umbrella’, on 31 December 2008 Mr Andrew Allen suggested to Ms Yeadon and Mr Roberts an agenda which included at point (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]*”⁹⁶⁸. The agenda that was actually proposed by the United Kingdom to Mauritius simply cited “*fishing rights/protection of the environment*”⁹⁶⁹.

A.105 That fishing rights was an agenda item was entirely in line with the agreement between the State representatives that this was an issue to be discussed, and the fact that at that time Mauritius were accorded privileged access under the licensing regime in the form of free licences⁹⁷⁰.

A.106 With regard to this agenda item, the United Kingdom considered there might be fruitful cooperation between the two countries over fishing rights in the form of a revived BMFC or something similar, although it was aware that Mauritius was seeking a sharing of fisheries resources.

Mauritius when it is no longer needed for defence purpose.” (MR, Annex 123), on 21 November 2008 stating “*there are issues on BIOT that we can discuss with Mauritius e.g., traditional fishing rights, formalizing the sovereignty issue in a treaty*” (MR, Annex 124). The relevance of internal documents (including those ones authored by Ms Yeadon) is discussed in more detail at paragraphs 8.12 to 8.15 of the Rejoinder.

⁹⁶⁶UKCM, Annex 87.

⁹⁶⁷ Third witness statement of Ms Yeadon at paras. 6-9. (**Annex 73**)

⁹⁶⁸MR, Annex 125.

⁹⁶⁹MR, Annex 127.

⁹⁷⁰ See the record of the meeting on 14 January 2009 where the United Kingdom delegation repeated its position that “*we were talking about the grant of privileged access; nothing more*”. (MR, Annex 128)

A.107 Mauritius challenges this understanding of the inclusion of fishing rights on the agenda with reference to some internal emails from Ms Yeadon⁹⁷¹. However, Ms Yeadon's position on this is clear:

*“‘Fishing rights’ had been one of the agenda items tabled at the UK-Mauritius bilateral discussions of 14 January 2009 on issues relating to BIOT. Mauritius was seeking a sharing of fisheries resources. We understood this to be linked to Mauritius’ claim to sovereignty, for granting fishing licences is recognized as the right of the territorial state”*⁹⁷².

A.108 This is also confirmed by Mr Roberts (then Director of the Overseas Directorate of the FCO, HM Commissioner for the BIOT and the Head of the United Kingdom Delegation at the 2009 bilateral talks) as follows:

*“Part of my Directorate’s role was to create a framework for these talks [between the FCO and Mauritian representatives on issues relating to the BIOT]. We were very clear that sovereignty was a ‘red line’ issue, but endeavoured to find other issues we could discuss with the Mauritians in order to have a worthwhile agenda. One of the issues identified, among others, was ‘fishing rights’, as reflected in the correspondence within the FCO and with Mauritius in 2008 and advice to Ministers....What we had in mind under the rubric of “fishing rights”, and the only proposal we were prepared to advance with Mauritius at the talks on BIOT, was practical cooperation, such as sharing fisheries research and data and a joint observer programme, as we have with the Seychelles through the British-Seychelles Fisheries Commission.....Mauritius was only interested in using fisheries to advance its sovereignty claim. There was however plenty that could be done under a fisheries cooperation framework, namely exchanging fisheries data and scientific research, and other practical matters such as Mauritius-flagged vessels taking advantage of the arrangement whereby they did not have to pay for licences”*⁹⁷³

A.109 That this was how the agenda item was understood is also confirmed by the record of the January 2009 talks (cited below) which stated that:

“The UK and Mauritius had a framework for discussing fisheries in the 1994 Agreement. It was not the UK’s fault this had lapsed. The UK was ready to look at returning to the 1994 Agreement. But we were talking about the grant of privileged

⁹⁷¹ MR, paras. 3.24 to 3.27. As set out above at fn. 964, in these emails Ms Yeadon stated on 31 October 2008 that “What we are willing to discuss are fishing rights and a potential Treaty on sovereignty” (MR, Annex 122), on 5 November 2008 that “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 purpose.” (MR, Annex 123) and on 21 November 2008 that “there are issues on BIOT that we can discuss with Mauritius e.g., traditional fishing rights, formalizing the sovereignty issue in a treaty” (MR, Annex 124).

⁹⁷² Third witness statement of Ms Yeadon, para. 9. (**Annex 73**)

⁹⁷³ Third witness statement of Mr Roberts, para 8. (**Annex 74**)

access; nothing more.....it became apparent during the rest of the discussion that Mauritius 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”⁹⁷⁴.

A.110 Mauritius also asserts that the bilateral contact preceding the January 2009 talks “*indicates that Mauritius consistently emphasized its rights over the Chagos Archipelago, including fishing rights, and that these were consistently recognized by the UK*”⁹⁷⁵. In fact, the contacts show that Mauritius was not consistently referring to the 1965 understanding and, as set out above, both Ms Yeadon and Mr Roberts are clear as to their understanding of the broad references to “fishing rights”⁹⁷⁶.

First round of talks: January 2009⁹⁷⁷

A.111 Accordingly at the first round of bilateral talks on issues relating to the Chagos Archipelago/BIOT held on 14 January 2009, after the delegations set out their respective views on sovereignty, there was a “*mutual discussion of fishing rights, environmental concerns, the continental shelf, future visits to the Territory by the Chagossians and respective policies towards resettlement*”⁹⁷⁸.

A.112 Mauritius explained at the start of the discussions that “[a]ll of the issues on the agenda derived from the sovereignty issue”⁹⁷⁹.

A.113 The record of the discussions prepared by the Overseas Territories Directorate also stated “*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*

⁹⁷⁴ Mr Roberts states that the reference to “mutual discussion of fishing rights” was a “*reference to these sorts of arrangements and we would not have allowed it in if it had been a reference to anything else*” (at para. 13, **Annex 74**).

⁹⁷⁵ MR, para. 3.22.

⁹⁷⁶ See also Bancoult at para. 132 “*Mauritius's stance towards the creation of the MPA has rested from the outset on its claim to sovereignty over the Chagos Archipelago*” (UKCM, Authority 43).

⁹⁷⁷ See also paras. 3.45 and 3.46 of the UKCM.

⁹⁷⁸ Joint Communiqué, Bilateral talks between Mauritius and the United Kingdom on the Chagos Archipelago, 14 January 2009 (MM, Annex 137 and also at UKCM, Annex 93). See also the Bancoult judgment at para. 133 referring to a paper presented during the January 2009 talks: “*The paper contains no suggestion that Mauritius might enjoy fishing rights over BIOT waters on grounds other than sovereignty*” (UKCM Authority 43). The paper refers to the 1965 understanding as providing an “*alternative framework*” for future negotiations, as opposed to a pre-existing legal obligation.

⁹⁷⁹ UKCM, Annex 94 at p.2 (third para.) of the record of discussions prepared by the Overseas Territories Directorate.

sovereignty”⁹⁸⁰. This aligns with a Mauritius internal document now deployed by Mauritius which records the Mauritius delegation as stating that “*the mere fact of applying for a licence has an impact on our position of sovereignty*”⁹⁸¹.

A.114 The Overseas Territories Directorate record of discussions under the heading “*access to natural resources*” has already been referred to above. It noted that: “*The UK and Mauritius had a framework for discussing fisheries in the 1994 Agreement*” and that “*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 record stated that “*it became apparent during the rest of the discussion that Mauritius were under the illusion that we were agreeing to share resources*” to which the United Kingdom responded that “*this was not the case. We were talking about privileged access only*”⁹⁸².

A.115 This record of what was discussed with regard to “*access*” aligns with a Mauritius internal document now deployed by Mauritius which recorded that “*we are asking that Mauritius gets its equitable share of the stock in the Chagos Archipelago*”⁹⁸³.

A.116 Another Mauritius internal document now deployed by Mauritius records that:

*“At the first meeting in January 2009, the Mauritian side had pointed out the difficulties in the implementation of the Agreement on the....BMFC,.....in particular the fact that Mauritian vessels were required to take a licence from the British authorities to fish in Chagos waters. At the second round of talks the Mauritian side reiterated the need for the joint exploitation and management of marine resources in the region and fishing licences to be issued jointly”*⁹⁸⁴.

A.117 Mr Roberts explains that:

⁹⁸⁰ UKCM, Annex 94 (under item 6, “*access to natural resources*”).

⁹⁸¹ MR, Annex 129 at p. 23. This document does record passing reference to the talks in Lancaster House in 1965. However, the thrust of the Mauritius stance is on the issue of sovereignty. As stated by Mr Roberts in his statement at para. 11 “*The 1965 Lancaster House talks and the arrangements which resulted were referred to separately, firstly to reject them as a basis of agreement for the excision of BIOT, and secondly, as the basis of an alternative legal framework to sovereignty and a recognition of the legal interest of Mauritius in the BIOT. It was not claimed that Mauritius had legally enforceable fishing rights and/or a right to free licences as a result of the 1965 understandings reached at Lancaster house*” (**Annex 74**).

⁹⁸² Mr Roberts states that the reference to “*mutual discussion of fishing rights*” was a “*reference to these sorts of arrangements and we would not have allowed it in if it had been a reference to anything else*” (at para. 13, **Annex 74**).

⁹⁸³ MR, Annex 129, at p. 25.

⁹⁸⁴ MR Annex 144 (at p. 4, under item (iv) “*Fisheries*”).

“it was made clear to us by Mauritius in the talks in January 2009 that it was only interested in fisheries concessions as a way of establishing sovereignty, it had no proposals to make under this heading, and the issue was not pursued by either side”⁹⁸⁵.....The focus of the Mauritius presentation was sovereignty. “Fishing rights” were raised by Mauritius’ counsel, along with resettlement, rehabilitation of the economy of certain islands, protection of the environment and the resources of the continental shelf, as an aspect of the exercise of sovereign rights of Mauritius based on their argument that they had sovereignty over BIOT⁹⁸⁶... It was not claimed that Mauritius had legally enforceable fishing rights and/or a right to free licences as a result of the 1965 understandings reached at Lancaster house⁹⁸⁷”

A.118 The documents cited above demonstrate that references to “fishing rights” was not understood by the BIOT delegation as relating to any ‘fishing rights’ under the 1965 understanding but to Mauritius’ wish to establish a sovereignty “win”⁹⁸⁸.

Discussions between the first and second round of talks

A.119 That Mauritius’ stance on the MPA rested on its claim for sovereignty is further evidenced by the correspondence between the first and second round of talks, in particular:

- a. In a letter dated 5 March 2009 from the Mauritian Ministry of Foreign Affairs to the FCO Mauritius asserted its sovereignty over the Chagos Archipelago, concluding that *“the creation of any marine park in the Chagos Archipelago will therefore require, on the part of all parties that have genuine respect of international law, the consent of Mauritius”*⁹⁸⁹. There was no reference made to fishing rights under the 1965 understanding⁹⁹⁰.
- b. Similarly on 10 April 2009, a *Note Verbale* from the Mauritian Ministry of Foreign Affairs to the FCO reiterated its claim to sovereignty and that its consent should therefore be obtained, but it did not refer to fishing rights under the 1965 understanding⁹⁹¹.

⁹⁸⁵ At para. 8 (**Annex 74**).

⁹⁸⁶ At para. 10 (**Annex 74**).

⁹⁸⁷ At para. 11 (**Annex 74**).

⁹⁸⁸ Cf. MR para. 3.48 *“the UK provides no evidence of the understanding of the UK delegation that the discussion of fishing rights could be constrained in that way”*.

⁹⁸⁹ MM, Annex 139.

⁹⁹⁰ As commented on by Mr Roberts in his witness statement at para.16 (**Annex 74**).

⁹⁹¹ MM, Annex 142. As commented on by Mr Roberts in his witness statement at para. 16 (**Annex 74**).

- c. It was observed internally that “...*They have also expressed concern but more for sovereignty reasons that anything else – they do not for example often exploit their historical inshore fishing rights*”⁹⁹².

A.120 Mr Roberts confirms that:

*“in the run up to the second round of bilateral talks with Mauritius, my firm understanding.....was that Mauritius did not have legal rights to fish in BIOT waters, whether as a result of the 1965 understandings or otherwise.....Nothing that was said subsequently on behalf of Mauritius caused me to question our conclusion that Mauritius had no “fishing rights” as result of the 1965 understandings or the subsequent arrangements concerning free licences to Mauritian-flagged vessels which prevented the establishment of an MPA, including a full no-take MPA”*⁹⁹³.

Second round of talks: July 2009⁹⁹⁴

A.121 This section addresses the second round of talks, which took place on 21 July 2009.

A.122 Prior to the formal discussions, the Head of the United Kingdom Delegation (Mr Roberts) met with Mr Seeballuck during which time he discussed the possibility of a BIOT MPA⁹⁹⁵. Mr Seeballuck did not mention fishing rights under the 1965 understanding or free licences issued to Mauritian-flagged vessels⁹⁹⁶.

A.123 Mr Roberts explained that one of the ideas being mooted was a complete no-take MPA in the entire 200 nautical miles extent of BIOT waters⁹⁹⁷. The Overseas Territories Directorate record of the discussions stated that:

⁹⁹² MR, Annex 135: Email exchange between Joanne Yeadon and Ian [surname redacted]. Mauritius has also referred to a document from MRAG sent to Ms Yeadon dated July 2009 (MR, Annex 137, cited at MR para. 3.40). This document refers to “*Mauritius historical fishing rights*” and observes that the “*‘right to fish’ has been put into practice since the declaration of the FCMZ in 1991 as ‘free licences’*”. As noted above, MRAG is a consultancy firm (and these views are not therefore following detailed legal consideration nor do they express an officially adopted view). Ms Yeadon explains in her witness statement at para. 13 that “*I cannot recall what if anything was said in response to this point. By that stage of our preparations for the bilateral talks we had reached the clear conclusion that the UK had no legal obligations stemming from the 1965 understanding that would preclude a no-take MPA.*” (Annex 73) Similarly Mr Roberts explains that MRAG’s submission of 2 February 2010 did not alter their understanding (third witness statement at para. 32, Annex 74).

⁹⁹³ Third witness statement at para. 19. (Annex 74)

⁹⁹⁴ See also para. 3.46 of the UKCM.

⁹⁹⁵ UKCM, para. 3.44.

⁹⁹⁶ Third witness statement of Mr Roberts at para. 22. (Annex 74)

⁹⁹⁷ UKCM, Annex 99, eGram from the British High Commissioner dated 21 July 2009 reported that “*the bulk of the talks, and of the meeting with Boolell, focused on the concept of a Marine Reserve in BIOT*” (at para. 4).

“The Mauritian delegation explained that they had taken exception to the proposal from the Chagos Environment Network but on the basis that it implied the Mauritians had no interest in the environment. They had also found it necessary to protest on sovereignty grounds”⁹⁹⁸.

A.124 In relation to agenda item (iv) (“access to natural resources of the maritime zone/fishing”⁹⁹⁹), Mauritians focused on joint management of resources. This is reflected in the note of the meeting which recorded a:

“short discussion about access to fishing rights. The Mauritians wanted to manage jointly the resources....seemed a bit surreal when we’d spent the last half hour discussion [sic] the possible ban on any fishing in the territory but the Mauritians had warned us that this would remain an agenda item¹⁰⁰⁰. We agreed to consider the idea but would need to take into consideration the implications of a proposed marine protected area”¹⁰⁰¹.

A.125 Mr Roberts confirmed that there was a short discussion under the heading of “fishing rights”:

“the Mauritians wanted us to consider joint issuing of fishing licences, but this – as we understood – related not to Mauritius’ ‘fishing rights (it was not about fishing but about the licensing process), but to their wish to establish a sovereignty win¹⁰⁰².....No objection to the MPA proposal was raised by Mauritius on the grounds of ‘fishing rights’ under the 1965 understanding and the issue of free licences to Mauritian-flagged vessels”¹⁰⁰³.

A.126 Ms Yeadon explains as follows:

⁹⁹⁸ UKCM, Annex 101 at para. 10. See also UKCM, Annex 99 “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” (at para. 5).

⁹⁹⁹ MR, Annex 139 and Annex 140. The item agenda was stated to be “fisheries issues” in an internal Information Paper by the Prime Minister of Mauritius, Second Meeting at Senior Officials’ Level between Mauritius and United Kingdom on the Chagos Archipelago, CAB(2009) 624, 12 August 2009 at MR, Annex 144.

¹⁰⁰⁰ Mr Roberts explains that “We understood, from our discussions with Mauritian officials beforehand, that this particular item remained on the agenda because of its importance, in view of connection to maintenance of Mauritius sovereignty, to one member of the Mauritian delegation” (third witness statement at para. 24, **Annex 74**).

¹⁰⁰¹ UKCM, Annex 101 at para. 12. See also UKCM, Annex 99 Egram from the British High Commissioner, Port dated 21 July 2009 “At Mauritius’s request we agreed to further investigate their suggestion to set up a mechanism to look into the joint issuing of fishing licences for BIOT waters, although discussion on this point (tabled on the agenda ahead of time) was somewhat overtaken by the large issue of a possible marine reserve....which might render the issue of fishing licenses redundant” (at para. 2).

¹⁰⁰² Third witness statement at para. 24. (**Annex 74**)

¹⁰⁰³ Third witness statement at para. 26. (**Annex 74**)

*“They did not raise the subject of “fishing rights” under the 1965 understanding or free fishing licences for Mauritian-flagged vessels in their response, which I am sure the Mauritian delegation would have done if that had been a concern for them. The proposal for joint issuing of fishing licences was on the agenda because joint management of the fishery would be an acknowledgment of Mauritian sovereignty so the Mauritians were keen to keep the issue live for political reasons. There was no discussion of fishing outside the subject of the joint issue of fishing licences”*¹⁰⁰⁴.

A.127 This is consistent with Ms Yeadon’s submission after the announcement of MPA that:

*“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”*¹⁰⁰⁵.

A.128 Ms Yeadon and Mr Roberts account of these talks are supported by the Mauritius internal information paper now deployed by Mauritius in which the Prime Minister informed colleagues of the outcome of the July 2009 talks¹⁰⁰⁶. He stated that:

“At the second round of talks the Mauritian side reiterated the need for the joint exploitation and management of marine resources in in the region and fishing licences to be issued jointly....During discussions in the second round of talks, the Mauritian side reiterated the proposal it made in the first round of talks in the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago”.

No reference was made to the 1965 fishing understanding.

A.129 Similarly, Ms Yeadon recounts her discussions with Mr Alain Talbot of the Talbot Fishing Company at this time; Mr Talbot is not reported as asserting any fishing rights¹⁰⁰⁷.

¹⁰⁰⁴ At para. 14. (**Annex 73**)

¹⁰⁰⁵ MR, Annex 164 (at para. 11). Mauritius has highlighted that in the preceding sentence Ms Yeadon says that “Mauritius may raise the issue of their historical fishing rights in the Territory” (MR, para. 3.74 (ii)). Ms Yeadon’s understanding of the “fishing rights” in the 1965 understanding has been set out at paragraph A.103 above. Consistent with that understanding Ms Yeadon notes in this submission that “Over the years, these rights have come to mean free fishing licences to Mauritian-flagged vessels upon application....Very few Mauritian-flagged vessels have fished in the Territory’s Fishing (Conservation and Management) Zone” (para. 11).

¹⁰⁰⁶ This document was circulated by the Prime Minister of Mauritius, Second Meeting at Senior Officials’ Level between Mauritius and United Kingdom on the Chagos Archipelago, CAB(2009) 624, 12 August 2009: MR, Annex 144. See at p. 4, item (iv).

¹⁰⁰⁷ Third witness statement at para. 15. (**Annex 73**)

Communications between Mauritius and the United Kingdom following bilateral talks in July 2009

A.130 The MPA was the subject of subsequent communications:

- a. In an email from the British High Commissioner dated 13 October 2009 relaying a conversation with Mr Boolell, the Foreign Minister of Mauritius, Mr Boolell said that the “*opposition (Berenger) would seek to portray it as the UK going ahead with the MPA in the face of Mauritius’ sovereignty over the island*”¹⁰⁰⁸. On the subject of fishing it refers only to the “*shared commitment to protecting the commercial viabilities of fisheries in the Indian Ocean: Mauritius as a seafood hub*”. No reference is made to the 1965 understanding.
- b. In an email from the British High Commissioner dated 23 October 2009 relaying a conversation with Mr Kailash Ruhee, the Mauritian Prime Minister’s Chief of Staff, Mr Ruhee was described as “*1000% committed to the idea*” of the MPA. No reference was made to the 1965 understanding¹⁰⁰⁹.
- c. A *Note Verbale* from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the United Kingdom Foreign and Commonwealth Office dated 10 November 2009 did not refer to the 1965 understanding¹⁰¹⁰.
- d. A record of telephone call between the United Kingdom Foreign Secretary and the Mauritian Prime Minister dated 10 November 2009 referred to the issue of resettlement, but not to any separate claim based on the 1965 understanding; Mr Ramgoolam stated “*that the consultation document completely overlooked the issue of resettlement. A total ban on fishing would not be conducive to resettlement. Neither was there any mention of the sovereignty issue....PM Ramgoolam repeated his point that a ban on fishing would be incompatible with resettlement*”¹⁰¹¹.

¹⁰⁰⁸ UKCM, Annex 103.

¹⁰⁰⁹ UKCM, Annex 104. Consistent with this account, the memorandum dated 18 July 2013 from Kailash Ruhee, Chief of Staff of the Prime Minister of Mauritius to the Secretary to Cabinet, Mauritius (MR, Annex 178) refers to this meeting and makes no reference to fishing rights or the 1965 understanding: “*I did have a meeting with the then British High Commission at his request, and I told him that nobody would dispute the setting up of an MPA on strictly environmental ground [sic] but that we should look into all its implications including the issue of sovereignty of Mauritius.....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....*”

¹⁰¹⁰ MM, Annex 151. See also *Note Verbale* to the British High Commission at MM, Annex 153.

¹⁰¹¹ UKCM, Annex 106 (at fourth para.).

- e. On 23 November 2009 a *Note Verbale* from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the United Kingdom Foreign and Commonwealth Office stated that “*The Government considers that an MPA project....should not be incompatible with the sovereignty of the Republic of Mauritius....and should address the issues of....access to the fisheries resources....A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of or progress in the talks, on the sovereignty issue*”¹⁰¹². This reference to access to fisheries resources was in the context of sovereignty concerns, not fishing rights based on the 1965 understanding¹⁰¹³.
- f. The Mauritian internal record of a meeting between the United Kingdom and Mauritian Prime Minister focused on the issue of sovereignty and simply stated “*Mauritian fishing rights have to be taken into consideration*”¹⁰¹⁴. Again, there was no reference to the 1965 understanding.
- g. Before the Mauritian Parliament, the Mauritian Prime Minister relayed that during talks with the United Kingdom Prime Minister:

*“I stressed that....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”*¹⁰¹⁵.

¹⁰¹² MM, Annex 155. Similarly see the letter dated 19 February 2010 from the Secretary to Cabinet and Head of the Civil Service, Mauritius to the British High Commissioner, Port Louis (MR, Annex 162) stating that “*Any proposal for protection of marine environment of Chagos Archipelago “needs to be compatible with an meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issues of resettlement and access by Mauritians to must address issues of access by Mauritians to fisheries resources in that area”*”.

¹⁰¹³ Similarly see MM, Annex 157. The letter from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the United Kingdom Secretary of State for Foreign and Commonwealth Affairs dated 30 December 2009 stated that “*the issues of resettlement.... access to the fisheries resources and the economic development of the islands in a manner that would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos Archipelago are matters of high priority to the Government of Mauritius. The exclusion of such important issues in any discussion relating to the proposed establishment of a Marine Protected Area would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago...*”. Both MM Annex 155 and Annex 157 are cited at MR, fn. 212 as supporting the submission that Mauritius raised the issue of fishing rights in bilateral exchanges with the UK. If one looks more closely at what in fact was being raised, it is apparent that the 1965 understanding is not referred to and that the reference to access to fisheries resources was in context of sovereignty concerns. In a letter from the Mauritius High Commission to the Times newspaper at this time (30 December 2009) the objection to the MPA is solely with reference to its sovereignty claim. (Annex 61)

¹⁰¹⁴ MR, Annex 148.

¹⁰¹⁵ MR, Annex 151.

A.131 Subsequent references to “access to fisheries resources” were accordingly understood to be with reference to Mauritius’ sovereignty claim and the issue of joint fishing licenses as a statement of sovereignty¹⁰¹⁶. See for example the Foreign and Commonwealth Office internal submission dated 30 March 2010 which stated that “*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 United Kingdom Government policy on the territory as the Mauritians know*”¹⁰¹⁷. Ms Yeadon who prepared this briefing was clear that the reason this briefing did not refer to fishing rights was “*because Mauritius never raised them and my belief was that Mauritian did not have any legally enforceable fishing rights stemming from the 1965 undertakings*”¹⁰¹⁸.

A.132 As pointed out by Mauritius in its Reply, the issue of Mauritian fishing rights was sometimes mentioned in general terms. However, both Mr Roberts and Ms Yeadon, the officials responsible for the preparation of the consultation document, are clear that they did not consider Mauritius to have fishing rights that would preclude a no-take MPA¹⁰¹⁹.

2010: Mauritius’ response to the establishment of the MPA¹⁰²⁰

A.133 Consistent with its stance in the discussions during the consultation process, the Mauritius response to the announcement of the MPA on 1 April 2010 referred to its sovereignty, but made no reference to fishing rights under the 1965 understanding¹⁰²¹. This is evident from the following:

¹⁰¹⁶ For example see MM, Annex 162, 19 February 2010 Mauritius to British High Commissioner stating that proposal for protection of marine environment of Chagos Archipelago “*needs to be compatible with an meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issues of resettlement and access by Mauritians to must address issues of access by Mauritians to fisheries resources in that area*”. This is cited at MR, fn. 212 as supporting the submission that Mauritius raised the issue of fishing rights in bilateral exchanges with the UK. If one looks more closely at what in fact was being raised, it is apparent that the 1965 understanding is not referred to and that the reference to access to fisheries resources was in the context of sovereignty concerns.

¹⁰¹⁷ **Annex 65.**

¹⁰¹⁸ See Joanne Yeadon’s third witness statement at final para. See also Mr Roberts third witness statement at para. 34. (**Annex 74**)

¹⁰¹⁹ See Bancoult at para. 159. In Ms Yeadon’s email of 1 April 2010, she anticipated that the Mauritians would insist “*that any MPA must deal with sovereignty and resettlement*”. She did not refer to the 1965 understanding (MR, Annex 157, at second page).

¹⁰²⁰ See also paras. 3.66 to 3.67 of the UKCM.

¹⁰²¹ Similarly, the collation of responses on “fishing interests” does not refer to legal obligations pursuant to the 1965 understanding. MRAG refers to “Mauritian historical fishing rights” under the heading “political factors”: UKCM, Annex 122.

- a. The record of the telephone conversation off 1 April 2010 contained in an email from the Global Response Centre¹⁰²²;
- b. The Note of Protest from the Mauritius Foreign Ministry dated 2 April 2010¹⁰²³;
- c. The letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Hon. Edward Davey MP¹⁰²⁴;
- d. The letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Rt. Hon. William Hague MP¹⁰²⁵;
- e. A meeting with the British Foreign Secretary in June 2010¹⁰²⁶;
- f. The Mauritian Parliamentary Debates in July 2010 which state that:

*“The creation of a MPA 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...”*¹⁰²⁷

Conclusion

A.134 With reference to the documentary record set out in detail above, the correct position is that the 1965 understanding was a non-binding understanding that the United Kingdom has sought over the years in good faith to give effect to, in circumstances where Mauritius has demonstrated minimal interest in the actual exploitation of its “fishing rights”.

A.135 Mauritius claims that its “*overarching position on sovereignty placed limitations on its ability to pursue fishing rights as a separate issue*”¹⁰²⁸. However, as noted at paragraph 3.75 of this Rejoinder, its position on sovereignty would not have prevented a robust objection on the separate basis of the 1965 understanding (as it now adopts in its pleadings in

¹⁰²² UKCM, Annex 114.

¹⁰²³ MM, Annex 167.

¹⁰²⁴ MR, Annex 159.

¹⁰²⁵ MR, Annex 160.

¹⁰²⁶ MR, Annex 161 (Extract of Information Paper CAB (2010) 295 – Official Mission to France and the United Kingdom, 9 June 2010).

¹⁰²⁷ MR Annex 163.

¹⁰²⁸ MR para. 3.30.

these proceedings)¹⁰²⁹. Yet the documentary record illustrates that right from the start in its response to the MPA proposal Mauritius has taken its stand on the ground of sovereignty and not with reference to the 1965 understanding.

¹⁰²⁹ For example, Mauritius could have made cumulative objections, and it could have proposed discussions on a without prejudice basis. It is recalled that discussions in the BMFC and the UK-Mauritius bilateral talks were conducted under the “sovereignty umbrella” (UKCM, fn. 170, para. 5.34 (f)), para. 7.52 and para. 7.56).