PERMANENT COURT OF ARBITRATION

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

x

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

-x

PCA Reference MU-UK

Volume 5

HEARING ON JURISDICTION AND THE MERITS

Monday, April 30, 2014

Pera Palace Hotel
Mesrutiyet Cad. No:52 Tepebasi, Beyoglu
Conference Room Galata II & III
34430, Istanbul-Turkey

The hearing in the above-entitled matter convened at 9:30 a.m. before:

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Well, good morning, ladies and gentlemen, and I hope that the break has been productive for you all and that you're returning now to the oral submissions of the United Kingdom with vigor.

But before I call upon the Agent for the United Kingdom, I want to note that the Tribunal has received a communication from the United Kingdom regarding the publication of the annexes to its Counter-Memorial and Rejoinder. I note the response of Mauritius requesting time to consider this, but in the meantime I've been advised informally that the Parties will get together at some time in the near future and see if they can arrive at an agreement as to the contents of the annexes, and so the Tribunal will await the outcome of those informal consultations.

And I think that's all that I wanted to say by way of announcement or introduction to the resumption of these proceedings, and I call upon Mr. Whomersley, Agent for the United Kingdom.

Thank you, Mr. Whomersley.

MR. WHOMERSLEY: Thank you, Mr. President, and good morning, everyone.

1. Introductory observations

Christopher Whomersley: Agent for the United Kingdom

1. Mr. President, Members of the Tribunal, it is obviously a great privilege for me to be appearing before you as Agent for the United Kingdom in this case. The Attorney General of the United Kingdom has already introduced our case, last Tuesday, and we have since listened with great attention to the first round of oral pleadings of Mauritius. I will be making a few brief opening observations, before outlining the structure of our oral presentation this week.

2. Mr. President, as an introductory point, we have submitted responses to questions 1 to 8 which were posed by Judge Wolfrum. These responses are from the Administrator of the British Indian Ocean Territory and are at Tab 1 to the folder. At Tab 2 you will find the text of the latest Fisheries Ordinance enacted in BIOT. Obviously if there are any other questions or requests for clarification we will endeavour to obtain responses to them.

3. Mr. President, we see this as an appropriate time to take stock, given that we have now seen how Mauritius puts its case, and indeed have now seen some of that case for the first time.

4. As we see it, Mr. President, Mauritius has chosen to put a case of extremes in extreme terms:

    a. Professor Sands last week opened by saying that we have used extreme language in our written pleadings - adjectives like 'spurious' and so forth - which we find perplexing.

    b. It is not just that Mauritius, for what it is worth, tends towards rather more extreme language; more seriously it alleges abuse of rights on the basis of minimal evidence; it takes pot shots at the scientific basis for the MPA, without any evidence at all to back those up; and it says in plain terms in its written pleadings that we have suppressed evidence on a wafer-thin basis, and then pulls back from this without a murmur.

    c. To similar effect, Mauritius takes every opportunity to say that the UK internal documentation was not disclosed in these proceedings, hints at lack of candour, but then does not disclose its own internal documents or offer any explanation as to what has become of these.

5. Now, Mr. President, there are issues around all of these points that we will develop where appropriate over the next few days. But I have to say that in truth we see all of this as so

much background noise. We are quite confident that this Tribunal, like any international court or tribunal, will focus on the real issues in the case.

6. Mr. President, it is the jurisdictional issues, and in particular the issue as to your jurisdiction to determine sovereignty over BIOT, which we continue to see as the central, indeed the real, issue in this case.

a. And the first, the most obvious, and the most serious, respect in which Mauritius has adopted an extreme, and uniquely extreme, position is this. It has been unable to find any support for the proposition that the territorial sovereignty of a coastal State can be put in issue and determined wherever the coastal State exercises rights under the 1982 Convention – there is no support in State practice or, despite its professed admiration for certain members of the UK team, in the views of commentators.

b. Now, Mr. President, of course, Mauritius says you are only deciding the case before you, and that its case is *sui generis* – so you needn't trouble yourself with the ramifications of what you are asked to decide in this brave new world that Mauritius invites you to inhabit. But, Mr. President, which claimant State could not say that its case is unique and, more important still, what difference does the assertion of uniqueness make to Mauritius' analysis of the Convention? The whole Mauritian thesis is based on what it characterises as the ordinary meaning of Article 288(1), as well as the argument that if it is not expressly excluded by Articles 297 and 298, then a given matter of interpretation or application is within Part XV jurisdiction. That is a position on interpretation which, if correct, is of entirely general application. The simple point is that Mauritius is not putting forward a reading of Article 288(1) that ties into its protestations on *sui generis*. Mauritius cannot identify any particular element of Article 288(1) that applies only where there has allegedly been an internationally unlawful detachment of territory from a former colony.

c. Mauritius also says the claim is not all about its case on sovereignty. We disagree, and we note that the answer given by Mauritius to Judge Wolfrum's question on how the different elements to its claim fit together demonstrated this in helpfully clear terms. And this is because Mauritius explained that, if the sovereignty issue is decided in its favour, there is nothing left; there is no residual, let alone any substantial, UNCLOS claim. And that is one illustration of how its case on jurisdiction is truly radical, is quite different from a maritime delimitation case where, for example, an issue of identifying the precise terminus of a land boundary may arise in truly incidental fashion.

7. Mr. President, let me then say something on the way the claim has been put on the merits, although of course we say that you will never get there.

8. We will be showing how the various contentions on the merits do not fit the documents, which the Tribunal is evidently reading with great care. But there are five elements to the merits that we are either now hearing for the first time, or that have been developed with a wholly new focus, and I want to say a word on each of these.

9. First, Mr. President, there has been an emphasis on the Chagossians that did not feature in the written pleadings. The Attorney General fully explained the British Government's position during his opening speech, and I would refer the Tribunal back to that. But the point I want to note here is that, although this appeared to be taken as a given last week, the interests of Mauritius are not the same as those of the Chagossians.

10. Secondly, we have seen the alternative case on sovereignty, the 'a coastal State' case, being developed for the first time. It was developed with much attention to alleged rights of Mauritius arising from the understandings of 1965, but with no close analysis of how the 1982 Convention might establish the possibility of there being more than one coastal State in respect of the same land territory. And we noted how difficult it is, as the Respondent, to pin down the argument, as the way it was put appeared to straddle the issues of sovereignty

and rights to fish or to oil and minerals. But, so far as concerns jurisdiction, there is just no concept of a straddling case. Either this is a case that requires a determination on sovereignty, albeit some form of reversionary sovereignty, in which case it faces exactly the same difficulties as Mauritius' claim 'we are the coastal State'; or it is a claim that turns on interference with fishing rights and the like, through the declaration of the MPA, which falls at the jurisdictional hurdle of Article 297.

11. Mr. President, third, there is the extraordinary emphasis on what former Prime Minister Gordon Brown is alleged to have said at a private meeting in November 2009 – the so-called 'put it on hold' point. Now, if this had been a central plank to the Mauritian claim, a perceived undertaking that for example meant that it was futile to proceed with any exchange of views, then we might have expected to have heard something about this in Mauritius' Notification of Claim and certainly an extended exposition in the Memorial. But no. Well, Gordon Brown did not say what the Mauritian Prime Minister understood him to have said. Whatever counsel for Mauritius may say, there must have been a misunderstanding. But once the British Government became aware of it, the Foreign Secretary wrote to his Mauritian opposite number - and less than three weeks later - to set the record straight. And, of course, to suggest that we should have called Mr. Ramgoolam as a witness is quite fanciful.

12. Fourth, Mr. President, Mauritius made great play, last week, of the statement in our Rejoinder that "Mauritius is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to BIOT."[1]. Michael Wood will deal with this more fully tomorrow. I should just like to make clear that this statement did not represent any 'new position'. It was included in the Rejoinder as part of our legal argument in response to Mauritius' repeated argument that "[t]he absence of protest on the part of the UK appears to

[1] UKR, para. 8.39.

be a clear recognition that Mauritius has sovereign rights in relation to the continental shelf."[2]

13. Mr. President, the United Kingdom offered to make a joint submission with Mauritius to the Commission on the Limits of the Continental Shelf. But Mauritius declined to pursue this. We understand that Mauritius may be in a position to make a full submission later this year. If so, we look forward to discussing with Mauritius how this might be taken forward, although I should make clear here that the United Kingdom has absolutely no plans to explore for mineral resources in the seabed off BIOT.

14. In these circumstances, we can see no basis for Mauritius to seek to introduce a new dispute into the present proceedings, and certainly there is no basis for the Tribunal to make the kind of prospective order that we are told Mauritius that will be seeking.

15. Finally, Mr. President, our opponents have made much of the alleged absence of legislation to enforce the MPA. This is incorrect. As is made clear by the Administrator of BIOT in his answers to Judge Wolfrum's questions at Tab 1, the existing BIOT legislation is sufficient to implement the ban on commercial fishing. At Tab 2 is the recent legislation in BIOT to strengthen the enforcement powers by providing for on-the-spot fines for fishermen caught fishing illegally. And work is continuing to consolidate and improve the various pieces of relevant BIOT legislation. But this does not affect the fact that BIOT legislation does exist which enables the ban on commercial fishing to be implemented.

16. Mr. President, in conclusion, let me say just a few words about our first round of oral pleadings. The aim will be, so far as possible, to respond to what our friends opposite said last week, and of course to the questions addressed to us by Members of the Tribunal. Unlike Mauritius, we shall deal with jurisdiction before the merits. Our objections to

[2] UKR, para. 7.51.

jurisdiction are serious and, in our view, decisive. That is so both as regards Mauritius' sovereignty claims and as regards its non-sovereignty claims.

17. You will find the outline structure of our submissions at the front of your folders. And, as you will see, we have divided our presentation into four parts.

18. In the first Part we shall addresses the facts. Michael Wood will begin with the geographical, historical and constitutional background. Penelope Nevill will then take you through the facts relating to the establishment of BIOT MPA, showing what actually happened as opposed to the picture drawn by Mauritius. Amy Sander will then explain the position on Mauritius' claims to fishing rights over the years, taking you through the evidence. That part of our presentation will take up this first day.

19. On the second day, Part II of our presentation will deal with the subject which actually lies at the heart of this case, namely Mauritius' 'sovereignty' claim. Michael Wood and Sam Wordsworth will repeat our firm conviction that a court or tribunal under Part XV does not have jurisdiction over questions of territorial sovereignty such as raised by Mauritius.

20. Michael Wood will then address points made by Mauritius last week in connection with its sovereignty claim, particularly the arguments based on self-determination, and what one might call its 'attributes of a coastal State' argument. He will do so, not because you will need to decide these matters – in our firm view you will not; nor to show that Mauritius' arguments are baseless, though they are; but in order to reinforce the point that these are issues that do not concern the interpretation or application of the Convention.

21. Mr. President, in the third part, we will explain that the Tribunal, on separate bases, does not have jurisdiction over any of the claims. This is for two reasons. Michael Wood and Sam Wordsworth will explain that Mauritius has not established that the preconditions in Article 283 of the Convention has been met. And Alan Boyle will show that the claims are excluded by the automatic limitations in Article 297.

22. Finally, in Part IV, we show that Mauritius' arguments both on fishing rights and on the substantive provisions of the Convention fail, as well as the extraordinary claim based on Article 300. Sam Wordsworth will cover the 1965 understandings with a particular emphasis on fishing rights, and Alan Boyle will deal with the other matters.

23. Mr. President, Members of the Tribunal, that concludes my introductory remarks, and, if you would, I'd be grateful if you could call Michael Wood to the podium.

Thank you very much.

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

And I give the floor now to Sir Michael Wood.

2. Geographical, historical and constitutional background

Sir Michael Wood

Mr. President, Members of the Tribunal,

Introduction

1. It is an honour to appear before you, yet again, and to do so on behalf of the United Kingdom.

2. What I propose to do in this speech is to recall some of the geographical, historical and constitutional background to the case. It is important, in our submission, for the Tribunal to have a clear picture of this background, since it is fundamental to a proper appreciation of the issues which Mauritius seeks to raise in these proceedings under annex VII of the Law of the Sea Convention.

3. I shall cover four main points:

First, that the British Indian Ocean Territory, which I shall refer to as the 'BIOT', the Chagos Archipelago, is one of the most remote island groups in the world.

Second, that until the establishment of the BIOT in 1965 the islands of the Chagos Archipelago were administered as a Dependency of Mauritius.

Third, that in 1965 Mauritian Ministers gave their agreement to the 'detachment' of the Chagos Archipelago. In giving their agreement, they were not - as is now asserted by Mauritius - acting under duress. Their consent was not questioned for many years.

And, *fourth*, that Mauritius itself only purported to include the Chagos islands within the territory of Mauritius, under its own law in 1982; that is more than 14 years after Independence, and it amended its Constitution only in 1992.

I. The British Indian Ocean Territory is one of the most remote island groups in the world[3]

4. Mr. President, on the screen you will see a sketch-map of the Indian Ocean[4]. It is also in the folders at Tab 3.

5. The Indian Ocean is, together with the Atlantic and the Pacific, one of the three great oceans of the world. It has a total area of approximately 74 million square kilometres. You will see the Island of Mauritius in the southwest of the Ocean, near the island of Réunion, which is an overseas Island of Mauritius in the southwest of the Ocean, near the island of Réunion, which is an overseas *département* of France. These islands, Mauritius and Réunion, lie directly east of Madagascar. Then, far to the north east, in the northern part of the Indian Ocean, approximately half way between the coasts of Africa and Indonesia, lies the BIOT, also known as the Chagos Archipelago. The BIOT lies due south of the Maldives and about 1,000 nautical miles south of the Indian subcontinent. The distance between the island of Mauritius and the BIOT is approximately 1,200 nautical miles; that is over 2,200 kilometres. The Republic of Mauritius itself includes a number of scattered islands. The distance between the BIOT and the nearest Mauritian island, Agalega, is some 962 nautical miles. Agalega itself is about 580 nautical miles from the island of Mauritius.

[3] UKCM, paras. 2.2-2.15.
[4] UKCM, Figure 2.1.

6. Going due west from BIOT there is approximately 1,900 nautical miles of ocean before one reaches land near the island of Zanzibar in the Republic of Tanzania. And going east it is some 1,500 nautical miles until one reaches the coast of Sumatra. It is only to the north that the 200 mile zone around the BIOT overlaps with that of another country, the Republic of Maldives. Between the BIOT and the southernmost islands of Maldives the distance is 280 nautical miles. By contrast, the 200 mile zones of BIOT and of Mauritius lie far apart, as can be seen from the sketch-map which has now appeared on the screen[5] and which you also have at Tab 4. At their nearest point, the 200 mile zones of Mauritius and the BIOT are about 500 nautical miles apart.

7. The British Indian Ocean Territory, as I have said, is one of the most remote island groups in the world. At this point, I was going to show you a map that is to be found on page 282 of the latest edition of *Brownlie's Principles of International Law*, but, unfortunately, the copy in your folders at Tab 5 has not come out clearly enough. So I can only suggest that you purchase the book. I have a copy available if anyone wishes to study it but it does show quite clearly how isolated BIOT and its 200 mile zone is. I apologize for the copy.

8. Not only are the islands of the BIOT remote, they are all quite small and dispersed, as can be seen from the extract from an Admiralty Chart now on the screen[6] and at Tab 6. There are about 58 coral islands altogether, some situated on the Great Chagos Bank, which is the world's largest drying coral atoll; others on atolls to the north and the south. The largest island, Diego Garcia, lies not on the Bank, but some 30 nautical miles to the south east, and it has an area of about 30 square kilometres. The total land area of all the islands of the Archipelago is less than 60 square kilometres.

9. Mr. President, this would be an appropriate point to respond to Judge Wolfrum's question no. II.

[5] UKCM, Figure 2.2.
[6] UKCM, Figure 2.3.

Judge Wolfrum asked:

> "*II: What is, in the view of both parties, the Law of the Sea status of Diego Garcia and the other islands of the archipelago? I raise this question*[, he said,] *from the point of view that Diego Garcia has no permanent population anymore and that – according to a report of 2002 by Posford Haskoning Consultant (initiated by the FCO) – a resettlement of the population would not be feasible."*

10. Mr. President, we have noted the response given by Mauritius on Friday[7], and think the Parties are in basic agreement on the status of the islands for the purposes of Article 121 of the Convention.

11. In the United Kingdom's view, the status under the Law of the Sea Convention of Diego Garcia and the other islands of the BIOT is that they are islands within the meaning of paragraph 1 of Article 121 of the Convention, and they are not "[r]ocks which cannot sustain human habitation or economic life of their own" within the meaning of paragraph 3. While there may be individual features that fall within paragraph 3, in general, in the words of paragraph 2, the exclusive economic zone and the continental shelf of the islands of the archipelago are determined in accordance with the provisions of the Convention applicable to other land territory. It is on this basis that zones out to 200 nautical miles have been established around the BIOT, and that consideration has been given to the delineation of the outer limits of the continental shelf beyond 200 miles.

12. The Attorney General recalled last Tuesday[8] that, as part of a review of the United Kingdom's policy towards BIOT, the Government are looking again at the question of resettlement and hope to be able to reach conclusions in the early part of next year.

13. Mr. Sands on Friday referred to Mauritius' Maritime Zones Acts and Regulations, which he distributed[9]. For the record, I must make it clear that the United Kingdom has protested

[7] Transcript, Day 4, pp. 423-424 (Sands).
[8] Transcript, Day 1, p. 43, lines 5-25 (Grieve).

Mauritius' purported action in respect to the Chagos Archipelago. You will find at Tab 7 our Note Verbale of 19 March 2009, which was published in the Law of the Sea Bulletin[10]. I won't ask you to read it now, but it states the United Kingdom position very clearly and very firmly.

14. I hope that answers Judge Wolfrum's question.

ARBITRATOR GREENWOOD: Sir Michael, might I ask a follow-up question, but I don't know whether Judge Wolfrum was going to ask one first.

ARBITRATOR WOLFRUM: No, I leave it to you.

ARBITRATOR GREENWOOD: I have brought Brownlie's Principles of International Law in its latest edition, thereby enriching one of the counsel for your adversary, though not likely by very much. It strikes me that the line to the north, the northern boundary of the EEZ and continental shelf around the Chagos Archipelago, looks as though it is a median line with Maldives. Can you just clarify for me: Was that an agreed boundary with the Government of the Maldives, or is that merely an approximation?

SIR MICHAEL WOOD: Subject to correction by those behind me, I think the position is that there has not yet been an agreement with the Maldives. I assume that the author of this map, Dr. Robin Cleverly, Head of the UKHO Law of the Sea, was just indicating on this map where, roughly speaking, the line might be.

ARBITRATOR GREENWOOD: Thank you.

And the other follow-up question concerns both parties. Leaving aside for the moment any question about who is entitled to do what in relation to these waters, is the maritime boundary drawn by Mauritius around the islands and the one maritime boundary drawn by the

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[9] Transcript, Day 4, p. 423, paras. 7 and 8 (Sands).

[10] United Kingdom of Great Britain and Northern Ireland: Note verbale dated 19 March 2009 concerning a deposit of charts and lists of geographical coordinates by the Republic of Mauritius LOS Bulletin No. 69, p. 110. http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin69e.pdf

United Kingdom around the islands, are they roughly the same or is there any significant difference between the two Parties over what maritime entitlement appertains to these islands, irrespective of which State benefits from it?

SIR MICHAEL WOOD: I think we will get back to you on that, but as a quick answer, my understanding is that they are roughly the same. I think there may be some different features that have been taken into account, but we will get back on that question, if we may.

ARBITRATOR GREENWOOD: Thank you very much.

ARBITRATOR WOLFRUM: One brief question, Sir Michael.

I read through the response of the BIOT Administrator, and at one point there is a brief reference that there is a feasibility study, obviously been undertaken or is in preparation, for the resettlement. When do we expect this study to be finalized? Before we end this case or after?

SIR MICHAEL WOOD: We'll get back to you with more specific information, but, as I've just said, I think it is expected next year. Whether that's before or after you finalize the case, it's up to you.

II. The islands of the BIOT were administered as a Dependency of Mauritius

15. Mr. President, if I may, I now turn to the point that the islands of the BIOT were administered as a Dependency of Mauritius. The geographical reality, which I just described, which in fact our friends opposite described in very similar terms last week, goes a long way to explaining the history of the islands that now form the BIOT, and the arrangements made for their governance over the last two centuries. The main point I want to stress is that, as explained in our written pleadings, the islands were previously administered as a Dependency of Mauritius. Ms. Macdonald suggested that this argument

had been concocted for the purposes of these proceedings[11]; that is not the case. The position had, for example, been made clear by British representatives at the United Nations in the debates in 1965[12]. Despite now admitting that the argument is not new, Mauritius still feigns surprise[13].

16. Mr. President, I want to make it clear that we have not raised the 'Dependency' point because we expect this Tribunal to enter into the finer points of British colonial constitutional law and history, and we acknowledge that the terminology used was not always consistent; those writing memorandums, et cetera were not necessarily well versed in the details of constitutional practice. The point we are making is a broader one; it's part of the factual background. The important point is that the Chagos Archipelago was attached to Mauritius for reasons of administrative convenience, not because it was seen as part of a territorial unit. Even if in some contexts the Archipelago is treated as if it were part of Mauritius, that does not detract from this basic point.

17. The early history of the islands has been covered in the written pleadings[14]. They were explored and indeed named by the Portuguese in the sixteenth century. France then occupied them in the eighteenth century, and administered them as *Dépendences* of the *Île de France*, as Mauritius was then known. France ceded the *Dépendences* to Great Britain by the Treaty of Paris of 1814[15]. From that date on, under international law, it is the United Kingdom that has territorial sovereignty over the islands, having replaced France as the sovereign.

18. As a matter of British constitutional law, from 1814 to 1965, that is, for a period of a hundred and fifty years, the Chagos Islands continued to be governed not as an integral part of

[11] Transcript, Day 2, p. 82, paras 12-13 (MacDonald).
[12] E.g., MM, Annex 36.
[13] Transcript, Day 2, p. 83, para 14 (MacDonald).
[14] UKCM, paras. 2.17-2.32.
[15] UKCM, Annex 1.

Mauritius but as a Dependency. And we showed in our written pleadings the various laws which indicate that they were extended to the Dependency, that the Dependency was mentioned separately, that specific provisions made for visiting magistrates and the like, and the constitutional concept of a 'dependency' was explained in the Counter-Memorial[16].

19. As a general matter, and this was the case with the Chagos Archipelago, when one British territorial unit is described as a 'dependency' of another, the two remain separate, at least for internal purposes, whatever practical arrangements may be made for their governance. A current example of the use of the term 'Dependency' in British constitutional usage are the three 'Crown Dependencies': the Bailiwick of Guernsey, the Bailiwick of Jersey, and the Isle of Man. As is explained in the *Max Planck Encyclopedia of Public International Law*, these are "three insular territories under British sovereignty as Crown dependencies. Constitutionally" – I'm quoting – "the three are neither part of the metropolitan territory of the United Kingdom nor British overseas territories."[17] Coming closer to Mauritius, in the appendix to Chapter II of our Counter-Memorial we referred to the case of the Esparses Islands[18]. These were administered as Dependencies of Madagascar before the latter's independence from France in 1960. Again there is an illuminating article in the *Max Planck Encyclopedia*[19].

20. We set out the constitutional position of the Chagos Islands as Dependencies of Mauritius in our written pleadings[20]. In its Reply, Mauritius essentially limited itself to the bald assertion that "the Chagos Archipelago has always been an integral part of Mauritius."[21] It gave no authority for this assertion. In fact, Mauritius has said nothing in its written pleadings, or last

[16] UKCM, paras. 2.19-2.32.

[17] D.H. Anderson, "Channel Islands and Isle of Man", in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), Vol. II, pp. 78-81, at para. 1.

[18] UKCM, A2.14.

[19] A. von Ungarn-Sternbeg, 'Eparses Islands', in R. Wolfrum ed., *Max Planck Encyclopedia of Public International Law* (2012), vol. III, pp. 597-600 (UKM, Authority 106).

[20] UKCM, paras. 2.19-2.32; UKR, paras. 2.12-2.20.

[21] MR, para. 2.7.

week, that in our view casts doubt on the constitutional position which we have described. Nor could it. It is undisputed that the Chagos Archipelago was a Dependency. The one or two references to an occasional inaccurate description of the constitutional status referred to by Counsel for Mauritius[22] last week cannot change or cast doubt on the constitutional position. Such inaccuracies are not unknown in even the most polished of bureaucracies.

21. Mauritius seems now to be arguing that the constitutional position is irrelevant for the purposes of the international law of self-determination.[23] But that cannot be right. In so far as that law refers to a territorial unit it must take the units established under domestic law, the units as they appear under domestic law. The position of the Chagos Archipelago vis-à-vis the Colony of Mauritius was a matter of British constitutional law. The Select Committee of the Mauritius Legislative Assembly, which reported in June 1983, referred to the 'long association'[24] of the Dependency with Mauritius; 'association' is not a bad description. To refer to an 'association', a 'close link', a 'close legal nexus' is not to say that one territory is an integral part of the territory of another. Another way that it's often put is to say that the Chagos Archipelago was 'attached' to Mauritius for administrative purposes. In their ordinary dictionary meaning, the words 'attach' and 'detach' do not, as was suggested last week[25], indicate that one thing becomes part of another. Quite the contrary. 'Attach' means 'to fasten, secure, or join: *attached the wires to the post* is the example given in the online dictionary that I looked at.[26]

22. There is a basic distinction, overlooked by Mauritius, between the arrangements that are put in place for the administration of a territory, the day-to-day administration of a territory, and its territorial appurtenance. The arrangements for the day-to-day administration of a territory

[22] Transcript, Day 1, p. 19, para. 8 (Sands).
[23] Transcript, Day 2, pp. 82-83, para. 13 (MacDonald).
[24] *Report of the Select Committee on the Excision of the Chagos Archipelago*, Legislative Assembly, 1 June 1983, UKCM, annex 46, para. 10.
[25] Transcript, Day 1, pp. 17-18, para. 6 (Sands).
[26] American Heritage Dictionary, online.

often change over time, without changing the territorial position. We can see the distinction between administrative arrangements and territory also in international law. A territory under mandate or a trust territory, while administered by the mandatory or the administering authority, did not become part of its territory. A territory under UN administration does not become United Nations territory. Germany in 1945 did not become part of the territory of the four Powers.

23. Mauritius seeks to sustain its own peculiar view of United Kingdom constitutional law by referring to "economic, cultural and social links";[27] and also by claiming that the "international community" has "recognised the Chagos Archipelago as part of the territory of Mauritius;[28] and also by asserting that the United Kingdom acted in some manner that implied such recognition"[29]. None of these arguments is persuasive. Just to summarize:

- Even if the "close economic, cultural and social ties" were as described by Mauritius, that would not show that the islands were part of the territory of Mauritius. Many places have close cultural and social ties, but this does not mean that they come under the same territorial sovereignty.
- As for the claim that "the international community [has] recognised the Chagos Archipelago as part of the territory of Mauritius"[30], it is clear that various political statements, many no doubt Mauritius-inspired, cannot change, whether retrospectively or not, the territorial sovereignty over the islands or their position under United Kingdom constitutional law. Such political statements are without legal effect[31].
- Mauritius' assertion that the United Kingdom itself has acted in a manner that implies recognition of the Chagos Archipelago as part of the territory of Mauritius is, quite frankly,

[27] Transcript, Day 2, p. 97, paras. 42-44 (MacDonald).
[28] *Ibid*., pp. 91-92, paras. 31-34.
[29] MR, para. 1.33.
[30] *Ibid*., Heading (d) above para. 2.29.
[31] UKCM, paras. 7.59-7.60.

fanciful. Reliance upon implied recognition in a matter as serious as sovereignty only reveals the weakness of Mauritius' case. None of the actions referred to by Mauritius, such as the undertaking to cede the islands under certain circumstances, or the position on Mauritius' *Preliminary Information* to the Commission on the Limits of the Continental Shelf, to which I will return tomorrow, begins to amount to United Kingdom recognition of Mauritius sovereignty. Quite the contrary. The United Kingdom has been scrupulous to protect its legal position on sovereignty whenever that was called for. For example, I showed you just now the 2009 Note Verbale, which was published in the *Law of the Sea Bulletin*.

Mr. President, the next factual point I shall deal with is Mauritius' contention that in 1965 the Mauritian Ministers agreed to the establishment of the BIOT under duress.

PRESIDENT SHEARER: Sorry, Sir Michael. Before you pass to that point, I think Judge Wolfrum would like to ask you a question.

ARBITRATOR WOLFRUM: Sorry to interrupt you, Sir Michael.

You said you didn't invite the Tribunal to look into the fine points of British colonial law – I don't intend to do that – but I'm still somewhat puzzled about the meaning of a "dependency." You said, Sir Michael, that the Chagos Archipelago was not part of the Territory of Mauritius. I believe I quoted that correctly. But my follow-up question is: To which territory does it belong? To the one of the United Kingdom are do we have to consider it as a territory of its own?

The first sentence I understand, the full follow-up sentences are somehow missing.

Thank you, Sir Michael.

SIR MICHAEL WOOD: Thank you very much. That's a very good question.

I think these questions of colonial law are often extremely subtle, and I hesitate to give immediate answers to such questions. But the position, as I understand it, is that, in the case of a dependency, it was regarded as separate from the territory from which it was

administered. If you take, for example, in the past, Saint Helena, Tristan da Cunha – sorry, Ascension Island and Tristan da Cunha, which are very distant from Saint Helena, which were Dependencies of Saint Helena, and were treated for some purposes together and for other purposes not. Particularly the internal administration of the Territories was separate but, nevertheless, one was below the other, as it were.

So, I'm not sure that my predecessors or those who were in the Colonial Office in the nineteenth century and the twentieth century would have really asked themselves the kind of question you've asked. I think the key thing is that it is separate, and separate from, the Territory.

The sovereignty in international law, of course for all these Overseas Territories is the same as that of the metropolitan territory. The United Kingdom is the sovereign. So, sovereignty lies with the United Kingdom. The question of how the administrative divisions are made up is another matter. And I think it varies very much from case to case. I think, things were done on a pretty ad hoc basis in the past, as no doubt they are today.

PRESIDENT SHEARER: Sir Michael, I think Judge Greenwood has a follow-up question.

ARBITRATOR GREENWOOD: Sir Michael, it may be that you are going to come to this point when the UK answers the question the President asked last week about the application of treaties to the Dependencies and to Mauritius itself. But I couldn't help noticing when I read the European Court of Human Rights judgment in the Chagos Islands case, that the summary there of the United Kingdom's argument, and I haven't of course seen the argument itself, suggests that when the United Kingdom extended the European Convention to "Mauritius," it took for granted that that included the Dependencies. And then when the Dependencies were severed or excised or whatever one goes to call it and became the BIOT in 1965, the United Kingdom took it for granted without actually saying anything that, therefore,

they were then removed from the application of the European Convention.

Is that right? And, if so, does it not suggest that, at least in terms of the way the United Kingdom portrayed these Territories to other States and other institutions, during the 1950s and early '60s it was portraying the Dependencies as part of Mauritius?

SIR MICHAEL WOOD: Thank you, Judge Greenwood, for that question. We will indeed be replying to the President's question, I think, next week. We're checking certain things with London still, and we'll particularly look at the position under the European Convention on Human Rights as well. But I think there is a distinction between external action and internal action in these matters. We will be looking into that, and we will reply in the course of next week, if we may.

ARBITRATOR GREENWOOD: Mr. President, I can understand that the question that you asked, sir, might involve quite a lot of research, but I hope that the United Kingdom will reply to the question I've just put, Sir Michael, in time to allow Mauritius to comment on your answer.

SIR MICHAEL WOOD: Yes.

ARBITRATOR GREENWOOD: I can't speak for my colleagues, but I, for one, was hoping that we get all the answers during the hearings rather than matters being left to post-hearing briefs of any kind, and I think it's only fair that Mauritius is given the opportunity to respond to what the United Kingdom has to say.

SIR MICHAEL WOOD: Certainly, and we understand that, and I'm sure we're not in favour of post-hearing briefs – I think we could agree with our colleagues on that – and we will get back with an answer just as quickly as we can.

ARBITRATOR GREENWOOD: Thank you.

SIR MICHAEL WOOD: To answer your question, we shall need to look at the pleadings in the case and it wasn't one I was involved in.

III. In 1965 Mauritian Ministers gave their agreement to the detachment of the Chagos Archipelago. They did not do so under duress as now alleged by Mauritius.

24. Mr. President, as I was saying, I come on to the next point, which is Mauritius' contention that, in 1965, Mauritian Ministers agreed to the establishment of the BIOT under duress. It is our view that Mauritius has not produced a shred of evidence, a shred of solid evidence to back up this very serious allegation. Their argument is entirely speculative based on supposition and, to put it bluntly, on a rewriting of history.

25. But, Mr. President, before I turn to this matter, it may be helpful if I mention briefly the changes that took place in London between 1966 and 1968 as regards the Department of State responsible for the colonies. This was, successively, over that short period the Colonial Office, the Commonwealth Office, and the Foreign and Commonwealth Office. You will see in the documents you've been taken to, references to all three departments, to the Colonial Secretary, the Commonwealth Secretary, and the Foreign and Commonwealth Secretary, who, to add to the complexity, is often referred to simply as the Foreign Secretary.

26. We have given you, and I hope our colleagues opposite, a piece of paper, one side of paper, listing relevant dates. But, in short:

- in 1966 the Commonwealth Office was formed by the merger of the Commonwealth Relations Office, which dealt with relations with independent countries of the Commonwealth and the Colonial Office; And then in 1968 the Foreign and Commonwealth Office was formed by the merger of the Foreign Office and the Commonwealth Office. I didn't think anything turns on this but just to understand the documents. I find it confusing and it just happens at this critical period there were two changes: Colonial Office, Commonwealth Office, Foreign and Commonwealth Office.

27. Mr. President, as I've just said, Mauritius, in its Reply, and again last week, repeats the allegation that the consent of the Mauritius Council of Ministers to the detachment of the

BIOT was vitiated by duress[32]. This idea seems to have emerged some fifteen or more years after the event, in the heated political atmosphere at the time of the change of Government of Mauritius in 1982. Mauritius accepts that, and I quote, "[p]rior to the detachment of the Chagos Archipelago, the UK consulted the Mauritian Premier and the Council of Ministers,"[33] and indeed that consent was, in fact, granted.[34] But it then goes on to deny that this consultation was adequate. It does not explain in what respects it was inadequate. Mauritius does not explain in what respects it was inadequate. Mauritius is unclear as to what legal standard applied and was not met, and, in our view, it distorts the contemporaneous documentary evidence.

28. There are certain underlying themes evident throughout Mauritius' argument on this issue. Mauritius asserts that, at the time of convening the 1965 Constitutional Conference, the question of independence was up in the air so to speak, and that Mauritius' representatives in London had no indication that independence would be granted.[35] In addition, they say that they were required either to agree to the detachment of the Chagos Archipelago and get in return some form of compensation, or see it detached unilaterally by the United Kingdom[36]. And lastly it was said that the 'prize' for such detachment was independence[37]. These are Mauritius' general assumptions and these underlying assumptions, in our view, bear no relationship to reality, and – to use Mauritius' language – they appear to have been concocted for this case and they reflect a belated attempt to reverse, years later, what had been mutually agreed in 1965.

29. It is important, we suggest, that the Tribunal has in mind the general policy guiding the United Kingdom at the time of the Constitutional Conference in 1965 with regard to its

[32] MR, Part III of Chapter 2.
[33] MR, para. 2.26.
[34] Transcript, Day 3, p. 253, para 54, lines 10-11 (Crawford).
[35] Transcript, Day 2, pp. 101-104, paras. 58-66 (MacDonald).
[36] Transcript, Day 2, p. 108, para 1 (Crawford).
[37] Transcript, Day 2, p. 108, para 1 (Crawford).

remaining colonial territories. As stated in the United Kingdom's explanation of vote on the General Assembly on resolution 1514 of 1960, and I quote:

> "The United Kingdom, of course, subscribes wholeheartedly to the principle of self-determination set out in the Charter itself and we feel that we have done as much to implement this principle during the past fifteen years as any delegation in this Assembly… But we also share the views of those sponsors who urged that constructive steps must be taken in the political, economic, social and educational fields, as a preparation for independence, in order that independence, when it comes, can be effective and have real meaning…
>
> And the representative continued:
>
> "The method and timing of progress towards independence must be a matter for the people themselves to work out together with the administering Power"[38].

This, Mr. President, was the United Kingdom's practice at the time. The premise was that the terms of independence needed to be agreed with the government of the future independent State[39]. The broad lines of a constitution were normally agreed at a constitutional conference with the territories' representatives to be followed later with the drafting of the full constitution[40], also with their participation. It is this gradual approach that became accepted as consistent with customary law and that was included in the unanimously adopted Friendly Relations Declaration in 1970. It is with this mind-set, and with the progressive achievement of self-government in many new States as background, self-government and independence, that the parties came to the table in September 1965. Annex 37 of the Reply, to which Ms. Macdonald referred last week – and I haven't included most of the documents in the folders. We'll give full references in the footnotes, but I'm only going to be quoting short passages from them – was a,

[38] United Nations General Assembly, Fifteenth Session, Official Records, 947th Plenary Meetings, Wednesday, 14 December 1960, 3 p.m., New York paras. 53-54.
[39] Ian Hendry and Susan Dickson, *British Overseas Territories Law* (2011), p. 283.
[40] *Ibid*.

Annex 37 of the Reply, 1965 letter from Mr. Terrell of the Colonial Office to the Ministry of Defence, and it discusses just this: its focus was on the wishes of the Mauritians, their readiness for independence, and internal and external defence considerations[41]. There were of course uncertainties about the outcome of the Constitutional Conference. It depended upon the wishes of the people of Mauritius who would themselves decide the matter. What was absolutely clear was that the United Kingdom Government's wish was that Mauritius should move to independence.

Mr. President, that would be a convenient moment if the Tribunal would like to take a short break.

PRESIDENT SHEARER: Yes, Sir Michael. We will take a 15-minute break now.

On, sorry, there is one.

ARBITRATOR GREENWOOD: I'm sorry. I have one further question, Sir Michael, and it may be that Ms. Nevill is going to address this in her speech.

Can you help me with the question of was the Convention about the ultimate decision to grant independence at the time we're talking about, 1965 to '68, because reading some of the internal British papers, I have the impression that the Secretary of State for the Colonies thought it was a matter for him to decide, obviously in the light of the views expressed by the parties at the Constitutional Conference rather than being a matter for the decision of the Cabinet as a whole. Can you clarify that for me? Was it as a matter of UK Constitutional Convention ultimately a decision for the Cabinet or ultimately a decision for the Secretary of State acting independently? I know that's often a very important issue in UK constitutional terms, and I would like to make sure that we're properly guided on it.

SIR MICHAEL WOOD: Mr. President, we'll respond to that later. I think,

[41] Transcript, Day 2, pp. 102-103, para. 61 (Macdonald).

ultimately, it was the decision of Parliament because, an Act of Parliament would be needed. So I think it goes well beyond the Colonial Secretary, but we will get back to that.

And just to clarify, I think Ms. Nevill will be dealing with the establishment of BIOT MPA, not the establishment of BIOT. I think that's sufficient.

So, with that, Mr. President, unless there are further questions at this point...

PRESIDENT SHEARER: No. Thank you, Sir Michael. We'll rise now for 15 minutes. Thank you.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Sir Michael.

SIR MICHAEL WOOD: Thank you, Mr. President.

To begin, just to go back to two of the questions that were put to confirm what I said about the median line with the Maldives is correct. In fact, if you look at the map on Tab 4, you will see that the United Kingdom, the 200 mile zone around BIOT does have a median line with the Maldives. That is what the United Kingdom has included in its 200 mile zone around BIOT. But that does not reflect a maritime boundary agreement with the Maldives.

And the second question was to confirm what I said about the timing of the Feasibility Study, the resettlement study. A Foreign Office Minister stated very recently, and I quote, "We should be able to complete this study and take decisions on the future of the Territory before the General Election next year." And I believe the General Election next year will be in May 2015.

Mr. President, before the break, I had just begun to deal with the duress point. I had set out what we saw as some of the themes or underlying assumptions of Mauritius' case on this matter, and I had also described the United Kingdom's basic approach to the independence of its colonial territories in the 1960s, that basic approach being that it depended upon the will of the people of the Territory. There was negotiation. And I will come back to Judge

Greenwood's question about the precise authority for granting independence in due course, but I think essentially it must be the Government and the Parliament as a whole, whatever the Colonial Secretary may have been saying but we will reply in due course.

So, what I would like to do quite briefly now is look at the events of 1965, although you're very familiar with them. They are dealt with quite fully, I hope, in our written pleadings, and you heard about them last week.

30. But in our submission, the documents show unambiguously that the agreement of the Mauritius Council of Ministers, which was given on 5 November 1965, following consultations extending over a five-month period, it appears unambiguous from this that there were no conditions of independence; there was no duress applied, as Mauritius has suggested. Notwithstanding the importance of the September meetings, in our view, the key date – or a key date – was 5 November, which was when the elected representatives of Mauritius agreed to the establishment of the BIOT. Both the United Kingdom and Premier Ramgoolam's party wanted independence. There were some others in Mauritius who did not, and providing them with sufficient guarantees was an important part of the independence debate. Ms. Macdonald labelled those holding this view as representing the minority among Mauritians[42] indicating that the pro-independence bloc represented the majority. As Mauritius accepts, they held the majority of the seats in the Council of Ministers during the period in question.[43] As we have shown in the written pleadings, support for independence was secured by, inter alia, the promise of an external defence agreement and assurances of assistance with internal security after independence. As opposed to the picture painted by Mr. Crawford, the defence interests of Mauritius were not a code for the American base on Diego Garcia[44]. In addition to ensuring internal security, the United Kingdom had interests in the

[42] Transcript, Day 2, pp. 101-102, para. 59 (MacDonald).
[43] *Ibid*.
[44] Transcript, Day 2, pp. 113-115, paras. 14-15 (Crawford).

continuing use of H.M.S. Mauritius, a communications facility on Mauritius, and Plaisance Airfield on Mauritius. 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 independent members over communal tensions within Mauritius and to secure sufficient support for independence. And this all comes out clearly, we say, from the contemporaneous record, that's in the written pleadings[45].

31. Mr. Sands, Ms. Macdonald and Mr. Crawford, ignoring the critical decision of the Council of Ministers in Port Louis in November 1965 prefer to focus pretty much exclusively on the September discussions in London. They claim that the records and written notes relating to those discussions are evidence that the consent given was not true consent. That, on their reading, the Mauritian representatives were forced to consent to a deal that was predetermined. Detachment for independence. But this is not the case. This is evident from the very documents that Mauritius itself chooses to focus on. And I will now address these briefly within the time at my disposal. We have not included all the documents in the folders. You were taken to them often enough last week, and they will be referenced in the footnotes that will appear in the Transcript. I would say one other thing about the footnotes in the Transcript, we've tried to give precise references to what our friends opposite said last week by referring to the particular page and line, but that's in the version of the Transcripts that we had available at the time, and that may, as I understand it, change, but I'd hope only by a little bit. So the references should be able to take you to the precise point, even with a slight adjustment, if I can put it that way.

32. So last week, Mr. Sands quoted from the brief prepared by the Colonial Office[46] for the meeting of the Prime Minister and Premier on 23 September 1965, and he did so to show that while the United Kingdom attached great importance to Mauritius' consent to detachment,

[45] UKR, paras. 2.33-2.49.
[46] MM, annex 17.

detachment could be carried out without consent as a last resort[47]. Let me quote from this brief, just to show where the real concerns were, and we haven't put this in your documents but you can look it up. On page 6 of the brief it says – this is the brief for the Prime Minister:

> "The Premier has asked for independence but at the same time he has said 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."

The brief 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". This was the matter of real concern to be stressed to the – or one of the matters of real concern to be stressed to the Premier.

33. Mr. Sands and Mr. Crawford made much ado about the short note attached by Harold Wilson's Private Secretary to this brief[48]. 'Frighten with hope', they say. Mr. President, Members of the Tribunal, I would invite you in due course to read this very short note in full to understand its strictly limited significance in terms of the content of the actual discussion that took place between the two leaders. As we explained in the Rejoinder, such Private Secretary covering notes are rarely more than a few sentences. They're scribbled on top of the considered brief in order to get the attention of the Minister or, in this case, the Prime Minister. And, in any event, what matters much more is what is in the briefing, and what matters of course above all is not the briefing itself but what in fact happens at the meeting.

[47] Transcript, Day 1, pp. 21-22, para. 11. (Sands).
[48] *Ibid*.; Transcript, Day 2, pp. 119-120, paras. 24-26 (Crawford).

34. I'd like also to quote from the Colonial Secretary's report to the Defence and Oversea Policy Committee in London on the 16th of September 1965, that is during the Lancaster House Conference. In that report, the Colonial Secretary said: "… [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 association."

In other words, what mattered was the opinion at the Conference, the opinion of the Mauritians.

"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 looking after external defence."[49]

Again, minority interests, internal security, external defence. These were the major concerns, the major doubts, if you like, that there were when the Conference convened in London in September.

35. I go back to the actual meeting between Prime Minister Wilson and Premier Ramgoolam. Mr. Sands asserted that Wilson made the point that detachment could be achieved by Order in Council or with the agreement of the Premier and his colleagues[50]. That while he can't commit the Colonial Secretary to this, the best result would be independence for Mauritius and detachment. Mr. Sands concludes that to claim that there was no connection at all between independence and detachment is, to use what's becoming his favourite word, 'hopeless'[51].

36. We do not claim there was 'no connection at all', as Mr. Sands alleges. Counsel for Mauritius pointed out last week that achieving consent for the creation of BIOT was a

[49] MR, Annex 46.
[50] Transcript, Day 1, p. 22, para. 11 (Sands). referring to MM, Annex 18.
[51] Transcript, Day 1, p. 22, para. 11 (Sands).

political priority of the United Kingdom. At the same time, the United States did not want to make its interests in the area public or lease Diego Garcia from Mauritius, and preferred to stay behind the scenes while the United Kingdom addressed the issues with the Mauritian leaders. The connection was one of timing. Upon independence the role of the United Kingdom would become irrelevant. It is precisely because Mauritius was moving towards independence that the issue had to be raised within a particular timeframe.

37. Nevertheless, in terms of substance, the two issues were completely distinct, as Prime Minister Wilson made clear during his meeting with the Premier[52]. You can see from the record of the meeting, that Premier Ramgoolam said Mauritius was ready to partake in the defence of the Commonwealth; that he had hoped to receive compensation for the Chagos Archipelago in form of instalments rather than a lump sum – that's the lease idea – and of trade benefits from the United States. He said that the residents of the Chagos were not represented in the Mauritian legislature; that reaching an agreement was matter of detail. There's no mention in the record of sovereignty, no mention of territorial integrity, no mention of any matters of principle for that matter.

38. Three days prior to the meeting with the Prime Minister, on the morning of the 20th of September, Premier Ramgoolam and three other Mauritian Ministers had met the Colonial Secretary and the Governor of Mauritius[53]. Professor Crawford emphasized last Thursday that Premier Ramgoolam's proposal for a 99-year lease of the islands was rejected by the Colonial Secretary, who insisted on retaining British sovereignty over the Chagos Archipelago[54]. Mr. Crawford noted that "the rest of the meeting consisted of a heated debate regarding the terms that Mauritius expected the US would agree to or could agree to in return for such a lease"[55].

[52] MM, Annex 18, pp. 1-2.
[53] MM, Annex 16.
[54] Transcript, Day 2, p. 116, para. 17 (Crawford).
[55] *Ibid*.

39. This last statement by Mr. Crawford is key. It accepts that compensation was what this meeting was about. The Mauritian preference for a 99-year lease was to gain steady income, not to secure sovereignty. It was what concerned the Mauritian Ministers and that is why what they themselves chose to focus on: compensation.

40. Premier Ramgoolam expressed his agreement with the following statement made by Mauritian Minister, Mr. Mohamed. Mr. Mohamed had said:

> "If only the U.K. were involved then they would be willing to hand back Diego Garcia to the U.K. without any compensation; Mauritius was already under many obligations to the U.K. But when the United States was involved as well they wanted something substantial by way of continuing benefit. They were prepared to forego lump sum compensation but continuity was essential and the most important thing was the U.S. sugar quota"[56]
>
> I repeat, "The most important thing."

41. When Premier Ramgoolam said that "he would prefer to make the facilities available free of charge than accept a lump sum of £1m" and that the United States should contribute the annual fees he had in mind, two other Mauritian Ministers agreed[57]. And I quote, "[A] foreign government", i.e., the United States, "was involved and they should pay up" he said[58]. And a fourth Minister, Mr. Koenig, took the same position[59].

42. Summing up the position taken by the Ministers, the Colonial Secretary concluded the meeting as follows:

"The Secretary of State said that he would like to be clear on the attitude of Mauritian ministers. As he understood it their attitude could be summed up as follows:

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[56] MM, Annex 16, p. 8.
[57] *Ibid*, p. 4.
[58] *Ibid.,* p. 9.
[59] *Ibid.,* p. 4.

(i) If economic assistance from the United States on the scale that had been suggested could be made available then the Mauritius Government would be willing to agree to the detachment of the Chagos Archipelago without compensation.

By this the Secretary of State was referring to the sugar and other commodity quotas sought by Mauritius from the United States.

(ii) If however economic assistance on the lines suggested was not forthcoming then they would propose that Chagos should be made available on a 99-year lease at a rental of £7 million per annum for 20 years and £2 million thereafter.

(iii) That the Mauritius Government were not interested in lump sum compensation from Britain of £2 million, part in capital at once and part spread over a period"[60].

So the meeting was all about money, all about compensation and very understandably so.

43. It is evident that the Mauritian Ministers knew exactly what was at stake, and had a clear vision of what monetary compensation they would require for it. If sovereignty over the Chagos Archipelago was of concern to them, they signally failed to mention it during the meeting. That the sum of compensation they ended up agreeing to – and that some of that money came from the United States – was lower than they initially sought is hardly surprising, and does not get us even remotely close to duress.

44. The third meeting at Lancaster House that Mr. Crawford took you to was the one that you're very familiar with. It was held that same afternoon at 2:30 p.m. It was between the Mauritian Ministers with the Colonial Secretary[61]. Mr. Crawford makes much of the fact that the Colonial Secretary informed the participants that he was required to inform his colleagues about the conclusions of the discussion at 4 p.m.[62]. That suggestion of time pressure is, we say, a red herring. As you are aware, over the next week or more Premier Ramgoolam

[60] *Ibid*., pp. 8-9.
[61] MM, Annex 19.
[62] Transcript, Day 2, pp. 122-124, paras. 31-35 (Crawford).

effectively negotiated the terms of the record. Then the Council of Ministers had six weeks or so to come to a coordinated position, and eventually did so on 5 November 1965.

45. You are already very familiar with the final agreed record of this meeting. But we have nevertheless included it at Tab 8 in your folders. As you will see at paragraph 2, towards the bottom of the first page, the Secretary of State began by setting out the United Kingdom's considered offer to the Mauritius. That's the first page, paragraph 2, towards the bottom. This included, among other things, compensation totalling £3m, negotiations for a defence agreement, the good offices of the United Kingdom with the United States to pursue concessions over commodities, and the understanding of the two Governments – if Mauritius became independent – the understanding that the two governments would consult together in the event of a difficult internal situation arising in Mauritius[63]. Yes, it was stated that legally speaking the United Kingdom did not need the consent of the Ministers to create the BIOT. That was indeed self-evidently the position under British law. But of course the whole purpose of the meeting was to achieve a result agreeable to all. That said, the conversation quickly turned to what was of real interest to Mauritius, compensation in exchange for remote islands that were "accidentally" linked to Mauritius, as the Colonial Secretary[64] put it in the same record, again in paragraph 2. Not only were these clear words not met with any objection, but Mr. Mohamed went on to say that –

> "his party was ready to leave the bases question to the discretion of H.M.G. and to accept anything which was for the good of Mauritius. Mauritius needed a guarantee that defence help would be available nearby in the case of need"[65]

[63] MM, Annex 19, para. 2.
[64] *Ibid*., para. 3.
[65] *Ibid*, para. 10.

46. As you will see when you read through the document as a whole, the conversation then continued to discuss various assurances and understandings, and eventually the understandings at paragraph 22 of which you have heard so much in these proceedings[66].

47. At one point Mr. Paturau indicated his dissent, he protested, walked out, protested the sum offered by the United Kingdom was too low to close the gap in the Mauritian development budget, and he added, "that since the decision was not unanimous, he foresaw serious political trouble over it in Mauritius".[67]

In short, there was dissent, and the dissent was on the amount of compensation. Mr. Paturau clearly did not feel duress.

48. And in conclusion, Premier Ramgoolam said that he and the Ministers accepted the terms in principle but would have to consult with their fellow Ministers[68]. So the matter was not finally decided in the course of one short meeting on the 23rd of September.

49. Just a few further words about this and the other meetings at Lancaster House. First, as we have seen, Mr. Paturau was not willing to agree to the terms proposed by the Colonial Secretary which were agreed by his fellow Ministers. He stated his position loud and clear[69]. He showed no signs of feeling under 'duress'. In addition, other Ministers had refused to attend the meeting, which explains Mr. Koenig's absence[70]. Clearly, if one Minister felt able to reject the offer and others stayed away, others could have done the same. And the Council of Ministers on the 5th of November in Port Louis, they were of course free to accept or reject the package that had been outlined in September. They accepted it.

50. I would note that at the meeting on the 23rd of September, the afternoon meeting, as in all others, not one of Mauritian participants, at any point, is recorded as referring to "sovereignty", or

[66] *Ibid*.
[67] *Ibid*., p. 4, para. 18.
[68] *Ibid*., para. 23.
[69] *Ibid*., p. 4, para. 18.
[70] MM, Annex 97, p. 14.

"self-determination" or "territorial integrity". The well-recognized customary rule of self-determination, with all its attributes, even claimed by Mr. Crawford to be a peremptory rule at that time[71] was apparently overlooked by the ministers, who did not seek to argue its relevance.

51. At the key meeting of the Council of Ministers on 5 November 1965, six weeks after the Lancaster House meeting – this was the meeting at which the Council of Ministers agreed to the establishment of the BIOT – three of the Ministers placed on record that, and I quote:

> "while they were agreeable to detachment of the Chagos Archipelago, they must reconsider their position as members of the Government in light of the Council's decision, because they considered the amount of compensation inadequate, in particular the absence of any additional sugar quota, and the assurance given by the Secretary of State in regards to points (v) and (vi) unsatisfactory."[72]

52. A final note on the Lancaster House meetings before moving forward to the 1970s and 1980s. That consent was sought, as a matter of policy, by the United Kingdom, is shown by the sentence in the telegram read out to you by Ms. Macdonald: "our view that willing acceptance in the two Colonies" – Seychelles and Mauritius – "is essential to our object".[73] "Willing acceptance", nothing less. And that such acceptance was obtained is evident, first, by the fact that the majority but not all of the Ministers agreed to the detachment at the time of the Constitutional Conference, and subsequently, in Port Louis; and second, that the United Kingdom expressed serious concern in between these meetings, these dates, that Mauritian elected officials would retract their consent prior to independence, opening the door to political criticism against it. Mr. Crawford quoted the Colonial Secretary's Minute to the Prime Minister of 5 November 1965, that because of possible pressure from the UN General Assembly, "the Mauritius Government will be under

[71] Transcript, Day 3, p. 237, para. 14 (Crawford).
[72] *Report of the Select Committee on the Excision of the Chagos Archipelago*, Legislative Assembly, 1 June 1983, UKCM, annex 46, p. 15.
[73] Transcript, Day 2, p. 86, para. 19 (MacDonald); UKR, Annex 2.

considerable pressure to withdraw their agreement to our proposals."[74] A Foreign Office telegram of 27 October 1965, referred to by Mr. Crawford, expressed similar fears[75].

53. If Mauritian Ministers were not given the opportunity to decline detachment in September since they were under duress, how was it that that option become available a few weeks later? If there was nothing they could do but sign up to the BIOT, what could the Colonial Secretary and the Prime Minister possibly fear? The answer is that the consent given at the time of the Constitutional Conference was genuine, that it was confirmed freely by the Council of Ministers on 5 November.

54. This point is further demonstrated by the complete silence on the issue after independence until the 1980s. Not only was Mauritius silent internationally, which is significant, but its officials expressed their satisfaction with the state of affairs on the issue. For example, in the Anglo-US talks held on 7 November 1975 in Washington, D.C., which you will find at Tab 9 in the bundle, on the third page in the middle of paragraph 50, the Head of the FCO's Indian Ocean Department – this was in 1975, after independence – reported that, and I quote:

"it seemed clear that the retention of Chagos was not an issue for Sir S Ramgoolam, the Mauritian Prime Minister: during his talks on 24 September" – in 1975 – "with Mr. Ennals, the Minister of State at the Foreign and Commonwealth Office, he had been given every chance to raise the Diego Garcia issue but had not done so. Moreover, at his press conference later the same day, he had said that the British had paid for sovereignty over the Chagos Archipelago and now could do what they liked with it".[76]

That is the Prime Minister of Mauritius in 1975. Those are hardly the words of a man who felt that he had given away a territory under duress, that he had been cheated of a territory to which he felt a strong attachment.

[74] Transcript, Day 2, p. 132, para. 61 (Crawford); MM, Annex 26.
[75] Transcript, Day 2, p. 131, para. 59 (Crawford).
[76] MM, Annex 76, para. 50.

55. It was at the beginning of the 1980s, that debate in Mauritius became heated and highly political on this subject. Opposition leaders accused Ministers, and in particular the Prime Minister, of a sell-out in 1965. Mr. Crawford criticized the United Kingdom's reliance on this debate, and on the subsequent Report of the Select Committee of the Mauritius Legislative Assembly, which he claims is selective, and stressed that Prime Minister Ramgoolam had stated that he had no legal way to prohibit the United Kingdom from exercising its powers[77]. That when asked if he had a 'noose around his neck' he chose not to reply to the question. That when Sir Harold Walker, a leading member of his party, admitted that the BIOT was created by consent, this must be read in context. Mr. Crawford quotes him as saying that his party had no choice since they alone were fighting for independence[78].

56. We would agree that comments in the Mauritius' Assembly should be read in context. Accusation and counter-accusation led to a pretty distorted view of the historical facts, which was not greatly clarified by the 1982/83 investigation by a Select Committee of the Legislative Assembly, itself a highly political exercise. The Committee's Report does, however, note that, and I quote, "[i[t would be wrong … to pretend that the excision of the Chagos Archipelago was a unilateral exercise on the part of Great Britain"[79]. That is from the Legislative Assembly's Committee's Report. Even allowing for its party political nature, the summary of the evidence given to the Committee concerning the events of 1965 shows that at the time Mauritian politicians accepted the establishment of the BIOT because, on balance, they saw it in their political interest to do so. All in all, in my view, the Report is a good read, although its conclusions would seem to be highly politicized.

57. Mr. Crawford quoted from the Report where Sir Seewoosagur Ramgoolam alluded to the legal impossibility of avoiding detachment, but he did not refer you to the passage where he

[77] Transcript, Day 2, pp. 129-130, paras. 54-56 (Crawford).
[78] *Ibid*., p. 128, para. 51.
[79] *Report of the Select Committee on the Excision of the Chagos Archipelago*, Legislative Assembly, 1 June 1983, UKCM, annex 46, para. 12.

"declared that he accepted the excision, in principle" *inter alia* "because he could not then assess the strategic importance of the archipelago which consisted of islands very remote from Mauritius and virtually unknown to most Mauritians."[80] And, that it was not communicated to him that the islands would be used for a military base.[81] The latter point we know not to have been the case; the former point is the real reason; as we have seen in 1965 Mauritian Ministers were concerned with what could be gained in return for detachment. Ramgoolam, and I quote, "had the impression that, apart from the claim for sovereignty, all the points were agreeable to the British Government including a proposition that, in the event of excision, the islands would be returned to Mauritius when not needed by the United Kingdom Government."[82] The evidence of the other politicians set out in the Legislative Assembly's Report is similar. Their focus was on independence. This is well exemplified by Sir Satcam Boolell, who is recorded as saying that "he was not much concerned about [the question of the excision of the Chagos Archipelago] as he only had in mind independence."[83]

58. When stating that they alone were 'fighting for independence', Sir Harold Walker was criticizing his fellow Mauritians, on their position on independence. This is further clarified by the Report, where Sir Seewoosagur is reported as saying that one reason for his consent was the fear that the British would side with the PMSD and opt for a referendum on independence.[84] For more on this point, I return to Mr. Crawford's brief reference to the debate in the Legislative Assembly, where Sir Seewoosagur referred to the noose that could have tightened around his neck. But who was potentially tightening the noose? It was not the United Kingdom. Let me refer you to the full quotation:

[80] *Ibid*., para. 25 A
[81] Ibid.
[82] *Ibid.*
[83] *Ibid.*
[84] MM, Annex 97, p. 12.

59. Mr. Berenger had asked Sir Seewoosagur why he agreed to the BIOT if his agreement was not necessary. Sir Seewoosagur replied that "[i]t was a matter that was negotiated, we got some advantage out of this and we agreed".[85] Mr. Berenger then asks Sir Seewoosagur to confirm that he said in a magazine interview that he said that "There was noose around my neck. I could not say no. I had to say yes, otherwise the noose could have tightened". Then Mr. Berenger asked the following:

> "Could I ask him to confirm that, in fact, he is referring to the referendum which the PMSD was then requesting against independence?"
>
> Mr. Ramgoolam answered bluntly, "Since my hon. Friend has raised it, let him digest it".

60. Mr. President, Members of the Tribunal, there seems little doubt from the record before you that Premier Ramgoolam and his colleagues consented to the creation of the BIOT since they did not regard the Chagos Archipelago to be of particular interest to Mauritius and since the United Kingdom was willing to make offers in return for its detachment. Neither the contemporaneous records, not the later evidence of the main Mauritian protagonists, indicates the slightest hint of duress or blackmail during the five months or so, between July and November, that the matter was under discussion between the British and Mauritian authorities. On the contrary, there was hard bargaining on both sides, leading to agreement.

61. But matters did not end in November 1965. There followed a general election. As was common practice, there was a pre-Independence election for the Legislative Assembly on 7 August 1967. This was seven months before Independence, and 21 months after the establishment of the BIOT. Independence and the terms of independence would surely have been the main issue in the minds of the electorate in this pre-Independence election. It would not appear that the detachment of the BIOT played any role whatsoever. That in itself is interesting. Detachment was of course a matter of public record: see, for example, the

[85] MM, Annex 96, column 4223.

1965 Order in Council and the references to it in the Legislative Assembly. Leading Mauritian politicians would have been fully aware of the matter. What the general election showed was the endorsement of a Government whose policy had been to accept detachment of BIOT at the time of the independence negotiations.

ARBITRATOR WOLFRUM: With your permission, Mr. President, since you're switching to a different subject now, may I ask a question about your Statement so far.

You said, Sir Michael, that the UK did not need the consent of the Mauritian Ministers, including the Prime Minister, for the detachment of the Chagos Archipelago. I believe those were your words. They were seeking it for more political reasons. The first part of this sentence interests me: What is the reason for that statement? Has it something to do with the fact, the alleged fact, that the Chagos Archipelago was a Dependency, it was not an integral part of Mauritius in the view of the United Kingdom, or are there other grounds why the UK believed it did not need the consent? That's my first question.

My second one, your Statement touched upon that a bit earlier, is you said there was no evidence of duress. Now, would you perhaps qualify, Sir Michael, what you would consider a situation of duress in international law. Well, there is quite some writing on that. I remember the sentence – I don't know who said it – it was addressed to the Prime Minister of Mauritius – you can leave this room with or without independence. Is that not putting pressure upon somebody? These are my two questions.

Thank you, Sir Michael.

SIR MICHAEL WOOD: Thank you, Judge Wolfrum.

On the first question, the statement is one essentially of law. As a matter of pure law, it was always possible for the United Kingdom under its legislation to divide territories, to adjust boundaries, to do whatever it liked. Indeed, it did so frequently with regard to many territories on many occasions. So, it was a statement of law. As a matter of law, we don't need agreement.

However, as I showed, I hope, as a matter of policy, and as a matter not of policy just with regard to – the general agreement was – the agreement of the people was what was needed before you moved to independence, and that meant the agreement of the people, the representatives of the people to all the matter that were relevant to independence. So, I think in that context, politically, as a political matter, it was regarded as very important. Indeed, I think the word "essential" was used.

So, the distinction between the pure law, the position under law, and the political requirements before such legal measures were taken. I don't think that this had anything to do with the question or is related in any way to the question whether it's a Dependency or not. It would have been possible as a matter of law to detach any part of any territory at any time. As a matter of politics, that is quite a different matter.

Your second question –

ARBITRATOR WOLFRUM: Before you come to that, Sir Michael, I see your point. If it is a matter of law, UK law, can you perhaps indicate to us other instances where former colonies became independent before that, the boundaries were given a new shape or Territories were separated? There were numerous cases of former colonies getting independence. I would rather want to know whether this Chagos Archipelago business was unique or one amongst others.

SIR MICHAEL WOOD: Certainly, and I will partly come back to that tomorrow, but by way of examples, Cayman Islands separated from Jamaica. One example I will be giving tomorrow relates to the Sovereign Base Areas in Cyprus, which were detached from the colony of Cyprus before Cyprus became independent in 1960, which is actually quite analogous because the reasons were quite similar in a way. But I will give you a fuller answer on that, if I may, tomorrow.

Turning to your second question, I'm going to say the same thing. I was proposing tomorrow to look a little at the notion of duress under international law under the

Vienna Convention on the Law of Treaties, for example, so I will, if I may, park your question and come back to it tomorrow.

ARBITRATOR WOLFRUM: Okay.

SIR MICHAEL WOOD: Thank you.

IV. Mauritius has only belatedly purported to include the Chagos Islands within its territory, in 1982/1992

62. If I may then turn to the fourth and last point that I'm going to make this morning, and this is that Mauritius only belatedly purported to include the Chagos Islands within its territory, in 1982 and 1992.

63. Following agreement at the Constitutional Conference in September 1965, and in accordance with the wishes of its people expressed at a general election in 1967, Mauritius became independent on 12 March 1968. This was done by the enactment, by the Westminster Parliament, of the Mauritius Independence Act of 1968[86] and the adoption thereunder, by the Queen in Council, of the Mauritius Independence Order[87]. At the time, there was no doubt in anyone's mind that the BIOT did not form part of the territory of the independent State of Mauritius. To suggest otherwise is yet another attempt to rewrite history.

64. The 1968 Order contained in the Schedule the first Constitution of the 'sovereign democratic State of Mauritius'[88]. The Constitution was 'the supreme law of Mauritius'[89]. Any inconsistent law was, to the extent of the inconsistency, void[90].

65. Both the Independence Act[91], and the Constitution[92], defined 'Mauritius' as meaning "the territories which immediately before the appointed day – its Independence Day – 12th March

[86] Mauritius Independence Act 1968 (1968 c. 8), s 1(1), UKCM, Annex 19.
[87] Mauritius Independence Order 1968, UKCM, Annex 20.
[88] Constitution, s. 1, UKCM, Annex 20.
[89] *Ibid*., s. 2.
[90] *Ibid.*
[91] Mauritius Independence Act, s. 5(1), UKCM, Annex 19.
[92] Constitution, s. 111(1), UKCM, Annex 20.

1968 constitute[d] the colony of Mauritius". These territories did not include the Chagos Archipelago, which had become part of the BIOT in 1965 and was after that date entirely separate from Mauritius. The Chagos Islands therefore remained under United Kingdom sovereignty, and did not become part of the Republic of Mauritius upon independence. That, we say, was clearly understood in Mauritius.

66. And that remained the position under the Constitution of Mauritius until it was replaced in 1992 – until it was amended in 1992.

67. Eventually, years after 1968, as we have seen, the Chagos Islands became a highly contentious issue in the party politics of the independent Mauritius. In 1980, an attempt was made by opposition politicians in the Legislative Assembly to amend the law of Mauritius by adding the Chagos Islands to the territory of Mauritius. That attempt failed. When the definition of "Mauritius" in the Interpretation and General Clauses Act of 1974 was amended to include Tromelin, of which you heard last week – it's a small island lying east of Madagascar, which is also claimed by France – by passage of the Interpretation and General Clauses Amendment Act 1980, the inclusion of the Chagos Archipelago was proposed by the opposition. The proposal was rejected both by the Government and by the Legislative Assembly[93]. There was thus a deliberate decision by the Mauritius Assembly in 1980 not to add the Chagos Archipelago to the definition of Mauritius in the Interpretation and General Clauses Act at the time when Tromelin was added to that definition[94].

The legal position on sovereignty was well understood at the time of the 1980 debate. The Leader of the Opposition, Mr. Jugnauth, referred to, and I quote, "an Order in Council, by which the Chagos Archipelago was taken away from the territories forming part of Mauritius"[95] – "taken away". Reading the committee debate, at least in some quarters the amendment hardly

[93] UKCM, para. 2.48.
[94] Debate in Mauritius' Legislative Assembly of 28 June 1980, UKCM, Annex 35.
[95] *Ibid*, MS Page No. 655.

seemed to have been taken seriously. It was, for example, proposed that Seychelles, then an independent country, should also be added! In any event, the Government spokesman said:

> "There is no doubt that everyone here would like this country *[Chagos]* to come back to the State of Mauritius; but there is unfortunately - and I am appealing to the lawyers to see the legal issue about it […] at the moment, it is still with Great Britain."[96]

Sir Harold Walker spoke of 'add[ing] to a Bill a territory over which you have no sovereignty"[97], and referred in this connection to the OAU principle "that the frontiers inherited at the time of independence will not be disputed".[98] The Opposition, who moved the amendment, do not seem to have taken a different position on the law.

68. It was only in July 1982, following elections and a change of Government in Mauritius, that the Legislative Assembly enacted the Interpretation and General Clauses (Amendment) Act[99], which purported to include the Chagos Archipelago within the territory of Mauritius. It seems to have been recognised at the time by its proponents as essentially symbolic, a '*geste légal*' in the words of one Minister[100].

69. And it was only in 1992 that an amended Constitution included a definition, providing that 'Mauritius' included "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"[101].

70. Mr. President, Members of the Tribunal, that, subject to any further questions, concludes what I have to say this morning. And I don't know if you would like to invite Ms. Penelope Nevill to begin to address you now on the steps taken leading to the declaration of the Marine

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[96] *Ibid*, MS Page No. 662.
[97] *Ibid*, MS Page No. 669.
[98] *Ibid*, MS Page No. 670.
[99] UKR, Annex 26, Interpretation and General Clauses (Amendment) Act 1982.
[100] UKCM, Annex 43, MS Page No. 735 (Mr. Bérenger).
[101] The Constitution of Mauritius (Amendment No. 3) Act 1991 was passed on 17 December 1991 and came into force on 12 March 1992, UKCM, Annex 32, s. 111.

Protected Area or whether this would be a convenient moment for the second short break of the morning.

PRESIDENT SHEARER: Thank you, Sir Michael. Yes, I guess it is 11:45. So it would be convenient to take a break until 12 noon, and then we will hear from Ms. Nevill afterwards.

Thank you very much.

Any further questions?

Sorry. There is a question from Judge Greenwood.

ARBITRATOR GREENWOOD: Thank you, Mr. President.

Sir Michael, I would just like to go back to what you said about the separate status of the islands, those Dependencies of Mauritius.

You made the point in your speech, if memory serves me right, that too much attention should not be paid to isolated comments in internal documents that didn't reflect a considered legal view. But I just looked back at the document that appears as Annex 31 to the Mauritius Reply, which is the note by the Secretary of State for the Colonies for the Defence and Overseas Policy Committee of the Cabinet dated 27 April 1965. And that Note begins – and this is on the basis of legal advice, which is, rather skeletal legal advice, I grant you, which is attached to his note: They, the islands are all legally established as being parts of the colonies of Mauritius or Seychelles. And that presumably paves the way for the reference in the Foreign Office Telegram to the embassy in Washington a few weeks later, which says the colonies have sovereignty over them. That was a rather strange term to use.

SIR MICHAEL WOOD: Yes.

ARBITRATOR GREENWOOD: Wasn't there, in fact, a considerable ambiguity about the status of these Territories before the excision in the autumn of 1965? British

Government appears to have been, to put it mildly, in two minds about what their status really was.

SIR MICHAEL WOOD: Judge Greenwood makes a good point. I think that the papers he referred to were in connection with an approach to the United States to try and persuade them to be generous, et cetera. They may have oversimplified the constitutional position.

As I said at the outset, however, the point we're making about Dependency is not so much a narrow constitutional point. It's that the notion of Dependency, the fact they were referred to as Dependencies, the fact that in many respects they were treated separately, laws had to be extended to them, et cetera, et cetera, as you have seen, all go as part of the background, if you will, to the proposition that they were not regarded as part of a territorial unit in the sense that it's known and for the purposes of self-determination. That's really the point we're making. There may be points at which they are or are not regarded as Dependencies, where statements are made about their appurtenance to the colony, which say one thing and on another occasion another thing, but the point was made consistently when the argument, particularly on self-determination came up, back in 1965, and we say that that is a good point, and one that we have made out.

I will take a further look at the document to which you referred, and weave in something to one of my statements tomorrow.

Thank you.

ARBITRATOR GREENWOOD: Mr. President, thank you.

I think the paper trail goes something like this: There is an earlier meeting at the Defence and Overseas Policy Committee at which the Secretary of State for the Colonies says we need to clarify the legal status of these islands. In other words, he wasn't sure what it was.

He then comes back with this Note of April 1965, which I have just quoted, which he represents to the other colleagues on the Defence and Overseas Policy Committee as meaning that the islands are part of Mauritius or the Seychelles.

SIR MICHAEL WOOD: Yes.

ARBITRATOR GREENWOOD: The Seychelles refers to Aldabra in the other archipelago. Now, that is in the context of the grant of defense facilities to the United States, in other words, precisely the context we're talking about here, because otherwise it wouldn't have been in front of the Defence and Overseas Policy Committee in the first place, would it? They didn't normally deal with colonial matters in those days.

SIR MICHAEL WOOD: Thank you. I will come back to the question tomorrow, if I may.

PRESIDENT SHEARER: Yes. We will come back at 12:03.

Thank you.

(Brief recess.)

PRESIDENT SHEARER: Yes, Ms. Nevill.

MPA BACKGROUND FACTS:

STEPS LEADING TO DECLARATION OF THE MPA

Penelope Nevill

30 April 2014

Mr. President, Members of the Tribunal, it is an honour to appear before you today on behalf of the United Kingdom.

Introduction

1. The purpose of my speech is to describe the BIOT MPA, and the steps leading to its declaration on the 1st of April 2010. I hope you will not be too disappointed to learn that I will not be talking about the steps leadings to the declaration of the BIOT as the agent's

omission of the word "MPA" may have suggested this morning. I will also touch briefly on certain points concerning its implementation and enforcement, although I note that the point regarding implementing legislation has, to some extent, already been addressed by the Agent in his speech and the written answers provided by the BIOT administration in response to Judge Wolfrum's question.

2. Now, you heard from the Attorney General last Tuesday about the scientific justification for the MPA and the importance of its role in attempts by UN agencies to address the escalating problems faced by the world's oceans and fisheries[102]. I do not intend to repeat what he said, although I may touch on certain of the points that he raised.

3. The steps that led up to the proclamation of the BIOT MPA were described in detail in the Counter-Memorial. What I propose to do today, which I hope will be of the most assistance to the Tribunal, is to run through a chronological account of those steps and, in the course of doing so, focus on aspects which received particular attention from Mauritius in its submissions last week. Footnote references to the written pleadings and supporting documents which contain the detail will be provided with the transcript. The Mauritian oral submissions on the MPA and its creation last week centred on the claims that the MPA was, "imposed on Mauritius without adequate consultation," and that the bilateral consultation cut across the bilateral talks[103] and that the decision to declare the MPA was, "policy making 'on the hoof,'" and, "rushed through."[104] None of these allegations is supported by the record of events or the documents on which Mauritius relies. Rather, it is the UK's submission that they show the opposite. Mauritius also implied that the scientific

[102] Day 1, Grieve, pp. 45:7-51:11.
[103] Day 2, Macdonald, pp. 177: 18 and 196:9-11.
[104] Day 2, Macdonald, p. 177:21-23.

case for a no-take MPA has not been made out[105], and that the MPA approaches a sham in certain respects[106]. As will be shown, there is no merit in these claims either.

The BIOT MPA and environmental protection in the BIOT

4. But first, a brief description of the BIOT MPA.

5. It is illustrated on the chart shown now on the screens before you. The BIOT MPA covers almost the entire 200 nautical mile Environment Preservation and Protection Zone, the "EPPZ." The EPPZ is coextensive with the Fisheries Conservation and Management Zone, or the "FCMZ."

6. The MPA includes the land territory of the islands, their 3 nautical mile territorial seas and internal waters, but it excludes Diego Garcia and its internal waters and territorial sea.

7. The BIOT is mostly sea, not land. Its land territory is made up of 58 coral islands of the Chagos Archipelago, which range in size from the very small to the tiny, as you can see on the illustration before you, and they are spread out over some 21,300 kilometres of ocean. And so, the MPA covers a marine area of roughly 644,000 square kilometres, which is, as Mauritius has already pointed out, roughly the size of France[107].

8. Diego Garcia is not included in the MPA because, during consultations with the United States over the MPA proposal, it became clear that its preference was for Diego Garcia to remain outside any MPA[108]. Diego Garcia and the area outside the MPA are also marked on the diagram before you, and you can see an arrow in a white box pointing to it just off center, probably about 5:00, in the direction of 5:00 on the illustration before you.

ARBITRATOR GREENWOOD: Ms. Nevill, I'm terribly sorry to interrupt you, and I'll speak up because I gather my questions have been a bit difficult to hear earlier on.

[105] Day 2, Macdonald, p 182:7-8; Day 4, Crawford, p. 382: 21.
[106] Day 4, Crawford, p. 376: 9-10.
[107] Day 1, Sands, p. 37: 20-21.
[108] UKR, Annex 70, Colin Roberts 1st witness statement, para. 16; MR, Annex 147, para. 10.

Have you got a copy of this document? Because I have to tell you, what we can see on the screens here is extremely difficult to follow. It's a very blurred image, indeed, and that was true of earlier illustrations that have been showing up. I'm afraid the screens that you can see seem to be much clearer than the ones that the Tribunal Members have got.

MS. NEVILL: I'm afraid that I don't have to hand copies of the charts. They are actually – this is an illustration that's taken from the UK Counter-Memorial. So if you have that to hand, you might be able to see it there. Otherwise, perhaps I shall just – I will be quickly moving through this part, and so you might be able to refer to that later. After the break we may be able to provide the Tribunal with actual printouts of the diagram.

ARBITRATOR GREENWOOD: Thank you very much. Sorry to have interrupted you.

MS. NEVILL: Well, as can been seen or cannot be seen on the chart, the area excluded from the MPA which I hope you will see when you do finally get to look at it more closely, is only a very small part of BIOT waters. Nevertheless, as explained in the Counter-Memorial and the written answers to Judge Wolfrum's questions[109], Diego Garcia and its waters are subject to strict environmental controls, including the regulation of recreational fishing. Diego Garcia contains a Nature Reserve Area, four Strict Nature Reserves, and a RAMSAR wetland site. The RAMSAR site covers the entire lagoon and all those parts of the island of Diego Garcia which are not set aside by treaty obligations for the military base.

9. The BIOT MPA is what is termed a "full no-take" marine reserve or protected area. All commercial fishing is prohibited. Limited fishing for consumption is allowed by yachts in transit, or those which moor under permit at designated sites off the outer islands of Peros Banhos and Salomon. This fishing is subject to strict regulation. It is limited to what can be consumed within three days and returns on numbers and species caught are required to

[109] UKCM, paras. 3.15, 3.70; UKAF, Folder 1, Tab 1.

be provided[110]. Subsistence fishing by yachtsmen and women sailing the Indian Ocean and using the Chagos Islands as a temporary stopping point in bad weather or to break up a long voyage was one of the issues highlighted in submissions to the public consultation[111], and for this reason it remains allowed in the MPA.

10. No specific MPA legislation has yet been enacted, a point much remarked upon by Mauritius. As has already been pointed out by the agent, the "no-take" fishing element of the MPA is implemented by not issuing fishing licences under the existing fisheries legislation. The land territory within the MPA is already conserved and protected by the Protection and Preservation of Wild Life Ordinance 1970 and related legislation[112]. There are strict nature reserves on the islands of Peros Banhos, Nelson Island, The Three Brothers and Resurgent Islands and Cow Island[113]. And I was going to say that they are also shown on the screen before you, so when you do see a clearer copy of the document, they are indicated by the red circles. The intention is that "omnibus" legislation which incorporates and updates all the existing fisheries, conservation and environment legislation covering the BIOT will replace the existing legislation.

11. In the 2007-2008 Report of the Foreign Affairs Committee on Overseas Territories it is stated, as pointed out by Judge Wolfrum, that, "BIOT is considered to have the most pristine tropical marine environment surviving on the planet and to be by far the richest area of marine diversity of the United Kingdom and its Overseas Territories." Judge Wolfrum asked for confirmation of the content of this statement last week.

12. As has been explained in the written answers provided by the BIOT Administration, the statement is found in the evidence submitted to the Committee by the Chagos Conservation Trust. The Chagos Conservation Trust was founded in 1993 by John Topp, who was

[110] UKCM, para. 3.70.
[111] UKCM, Annex 121, p. 11.
[112] See generally UKCM, paras. 3.11-3.16.
[113] UKCM, para. 3.15.

appointed the first BIOT Conservation Advisor in 1993. The Trust's members include Professor Charles Sheppard, the BIOT Environmental Adviser between 2003 and 2013. Professor Sheppard has been involved in scientific research expeditions to the BIOT since the 1970s and is a leading member of the Chagos Trust. The members of the Tribunal will have seen and heard him in the two Chagos Science in Action DVDs which were filed with the Rejoinder. He is the narrator in two of those.

13. The Trust's statement was recently repeated in October 2013 by a number of international conservationists and scientists,[114] and it reflects the level of scientific interest in the BIOT and its scientific importance. And this is further illustrated by the large number of publications on the Chagos Archipelago, authored by scientists. To take one example, one bibliography of publications up to January 2003 which has been published online by the Island Vulnerability Organisation lists 80 scientific publications[115]. According to information provided by the BIOT Administration, a further 19 articles have been published since 2011. The sheer number of articles, even with an eight-year gap, serve to emphasize the point.

The NGO proposal in 2007 for a large scale marine park in the Chagos Archipelago

14. It was the BIOT's special environment, stable government, limited economic activity, and the environmental commitment by the United Kingdom that led the Pew Environment Group, a US-based charity, to identify it in 2007 as a prime candidate for a large scale marine park.[116] This was part of Pew's Global Ocean Legacy campaign, which aimed to

[114] Ecole Polytechnique Fédérale de Lausanne; Blue Marine Foundation; Stanford University; University of St. Andrews; Save Our Seas Foundation; Oceana; University College London; Swansea University; Pew Environment Group; The Bertarelli Foundation; University of Western Australia; Australian Institute of Marine Science; University of Warwick; The Manta Trust; University of Bangor.

[115] http://www.isn.net/islandweb/ot/bibliref.html#chagos

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

establish a worldwide system of very large, highly protected marine reserves where fishing and other extractive activities are prohibited[117].

15. Pew first approached the Government with its idea in July 2007, via Professor Sheppard, who was then, as I have already noted, the BIOT Environmental Adviser and a member of the Chagos Conservation Trust[118]. Pew then joined forces with the Chagos Conservation Trust to form the Chagos Environment Network in 2008, and it, in turn, launched its campaign on the 22nd of April 2008 that year to create a large scale marine park in the Chagos Archipelago[119].

16. The Government's initial response to Pew, while receptive, was cautious. As recorded in the note of the meeting between Pew and BIOT officials on 22 April, which was annexed to the Counter-Memorial[120], it was recognised that the proposal raised potential political and legal issues that would have to be worked through. These included the undertaking to cede BIOT to Mauritius when no longer required for defence purposes, and the practice of issuing licences to Mauritian-flagged vessels for inshore fishing free of charge, which was understood to have evolved from the 1965 understandings. The facts and documents relating to the 1965 "fishing rights" understanding and the practice of the parties will be described by Ms. Sander in the next speech.

17. I refer to it now in the context of describing the process leading up to the establishment of the MPA[121] because it shows that UK officials were cognisant that these were amongst the issues that would need to be looked into, if the marine park proposal were to be pursued.

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[117] http://www.pewenvironment.org/campaigns/global-ocean-legacy/id/8589941025

[118] UKCM, Annex 82, Email of 17 July 2007 from Charles Sheppard to Tony Humphries, Head BIOT and Pitcairn Section, FCO, forwarding an email from Heather Bradner of the Pew Charitable Trusts

[119] UKR, Annex 69, Joanne Yeadon's 1st witness statement, paras. 6-7 and UKCM, Annex 88.

[120] UKCM, para. 3.33 and Annex 87, Email from Joanne Yeadon, Head of BIOT and Pitcairn Section, to Andrew Allen, 22 April 2008.

[121] UKCM, paras. 3.33 and 3.40.

First phase: initial scoping of the Chagos Environment Network proposal

18. In July 2008 the BIOT Administration started discussions with interested stakeholders to explore the options for strengthening environmental protection in BIOT in line with government policy on the Overseas Territories. One such option was the large scale marine protected area promoted by Pew and the Chagos Conservation Trust[122].

19. Now, Ms. Macdonald made much of this reference to consulting with "interested stakeholders" in her submissions. She suggests that what the UK was effectively saying was that there was a full year of consultations with these stakeholders while Mauritius was "kept in the dark"[123] and that it "was to learn of the proposal only with the rest of the world, [when reports surfaced in the British press] and when the decision to consult publicly was a *fait accompli*"[124]. Ms. Macdonald was referring here to an article published in the *Independent* on 9 February 2009 on the Chagos Environment Network's proposal[125], which was entitled, "Giant Marine Park Plan for Chagos." This article led Mauritius to send the UK a Note Verbale on 5 March 2009 claiming, on sovereignty grounds, that any such marine park would require the consent of Mauritius,[126] and that much is agreed.

20. Returning to Ms. Macdonald's focus on "interested stakeholders", now the reality is rather more banal than Ms. Macdonald is seeking to make out. "Interested stakeholders" means the Ministry of Defence, the Natural Environment Research Council, the British Geological Survey and the National Oceanographic Centre[127], all UK bodies whose support would be essential if the idea was to make any progress. Without that there would

[122] UKCM, para. 3.35, UKR; Annex 70, Colin Roberts 1st witness statement, para. 12.
[123] Day 2, Macdonald, p. 185:5.
[124] Day 2, Macdonald, p. 185: 5-6.
[125] MM, Annex 138, "Giant marine park plan for Chagos", The Independent, Sadie Gray, 9 February 2009
[126] MM, Annex 139, Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and Trade, Mauritius, to the UK Foreign and Commonwealth Office, No. 2009(1197/28).
[127] UKCM, Annex 96, p. 4 (numbering in original).

have been nothing to discuss with Mauritius. At the same time, Pew and the Chagos Conservation Trust continued to lobby the BIOT Administration, and there were further meetings with BIOT officials[128]. A more detailed description of this engagement can be found in Joanne Yeadon's first witness statement, prepared for the judicial review proceedings and now annexed to the Rejoinder[129]. Ms. Yeadon was the BIOT Administrator and Director of Fisheries from December 2007 to March 2011, so she will be a key personality in many of the events that I will go on to talk through. And this may be an appropriate moment to note that I understand there has been handed up with our folder a brief dramatis personae, and this goes together with my speech and should explain the positions of some of the people that are referred to in the e-mails, and who were actively engaged in the steps leading up to the declaration of the MPA.

Do you have that?

PRESIDENT SHEARER: Yes, we have that, Ms. Nevill.

ARBITRATOR WOLFRUM: Sorry, may I interrupt you. So, with this list, you mentioned Pew Foundation several times. And if I understood the documents correctly, the Pew Foundation was first initiated with the MPA at the beginning. Could you give us something on the background of Pew Foundation and where the finances of the Pew Foundation come from.

MS. NEVILL: My understanding – and I confess that this is based on research carried out on my own initiative – is that the Pew Foundation is actually related to the Sunlight Soap fortune in the United States, and that it's a charity that is associated with the fortune that was built up through that industry, and it now directs its attention at environmental concerns, in particular in the area of the seas and oceans.

[128] UKR, Annex 69, Joanne Yeadon, 1st witness statement, paras. 6, 8 and 12.
[129] UKR, Annex 69, Joanne Yeadon's 1st witness statement, paras. 6-12.

I will in the break ask my clients if they have any further information that I can provide.

21. Now, returning to the chronology, at the time that the Independent published its article on the Chagos Environment Network proposal[130], on the 9th of February 2009, it was not even certain that a submission on the MPA proposal would be put to Ministers. There was no proposal to go to a formal public consultation. The article appears to be the result of a press campaign about the launch of the Chagos Environment Network's campaign.

22. The Government's position on the campaign at that time is set out by the Minister for the Foreign and Commonwealth Office, Gillian Merron, in her response to a letter sent to her by the Chagos Environment Network which notified her of its plans to make an announcement about the proposal[131]. You can find that letter, which is dated the 5th of March 2009, at Tab 10 of your folders. In it, the Minister explains, and you can see the passage is highlighted in the margin towards the end of the second paragraph, the Minister explained that while the Government had, "signalled its desire to work with the international environmental and scientific community to develop the preservation of the unique BIOT environment, it still needed to look into the ideas presented by the Chagos Environmental Network in greater detail" and that that was something that her officials "were in the process of doing."

Foreign Secretary's decision to pursue the MPA proposal: May 2009

23. Thus, it was not until April 2009 that the scoping work being carried out by those officials was sufficiently clear to present the issues to the Foreign Secretary.[132] And it was not until 5 May 2009 that the submission on the proposal was finalised, and sent by the BIOT

[130] MM, Annex 138, "Giant marine park plan for Chagos", The Independent, Sadie Gray, 9 February 2009.
[131] UKCM, Annex 95, Letter from the Chagos Conservation Trust to Gillian Merron, MP, Minister of State, 12 February 2009 and her response dated 5 March 2009, UKAF, Folder 1, Tab 10.
[132] UKR, Annex 70, Colin Roberts 1st witness statement, para. 13.

Commissioner, Mr. Colin Roberts, to the Foreign Secretary for his decision[133]. Mr. Roberts is another name that you will become familiar with if you are not already from Mauritius' submissions last week. As explained in the Rejoinder, officials simply would not have engaged in formal discussions on the proposal with third States until the policy to move forward with it had been adopted by Ministers[134]. There was no basis upon which to do so. Ministers might have decided not to pursue the proposal.

24. As with all policy submissions to Ministers, the submission of 5 May identified the various risks in moving forward with the proposal. The "big risks" identified were political, and these included Mauritius's sovereignty claim. The 5 May submission, referring to the Mauritian Note Verbale of 5 March, noted that Mauritius had formally stated its opposition to the Pew and Chagos Trust proposal on sovereignty grounds, but it was also thought the Mauritians were, "bothered by the risk of losing forever the chance to exploit the fishery." As Ms. Sander will explain, at the first bilateral talks in January 2009 Mauritius had tabled plans for a joint licensing and revenue sharing arrangement for the BIOT fisheries. This was understood by BIOT officials to be connected to the Mauritian sovereignty claim[135]. The 5 May submission also recorded that the position was complicated by a "side deal" in 1965 which "gave Mauritius the right to apply for fishing licences free of charge."[136] Again, I refer to these issues to show that they were not ignored as potential issues but received due and proper consideration as part of the assessment of the case for a large scale MPA.

25. The Foreign Secretary approved the policy of pursuing the MPA proposal shortly after the 5 May submission, and this is recorded in an email by his Private Secretary of 7 May

[133] MR, Annex 132, Submission of Colin Roberts, BIOT Commissioner, to the Foreign Secretary, "Making British Indian Ocean Territory the World's Largest Marine Reserve".
[134] UKR, para. 3.4.
[135] UKR, Annex 73, 3rd witness statement of Joanne Yeadon, para. 9.
[136] MR, Annex 132, Submission of Colin Roberts, BIOT Commissioner, to the Foreign Secretary, "Making British Indian Ocean Territory the World's Largest Marine Reserve", page 4 [219].

2009. Ms. Macdonald took you to this email in her submissions, saying that it, "shows that the UK had already decided to announce the reserve."[137] Yet again, this is another of the Mauritian claims that is not borne out by the evidence, neither in the brief email exchange between officials on 7 May 2009 to which she referred, nor what followed. And, in fact, what followed was a period of consultations and other work on the proposal that extended over a period of nearly 11 months.

26. Once the Foreign Secretary had taken the decision to pursue the MPA, BIOT officials made preparations to enter into consultations with key external stakeholders, in particular Mauritius and the United States, and to seek independent scientific advice on the CEN proposal. When I refer to CEN, I mean the Chagos Environment Network. Whether a decision was taken to proceed to a public consultation[138], a possibility which had been raised earlier in May, would depend on the outcome of these consultations and the independent scientific advice received. In fact, the decision to go to public consultation was not taken by the Foreign Secretary until after the 29 October 2009[139]. Thus, the record shows that there's absolutely no merit in Mauritius' submission that Mauritius was presented with a fait accompli or that there was a fait accompli in place in February 2009.

Preparations in advance of consultations with Mauritius

27. The MPA proposal was tabled for discussion with Mauritius at the second round of bilateral talks on 21 July 2009. In advance of these consultations, Mr. Roberts asked Ms. Yeadon for a "full analysis of the history of fishing and environmental protection in BIOT," and this was to include "an authoritative statement of what we think are Mauritius'

[137] Day 2, Macdonald, p. 191: 13-14.

[138] MR, Annex 132/133, Submission of Colin Roberts, to the Foreign Secretary, "Making British Indian Ocean Territory the World's Largest Marine Reserve"

[139] UKCM, para. 3.39; MR, Annex 147, Submission dated 29 October 2009 from Joanne Yeadon and Colin Roberts to the Foreign Secretary, "BIOT: Public Consultation on Proposed Marine Protected Area".

rights today to fish in BIOT."[140] You can see this email at Tab 11, p. 1 of the Folder, and it's on the first page, and it should be highlighted at the second email dated the 3rd of July.

28. Ms. Yeadon then asked MRAG Limited to provide a "full history of fishing in BIOT by Mauritian vessels."[141] MRAG is a specialist marine environment consultancy which contracted with BIOT from 1991 to manage the BIOT fishery[142]. MRAG provided details of Mauritian fishing in an email to Ms. Yeadon on 6 July 2009,[143] and this can be found at p. 4 of Tab 11. The page numbers I'm referring to here are the large numbers at the bottom of the page, at the bottom right-hand corner of the page. So, if you turn to page 4, you will see that the first line of the email refers to "our conversation this morning, when you requested a full history of fishing in BIOT by Mauritian vessels". And this attaches two tables setting out the information.

29. On 9 July 2009 MRAG sent another email attaching a document with its comments on the MPA proposal[144]. This is distinct from the information provided on fishing by Mauritian vessels. This is at p. 7 of Tab 11. As recorded in the email, MRAG was responding to a request "in advance of the formal consultation on the proposal to make the BIOT FCMZ a marine reserve." The document attached by MRAG, which you can find over the page, is duly entitled "MRAG comments on the proposal." In this comment, MRAG questioned the case for a full no-take MPA proposing instead the closure of an area encompassing the islands and the Great Chagos Bank to protect vulnerable reefs

[140] MR, Annex 138, Email exchange between Colin Roberts and Joanne Yeadon, 13-14 July 2009, UKAF, Folder 1, Tab 11.

[141] UKCM, Annex 98 Email from MRAG to Joanne Yeadon, BIOT Administrator, 6 July 2009 and attachments, 'Summary of the activities of Mauritian (flagged and owned) vessels in the BIOT FCMZ by year 1991 to date' and 'Purse Seine Fishery' and UKAF, Folder 1, Tab 11.

[142] UKR, Annex 75, John McManus's witness statement, para. 26; UKR, Annex 73, Joanne Yeadon's 3rd witness statement, para. 11.

[143] UKCM, Annex 98, Email from MRAG to Joanne Yeadon, BIOT Administrator, 6 July 2009 and attachments, 'Summary of the activities of Mauritian (flagged and owned) vessels in the BIOT FCMZ by year 1991 to date' and 'Purse Seine Fishery', UKAF, Folder 1, Tab 11, and UKCM, para. 3.41.

[144] MR, Annex 137, Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, BIOT Administrator, and "MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve", UKAF, Folder 1, Tab 11.

while allowing continued tuna fishing[145]. In this document, MRAG also volunteered comment on various legal questions, including what it called "Mauritius historical rights to fish inside the BIOT FCMZ," and other matters of international law.

30. Mr. Reichler took you to these documents in his speech on the "UK's undertakings to Mauritius," last week. He argued that it was this document, MRAG's comments on the proposal, that was the authoritative statement of Mauritian rights to fish in BIOT waters that had been sought by Mr. Roberts on 3 July, arguing that the "report" on fishing and legal and historical obligations was sought from MRAG, not anyone else, because BIOT did not have the "capacity in-house." [146]

31. Now, this is a clear misreading of the documents. If you turn to page 15 of the same tab using the big numbers, you will find there an email from Ms. Yeadon of 14 July 2009. Mr. Reichler attempted to demote this email to a "covering message." But it is quite clear from a quick scan of the document that it is not a covering message, but the "full analysis of the history of fishing and environmental protection in BIOT" that Mr. Roberts had sought[147] from Ms. Yeadon in his email of 3 July: it responds to the questions in the 3 July email using the same numbering and wording, and it also includes a summary of environment legislation. It is referred to as such by Mr. Roberts, as the answer to his questions, in his third witness statement for the judicial review proceedings[148].

32. Now, MRAG was contracted to run the fisheries. BIOT officials simply would not have asked it for legal advice. In fact, legal advice on all legal issues potentially arising from the MPA proposal was sought from the FCO Legal Directorate[149].

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[145] MR, Annex 137, Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, BIOT Administrator, and "MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve", UKAF, Folder 1, Tab 11, p. 1.

[146] Day 2, Reichler, pp. 160:5-24 – 161:1-6.

[147] MR, Annex 138, Email exchange between Colin Roberts and Joanne Yeadon, 13-14 July 2009, UKAF, Folder 1, Tab 11.

[148] UKR, Annex 74, 3rd witness statement of Colin Roberts, para. 18.

[149] UKR, Annex 74, 3rd witness statement of Colin Roberts, para. 15.

33. I also note that, although Mr. Reichler referred to Ms. Yeadon's third witness statement in support of this argument[150], in particular of the point that they did not have in-house capacity, which he misread - it was intended to refer to the in-house capacity to manage the BIOT fisheries - in support of his argument he then goes on to make an extensive submission to the effect that two of the witness statements of Mr. Roberts and Ms. Yeadon attached to the Rejoinder, their third statements in the judicial review proceedings, should not be accorded any weight because they are, "post-litigation" statements[151]. The UK rejects this submission. The circumstances of the preparation of these statements bears no resemblance to the affidavits the International Court of Justice was addressing in the *Nicaragua and Honduras* case to which Mr. Reichler referred. Nor does it resemble the evidence or the circumstances of its production with which the Court was concerned in the *Democratic Republic of the Congo v Uganda* and *Nicaragua v United States*, to which Mr. Reichler also referred the Tribunal.

34. These two statements were prepared for the purposes of another case, the judicial review proceedings in the English Divisional Court in *Bancoult v Secretary of State for Foreign and Commonwealth Affairs*. The question before the Divisional Court was whether the public consultation was flawed because it failed to refer to the credible evidence of the 1965 understanding on fishing rights and the subsequent preferential treatment for Mauritius flagged fishing vessels[152]. Together with Mr. Roberts and Ms. Yeadon's first and second witness statements, these statements referred to, and exhibited, a large number of the internal documents which Mauritius subsequently annexed to its Reply. Indeed, many of the documents exhibited and referred to by Mr. Roberts and Ms. Yeadon were authored, received, seen and or commented on by them at the time. Neither witness

[150] Day 2, Reichler, p. 160:9-14.
[151] Day 2, Reichler, pp. 165:8-24 – 166:1-12.
[152] As set out in the Divisional Court's judgment of 21 November 2012 giving permission to amend the grounds of review, para. 15 (UKCM, Authority 43).

purported to give a legal analysis of Mauritian rights, and nor were they being asked to do so. The two witness statements were received into evidence by the Divisional Court, and Mr. Roberts and Ms. Yeadon were cross-examined by counsel for Mr. Bancoult. And Mauritius even annexed an excerpt from the transcript of Mr. Roberts' cross-examination to its Reply. The Court gave its judgment on 11 June 2013, and the United Kingdom relied on certain of its findings of fact in its Counter-Memorial.

Consultations with Mauritius

35. I turn now to the consultations with Mauritius on the MPA proposal. It was outlined in detail by UK officials at the bilateral talks on 21 July. In addition to the formal talks scheduled for that day, there were two other meetings, a meeting between Mr. Roberts, the head of the UK delegation and the British Commissioner for BIOT, and the British High Commissioner based in Port Louis, John Murton. On the other side it was attended by the Mauritian Foreign Minister[153], Arvin Boolell. There was also a tête-à-tête between Mr. Roberts and Mr. Seeballuck, the Prime Minister's chief cabinet Secretary[154].

36. At these meetings Mauritian officials were broadly supportive of the proposal, and Mr. Roberts recalled that he raised the possibility with the Foreign Minister that a formal public consultation might be conducted and invited Mauritius to join with the UK in that consultation, for example, by launching it with a joint press statement[155].

37. The formal record of the UK of those talks can be found at Tab 12 of the Folder. If you turn to the second page, the discussion of the MPA proposal is recorded under a heading, "Environmental Issues". It then goes onto the next page down to the end of paragraph 11.

[153] UKCM, Annex 101, Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009, UKAF, Folder 1, Tab 12; see also Colin Roberts' 3rd witness statement, UKR Annex 74, para. 20.

[154] UKCM, para. 3.43-3.44, 3.49; UKR, Annex 74, 3rd witness statement of Colin Roberts, para. 20, and Annex 99 (EGram from the British High Commissioner, Port Louis, dated 21 July 2009) and Annex 101(Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009).

[155] Colin Roberts' 3rd Witness Statement, UKR, Annex 74, paras. 20-21.

You can see from the record that the UK delegation outlined the MPA proposal in some detail. It was explained in a passage, highlighted at the top of the page, that one of the ideas being mooted was the whole of the EEZ being a no-take for fishing.

38. Then in Paragraph 9, it continues: "There were many powerful arguments in the UK to establish a marine protected area. However, many questions still needed to be worked through. The UK delegation explained the advantage to Mauritius that through a marine protected area, the value of the Territory would be raised and this resource would eventually be ceded to Mauritius." And then it records the UK said that, "No decisions had been taken…" This runs completely counter to Mauritius' argument that the decision to go ahead with the MPA was made earlier by the Foreign Secretary on 7 May or at an earlier stage again, as Ms. Macdonald appeared to suggest.

39. What is also interesting is the Mauritian response which is recorded in paragraph 10. They explained: "… that they had taken exception to the proposal from CEN" -the Chagos Environment Network set up by Pew and the Chagos Conservation Trust to promote a BIOT marine park - "they had taken exception to that proposal, but on the basis that it implied that the Mauritians had no interest in the environment. They had also found it necessary to protest on sovereignty grounds. There was a general agreement that scientific experts should be brought together. However, the Mauritians welcomed the project but would need to have more details and understand the involvement of the Mauritian government…" In the next paragraph you can see that the UK delegation added that the Foreign Secretary was "minded to go towards a consultative process and that would be a standard public consultation. However, the UK had wanted to speak to Mauritius about the ideas beforehand…"

40. As recorded in the "comment" section, which is on the next page, UK officials considered that it was"[a] surprisingly positive meeting".

41. The Mauritian record of the meeting echoes this[156]. It records that "The Mauritian side… welcomed the proposal, since it concerns the protection of the environment, the more so that it is in line with the policy of Government to promote sustainable development."

42. The parties agreed to meet up in London on a date to be mutually agreed upon, possibly October[157] or on a date mutually agreed upon during the first two weeks of October[158]. And the documents are a little unclear as to that.

43. In a curious passage in its oral submissions, Mauritius attempts to distance itself from its clear expression of support for the MPA proposal[159] that was expressed in the July meeting. But it is clear from these records that its officials did express support for the proposal, including the possibility of a no-take MPA.

44. Mauritius then leapt ahead in its submissions from this meeting to the telephone discussion between Prime Minister Ramgoolam and the Foreign Secretary on 10 November 2009, in support of its claim that the "UK cut across ongoing bilateral talks by launching a public consultation … over Mauritius' strong objections."[160] This truncation of the record left out of account the series of communications that took place between 21 July and 10 November 2009, which shows that this is simply not true. It is true that the third round of talks and planned meetings never took place, but not for want of trying by UK officials[161].

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[156] MR Annex 144, Information Paper by the Prime Minister of Mauritius, Second Meeting at Senior Officials Level between Mauritius and UK on the Chagos Archipelago, CAB(2009) 624, 12 August 2009, p. 5.

[157] UKCM, Annex 101, (Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009, UKAF, Folder 1, Tab 12)" and MR Annex 144 (Information Paper by the Prime Minister of Mauritius, Second Meeting at Senior Officials Level between Mauritius and UK on the Chagos Archipelago, CAB(2009) 624, 12 August 2009).

[158] MM Annex 148, Joint Communiqué, Second round of bilateral talks between Mauritius and the UK on the BIOT/Chagos Archipelago, 21 July 2009, Port Louis, Mauritius.

[159] Day 2, Macdonald, pp. 195: 21-25 - 196:1.

[160] Day 2, Macdonald, p. 196:10-11.

[161] UKCM, paras. 3.50-3.52; UKR, paras. 3.7-3.19.

45. First, on the 15th of September the British High Commissioner called on the Foreign Minister to ask him to let the UK know when Mauritius would like the third round of talks to take place: he received no response[162].

46. On the 1st of October the British High Commissioner called again to propose 4th and 5th of November for talks[163].

47. The British High Commissioner called again on the Foreign Minister on 12 October, and a record of this meeting is at Tab 13[164]. If you go to the second paragraph of that email, which sends a record of that meeting back to Ms. Yeadon in London, it records that "as requested by you [*Ms. Yeadon*], I flagged up the likelihood that we would be in public consultation on the MPA by the time the next round of bilaterals were held." In the next paragraph it records that, "Boolell was uncomfortable about the prospect of the MPA consultation. He said that the opposition would portray it as the UK going ahead in the face of Mauritius' sovereignty over the island. It could become a stick to beat the Government with."

48. The email then records that "we agreed that rather than seeking to stop the MPA consultation, we should seek to pro-actively manage our messaging on BIOT to ensure that we could portray it as being on [*a typo*] mutual benefit and about an area of mutual concern."[165]

49. The next day, on 13 October, the Mauritian High Commissioner in London met the Director of the FCO's Overseas Territories Directorate. The Director stressed how keen the UK Government were for Mauritian involvement in the MPA proposal, and explained that the reasoning behind the public consultation was that there were a wide range of

[162] UKCM, para. 3.50.
[163] UKCM, para. 3.50.
[164] UKCM, para. 3.50, UKCM, Annex 103, Email from British High Commissioner to Joanne Yeadon, dated 13 October 2009 , UKAF, Folder 1, Tab 13.
[165] Ibid.

people whose interests might be affected by an MPA, and so it was logical to have a public consultation alongside the discussions with Mauritius[166]. At that same meeting the Mauritian High Commissioner signalled that the dates of 4 and 5 November for the third round of talks would not work for Mauritius[167].

50. On the 22nd of October the British High Commissioner met the Mauritian Prime Minister in Port Louis, and a record of this meeting is at Tab 14[168]. At that meeting the High Commissioner outlined the nature of the draft public consultation documents. These were being prepared by Ms. Yeadon, and she describes that process in her first and third witness statements for the judicial review[169]. As recorded, in the second paragraph of the email:

"we discussed the political agenda in both countries. We agreed that it was best if GoM [that's the Government of Mauritius] could find its way to being positive about the consultation, were it signed off by the SoS [the Secretary of State]…"

51. There follows a list of messaging ideas, and then it continues after the bullet points:

"In short, the PM [the Prime Minister] could see the advantages in coming out in support of the consultation. This would, however, require some political footwork locally. He had 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 at the end of November?" The British High Commissioner reports that he replied that, "I thought it unlikely but would ask."

52. As is also recorded there in the email, the High Commissioner was subsequently informed by London that this did not look feasible. And he passed this message on to the Prime Minister's Chief of Staff, Kailesh Ruhee, when he met with him the next day to explain the

[166] UKCM, para. 3.51.
[167] Rejected by Mauritius by the Note Verbale dated 5 November 2009, MM Annex 150.
[168] UKCM, para. 3.52, UKR Annex 60, Record of meeting between British High Commissioner and Mauritian Prime Minister on 22 October 2009, UKAF, Folder 1, Tab 13.
[169] UKR, Annex 69 (paras. 17-25), Annex 73 (paras. 18-25).

likely shape of the consultation document. The record of that meeting is at Tab 15[170]. And I will just take you to two brief passages. The first is in the second paragraph towards the end. "Timelines were tight in the UK. The proposed consultation couldn't now be delayed." It is then recorded at the beginning of the next paragraph that, "Kailash took this in his stride. He, personally, was 1000% committed to the idea. He understood and agreed with the science" [171].

53. These exchanges show three things: First, that Mauritius was offered involvement in the public consultation; second, the third round of talks did not take place before the public consultation was launched, which might have allowed that to happen, because Mauritius did not commit to any dates; third, it shows that Mauritius was kept fully apprised of the fact that the public consultation would go ahead before the talks and could not be delayed. Officials on both sides were frank about their respective election timetables.

54. The UK's understanding at this time of the Mauritian position is reflected in the submission sent to the Foreign Secretary on 29 October 2009[172] recommending the launch of a public consultation. And this is at Tab 16. If you turn to paragraph 11, which is on the third page of the document towards the middle, it states 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 was 'unilateral' [the 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 telephone the

[170] UKCM, Annex 104, Record of meeting between British High Commissioner and Mauritian Prime Minister's chief of staff on 23 October 2009, UKAF, Folder 1, Tab 15.
[171] Referred to in UKCM, para. 3.51.
[172] MR, Annex 147, Submission dated 29 October 2009 from Joanne Yeadon and Colin Roberts to the Foreign Secretary, "BIOT: Public Consultation on Proposed Marine Protected Area", UKAF, Folder 1, Tab 16.

Prime Minister ahead of the launch to discuss the matter and so help optics in Mauritius".[173]

As you can see, the concern expressed centered on the domestic political timetable, a point to which I will return.

The National Oceanography Centre report

55. The submission on the 29th of October drawn up by Ms. Yeadon recommending the launch of the public consultation also drew on the scientific advice received from a workshop held at the UK's National Oceanography Centre in Southampton on 5-6 August 2009[174]. The workshop was convened by the Centre, which I will refer to in shorthand as the "NOC," to provide an independent scientific assessment of the scientific justification for the Chagos Environment Network proposal[175].

56. The NOC identified and invited a number of experts from both the NOC and elsewhere in the UK who could complement the input from the Chagos Environment Network[176]. The workshop report is at Tab 17. And although I won't take you to it, a list of the attendees can be found on p. 14, at Annex 2. This is an important document, and not referred to in any detail by Mauritius.

57. The executive summary of the Report was set out in the Counter-Memorial,[177] and the scientific case for the MPA was further elaborated in the Rejoinder[178]. And then the Attorney General in his submissions took you to the key aspects of the scientific case in support of the MPA. The footnotes in the transcript to his submissions include references to some of the findings in this Report. I will just focus on a couple of points.

[173] Ibid, para. 14; see also UKR, para. 3.11.
[174] Ibid, para. 19, p. 5 (numbering in original).
[175] UKCM, Annexes 97 (Letter from Professor Hill, NOC, to Colin Roberts, BIOT Commissioner, 19 June 2009) and 102 (National Oceanography Centre final report of workshop held on 5-6 August 2009), p. 2, UKAF, Folder 1, Tab 17.
[176] Ibid.
[177] UKCM, para. 3.54.
[178] UKR, paras. 3.45-3.53.

58. The conclusion of the workshop is set out in the third point of the executive summary, which is on p. 1 of the document, 3 pages in from the beginning of the tab. It says:

"There is sufficient scientific information to make a very convincing case for designating all the potential Exclusive Economic Zone of the [BIOT/Chagos Archipelago] as a Marine Protected Area."

59. Now, Mauritius did not challenge the scientific basis for the MPA in its pleadings, but now in its oral submissions casts doubt on the scientific case for a no-take MPA. Its submissions have centred on the comments on the MPA proposal sent by MRAG to BIOT officials on 9 July 2009, to which I have already referred. Professor Crawford argued that the UK disregarded MRAG's "scientific advice" which, he said, "strongly disapproved of the plan," and warned that closing its highly sustainable fishing zone would fail to "address all 'conservation concerns.'"[179]

60. This argument gives an incomplete and misleading picture. The UK did not disregard MRAG's advice, but it was not the only advice that it received. MRAG's arguments for a zoned rather than a no-take MPA were, in fact, the subject of discussion by other scientists at the NOC workshop. And you can see that, if you would turn to page 8 of the Report and if you look halfway down the column to the heading , "Fisheries Issues." Here it says that: "The expectation for MPAs is that they are partly, if not fully, no-take zones for fishing, either immediately or phased-in on the basis that the protected area thereby assists in achieving stock recovery and/or maximizing long-term yields over a larger area. No-take zones should also eliminate any non-targeted bycatch that might threaten endangered species." You will then see in the second column on the right-hand side that MRAG's representatives at the workshop questioned whether full closure of all BIOT fisheries would achieve the desired conservation outcome and that it provided a paper and the key

[179] Day 4, Crawford, pp. 383: 9-21 – 384:1-6.

points from that paper are then listed in the bullet points that follow at the bottom of that page and that they go over onto the next.

61. These arguments were not accepted. The report notes that: "Whilst acknowledging the complexities of the above issues, other workshop participants were not all fully persuaded by these arguments."

62. The Attorney General referred the Tribunal to arguments in favour of no-take MPAs published in other studies as well which support those scientists at the workshop who were not persuaded by MRAG's views[180]. This included the study by Dr. Koldewey and her colleagues. And this can be found under the next Tab, Tab 18.

63. If you turn to page 2, in the highlighted part of the first column, which is about just over two thirds of the way down, it states that the paper, "reviews the evidence that was compiled to assess the benefits of establishing a full no-take MPA during the FCO consultation, particularly closing the tuna fisheries to the 200 mile EEZ"[181].

64. If I could now take you to page 5 of the article, which is three pages through, in the highlighted passage in the second column, which is in the second paragraph, the authors conclude that the closure of BIOT to all commercial fishing would help to eliminate the problems of bycatch in the Indian Ocean and that it would also help to reduce the alleged Elasmobranch bycatch in the western Indian Ocean as a whole by providing a temporal and spatial haven".

65. If we turn to page 7, two pages through, in the first column starting at the second paragraph:

[180] Day 1, Grieve, pp. 48-51, citing H. Koldewey, D. Curnick, S. Harding, L. Harrison, M. Gollock, 'Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve', 60 *Marine Pollution Bulletin* 1906 (2010), UKR Annex 63 and UKAF, Folder 1, Tab 18, D. M. Ceccarelli, *The value of oceanic marine reserves for protecting highly mobile pelagic species: Coral Sea case study* (2011), UKR Annex 68 and G.J. Edgar, et al, "Global conservation outcomes depend on marine protected areas with five key features", *Nature*, vol. 506, 13 February 2014, 216, UKR, Annex 80.

[181] UKR, Annex 63, Koldewey et al, p. 2 (1st column).

ARBITRATOR GREENWOOD: Ms. Nevill, I'm sorry to interrupt you again. Before we leave Page 5, could you explain – I'm probably just grappling with the scientific parlance here, but what is Elasmobranch by-catch? I thought lawyers were good at weird technical jargon, but this leaves me completely cold. What is it?

MS. NEVILL: I'm afraid that I will have to come back and answer your question after the break. Or we may need to refer back to London for further advice. It may be that Professor Boyle will be able to provide further assistance on the term on Friday in his speech that will also be covering these issues.

ARBITRATOR GREENWOOD: Thank you. I'll look forward to hearing Professor Boyle's explanation of it.

PRESIDENT SHEARER: Ms. Nevill, I note that Professor Boyle is not going to be able to help you on that from his body language, so it may be that further investigation, but I note that we are approaching the time for luncheon break. Can you tell me – tell us how much longer you would be with your speech, whether we should adjourn now and you could take up the matter.

MS. NEVILL: With the leave of the Tribunal, I would just make a further point based on this document, and then stop, and then come back after the break.

PRESIDENT SHEARER: Very good. Thank you, Ms. Nevill.

MS. NEVILL: I had before Judge Greenwood's question referred to page 7 of the article and the second paragraph. There: "It is concluded that a permanent no-take zone in the Chagos BIOT will maintain both fish populations and a near pristine habitat that exists in this area". So, as you can see from the comments in the MRAG report and also that were followed up by the study, there was support for a no-take MPA, and that the proposals of MRAG that suggested a scientific case may not have been made out were considered by the scientists involved, and they reached a different conclusion, and so I will leave it there and return after the break.

PRESIDENT SHEARER: Okay. Thank you, Ms. Nevill.

Oh, there is one more question.

Judge Hoffmann.

ARBITRATOR HOFFMANN: Thank you, Mr. President.

Ms. Nevill, you referred to this report now which is a scientific report, I take it. Can you perhaps indicate whether there was any response from a scientific point of view on this idea of excluding from the MPA the Diego Garcia islands, considering that there is some catching of tuna taking place and other activities. Just from a purely scientific point of view, whether there was any reaction to the exclusion of Diego Garcia.

Thank you.

MS. NEVILL: I could answer that question now, but with your leave, I would suggest that it might be quicker and more focused if I come back to you after the break with a response on that point.

PRESIDENT SHEARER: Very good. Then we will rise for the luncheon adjournment and return at 2:30 this afternoon. Thank you.

(Whereupon, at 1:00 p.m., the hearing was adjourned until 2:30 p.m., the same day.)

AFTERNOON SESSION

66. Before moving onto the public consultation I have one more brief point, and that's taking you back to the NOC report, although there's no need to return to it unless the Tribunal wishes to do so. The Tribunal may have noticed that, in the same section of page 9 of the NOC Report, that "The workshop also considered that the issue of Mauritian fishing rights was a political one that could only be resolved by negotiation and international agreement." And this passage of the report was picked up on by Mauritius in its submissions. Neither MRAG, as I've already said, nor the workshop participants, who are not lawyers, were being asked for a legal analysis. That is not to say that the points did not receive attention. As already noted, legal advice was sought by BIOT officials on the legal issues raised by the proposals from the FCO Legal Directorate. And this is referred to in the witness statements of Ms. Yeadon and Colin Roberts in the third witness statements that were produced in the course of the judicial review.

The public consultation

67. Moving now to the launch of November 2009 and the Consultation Document is at Tab 19 of the folder. On page 5 of the Document, you will see under the heading Consultation Questions, and that three options are set out for a possible large scale MPA. Should it be a i) a full no-take MPA, ii) zoned to allow fishing for pelagic species such as tuna during part of the year, or iii) zoned to protect the coral reef system only? And the Consultation Document asks respondents to say which of the options they consider "the best way ahead."

68. In accordance with the government's guidelines on public consultations, the Consultation Document also includes an outline of "Impact/costs and benefits" which starts on page 11 of the document. If you turn over to the next page, you will see towards the bottom that

there is a heading for "Mauritius", and that the impact on Mauritius is summarised in a relatively full paragraph. It says:

"We have discussed the establishment of a marine protected area with the Mauritian government in bilateral talks on the British Indian Ocean Territory - the most recent being in July 2009," and then the Consultation Document actually annexes the joint communiqué produced from that meeting. It continues: "The Mauritian government has in principle welcomed the concept of environmental protection in the area. The UK has confirmed to the Mauritians that the establishment of a marine protected area will have no impact on the UK's commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes. We will continue to discuss the protection of the environment with the Mauritians."

69. The Chagossian community is the subject of the next paragraph, on page 13. It records that, "the current position under the law of BIOT is that there is no right of abode in the Territory," and that under "these current circumstances, the creation of a marine protected area would have no direct immediate impact on the Chagossian community." However, it is recognized that "circumstances might change following any ruling that might be given in the case in *Chagos Islanders and UK*" which was then before the European Court of Human Rights in Strasbourg, which essentially was taking a case challenging the House of Lords decision in 2008, which ruled against, which upheld the policy on settlement and right of abode. And it's also noted in that paragraph that "[c]ircumstances may also change when the Territory is ceded to Mauritius."

70. Thus the Consultation Document made clear that the MPA was without prejudice to the undertaking to cede the territory when no longer needed for defence purposes and any changes to policy on resettlement. It also records the Government's intention to continue separate talks with Mauritius alongside the public consultation.

Mauritius' initial responses to the public consultation

71. On the 10th of November 2009, the same day as the scheduled launch of the public consultation, the British High Commissioner in Port Louis called on Foreign Minister Boolell and took him through the Consultation Document. He then called on the Cabinet Secretary and provided him with a copy[182].

72. The United Kingdom Foreign Secretary then telephoned Prime Minister Ramgoolam to brief him on the public consultation. And the record of the call is at Tab 20 of the Tribunal's folder[183]. You will see there that the Foreign Secretary sought to assure the Prime Minister that the public consultation was on the "idea of an MPA," and this is recorded about halfway through the first paragraph: "Going out to consultation was the right thing to do before making any decisions. We would talk to Mauritius before we made any final decision. Mauritian views are very important". There's then a reiteration in the second, in the next paragraph that it was without prejudice to the UK commitment to cede the territory when no longer required for defence purposes. It then concludes in that paragraph that the Foreign Secretary "hoped the UK and Mauritius could work closely together on this".

73. Prime Minister Ramgoolam then "responded that environmental protection was an important subject for him. He had a few problems with the consultation document, which he had only just seen, and would be sending a Note Verbale on this. His first problem was on page 12. "we, {Mauritius} had agreed in principle to the establishment of an MPA". This was not the case. Could we amend the consultation document?". He also suggests and he also raises the complaint, for the first time, that a ban on fishing might be incompatible with resettlement and that the Consultation Document did not mention the

[182] UKCM, para. 3.62.

[183] UKCM, Annex 106, Record of telephone call between Foreign Secretary and Mauritian Prime Minister, 10 November 2009 and UKAF, Folder 1, Tab 20.

sovereignty issue. This was incorrect. As we have seen, the Consultation Document did in fact refer to both the Government's resettlement policy and the Mauritius claim to sovereignty.

74. The Foreign Secretary's surprise at the shift in tone is evident in the next paragraph: he says that "he hoped there had been no misunderstanding. He understood that the discussions between the UK and Mauritius had been positive".

75. The Foreign Secretary reiterated, at the third paragraph from the bottom of the page, that "the bilateral talks were an important forum and the purpose of the consultation was to bring the idea of an MPA to a wider public". And here obviously he's referring here to the public consultation.

76. This was the first indication the UK received that Mauritius was changing its position. But even then, the Prime Minister still expressed the view in this call that environmental protection was important. He did say that he did not "want" the consultation to take place outside the bilateral talks; no doubt this was because of the impact on his party's position in the forthcoming elections, as he had indicated in his conversations with the British High Commissioner in October. Mauritius says that the UK "twists the plain meaning of what the Prime Minister was saying," when it says that Prime Minister Ramgoolam was not saying that the public consultation should be withdrawn[184]. But quite simply, the Prime Minister did not ask for the public consultation to be withdrawn. He said would raise the matter with Gordon Brown at CHOGM later in November and sought and received—and this is on the page of the following page – an assurance that the subject could be brought up at the next bilateral talks, thus clearly anticipating that there would be further talks.

[184] Day 2, Macdonald, p. 196: 22-24.

77. If the Prime Minister's plain meaning was that the public consultation should be withdrawn, then why did Mauritius's Note Verbale of the same day not say so? And you will find that at Tab 21. The Note Verbale seeks amendment of the wording of the consultation document, but nowhere does it protest at the launch of the public consultation[185]. This is a baffling omission, if this was, as Mauritius now argues, its position on 10 November.

78. Indeed, communications between Mauritius and the UK after the launch of the public consultation initially continued relatively positively, as the record of a meeting between the British High Commissioner and Foreign Minister Boolell on 20 November shows.[186] This is at Tab 22. And you will see that it's the email towards the bottom of the page, and that there are some indications in highlighting of the relevant passages. Mr. Boolell is recorded as saying that he was pleased to see multiple references to the commitment to cede when no longer required for defence purposes. It also confirms, towards the end, it says, "We were both interested in marine conservation. We had plenty of scope to work together. Boolell agreed". Clearly these were propositions put to him by the British High Commissioner with which Boolell agreed.

Mauritius' change in position

79. However, in a Note Verbale sent only the next day, on 23 November 2009[187], which I haven't included here, but I will give you an account of its content, Mauritius said for the first time that it believed that it was quote, "inappropriate for the consultation," on the proposed MPA to take place outside the ongoing-bilateral talks, and that it considered that, "an MPA project in the Chagos Archipelago should not be incompatible with its

[185] MM, Annex 153, Mauritius Note Verbale of 10 November 2009, UKAF, Folder 1, Tab 21.
[186] UKCM, Annex 110, Record of meeting between British High Commissioner and Mauritian Foreign Minister on 20 November 2009, UKAF, Folder 1, Tab 22.
[187] MM, Annex 156, Letter from United Kingdom Foreign Secretary to Mauritian Foreign Minister of 15 December 2009, UKAF, Folder 1, Tab 23.

sovereignty over Chagos Archipelago and should address the issues of resettlement, access to fisheries resources and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty." Not only was this was the first time that Mauritius claimed that it was "inappropriate" for any consultation over the proposal to take place outside the bilateral process - and here it's clearly talking about the public consultation - but it was the first time that it said that any MPA project, "had to be compatible with the long-term resolution or progress in the talks on the sovereignty issue," which appears to be referring to the bilateral talks and insisting that any talks on the MPA must encompass those issues.

80. These were somewhat belated objections, given that the public consultation had by then been underway for nearly two weeks, and the Mauritian official reaction had been conveyed by the Note Verbale of 10 November, which did not make these protests.

81. The UK had already stated in the Consultation Document, and in exchanges with Mauritius, that the MPA proposal was without prejudice to the commitment to cede the Territory when no longer needed for defence purposes and any change in UK policy on the right of abode. It is very difficult to understand how any marine protected area preserving the environment or any consultation on one would "prejudice an eventual enjoyment of sovereignty."

The meeting between the Prime Ministers at CHOGM, 27 November 2009

82. I now turn to the conversation in the margins of the CHOGM conference on 27 November 2009 between Prime Minister Gordon Brown and Prime Minister Ramgoolam. It is alleged by Mauritius that Prime Minister Brown promised Prime Minister Ramgoolam that he would put the MPA "on hold." And this alleged conversation or this alleged commitment has been referred to several times already throughout the speeches and also was referred to again by the Agent today. This allegation has been invoked in support of

Mauritius' case under various articles including Articles 2(3) and 194, Article 78(2) and 283[188].

83. The UK said in its Counter-Memorial that, "when the allegation first arose that the United Kingdom Prime Minister had given any such undertaking to withdraw the consultation, the Prime Minister was asked whether he had: he said he had not." It reiterated this response in its Rejoinder. Ms. Yeadon explained in her submission to Ministers of 30 March 2010, which Ms. Macdonald took you to last Friday[189] and I will briefly come back to again in a moment, Ms. Macdonald took you to that on Friday, and it's the passage where it records that Prime Minister Ramgoolam "insist[ed] that Gordon Brown promised to halt the MPA consultation." Now, if there had been any understanding on the part of UK officials that Prime Minister Brown had in fact made such an undertaking, Ms. Yeadon would undoubtedly have said so in her submission. She did not. Ms. Macdonald also argues that Ms. Yeadon's words show that, "those within the Foreign Office were well aware of Mauritius's position at the time." The UK has never suggested that UK officials were not aware that a misunderstanding had arisen.

84. It is clear that it had, and it is not uncommon in any conversation between two individuals. The UK does not seek to suggest that Prime Minister Ramgoolam's stated understanding and recollection as to what was said was not genuine, nor to make light of it, but it does not accept that that was what was said by Prime Minister Brown.

85. The Attorney General last week assured the Tribunal that he was satisfied that no commitment to put the MPA "on hold" had been given by the Prime Minister[190].

[188] Day 2, Macdonald, p. 197:13-15; Day 3, Macdonald, pp. 220:3-25 - 222:1-89, p. 230:1-4, 15-19 ; Day 3, Sands, p. 292:17-19, pp. 292:21 - 293:1-5, 10-12, pp. 301: 5-25 – 302: 1-11; Day 3, Loewenstein, p. 322: 3-4, p. 340: 12-14.

[189] Day 3, Macdonald, p. 224:2-17.

[190] Day 1, Grieve, p. 55:12-13.

86. When UK officials became aware that some misunderstanding had arisen, the Foreign Secretary wrote to the Mauritian Foreign Secretary on 15 December 2009, which is a relatively quick turnaround in diplomatic terms, as the Agent for the United Kingdom pointed out this morning. And this was a genuine attempt to clear up the confusion[191]. That letter is at Tab 23 of your folders, and it's quite important, so I'll go through it at some length.

At the second paragraph it says:

"At our meeting [and here he is referring to the meeting between the Foreign Ministers at CHOGM], you mentioned your concerns that the UK should have consulted Mauritius further before launching the consultation exercise. I regret any difficulty that this has caused you or your Prime Minister in Port Louis. I hope you will recognise that we have been open about the plans and that the offer of further talks has been on the table since July.

I would like to reassure you again that the public consultation does not in any way prejudice or cut across our bilateral intergovernmental dialogue with Mauritius on the proposed Marine Protected Area. 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. The consultations and our plans for an MPA do not in any way impact on our commitment to cede the territory when it is no longer required for defence purposes." And he continues on the second to last paragraph on the page.

"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 looks likely to happen in January.

… I hope that Mauritius will take up the opportunity to pursue this bilateral dialogue." And then over the page: "Whatever misunderstandings there may have been to date, I remain

[191] MM, Annex 156, Letter from United Kingdom Foreign Secretary to Mauritian Foreign Minister of 15 December 2009, UKAF, Folder 1, Tab 23.

convinced that further marine protection in the Indian Ocean is a goal that we can both share." And then at the end: "I look forward to working with you towards this common goal of marine protection."

87. Thus, the letter makes it absolutely clear that first, the public consultation will continue, and, second, that the UK still sought further consultations with Mauritius on the MPA proposal alongside the public consultation. Mauritius could not, it is submitted, have been under any misapprehension following this letter as to either.

88. It might also be noted that the letters and Notes Verbale from Mauritius after the Foreign Secretary's letter of 15 December 2009—and I have references to these in a footnote in the transcript—none of these protested that the continuation of the public consultation breached any undertaking by Prime Minister Brown to put the MPA "on hold", or any commitment by him to withdraw the public consultation[192]. And/nor was this protest made in Mauritius' Note Verbale of 2 April 2010 protesting the MPA, and/nor was it raised in its Memorial."[193]

89. Despite the Foreign Secretary's letter, there were no talks with Mauritius in January.

ARBITRATOR GREENWOOD: Ms. Nevill, I'm sorry to interrupt you. Was there a reply from Mr. Boolell to Mr. Miliband? Was there a response directly to this letter? I can't remember.

MS. NEVILL: My recollection – I confess, I haven't got the documents in front of me. My recollection is it's a general letter coming back from Mauritius.

[192] UKCM, para. 3.63. MM, Annex 157 (letter of 30 December 2009 from Foreign Minister Boolell [nb: see p. 591 of the transcript]), MM, Annex 159 (letter dated 30 December 2009 from the Mauritius High Commissioner in London to the Sunday Times), MM, Annex 160 (written evidence of the Mauritius High Commissioner in London to the Foreign Affairs Committee, 4 February 2010), MM Annex 162 (letter of 19 February 2010 to the British High Commissioner in Port Louis), MM, Annex 167 (Note Verbale dated 2 April 2010).

[193] MM, para. 4.59.

ARBITRATOR GREENWOOD: Thank you. Please don't let me distract you further. I'm sure one of your colleagues can look up the answer.

MS. NEVILL: But I'm not aware whether it's a direct letter, but there are two documents that follow, a Note Verbale and a letter, both of the 30th of December which are expressed in similar terms.

Mauritius sent a Note Verbale and letter on 30 December 2009 in similar terms.[194]. The essence of what Mauritius said in these communications was that it would not hold separate consultations on the proposal unless any discussion relating to the proposed establishment of an MPA also included the discussion of the issues that it linked to its sovereignty claim it had set out—and this reflected what it had set out in its Note Verbale of 23 November 2009, to which I have just referred.

91. The United Kingdom continued to make overtures to Mauritius offering talks and consultation notwithstanding, first by a Note Verbale from the British High Commissioner of 15 February 2010[195].

92. The Mauritian response, in a letter of 19 February 2010, was, in effect, a refusal to resume the bilateral talks unless the public consultation was withdrawn [196].

93. The UK nevertheless tried again in a letter of 19 March, which is at Tab 24. Towards the end of the second paragraph it records that,

"… the United Kingdom is keen to continue dialogue about environmental protection within the bilateral framework or separately" and that the "public does not preclude, overtake or bypass those talks" [197].

[194] MM Annexes 157 (Letter from Foreign Minister Boolell to the Foreign Secretary) and 158 (Note Verbale from Mauritius dated 30 December 2009)

[195] UKR, Annex 64, Note Verbale No. 6/2010 from British High Commission to Mauritius Ministry of Foreign Affairs, 15 February 2010.

[196] MM, Annex 162, Letter from Secretary to Cabinet and Head of the Civil Service, Mr Seelballuck, to the British High Commissioner dated 19 February 2010.

[197] MM, Annex 163, Letter from British High Commissioner to the Secretary to Cabinet and Head of the Civil Service dated 19 March 2010, UKAF, Folder 1, Tab 24.

And the UK tried once more in a Note Verbale of 26 March 2010 to engage Mauritius in discussions on the proposal and again reiterated that the public consultation did not preclude, overtake or bypass those talks[198]. Mauritius did not take up any of these offers.

The outcome of the public consultation

94. I now turn to the outcome of the public consultation, which ran until 5 March 2010. Over a quarter of a million people responded from around the world. This is believed to be by far the biggest response ever to a public consultation undertaken by the UK Government.

95. A large number of responses were received from the international scientific community, and these are summarised in paragraphs 22 and 23 of the report of the consultation facilitator [199] which is annexed to the Counter-Memorial. Also annexed to the Counter-Memorial is a collation of the replies, and I was making reference to this document when I was saying we were pulling out references about comments on the scientific argument concerning the exclusion of Diego Garcia. The Consultation results also included the outcomes of oral discussions held with Chagossian communities in Mauritius, the Seychelles and the United Kingdom.

96. The 2 page executive summary of the Public Consultation results are at Tab 25. And the key findings are at paragraphs 7 to 9:

- Well over 90% of the responses supported greater marine protection in principle. The main difference between the responses was their view on potential Chagossian resettlement and whether this question should be tackled before designation of any MPA, or could be made later if circumstances changed.

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[198] MM, Annex 164, Note Verbale from the British High Commissioner, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and Trade, dated 26 March 2010.

[199] UKCM, Annex 121, 'Whether to establish a marine protected area in the British Indian Ocean Territory: Consultation Report', Rosemary Stevenson, Consultation Facilitator, undated; executive summary at UKAF, Folder 1, Tab 25.

ARBITRATOR WOLFRUM: Counsel, may I briefly interrupt you on this Executive Summary. Have you a breakdown about the responses which came from Mauritius? They are included in this Executive Summary, as I see particularly in Paragraph 6, but they are – this is an overall view of the responses?

MS. NEVILL: Yes.

ARBITRATOR WOLFRUM: Sure, it's easier for somebody from Costa Rica to agree or from Greenland than perhaps from Mauritius, so therefore that should be a bit more differentiated. Thank you.

MS. NEVILL: Thank you, Judge Wolfrum.

There was no submission to the public consultation by Mauritian fishing interests. As to whether they were responses by other – and there was a response by the Mauritian Chagossian community which is reflected in the consultation report, and the collation of responses. I could not say beyond that whether there were more responses from Mauritius, more detailed ones. We would need to go back and look through the document again, but I'm not aware of any.

Moving back to the conclusions of the key findings in the facilitator's report, of those that supported one of the three options listed, the great majority supported option 1; that is, a no-take marine reserve.

97. As recorded in paragraph 10, which is over the page, options two and three in the MPA Consultation Document, which reflected MRAG's comment on the proposal of a zoned MPA of 9 July 2009, these options received limited support.[200] These were, however, and perhaps unsurprisingly, "universally the choice of the Indian Ocean commercial tuna fishing community" who considered that the scientific case for the extra benefits of option

[200] UKCM, Annex 121, "Whether to establish a marine protected area in the British Indian Ocean Territory: Consultation Report", para. 10, UKAF, Folder 1, Tab 25.

1 were not strongly demonstrated[201]. They were, however, as this executive summary makes clear, in the minority.

The submission to Ministers on the MPA proposal

98. Following the conclusion of the public consultation, the BIOT administration made a submission to ministers on 30 March 2010 on the next steps for the proposed MPA.

ARBITRATOR GREENWOOD: Ms. Nevill, sorry, before you take us to the submission, what was the date when the consultation closed, and when were these documents from the facilitator published? Did they seem to have dates on them?

MS. NEVILL: Yes. The public consultation closed on the 5th of March 2009. I will need to confirm the date that – I mean, I appreciate that these documents are undated. I need to confirm the date that the report and the collation of responses was received by the BIOT Administration. I understand that it was sometime in March, but I would need to verify that.

ARBITRATOR GREENWOOD: Thank you.

MS. NEVILL: Following the conclusion of the public consultation, the BIOT administration made a submission to ministers on 30 March 2010 on the next steps for the proposed MPA, and this can be found in Tab 26.

99. Mauritius argued in its Reply that this submission and the internal communications between UK officials which followed it over course of the days of the 30th and 31st of March showed that the decision was "hastily declared" and that officials concerned considered that there had been an inadequate period of research and consultation,"[202] and that they saw the Foreign Secretary's decision-making as "decision-making on the hoof."[203] The UK dealt with this allegation in detail at paragraphs 3.20 to 3.28 of its Rejoinder, explaining why the Mauritian construction of these documents was out of

[201] Ibid.
[202] MR, para. 3.71.
[203] MR, para. 1.14.

chronological order and simply wrong. Read properly, they show that UK officials in fact supported a no-take MPA and support the conclusion that UK officials considered that the consultation was adequate and the MPA was scientifically justified.

100. Notwithstanding the analysis in the UK's rejoinder, Mauritius nevertheless went onto give exactly the same analysis in its oral submissions[204] as it had in its Reply reading the emails to the Tribunal out of order[205], although Ms. Macdonald then corrected herself.

101. What we have prepared for Tab 26 of the folder is a bundle of the relevant documents in this exchange, which were annexed to the Mauritian pleadings, but we have reassembled them in their chronological order. The pages of the tab are numbered with big number at the bottom right-hand corner so that we can move through these documents. I don't intend to go through them in great detail, but I thought it might be useful if we just went through and briefly mentioned the chronology.

First we have on page 1 of the tab Ms. Yeadon's submission of 30 March 2010: you will see that in the preferred option towards the bottom, it recommends the Foreign Secretary stop short of announcing the MPA.

Next at page 7 of the new numbering, we have a response from Minister of the Foreign and Commonwealth Office, or from his Private Secretary, Chris Bryant. He responds that he is inclined to be bolder.

Then at page 8 we see that the British High Commissioner sends an email on the 31st of March, the British High Commissioner in Port Louis, updating on the position in Mauritius.

Next in the timeline at p. 10 of the Tab is an email recording a telephone call from the Foreign Secretary, his Private Secretary to Ms. Yeadon, on the 31st of March 2010, and this is a key document, so I'm going to focus on it or pause to focus on it for a moment.

[204] Day 3, Macdonald, pp. 223: 22 to 227: 4.
[205] Day 3, Macdonald, ibid and pp. 227-230.

It notes that the "Foreign Secretary is minded to ask Colin [and that's Colin Roberts the BIOT Commissioner], to declare an MPA and go for option 1, {full no-take zone} BUT FINAL DECISION IS NOT YET NOT TAKEN. The FS [Foreign Secretary] has said that:

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

Ms. Yeadon's initial response to this is recorded in the next paragraph: "Our initial reaction here is that the Mauritians, having managed themselves into a corner publicly and insisting that any MPA must deal with sovereignty and resettlement, they will find out how to backtrack, especially if the UK will not be able to move on sovereignty and resettlement".

102. What the Foreign Secretary's email shows, or what the record of his message conveyed through his Private Secretary which has been recorded in the email shows, what this shows is that, right up until the last moment before the declaration of the MPA, the Foreign Secretary was trying to find ways to work with Mauritius. It suggests the Foreign Secretary was persuaded by the case for a no-take MPA put by officials, wanted to find some basis to work with Mauritius on the management of the MPA, but did not want to put the MPA at risk. An announcement declaring the MPA and a three month consultation period with Mauritius on management would have achieved this. Holding off, in the hope of reaching an agreement with Mauritius, especially given Mauritius' previous communications on the proposal, would not achieve that goal. And this, it is suggested, is what the Foreign Secretary was getting at. Nevertheless, he wanted officials to go and see if something could be done to work with Mauritius.

103. The next step in the chronology is the email from Mr. Roberts responding to Ms. Yeadon's email which records the Foreign Secretary's suggestion, and this is at the next page, page 11. And we need to go down to the, as is common in email chains, we start with the email at the bottom half of the page. Mr. Roberts responds:

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

i) the [Foreign Secretary] decides now that BIOTA[that's the BIOT Administration] – should establish a full no-take MPA in BIOT's EEZ".

He then goes on to elaborate a further five points which basically read together suggest a phased in MPA. As this shows, he certainly did think that there was a scientific case for an MPA.

104. Mr. Allen then responds, in the email which is at the top of the page, "Colin, I think this approach [i.e. Colin's approach] risks deciding (and being seen to decide) policy on the hoof. That's a very different approach to the one we recommended…" It is this email that leads Mauritius to what might be called the various hoof prints all over its submissions. In fact, it was not directed to the Foreign Secretary's decision making at all but to Mr. Robert's ideas..

105. The next step in the chain is John Murton's response to Ms. Yeadon and Colin Roberts and Mr. Allen's emails. He agreed, and this is on p. 12, he agreed with Mr. Allen's assessment. He also records, and I'll just summarize this, and it's really set out in paragraph 3 and 4 of this email, that there was a political implication, and that the "three months or 12 months to hammer out details of management idea would not fly. Ramgoolam would not be able to commit to negotiating this framework if we had already declared an MPA". And I should have pointed out the third paragraph that "the announcement could have very significant negative consequences for the bilateral relationship. It would be seen by the government here in general and by PM Ramgoolam in particular as exceedingly bad timing, and this is because of the general election. The

opposition MMM would welcome the announcement as an electoral gift". So, as we can see from this, the domestic political context which backgrounds the Mauritian position is very clear. Ms. Yeadon then writes a further minute to the Foreign Secretary, which is at page 14 of the Tab. In short, the advice of officials to the Foreign Secretary in this document was that his suggestion would not work, and that this was because of the domestic political sensitivities in Mauritius[206].

106. The Foreign Secretary's response is at p 16 of the Tab: "The Foreign Secretary was grateful for your submission and a copy of the report on the consultation. He's carefully considered the arguments in the submissions and the views expressed during consultation. He was grateful for your further note today. He has considered the submission in light of the High Commissioner's views in both of the ones we've expressed in the email which we just read to you, and has given serious thought to different possible options for announcing an MPA. The Foreign Secretary has decided to instruct Colin Roberts to declare the full MPA (option 1) on 1 April".

107. That the Mauritian position throughout was driven by domestic politics is confirmed by the response of the Prime Minister to the news of the announcement when the Foreign Secretary telephoned him on 1 April to advise of the decision. And this is at Tab 27[207]. In paragraph 4 Prime Minister Ramgoolam asked "if it might be possible to delay the announcement until after the Mauritius elections." Turning to the next page in paragraph

[206] As included in UKAF, Folder 1, Tab 26: email exchanges on 30 and 31 March 2010 (submission of 30 March, email from Minister's private office of 30 March at 18.06; email within British High Commission of 31 March at 08.30, email from Joanne Yeadon to British High Commission of 31 March at 11.47, email from Colin Roberts to Joanne Yeadon of 31 March at 12.07, email from Andrew Allen to Colin Roberts of 31 March at 12.31, email from British High Commission to Joanne Yeadon and Colin Roberts of 31 March at 12.45, minute from Joanne Yeadon to Foreign Secretary of 31 March, email from Foreign Secretary's private office of 31 March at 17.55: these are taken from MR Annex 152, MR Annex 153, MR Annex 153, MR Annex 154, MR Annex 155, MR Annex 156, MR Annex 157, MR Annex 158, UKR Annex 65, UKR Annex 66 and UKR Annex 67).

[207] UKCM, Annex 114, Notes of telephone call from Foreign Secretary to Mauritius' Prime Minister of 1 April 2010 in email of 1 April 2010 from Global Response Centre, unredacted version in UKR, Annex 67, UKAF, Folder 1, Tab 27.

6, "the Prime Minister then said that he had to take the line that Mauritius disagreed with the decision on the MPA but he would like to say that he and the Foreign Secretary had talked about sovereignty." So, here we see that he had to take the position in public. Notably the Prime Minister is not recorded as mentioning UNCLOS, Prime Minister Brown, or environmental protection or the 1965 understandings.

108. Mauritius does make any comment on this aspect of the Prime Minister's response. And/nor does it respond to the point made by the United Kingdom in its Rejoinder that the records of the discussions with Mauritian officials from October 2009 onwards point strongly to the conclusion that the Mauritian domestic political context was driving its responses to the public consultation and to the MPA proposal[208]. And that it had shifted from an initial position of support for the proposal.

109. What these communications also show, especially when considered against the background of two years of work by UK officials on the MPA proposal and the public consultation, is that the decision to declare the BIOT MPA was considered and supported by scientific evidence and the wider community. Indeed, the new incoming Conservative Government reconsidered the policy and decided to continue implementation of the MPA[209].

110. It is not lost on the UK that the type of management agreement envisaged by the Foreign Secretary in his email to officials on the 31st of March appears to be precisely the type of approach that Mauritius now claims is the correct way to "create a marine protected area"[210] and "an excellent example of what the UK should have done."[211] The UK's position is that this type of proposal could have been raised by Mauritius, but that offers

[208] UKR, para. 3.10 b, 3.11 and 3.12.

[209] UKR, para. 3.34 and MR Annex 162, Submission dated 1 September 2010 from Joanne Yeadon to Colin Roberts and Private Secretary to Henry Bellingham and Private Secretary to the Foreign Secretary, "British Indian Ocean Territory (BIOT): Marine Protected Area (MPA): Implementation and Financing".

[210] Day 1, Sands, pp. 26:23-24 - 27:1.

[211] Day 3, Sands, p. 312:23-25.

of discussions went nowhere because of the position adopted by it, not because of any lack of will on the part of the United Kingdom.

111. Even in the announcement of the MPA on the 1st of April 2010, which is at Tab 28 of your folder,[212], it states that the UK intends to work closely with all interested stakeholders in implementing the MPA; and it reiterates again publicly that it is without prejudice to the undertaking to cede the Territory to Mauritius when no longer needed for defence purposes.

112. The offer of engagement and cooperation with Mauritius is on the table. The Attorney General referred in his speech to the offer extended to Mauritius on the 4th of March this year inviting input on "improving the current framework for managing the Marine Protected Area." The Attorney General repeated the assurances about the UK's willingness to cooperate[213].

The implementation and enforcement of the MPA to date

113. I turn now to implementation and enforcement of the MPA. Mauritius has levelled several criticisms at the implementation of the MPA to support its arguments on abuse of rights. It claims that the lack of specific implementing legislation is "the declaration of an MPA without a real MPA,"[214] and that the MPA has "failed in financing" and is "unsupported in funds,"[215] and that it has imposed prohibitions without doing anything to establish the necessary enforcement mechanisms because it only has one patrol vessel, the Pacific Marlin[216]. Professor Boyle will address the legal merits of these arguments on Friday. I will confine myself to a few brief points.

[212] MM, Annex 165, Foreign Secretary's announcement of the MPA on 1 April 2010, UKAF, Folder 1, Tab 28.
[213] Day 1, Grieve, pp. 41: 5-11.
[214] Day 4, Crawford, p. 385:7-8.
[215] Day 4, Crawford, pp. 385:17-22 – 386: 1-6.
[216] Day 4, Crawford, pp. 386:7-21 – 387: 1-4.

114. The implementation of the MPA was described in paragraphs 3.69 to 3.72 of the Counter-Memorial, and updated in the Rejoinder at paragraphs 3.54 to 3.59. And I invite the Tribunal to refer to these passages.

115. Briefly, implementation and enforcement of the MPA is currently funded until at least 2015 by the UK Government and private donations, including a significant donation by the Bertarelli Foundation, a charitable foundation set up by the Bertarelli family. It is Ernesto Bertarelli who appears speaking at the end of first DVD submitted with the Rejoinder. This funding was for an initial period of five years. And the BIOT Administration is currently working on the next generation of funding beyond 2015.

116. Conservation planning is being undertaken, which includes looking at the best methods of surveillance and enforcement of the MPA and dealing with the problem of illegal fishing. Although Mauritius seeks to make mileage out of the fact that there is only one BIOT patrol vessel, it provides no evidence that enforcement of the MPA is in fact deficient.

117. As to the intended MPA legislation, I refer the Tribunal to what the Agent and the written answers say on this point. But it should be stressed that there has been no immediate practical need to enact legislation to implement and enforce the MPA because the policy can be implemented under the existing legislative framework. There is one caveat on this. The immediate need to be able to impose a fixed penalty fine to assist enforcement of the MPA was met earlier this year by an enactment amending the existing legislation.

118. Mauritius has, in the course of this hearing, either invited the UK to provide information in relation to the 2013 Sheppard Report, or accused the UK of failing to supply further information in support of its explanations as to how the MPA is funded and enforced. It has also raised the question as to whether the scientific case supports a full no-take MPA over a zoned MPA. As I have explained, that is unfounded. But that's not my point

here. These are precisely the kinds of issues that could have been discussed with Mauritius had it taken up the repeated offers of consultation, or, indeed, if Mauritius had sought an exchange of views as required by Article 283, a point to which Mr. Wordsworth will return.

Conclusion

119. In conclusion, the UK submits that the background to the BIOT MPA and its implementation show: first, that the decision to create the MPA was only taken after an extended period of assessment and consultation; second, if there was any lack of consultation with Mauritius, this was because it refused to proceed unless the UK halted the public consultation, which was a wholly unreasonable expectation in all the of the circumstances - the public consultation did not cut across consultations with Mauritius; third, the scientific case for a full no-take MPA is made out, and was made out on the scientific advice available to the BIOT officials at the time; fourth, the MPA has adequate legislation, funding and enforcement mechanisms and Mauritius has produced no evidence to the contrary.

MS. NEVILL: I have been provided with an answer to Judge Greenwood's question – two questions. First, is there a response to the letter of the 15th December of 2009?

Yes, there is a response from the Mauritian Minister of Foreign Affairs to the UK Foreign Secretary, and this document is at MM Annex 157, and it is dated 30 December 2009, and that was one of the letters to which I was referring earlier in my submission when I said there was a Note Verbale and a letter.

In the final paragraph it says: "You will no doubt be aware that in the margins of the last program, our respective PMs, agreed that the MPA project might be put on hold and that this issue be addressed during the next round of Mauritius-U.K. bilateral talks. And so this

clarifies that, in fact, and this was, as I've said – actually I will have to revise my submissions that, based on this, that that was not raised during this period.

What was the date of the facilitator's report? The only copies we have are unhelpfully simply dated 2010, and we will try to find a more precise date. As I said, my understanding was that it came through in March 2009.

What I would say about the letter – and I take full responsibility for missing this point in the letter of 30 December 2009, is that it does not detract from the point that the UK's position is, and has been, that this is not what Prime Minister Brown said and that this was not the understanding of officials. Nor was the allegation made by the Prime Minister in his response to the call of the Foreign Secretary on the 1st of April.

And that concludes my submissions and I will now hand over to Amy Sander who will take you through the relevant evidence and true position of the Claims relating to the fishing rights argument.

PRESIDENT SHEARER: Thank you, Ms. Nevill.

Just before you leave, I'm just wondering whether Judge Greenwood has some further questions to ask you. The letter from Dr. Boolell to Dr. Miliband, I found my copy of it while you were speaking, but it does seem to me that that last substantial paragraph in the letter is presenting squarely to the British Foreign Secretary that there had been an agreement of whatever kind, political or otherwise I'm not entering into at this stage – between the two Prime Ministers that the Commonwealth heads Government meeting, so whatever the position was before the 30th of December, the British Government was put on notice about this point on the 30th of December 2009.

Now, what I would be grateful for – I'm not asking you expecting you to answer this question on the hoof, but I think we will avoid that expression, I don't suggest you try to and answer it now, but I hope the United Kingdom will provide an answer is, what was the response to

this letter? Was the point just missed thereafter, or was something done about it? Because I don't think the United Kingdom can now avoid the fact that it had been put on notice about what Mauritius' understanding was, the conversation that the Commonwealth Heads of Government Meeting.

Now, the second question I had, and perhaps this is for both Parties, I would be grateful for clarification about how both Parties so you the relationship between the public consultation and the bilateral talks between the two Governments because the correspondence I have looked at doesn't appear to me to be wholly consistent on the subject. At one moment it seems to be suggesting that the two consultations, as it were, would run in parallel, a public consultation and bilateral and inter-governmental talks. At other points that the public consultation should be stopped, and at other points still that Mauritius, if it wanted its views known, would have to do so through the public consultation.

Now, I would be grateful if both teams would just give us an analysis, please, of the different communications and show precisely where they come out on that.

And the third point, Ms. Nevill, is in Ms. Yeadon's Third Witness Statement at Paragraph 36, she referred to something, and I will try to turn it up, I haven't got something at hand. The United Kingdom would run the risk of losing private funding. – maybe I have it here. Sorry, it's I not only cannot read my handwriting but I cannot read my typing on here. But somehow there was reference that the United Kingdom would lose private donations which had been made available to it conditional upon a complete ban on fishing.

Now, you mentioned the private funding from the Bertarelli Foundation. Could you or one of your colleagues please tie the two remarks in together. I would like to know what private funding there is, and what are the terms on which it has been given.

One final question, final, final question, the timetable followed for the Foreign Secretary's decision is an extremely tight one. The submission is made on the 30th of March. The decision is taken

on the evening of the 31st of March, and the Mauritius' Minister is telephoned on the 1st of April. What was the hurry? Why was it necessary to do it on the 30th of March to the 1st of April?

As I said, I don't expect you to answer any of those questions without preparation now. I just put something down that I would like the United Kingdom team to answer for me.

MS. NEVILL: I can make a couple of points on those questions. Of course, my colleagues may wish to – we may wish to come back in further detail.

Regarding your second point – and I will come back to you on the first one separately – we will come back to that by separate response, but clarification as to how the Parties saw the relationship between the public consultation and the talks between Mauritius and the United Kingdom, the United Kingdom's position was that these talks were separate, that there was a public consultation process that was separate, and that's what was made clear throughout the documents. So, these suggest that what it had in mind was that the bilateral talks or talks in some other form would continue alongside the public consultation. And as I have submitted by reference to the documents that was seen by Mauritius at the time, it was clear that the public consultation, which had been launched on the 10th of November would not compromise those – would not interfere with those discussions with Mauritius. Regarding the point on the rush for the Foreign Secretary, as it had been referred to in earlier discussions by both parties, both were under political timetable pressure, it may be that that may have had an influence on the turnaround on this decision-making. I understand that is the case.

ARBITRATOR GREENWOOD: Ms. Nevill, I understand that, but it would have to be said that the issue of Marine Protected Area around the Chagos Islands would probably feature more prominently in a General Election in the Mauritius rather than General Election of the United Kingdom it's not Ms. Yeadon's Witness Statement. It's Mr. Roberts' First Witness Statement at Paragraph 26 that contains the reference to funding.

MS. NEVILL: That point I will follow up separately. So, unless the Tribunal has further questions for me, I will now hand over to Ms. Sander.

PRESIDENT SHEARER: I think Judge Wolfrum has a question.

ARBITRATOR WOLFRUM: Counselor, a very brief question: You said that the MPA was scientifically well-founded. We have seen the report on this one conference, which included all, et cetera, but also officials from the FCO, and then we have seen one article in the one of the journals.

Do you have further evidence to that extent that the establishment of the MPA was well-founded?

Let me put it this way: The consultation process, which you described in detail, since we don't know who was responding exactly, and who was addressed, I would not qualify it as scientific adviser or something else, but I would rather to perspective that we get at least to some extent detailed analysis of the status of the coral reefs, of the fish stocks, of the situation of the atolls and islands, not Diego Garcia itself, sure, to indicate to us that this kind of Marine Protected Area was necessary in the way it was taken.

These are very different issues which have to be tackled. I'll only a lawyer, but at least I could possibly read reports of biologists and others.

Thank you.

MS. NEVILL: As with the other questions I had been asked just now, I think probably the best way forward would be for us to confer and then come back to the Tribunal with full answers.

PRESIDENT SHEARER: Very good.

MS. NEVILL: Any further questions?

PRESIDENT SHEARER: Thank you, Ms. Nevill.

And I would now call Ms. Sander to the podium.

Ms. Sander, we've got about 53 machines before we normally take our break, so I will leave it to you to indicate a convenient moment in your speech to take the break. Thank you.

MS. SANDER: Mr. President, I'm grateful I have the watch to my right.

The relevant evidence / true position on claims to fishing rights

Amy Sander

29.4.14

Purpose of this oral submission

1. Mr. President, Members of the Tribunal, it is an honour to appear before you on behalf of the United Kingdom.

2. In my submission I shall set out the key *facts* relating to the 1965 understandings, in particular the issue of fishing rights as now advanced by Mauritius. Mr. Wordsworth will be addressing the legal implications on Friday, in particular Mauritius' case that a series of *legally binding* undertakings were given by the British Government in 1965.

3. My submission is divided into eight points. They are as follows:

3.1. *One*, the factual record is clear; in 1965, fishing in Chagos waters was limited to fishing for the domestic needs of the then inhabitants of the islands.

3.2. *Two*, the individual who proposed the insertion of the reference to "fishing rights" in the record of the meeting of 23 September 1965, the Mauritian Premier, was seeking preferential fishing rights if granted.

3.3. *Three*, in 1965, Mauritian Ministers characterised the 1965 understanding on fishing rights as "mere assurances", thus reflecting the absence of an understanding that a binding legal obligation had been agreed.

3.4. *Four*, to comment on the significance of the internal correspondence from 1966 to 1968 referred to by Mauritius last week.

3.5. *Five*, Mauritius' attempt in the early 1970s to advance an expansive, and erroneous, interpretation of the 1965 understanding was rejected.

3.6. *Six*, that the British Government always informed the Mauritius Government as to new measures impacting on fishing in BIOT waters, and when the ability of Mauritian fishermen to fish in BIOT waters was *restricted*, Mauritius did not protest with reference to the 1965 understanding on fishing rights.

3.7. *Seven*, over the years, Mauritians have demonstrated minimal interest in the actual exploitation of any "fishing rights".

3.8. *Eight*, Mauritius's stance during the 2009 talks and in its response to the establishment of the MPA, rested on its claim to sovereignty, and was not made with reference to free-standing legally binding rights pursuant to the 1965 understanding.

4. Those eight points are all addressed in the Appendix to the Rejoinder at Pages 188 to 236. For reasons of time, I can only take the Tribunal to certain passages of certain documents, although the references for the documents to which I do refer but which I do not take the Tribunal to will appear in the transcript[217]. When the Tribunal separately considers the *full* documentary record, it is invited to do so with reference to that Appendix; it was prepared with *great* care, and it is intended as a helpful roadmap through what is a relatively large amount of material.

(1) In 1965, fishing was limited to fishing for the domestic needs of the then inhabitants of the islands

5. So turning to my first point: in 1965, fishing in Chagos waters was limited to fishing for the domestic needs of the then inhabitants of the islands [218].

6. I begin with this point as it is important for appreciating the context of discussions between the British Government and the Mauritian Council of Ministers in 1965 as to fishing, in particular for understanding why the issue of fishing rights received only *very* limited attention.

[217] Transcript references are to page/line numbers in the transcripts circulated 15 July 2014.
[218] Rejoinder paras. 3.69 and A.16 to A.20.

7. In November 1965 the Secretary of State for the Colonies sent a telegram to the Governor of Mauritius and of the Seychelles[219].

8. In that telegram, the Secretary of State asked for a report indicating, I quote, "*the nature of the fishing practised by people in Chagos Archipelago*" and an indication of use made of international waters. As the Tribunal will be aware, a territorial sea of 3 nautical miles was claimed with respect to the Chagos Archipelago, and at this time waters outside the 3 nautical miles were international waters open to any fishermen.

9. The Governor of Mauritius's response reads as follows: *"(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*"[220].

10. That report was confirmed by the Governor of the Seychelles[221] who had nothing to add other than to note that with respect to international waters, I quote, "*I understand from Moulinie that <u>Japanese and Formesan</u> vessels have sometimes been seen fishing in these waters*". And I pause there to note that Mr. Moulinie was the owner of the Seychelles company, Chagos Agalega Ltd, which then owned and operated copra plantations[222].

11. On 21 December 1965, before the Mauritius Legislative Assembly, a series of questions were posed by Mr. Duval to the Mauritian Premier and the Minister of Finance[223]. Mr. Forget stated on behalf of the Premier and Minister of Finance that , I quote, "*so far as I am aware the <u>only</u> fishing that now takes place in the territorial waters of Diego Garcia is casual fishing by those employed there".*

[219] MM, Annex 34.
[220] MM, Annex 37.
[221] Rejoinder Annex 16.
[222] UKCM, para 2.96.
[223] UKCM, Annex 15.

12. Now, Mauritius in its Reply highlighted the fact that Mr. Forget's response expressly referred to Diego Garcia only[224]. Well, that is clear from the face of the document.

13. But what is also clear is that Mr. Forget did not refer to any more expansive fishing practices. And from the other documents to which I have referred, it is clear that the nature of fishing was similarly limited elsewhere in Chagos waters.

14. That concludes my first point: in 1965, fishing was limited to fishing for the domestic needs of the then inhabitants of the islands.

(2) The individual who proposed the insertion of the reference to "fishing rights" in the record of the meeting of 23 September 1965, the Mauritian Premier, sought preferential fishing rights if granted[as1]

15. I'm turning now to the second of my points. This concerns what the Mauritian Premier had in mind when he proposed insertion of a reference to "fishing rights" which, as the Tribunal is aware, we see at paragraph 22 item (vi) of the final record of the 23 September 1965 meeting[225].

16. Those words did not appear in the equivalent paragraph in the original record of the meeting of 23 September 1965[226], but the Tribunal will have noted the handwritten comment on the fourth page of that original record referring to "*amendments enclosed*".

17. That brings us to some days after the 23 September 1965 meeting when, on 1 October 1965, the Mauritian Premier wrote a note from his hotel room. This is at tab 29 of the folder[227] and if I could ask the Tribunal to turn to that document.

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[224] MR, para. 2.212.
[225] Rejoinder paras. 3.68 and 3.70 and A.4 to A.15. Final record of meeting of 23 September 1965 at MM, Annex 19.
[226] Rejoinder, Annex 8.
[227] UKCM, Annex 9.

18. We see, on page one, towards the bottom of the page, that the Mauritian Premier points out *"the amendments that should be effected to page 4 of the document*". The document referred to here is the record of the 23 September 1965 meeting[228].

19. Staying at the very bottom of this page, we see that the Mauritian Premier expressly notes that the matters which he thinks can be incorporated are matters that "*formed* [and I am now turning overleaf] *part of the original requirements submitted to HMG*". And as we turn to the final page overleaf, you will see the proposed amendments. Amendment VIII reading "*Fishing rights*".

20. As observed by Mauritius last week, in his handwritten note, the Mauritian Premier does not spell out what was meant by "Fishing Rights"[229]. So what did he have in mind? What were the "*original requirements submitted to HMG*" to which he refers? Mr. Reichler addressed this matter only at the very end of his submissions last Wednesday, and without actually taking you to the handwritten note[230]. But what the author of the reference to "fishing rights" had in mind is of <u>critical</u> importance, especially in light of the absence of any negotiating record on this matter.

21. So, I pick up the narrative two months earlier in July 1965, when the Governor of Mauritius opened discussions with Mauritian Ministers, including the Mauritian Premier, on the proposals for detachment[231].

22. If the Tribunal could now please turn to tab 30 of the folder[232]. This is a telegram from the Governor of Mauritius, one week later on 30 July 1965. He is relaying the latest response of the Ministers to the proposal of detachment.

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[228] Rejoinder, Annex 8.
[229] Reichler, Day 2, 168:22-24.
[230] Reichler, Day 2, 168:11-24.
[231] MR, Annex 87, para. 2.
[232] MM, Annex 13.

23. Turning to paragraph one, the Mauritian Premier, speaking for the Ministers as a whole, said that they were "*sympathetically disposed to the request*" but (and I am now at paragraph two) as detachment "*would be unacceptable to public opinion*" they wished also that provision should be made for, and I'm quoting here from paragraph 2, "*ensuring preference for Mauritius if fishing or agricultural rights were ever granted*".

24. Now, Mauritius has sought to down play the significance of those documents, stating the proposals formed *"part of an entirely different package of conditions"*[233]. But any difference in terms of whether it was a lease or detachment is immaterial. And there are two points. First, we know from the handwritten note, which referred to the "*original requirements submitted to HMG*", that this was expressly what he had in mind. And secondly, two months later, on 13 September 1965, just one week before the 23 September meeting, the Mauritian Premier again referred to preferential fishing rights if granted.

25. If I could ask you to turn to tab 31[234]. This is an internal note dated November 1965; its relevance here is that it quotes a record of what the Mauritian Premier stated. If I could ask the Tribunal to move forward to page 5 of the note (and I'm referring here to the handwritten page numbers in the bottom right-hand corner).

PRESIDENT SHEARER: They don't appear in our document. Never mind, we can count.

MS. SANDER: My apologies, it is the page with the words "of trade will" in the first line.

PRESIDENT SHEARER: We have it now. Thank you.

MS. SANDER: In the middle of that page, it refers to a meeting on 13 September 1965. The Mauritian Premier is quoted as stating (and I'm looking here at the quote set out in the bottom section of this page). The Mauritian Premier is quoted as stating "*they would like*

[233] Reichler, Day 2, 168:15-19.
[234] Rejoinder, Annex 13.

preference in any fishing rights in Diego Garcia waters". That's five lines from the bottom of the page.

26. So it is clear that just 10 days before the 23 September 1965 meeting, the Mauritian Premier still had in mind <u>*preference*</u> for Mauritius <u>*if*</u> fishing rights were granted. And how could it be otherwise given the terms of the manuscript letter of 1 October.

(3) Mauritian Ministers characterised the 1965 understanding on fishing rights as *"mere assurances"*

27. Turning to my third point, this is that the contemporaneous records show that, as regards the understanding relating to fishing rights, Mauritian Ministers characterised that understanding as a *"mere assurance"*[235].

28. The relevant documents on this point are all at Annex 46 of the Counter-Memorial, in the appendices to the June 1983 Report of the Select Committee of the Mauritius Assembly. Mr. Reichler also took you to some of these documents[236] and I don't propose to take you to them now.

29. The Tribunal will recall the Colonial Office Despatch of the Governor of Mauritius dated 6 October 1965, enclosing the record of the 23 September 1965 meeting[237], which confirmed that as regards fishing rights, I quote, "*The British Government will make appropriate representations to the American Government as soon as possible".*

30. On 5 November 1965, at a meeting of the Council of Ministers, three Ministers (including the Attorney General) stated that "*the assurance given by the Secretary of State in regards to"* the fishing rights was *"unsatisfactory*"[238].

31. A telegram also of 5 November 1965 from Mauritius to the Secretary of State relayed Mauritius' agreement which was given earlier that day[239].

[235] Rejoinder para. 3.71, and A.12.
[236] Reichler, Day 2, 147:5 to 148:2.
[237] UKCM, Annex 46, Appendix L.
[238] UKCM, Annex 46, Appendix P.

32. And at paragraph three it relays that Ministers were dissatisfied with "*mere assurances*" about item (vi), fishing rights.

33. So this document shows that Mauritian Ministers characterised the 1965 understanding as a "mere assurances" and that fact was a source of some dissatisfaction. It does not say, for example, that the Ministers were dissatisfied with the fact that item (vi) only referred to using good offices with the United States. It seems clear that any dissatisfaction was with the fact that assurances, as opposed to a legally binding obligation, had been given.

ARBITRATOR WOLFRUM: Ms. Sander, may I interrupt you, the word "assurances" pops up in other places too. For example, in Paragraph 3, which is of no relevance here. Could you qualify, legally qualify, the word "assurances."

MS. SANDER: Without appearing to pass the buck, Mr. Wordsworth will be addressing the legal implications about the terminology being used, and so with the Tribunal's leave, we will wait until Friday until that point is addressed.

ARBITRATOR WOLFRUM: I was asking you. Okay.

MS. SANDER: And I was concluding there on my third point that the dissatisfaction with the fact that it was an assurance as opposed to a legally binding obligation was not "*belated and self-serving conjecture*" as suggested by Mauritius last Thursday[240]; but actually referring to the words used in the written record.

(4) The significance of the correspondence from 1966 to 1968

34. Moving on to my fourth point. This is to comment on the significance of the internal correspondence from 1966 to 1968. The annex references will appear in the transcript[241], and

[239] UKCM, Annex 46, Appendix O; also at UKCM 14.
[240] Reichler, Day 3, 266: 8-9.
[241] MM, Annex 41; MR, Annex 51; UKCM, Annex 16; Rejoinder, Annex 17; UKCM, Annex 17; Reply, Annex 52; Reply, Annex 53; MM, Annex 50: UKCM, Annex 18; Rejoinder, Annex 18; MR, Annex 66; Rejoinder, Annex 19; MM, Annex 52.

Mauritius referred in some detail to many of the documents last week. That correspondence is considered in paragraphs A.21 to A.31 of the Appendix to the Rejoinder.

35. When the Tribunal goes back to that run of correspondence, it will see that it demonstrates the following:

35.1. First, that the 1965 understanding was understood, in accordance with its express terms, to extend to a use of good offices with the United States.

35.2. Second, that the United Kingdom understood that it had a discretion as to which if any fishing rights to grant to Mauritius.

35.3. Third, that fishing was limited to fishing for the domestic needs of the then inhabitants of the islands, but that references to "traditional" or "habitual" fishing rights emerged because of a good faith concern to ensure preferential access to Mauritius if access was permitted[242].

36. To take an example, in the minute from Mr. Fairclough at the Colonial Office dated 15 March 1966[243] it stated that "*there 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".*

37. At paragraph 6 it refers to Mr. Moulinie's statement *"that the only fishing in the Archipelago at present is for local consumption".* It expressed a concern that in such circumstances then "*clearly the Americans might be less inclined to be forthcoming".* And concludes that it would "*thus be convenient to be able to base any undertaking to Mauritius on habitual or traditional fishing arrangements provided that no other country can claim similar use in the past".*

[242] Rejoinder, para. 3.72(a).
[243] UKCM, Annex 16, referred to by Reichler, Day 2, 148:20.

38. So that minute evidences a recognition of extremely limited fishing in fact being practised at the time - *the only fishing in the Archipelago at present is for local consumption* - and also that references to "traditional" fishing rights emerged because of a good faith concern to ensure preferential access to Mauritius.

39. Turning, if I may, to tab 32 of the folder[244], you will see the response to that minute from the Governor of Seychelles and BIOT Commissioner. This is at Tab 32. You will note the date of 18/4, 18 April, this is in the bottom right-hand corner of the second page but I will be quoting from the first page.

40. So looking at the first page, at the very bottom, it reads as follows "*any claim* [this is right at the final sentence on the first page] [and this is referring to the Seychelles claim] *to habitual fishing rights in those 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".*

(5) Mauritius' attempt in the early 1970s to advance an expansive interpretation of the 1965 understanding was rejected

41. My fifth point is that Mauritius did try to advance a much more expansive interpretation of the 23 September record than simply ensuring preference for Mauritius if fishing rights were ever granted, akin to the current claim that fishing rights covers "*all rights relating to fish*"[245]. But that interpretation was inconsistent with what in fact had been set out in the 1965 record, and was accordingly rejected by the United Kingdom.

[244] Rejoinder, Annex 17.

[245] This quote is from MR, para. 6.47. This point is addressed at Rejoinder fn 302 and paras. 8.12(a) and para. A.40.

42. If you could please turn to tab 33 of the folder[246]. This is a letter from the Mauritian Prime Minister to the British High Commissioner. You will recall that Mr. Reichler took you to this letter on Thursday[247].

43. In this letter the Mauritian Prime Minister is accepting a sum in full and final discharge of the undertaking regarding settlement of displaced persons.

44. In the third paragraph it reads as follows, "*the Payment does not in any way affect the verbal agreement on minerals, fishing and prospecting rights reached at the meeting at Lancaster House on the 23 September 1965 and is in particular subject to…..(iv) Mauritius reserving to itself (a) fishing rights….(v) the right of prospection and the benefit of any minerals or oils discovered in or near the Chagos Archipelago reverting to the Mauritius Government*".

45. Now that statement of the terms of the 1965 understanding, both as to fishing rights and mineral rights, is inconsistent with what we have seen the Mauritian Prime Minister had in mind in 1965, and is inconsistent with the express terms of the 23 September 1965 record[248].

46. And accordingly, it was rejected by the United Kingdom. This is evident from the document at tab 34 of the folder[249]. This is from the Foreign and Commonwealth Office to the British High Commission in Mauritius dated 27 April 1973. It is commenting on the letter from the Prime Minister of Mauritius that we have just looked at.

47. At paragraph two it states: "*The Prime Minister's recollection of the meeting at Lancaster House does not agree with the official record. Our undertakings in regard to navigation and meteorological facilities … fishing rights and the use of the airstrip … 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 I enclose".*

[246] MM, Annex 69.
[247] Reichler, Day 3, 264: 15-21.
[248] MM, Annex 19.
[249] UKCM, Annex 23.

48. The same paragraph proceeds to state that "*we clearly cannot allow the new version with its unfounded assertion of prospecting rights to supersede the agreed official record".*

49. And Mr. Reichler took you to the letter that was then sent to Mauritius confirming the agreed record of the meeting of 23 September 1965[250].

(6) Mauritius was informed of all measures and lack of Mauritius protest when rights restricted

ARBITRATOR WOLFRUM: Ms. Sander, it's a good system to read the paragraph before and the paragraph after you're quoting. May I draw your attention to what is the last paragraph. It has handwritten a six in front. We take it from the High Commissioner's letter. And if you go down a couple of lines, it says, "referring to the third paragraph of your letter – this is suggested as wording – we can assure you that there is no change in the undertakings given on behalf of Her Majesty's Government, which has set out in the record as then agreed at meeting on Lancaster House of 23 September 1965." A reaffirmation in this form would be acceptable to the legal advisors. Here, the United Kingdom uses the word "undertakings".

Thank you.

MS. SANDER: Yes. Two points on that. First of all is that I will take you to other documents where the term undertakings is also used by the British Government, I will also show you an example of a document where the term understandings is used. And the point is that the label of undertaking or understanding in this context, we say, is of no significance of the legally binding obligation of the 1965 understanding. That is the point that Mr. Wordsworth will also elaborate on on Friday.

ARBITRATOR WOLFRUM: I was assuming that.

50. So, turning to my sixth point, this is that the British Government always informed the Mauritius Government as to new measures impacting on fishing in BIOT waters, and when the

[250] Reichler, Day 2, 151:12-16 citing UKCM, Annex 24.

ability of Mauritian fishermen to fish in BIOT waters was restricted, Mauritius did not protest with reference to the 1965 understanding on fishing rights[251].

51. And of course such protests would have been expected if it had indeed considered itself to hold the rights that it now contends for.

52. Now, the Tribunal have a detailed account of the events from 1969 in the Appendix[252]. At this stage, I simply want to draw to your attention to five examples.

Fisheries Limit Ordinance 1971

53. My first example relates to the first phase of legislation, establishing a nine mile fisheries zone contiguous to the territorial sea in BIOT. Proclamation No 1 of 1969[253] was implemented by the Fisheries Limit Ordinance No 2 of 1971[254].

54. When the Tribunal reviews that Ordinance, it will see that "Fishery limits" is defined as "*the territorial sea…. together with the contiguous zone*". Foreign in relation to a fishing boat is defined as a fishing boat whose owner is not resident in BIOT.

55. Section three prohibits any person on board a foreign fishing boat from fishing within the fishery limits but that prohibition is subject to Section four which enabled the Commissioner by order to designate any country, and I quote, "*for the purpose of enabling fishing traditionally carried on in any area within the contiguous zone*".

56. So fishing in the territorial sea (where, as we have seen, is the only area where the very limited fishing was in fact practised at this time) was *entirely excluded*. I want to be clear on that point, as last week you were told that for, and I quote, "*nearly five decades… fishing vessels from Mauritius have been able to fish freely in the territorial sea around the Chagos Archipelago"*[255].

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[251] Rejoinder paras. 3.72(b), A.33 to A.40, A.51 to A.57, A.58 to A.65 and A.95 to A.98.
[252] See references in previous footnote.
[253] MM, Annex 53
[254] MM, Annex 60.
[255] Sands, Day 3, 303:16-18.

57. In the contiguous zone, fishing was subject to designation. This is a system of designation not a licensing regime (which came later in 1984)[256], but the system of designation is akin to a licensing regime in that access was both restricted and conditional.

58. Mr. Reichler stated last week that the qualification 'as far as practicable' meant *"only that they could be restricted as necessary to accommodate defence needs, and, in practice, this amounted to only a modest restriction on fishing rights in the near vicinity of Diego Garcia Island"*[257].

59. But under the 1971 Ordinance, there was not only a modest restriction on fishing rights in the near vicinity of Diego Garcia, but an entire exclusion in the territorial sea. Defence and security preferences may have been reflected in the legislation, but in any event Mauritius appears to have accepted that the United Kingdom had a discretion as to the extent to which the fishermen were excluded from BIOT waters and how the understanding of "so far as practicable" applied in practice.

60. Mr. Reichler[258] took you to the letter of 5 June 1970 in which the British Defence Department advised that the High Commission in Port Louis "*should forewarn the United States and Mauritius Government about the new B.I.O.T. fishing regime"*[259]. Mr. Reichler highlighted the use of the term "undertook" in this letter.

61. I would like to take you to the document recording the fact that Mauritius was notified of the new regime. This is at tab 35 of the folder[260]. If I could ask the Tribunal to turn to that tab. This is a File Note from Mr. Giddens of the British High Commission, Port Louis, dated 15 July 1971. In the second paragraph, Mauritius was informed that "*bearing in mind the*

[256] Cf Reichler Day 2, 167: 10-17 to 168:4.
[257] Reichler, Day 2, 153: 2-4. See also Day 2, 174: 4-7.
[258] Reichler, Day 2, 151:8, emphasis at 151:11.
[259] MM, Annex 59. It continues "*particularly the latter, that is the Mauritius Government, as we undertook at the Lancaster House Conference in September 1965 to use our good offices to protect Mauritian fishing interests in Chagos waters".*
[260] MM, Annex 64.

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 four to enable Mauritian fishing rights to continue to fish in the nine mile *contiguous zone* of BIOT. Because of an oversight, Mauritius was not in fact designated.

62. Now, here we see that the term "understanding" is used. This is an example of how the 1965 understanding has been referred, as I stated earlier, to in different ways in the documentation – sometimes as an understanding, sometimes as an undertaking and other examples where both terms are used are cited in the Counter-Memorial at paragraph 8.14[261].

63. What is striking is that the Mauritius Government did not respond complaining that the *complete exclusion* from the territorial sea, or the failure to be designated as regards the contiguous zone, was in any way inconsistent with the 1965 understanding.

64. And that stance is consistent with a common understanding that Mauritius was not entitled to an absolute or perpetual right to fish in BIOT waters.

1984 regime

My second example relates to when, in 1984, a new fisheries Ordinance came into effect establishing a *licensing* regime which required all fishing boats to hold a licence to fish within *both* the territorial waters and the contiguous zone[262]. A fee was payable.

65. Although the policy was not to charge Mauritius.

66. The British High Commissioner to the East African Department notified Mauritius that it would be permitted access pursuant to the new licensing regime which was to be introduced[263]. The Mauritian Foreign Minister was only reported as having indicated that some statement, quote, "*asserting their sovereignty*" should be made; he is not reported as referring to the 1965 understanding on fishing rights[264].

[261] See for example MM, Annex 78.
[262] UKCM, Annex 49.
[263] Rejoinder, Annex 27.
[264] Rejoinder, Annex 27.

1991 legislation

67. The third example is in 1991 when the Fisheries Conservation and Management Zone, the FCMZ, was established, extending the fishery limit to 200 nautical miles[265]. Fishing was prohibited in the internal waters, territorial sea and the FCMZ without a licence. There were three licences introduced: one for inshore fishing; one for purse seine fishing and one for long line fishing.

68. The British High Commission sent a Note Verbale to Mauritius informing Mauritius of the intention to declare the extended zone[266]. It referred to the good environmental reasons for the action**.** And confirmed 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*".

69. Preferential access was provided for Mauritian vessels, but this is a restricted and conditional access. And the terms of this letter are limited to *inshore* fishing licences.

70. Mauritius' response on 7 August 1991[267] based its protest on an assertion that the Chagos Archipelago is, and I am quoting from the second paragraph of that document, *"an integral part of the territory of Mauritius and that the Government of Mauritius has reaffirmed its sovereignty over the chagos archipelago and its maritime rights in respect of the chagos archipelago"***.**

71. It proceeds to state in the next paragraph 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*".

[265] MM, Annex 102.
[266] MM, Annex 99.
[267] MM, Annex 100.

72. No reference was made to the 1965 understanding on fishing rights; Mauritius' stance is with reference to its sovereignty claim and it is for that reason it states that it rejects the offer of free licences. And it raises no objection to the fact that as regards licences beyond inshore fishing, there is no offer to waive the fee.

73. So as we have seen, Mauritius was informed in 1991 that a *limited* number of free licences would be issued for *inshore* fishing.

74. Subsequently, there was an internal discussion over whether to charge for the other types of licences. In particular there was a concern of reflagging, i.e. vessels reflagging to Mauritius to avoid the licence fee.

75. After some internal discussion, it was decided that such free licences should be issued to Mauritius. When the Tribunal reviews that correspondence, it will see that this decision illustrates the good faith efforts of the British Government to ensure preference for Mauritius under the 1991 regime; free licences were issued for all types of licences to Mauritius because it would be "*prudent*" [268] to do so, and with reference to the "*spirit*" of the 1965 understanding[269].

Reduction of licences

76. My fourth example is in 1999, when Mauritius was informed that the number of inshore licences would be reduced from six to four to prevent coral bleaching, a substantial restriction on Mauritius's access for fishing[270]. There was a notable absence of objection with reference to the 1965 understanding on fishing rights; Mauritius's response simply reaffirmed, I quote, "*the position of the Government that sovereignty over the Chagos Archipelago rests with the Republic of Mauritius*"[271].

2003

[268] Reichler, Day 2, 155: 24, citing MR, Annex 97, quote at 155:11.
[269] Rejoinder, Annex 36; MR, Annex 100; Rejoinder, Annex 40; Rejoinder, Annex 41.
[270] MM, Annex 107.
[271] MM, Annex 109.

77. My final example relates to the events in 2003.

78. On 8 July 2003, a letter was sent by the Foreign and Commonwealth office to the Mauritius High Commissioner. This is a month prior to the letter in August 2003 when the Mauritian High Commission was informed of the intention to establish the Environment (Protection and Preservation) Zone[272]. So, turning to the letter of July 2003, this is at tab 36[273].

79. In the letter at Tab 36 we see reference made, in the first sentence, to the fact that MPAs in BIOT had been "*one of the regular agenda items at meetings of the British Mauritius Fisheries Commission*". In this letter Mauritius is informed of the decision to proceed to *close* an area of the waters of BIOT. And we see the coordinates are set out.

80. But we have not seen any objection from Mauritius that to be entirely excluded from BIOT waters, in this case a section of those waters, was inconsistent with the 1965 understanding on fishing rights.

81. The question was posed by Mauritius last Friday that "*if Mauritius considered that a pro forma licensing regime violated its rights, then how much more serious would it be to ban Mauritius from fishing in the Archipelago at all?"*[274] And last Wednesday it was asserted that there was "*no support whatever" for the view that if it was decided not to issue fishing licences to anyone, Mauritius's preferential rights would not be violated*"[275].

82. But we have seen here there was no protest to the restrictive licensing regime as violating the 1965 understanding, and where an area is <u>completed closed</u>, again, there is no objection with reference to the 1965 understanding.

(7) Over the years, Mauritians have demonstrated minimal interest in the actual exploitation of Mauritius' "fishing rights"

[272] MM, Annex 120.
[273] MM, Annex 119.
[274] Macdonald, Day 4, 409:20-22.
[275] Reichler, Day 2, 167:18 to 168:3.

83. I now move to my seventh point which is that, over the years, Mauritians have demonstrated minimal interest in the actual exploitation of Mauritius' "fishing rights"[276].

84. I can deal with this point swiftly, as you have already seen the table of license figures provided by the United Kingdom for licences issued in 1991 to 2010[277], and Mauritius do not challenge those figures.

85. The precise figures for inshore licences applied for by Mauritius flagged vessels and issued to those vessels are set out at paragraph A.82 of the Rejoinder. They are very low. Only two were applied for in 2000, 2002, 2003 and 2009, respectively. And no licences were applied for from 2005 to 2008, inclusive.

86. I should draw the Tribunal's attention to the fact that the table of figures, which is set out at Page 51 of the Counter-Memorial into which it has been referred, marks zero for the number of inshore licences in 2002; it should indicate two inshore licences were issued. That figure was corrected in the Rejoinder[278] and in any event the figure remains very low.

87. Regarding purse seine licenses, they are similarly very low for the years leading up to 1999, and after 1999 no such licences were applied for. And there is no reference to long line fishing in the table because no Mauritian flagged vessels ever fished using the long line method[279].

88. As I said, the licence figures are not in fact challenged by Mauritius. Its alternative argument is to refer to what Professor Sands termed "*de minimis activity*"[280], and to argue that all that is required to prevent overfishing is for the United Kingdom to stop giving licences to the vessels of third States[281]. Yet Mauritius's plans to establish itself as a *"seafood hub*" were then expressly referred to[282].

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[276] Rejoinder para. 3.73, A.45 to A.50 and A.79 to A.85.
[277] Figure 2-4 at p51 of UKCM; precise figures set out in Rejoinder, para. A.82.
[278] Para. A.82.
[279] UKCM paragraph 2.110; Annex 76 at p20.
[280] Sands, Day 3, 319:14.
[281] Reichler, Day 2, 170:20-21.
[282] Reichler, Day 2, 171:15.

89. Now, all Mauritius has provided in terms of figures is a table of catch data[283]. We are told in the Reply at footnote 257, that the source is the Ministry of Fisheries of Mauritius. But we are not provided with any information as to how that data was obtained.

90. The table records no catch data for two recent years (2005 and 2008). And it has been confirmed by Mauritius that this reflected the fact that vessels were under repair and no licences were applied for in those years[284]. But it is also the case that no licences were applied for by Mauritian flagged vessels in 2006 and 2007, yet catch data is cited for those years.

91. In any event, those figures show only a relatively low catch. And the Tribunal have the very low figures of licences applied for.

(8) Mauritius's stance during the 2009 talks and in its response to the establishment of the MPA, rested on its claim to sovereignty, not with reference to free-standing rights pursuant to the 1965 understanding

ARBITRATOR GREENWOOD: Ms. Sander, just tell me, what is the point you're making about this? Are you saying that in the year where no licenses were issued but there are catch figures recorded, the catch was illegal under the law of BIOT?

MS. SANDER: I don't know. There are inferences one can draw. One inference is the data relates to Mauritian-owned and Mauritian-flagged vessels, but that's a speculation on my part. The license figures only relate to Mauritian-flagged vessels because it was Mauritian-flagged vessels who received the free licenses.

92. My next point is that Mauritius's stance during the 2009 talks and in its response to the establishment of the MPA, rested on its claim to sovereignty, and was not made with

[283] Reichler, Day 2, 170:1.

[284] Reichler, Day 3 288:20-24 "In those two years, no licenses were taken up by Mauritius-flagged vessels 2 because the vessels that had taken up licenses in the years prior or the years subsequent to 3 the two in question were damaged and having difficulties obtaining certification of 4 seaworthiness for navigation. So, they opted not to obtain licenses in either of those two 5 years, but that applies only to those two years."

reference to free-standing legally binding fishing rights pursuant to the 1965 understanding[285].

93. This is my eighth and final point. As noted by Ms. Macdonald last week,[286] the bilateral talks took place against a background and a context of the previous decades of exchanges between the Parties.

BMFC

94. This is an appropriate point to note that in 1994 the British Mauritius Fisheries Commission (BMFC) was established.

95. Discussions of that Commission took place under what is termed the sovereignty umbrella. And if I can ask the Tribunal to turn to tab 37 of the folder[287]. This is the Joint Statement of 1994 which sets out the formula for what is sometimes termed the "sovereignty umbrella". In summary, it provides that, at paragraph 1, that discussions would be without prejudice to the parties' respective positions on sovereignty.

96. There are three themes that are apparent from the records of the BMFC meetings that have been annexed to the Rejoinder[288].

97. First, that when *access* of Mauritian vessels was discussed, this was with reference to the strictly regulated and conditional access pursuant to the *licensing* arrangements.

98. Second, Mauritius did not object to that strictly regulated and conditional access; its concern was regarding the sharing of licence fees.

99. Third, that when MPAs were raised before the Commission, Mauritius did not indicate that there would be any inconsistency with the 1965 understandings.

100. To illustrate those three themes, I will now take you to two of the records.

BMFC 1994

[285] Rejoinder paras. 3.74 and A.99 to A.133.
[286] Macdonald, Day 2, 185:14-16.
[287] UKCM, Annex 62.
[288] Rejoinder at paras A.86 to A.92.

101. The first meeting in April 1994. The Joint Communiqué we find at tab 38 of the folder[289].

102. If I could ask the Tribunal to turn to that document at Tab 38 of the folder, the first page is headed "Joint Communiqué".

103. And then if you turn forward to Page 3 of the document, we see it is entitled "agreed confidential minute". And if we turn to the final page, we see the heading, just to the right of the top hole punch, "*Access of Mauritian vessels to British Indian Ocean Territory*". It states 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*…".

104. I simply take the Tribunal to that document to show that no reference was made or recorded to have been made to the 1965 understanding under that heading; "access" of Mauritian vessels was discussed with reference to the licensing process, and Mauritius raised no objection to that restricted and conditional access.

BMFC 1997

105. Turning to the fourth meeting in 1997, the Joint Communiqué is at tab 39 of the folder[290].

ARBITRATOR WOLFRUM: Ms. Sander, may I go back to the beginning of that document under Tab 37 and draw your attention to which you referred in Paragraph 2 on the non-prejudice clause.

MS. SANDER: Can I just clarify, is this the document at Tab 38?

ARBITRATOR WOLFRUM: No, I'm going back to Tab 37. (ii).

MS. SANDER: Subparagraph (ii)?

ARBITRATOR WOLFRUM: It's a non-prejudice clause here, you referred to it very briefly, saying, all rights are reserved. I put it in simple terms that, no act or activity carried out by the United Kingdom, the Republic of Mauritius as a consequence in this shall constitute the

[289] UKCM, Annex 63.
[290] Rejoinder, Annex 51.

basis for affirming, supporting or denying the position of the United Kingdom or the Republic of Mauritius. Right?

If I read this paragraph correctly, I'm not too astonished that there is no reference to the Lancaster House undertaking or understanding, however you put it, for it's guaranteed under Paragraph 2, at least that's a version how to read it. Perhaps you or somebody else could later comment upon that.

MS. SANDER: Yes, I would simply note at this point that, of course, Mauritius' position as to the 1965 understandings is distinct from the sovereignty aspect to its claim. Its position is that the 1965 understandings were legally binding obligations, and that's the point that could have been advanced in a forum in which there was a sovereignty umbrella.

ARBITRATOR WOLFRUM: Okay. We'll let this go at the moment.

Yes. Thank you.

MS. SANDER: So, we were looking at the fourth meeting at Tab 39 of the folder and I simply wished to draw the Tribunal's attention to two paragraphs of this record. The first is paragraph six. This records that the United Kingdom delegation informed the Commission of plans to introduce a system of MPAs. The Mauritian delegation simply suggested establishing MPAs through licensing arrangements rather than legislation.

106. And at paragraph 15, which is at the bottom of the second page, the final sentence states that the Mauritian delegation proposed the sharing of licensing fees. That's the final sentence on that second page.

Evidence

107. So these exchanges before the BMFC form part of the relevant background to the 2009 bilateral talks.

ARBITRATOR GREENWOOD: Ms. Sander, I'm sorry, forgive all these interruptions.

What level of representation was there at the BMFC? Are these political officials from the High Commission representing the British and their counterparts in the Mauritian Government, or are they just technical fishing people?

MS. SANDER: The Joint Statement at Tab 37 states that, at Paragraph 3, simply that the Commission will be composed of a delegation from each of the two States. There are signatures at the bottom of the various records, for example, the document at Tab 38, there is a signature of the Head of the Mauritius delegation, Ambassador Markand (phonetic) – I think that's correct pronunciation, and the Head of the British delegation, Mr. Kacz (phonetic). But I think that for a fuller answer to your question, perhaps with the leave of Tribunal we will address it at a later point.

ARBITRATOR GREENWOOD: I think I do see that the Mauritian delegate, head of delegation is an Ambassador in each case. I don't know the status of the British one.

108. So, turning to the stance of Mauritius during those talks, in considering that, it is obviously important to look at, I should be clear I'm talking about the 2009 bilateral talks, it's obviously important to look at what those <u>actually present</u> have said, and the statements of Ms. Yeadon and Mr. Roberts, both members of the United Kingdom delegation, have been annexed to the Rejoinder (at annexes 73 and 74 respectively).

109. Now some comments were made by Mauritius last week as to the weight to be attributed to those statements[291]. Ms. Neville has already made observations on that matter; I will refer to certain paragraphs of the statements and the Tribunal is invited to read them in full.

<u>January 2009</u>

110. So, turning to the first round of talks in January 2009, it is common ground that at those talks, fishing rights was on the agenda.

[291] Reichler, Day 2, 165: 8-12.

111. Ms. Yeadon explains in her statement that she understood, I quote, "*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. '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 share of fisheries resources. We understood this to be linked to Mauritius' claim to sovereignty, for granting fishing licence is recognized as the right of the territorial state*"[292]. That it was an "*undertaking of a political not legal nature*" remained her firm view[293].

112. Now, if we turn to tab 40 of the folder[294], this is the United Kingdom's record of those January 2009 talks.

113. At page two, in the third paragraph, Mr. Neewoor is recorded as stating on behalf of Mauritius that the "*main aim of Mauritius was to seek an end to the lease over BIOT….All the issues on the agenda derived from the sovereignty issue*".

114. Turning forward to the fourth page [to assist the Tribunal, that page is the page with the number 206 in the bottom right-hand corner]. So turning to the fourth page, we see point six (1) is "fishing rights". In the first paragraph, the United Kingdom says that it was "*ready to look at returning to the 1994 Agreement*". That is a reference to the BMFC joint statement of 1994 which we looked at earlier[295].

115. It continues "*we were talking about the grant of privileged access nothing more…. The Mauritians explained that their lack of interest in taking up fishing rights (free licences) & continuing with the British Mauritian Fisheries Commission was that they felt this impacted their position on sovereignty. They were however prepared to have a fresh look to ensure that the resources of the Chagos Archipelago were exploited in an equitable and responsible*

[292] Rejoinder, Annex 73 at para. 9.
[293] Rejoinder, Annex 73, at para. 30 referring to events in 2010.
[294] MR, Annex 128.
[295] Cf Macdonald, Day 2, 187:11 and 21 to 24.

manner…..It became apparent during the rest of the discussion that the Mauritians were under the illusion that we were agreeing to share resources. The UK pointed out again that this was not the case. We were talking about privileged access only. We added too that the BMFC had been constructed under a bullet proof sovereignty umbrella"

116. So this record is entirely consistent with Ms. Yeadon's account that under the agenda item of fishing rights *"Mauritius was seeking a sharing of fisheries resources".*

117. It is also consistent with Mr. Robert's account of the January 2009 talks. I do not propose taking you to Mr. Robert's statement now, but at paragraph eight he confirms that it was made clear by Mauritius in the talks in January 2009 that Mauritius was only interested in fisheries concessions as a way of establishing sovereignty. And at paragraph thirteen he states that "*Any claim or proposal by Mauritius to joint sharing of resources or management of fisheries was a "red line" issue for HMG because it was designed to advance Mauritius' sovereignty claim*"[296].

118. Mr. Reichler took you to a short paragraph of Mauritius's record of the January 2009 meeting in which reference was made by Mauritius to a "*series of inducements…given in 1965*"[297]. And for the record, that paragraph is at page 26 of Annex 129 of the Reply.

119. But that paragraph has to be placed in context, namely the previous exchanges in which Mauritius has sought sharing of licence fees, and the fact that Mauritius's reference to fishing rights were made in the context of a proposal to share resources as part of its sovereignty claim.

July 2009

120. Turning then to the July 2009 talks, at this round of talks, the MPA was on the agenda.

121. It was at this time that I note, that Ms. Yeadon also met with Mr. Talbot of the Talbot fishing company, he was owner of one of the two Mauritian-flagged vessels to take up a licence in 2009. That meeting is addressed in Ms. Yeadon's witness statement at Annex 73 of

[296] Rejoinder, Annex 74.
[297] Reichler, Day 3, 265: 1-2.

the Rejoinder at paragraph 15. And the thrust of that meeting was a discussion of Mr. Talbot's ideas on how he could work with the MPA.

122. Mauritius last week accepted that the 1965 understanding on fishing rights was not advanced in this second round of talks. The explanation given was that "*as Mauritius had referred to these matters at the first round of talks, it was hardly necessary to specifically refer to the undertaking again when the issue of fishing rights was discussed at the July talks, and talks would never end and go late into the night if everybody had to reiterate everything that they had said in every previous round of talks*".[298]

123. That is scarcely a convincing explanation. And the contemporaneous records confirm that Mauritius' stance in July 2009 remained a focus on its sovereignty claim with brief references to fishing rights in the context of a proposal for the joint issuing of licences as part of that claim[299].

124. I will take you now to one of the documents to illustrate the point. This is at tab 41 of the folder[300]. The document at Tab 41 of the folder is an internal information paper deployed by Mauritius. At the top left of this document it is dated August 2009, and in the first paragraph it sets out its purpose, namely to inform colleagues of the talks held on 21 July 2009.

125. If we can now turn to page four of this document, and the page numbers are marked in the top right-hand corner. So if we turn to Page 4 of this document at Tab 41, item (iv) is marked "fisheries". It refers to the BMFC and Mauritius' difficulty with the fact that Mauritian vessels were required to take a licence from British authorities to fish in BIOT waters. That difficulty stemmed from its view that this was inconsistent with its sovereignty claim.

[298] Macdonald, Day 2, 195: 2-7.
[299] Mr. Roberts statement at Rejoinder, Annex 74, para 24; MR, Annex 144; UKCM, Annex 99 and Annex 101.
[300] MR, Annex 144.

126. The note continues as follows: "*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*….".

127. At the next paragraph, it reads "*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".*

128. There is no reference to the 1965 understanding on fishing rights, and it confirms that in both January *and* July 2009 Mauritius's focus was on the joint issuing of licences as part of its sovereignty claim. And that is entirely consistent with the evidence of Ms. Yeadon and Mr. Roberts in the judicial review process.

Post 2009

129. The fact that Mauritius's stance rested on its claim to sovereignty, and not with reference to free-standing legally binding rights pursuant to the 1965 understanding, is also illustrated by documents dated *after* the July 2009 talks. These are listed in detail in the Appendix, at paragraphs A.130 and A.133. So I will just take you to one example to illustrate the point**.**

130. This is at tab 42 of the folder[301]. This is a Note Verbale dated 23 November 2009 from the Mauritian Ministry of Foreign Affairs**.** And the Tribunal can see in the first paragraph it is referring to the launch of the consultation. If I could ask you to look at the paragraph at the end of page 1, it reads as follows: "*The Government considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation*

[301] MM, Annex 155.

*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"***.** So here "access to fishery resources" is raised, but this was made in the context of sovereignty concerns, not fishing rights with reference to the 1965 understanding.

131. And when the Tribunal reads the documents in full and in their proper context, it is clear that from the start in its response to the MPA proposal, Mauritius has taken its stance on the ground of sovereignty, it did not object to the MPA with reference to allegedly legally enforceable fishing rights pursuant to the 1965 understanding.

Reliance on the UK internal documents

132. I have addressed the Tribunal on the eight points I outlined at the beginning. I will now conclude with some remarks on Mauritius's reliance on the United Kingdom internal documents. As already noted, of course we don't have the benefit of seeing a similar array of *Mauritius's* internal documents showing how the 1965 understandings were discussed *by Mauritius* internally over the years.

133. Mr. Wordsworth will discuss the legal principles regarding the relevance or otherwise of such internal documents. What I will do is to make some comments about those documents focused on by Mauritius, with particular reference to the claim made last week that "*The contemporaneous documentary evidence….leaves no doubt that the U.K. intended and understood itself to be bound by them at all times from the time it made them in September 1965, through the next 45 years*"[302].

134. Now of course because of the constraints of time, you could only be taken by Mr. Reichler to certain passages of the internal documents, and he did refer to the fact that the Tribunal will separately read all of the documents in their entirety. I simply stress the importance of doing so

[302] Reichler, Day 3, 260: 11 - 13.

carefully with these internal documents, in particular with an eye to the issue that the author was actually focusing on.

135. So when you read the six page note from Mr. Aust on which Mauritius places such weight[303] you will see that the issue that Mr. Aust was actually addressing was "*negotiations with Mauritius Government regarding resettlement of the inhabitants of the Chagos Archipelago*". It is only in the very final paragraph that we find the *one* sentence relied upon by Mauritius where Mr. Aust appears to *implicitly* assume the binding effect of the fishing rights understanding, without however making clear whether he considers the understanding is binding as a matter of legal obligation or political commitment.

136. There is also a tendency to quote from the internal documents as if that quote represented a considered conclusion after having seen all relevant documents, when in fact that is not the case.

137. For example, last week there was extensive citation[304] from a 1996 research paper. But what was not expressly referred to was the covering letter of that paper. The author said that the research paper should be treated as a "working draft", that she was "not confident" of her grasp of all of the aspects to this matter, and concedes that there may be "obvious errors or misconceptions"[305].

138. And as to what Mr. Watts said in 1981[306], well you were taken last week to his description of an "agreement"[307]. But if you read on to the final sentence of the same paragraph, Mr. Watts says that, I quote, *"precisely what fishing rights Mauritius has reserved to itself with our agreement is a matter which will need looking into when the department produces the files*". And there are three points that flow from that sentence.

[303] Reply, Annex 73; Reichler, Day 2, 151:22 to 152:11.
[304] Reichler, Day 2, 156:19 to 157:17.
[305] Reply, Annex 101.
[306] Reply, Annex 83.
[307] Reichler, Day 2, 153:22 to 154:4.

139. First, earlier in that same paragraph, Mr. Watts refers to the letter from the Mauritian Prime Minister dated 24 March 1973. He had seen that letter and so did we, earlier this afternoon I took you to that letter. Mr. Watts appears to have adopted the language of that letter when he refers to Mauritius having "*reserved to itself*" fishing rights. But as we have seen, the characterisation of the understanding in that March 1973 letter was wholly inconsistent with the 1965 understanding, and was expressly rejected by the United Kingdom as inaccurate at the time.

140. The second point is that it is clear that at that point Mr. Watts has not been provided with all of the relevant documents; the department has yet to produce the files.

141. And the third and final point is that the question of precisely what was meant by "fishing rights" is not addressed; it is a matter which will "*need looking into*". And that is left to another day.

142. The internal discussions have also been presented to you as if it is a steady stream of confirmations over the years of a clear legally binding obligation. But in fact when one reads the full run of documents, it is much more of a mixed bag, and one often sees *confusion* as to *what it was precisely intended* by the 1965 understanding.

143. Indeed confusion and uncertainty is a noticeable theme in the internal documents which Mauritius did not take you to and which further undermine its submission that the internal documents are "*remarkably consistent*"[308] and that there was "*no vagueness in the U.K.'s understanding of the fishing rights it undertook to ensure for Mauritius in 1965*"[309].

144. For example, at Annex 92 of the Reply, the Tribunal will see an internal memorandum which refers to the 1965 understanding. It states that "*Precisely what was intended was never set out in detail. Since the creation of the BIOT, Mauritian fishermen have applied and been*

[308] Reichler, Day 2, 144:15.
[309] Reichler, Day 2, 167: 5-6.

granted licenses to fish in the BIOT. This is certainly with the knowledge of the Mauritian Government…"[310].

145. In similar terms is a note from Ms. Savill of the Overseas Territory Department in 2001. She was addressing the question of whether or not to amend a condition on fishing licences[311]. She observed that "*HMG gave an undertaking to grant Mauritius "fishing rights". We interpret this as the granting of free licences for the historical fishing"*[312]**.** She notes that "*The grant of free licencing has never meant unconditional fishing and we have historically attached many conditions, mainly related to the good management and conservation of the fishery"*[313].

146. My key point is that when the full run of documents is considered, and in context, with a close eye to what documents the individual had before him or her and what issue the individual was in fact addressing, they simply demonstrate a variety of views including as to the lack of clarity over the years as to the import of the 1965 understanding. In any event such internal documents do not advance matters regarding its correct interpretation, and on that Mr. Wordsworth will address the Tribunal on Friday.

147. Mr. President, Members of the Tribunal, unless you have any further questions, that concludes the presentation of the facts.

PRESIDENT SHEARER: Well, there appear to be no further questions, Ms. Sander, so thank you very much, indeed.

And so now, I think we – I had it down – we are going to hear from Sir Michael again.

MR. WHOMERSLEY: Tomorrow.

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[310] Towards the bottom of the second para. on the second page. The memorandum is considering the issue of fisheries protection in BIOT.
[311] Rejoinder, Annex 57.
[312] At para. 13.
[313] At para. 14.

PRESIDENT SHEARER: So, there are no further presentations by the UK side today; is that so, Mr. Whomersley?

MR. WHOMERSLEY: That's correct.

PRESIDENT SHEARER: I see. Well, we can then take the adjournment until 9:30 tomorrow morning. Thank you very much.

(Whereupon, at 5:09 p.m., the hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN

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