

PERMANENT COURT OF ARBITRATION

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

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND

PCA Reference MU-UK

Volume 6

HEARING ON JURISDICTION AND THE MERITS

Thursday, May 1, 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:

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SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

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1 PROCEEDINGS

2 PRESIDENT SHEARER: Good morning, ladies and gentlemen.

3 So, we resume oral presentations.

4 Is it correct that Sir Michael will be the first speaker for the UK? Yes. So, I
5 give him the floor. Thank you very much.

6 SIR MICHAEL WOOD: Thank you, Mr. President.

7 **Answers to questions**

8 **Sir Michael Wood**

9 Members of the Tribunal, with your permission, I would like to begin by responding to
10 some of the questions that were put to me yesterday to the extent that they have not already been
11 answered.

12 **Maritime zones**

13 Judge Greenwood asked both Parties the following question. He said: Leaving aside
14 for the moment any question about who is entitled to do what in relation to these waters, are the
15 maritime boundary drawn by Mauritius around the islands and the maritime boundary drawn by
16 the United Kingdom around the islands roughly the same, or is there any significant difference
17 between the two Parties over what maritime entitlement appertains to these islands?

18 As I indicated yesterday, we think the position is that they are roughly the same, but with
19 one important exception. It seems that Mauritius does not appear to have taken account of a
20 possible median line with Maldives, and this is clear, we think – of course, it will be for them to
21 say – through Figures 7, 8, and 9 in Mauritius' Memorial, which can be found in Volume 4 – it's
22 the large formatted volume – and Figure 9 in particular is said to show the overlapping EEZ of
23 Mauritius and the EPPZ of BIOT; and, as you can see from Figure 9, it indicates that Mauritius
24 EEZ does not show a median line whereas the United Kingdom one does. There is also a slight

1 difference to the east, which I can only assume takes account of some different features on the
2 part of the two States.

3 So that, I hope, answers Judge Greenwood's question on that matter.

4 **Dependency**

5 Mr. President, Members of the Tribunal, there were a number of questions that related to
6 the status of the Chagos Archipelago as a Dependency of Mauritius, which it was between 1814
7 and 1965. I would like to say once again that the main point we are making in drawing the
8 Tribunal's attention to the status of the Chagos Archipelago as a Dependency of Mauritius under
9 British constitutional law is to reinforce the point that it was attached to Mauritius for reasons of
10 administrative convenience. British colonial law had to cover a wide range of very different
11 circumstances. The general notion of a dependency was clear; and, for that, I would refer you
12 to the appendix to Chapter II of the Counter-Memorial.

13 But I think probably no two dependencies had exactly the same arrangements, and the
14 arrangements would have varied over time. The particular case of the Chagos Archipelago was
15 described in some detail in the Counter-Memorial at paragraphs 2.19 to 2.32 and in the Rejoinder
16 at paragraphs 2.12 to 2.20.

17 **Question from Judge Greenwood**

18 Judge Greenwood asked about Annex 31 to Mauritius' Reply, which is the note by the
19 Secretary of State for the Colonies to the Defence and Oversea Policy Committee of the Cabinet
20 dated 27 April 1965, and I think you will find that note at Tab 44 in today's folder. You will
21 see that, on Page 1, Paragraph 2, of the note. The Colonial Secretary says that, "as the annexed
22 report makes plain, they" – that is the islands in question – "are all legally established as being
23 parts of the Colonies of Mauritius or Seychelles".¹ Judge Greenwood noted that the context was
24 a previous meeting of the Defence and Oversea Policy Committee held on 12 April, which you

¹ MR, Annex 31

1 will find at **Tab 43**, where the point was made by the Colonial Secretary during discussions on
2 the creation of BIOT that “the legal position should be clarified”.² And Judge Greenwood also
3 referred to a telegram sent by the FCO to the State Department, which is on the fourth page of
4 **Tab 44**, stating that the “islands are legally part of the territory of the colony concerned”.³ I’ll
5 take you to these in a moment.

6 Last week, Ms. Macdonald took you to these documents⁴ and tried to make much of
7 them.

8 I would ask you first to look at Tab 43 which is the earlier Defence and Oversea Policy
9 Committee meeting. If you look at fourth page, which is marked as page 11, at little (d) you
10 will see a statement by the Colonial Secretary that, and I quote: “[T]he legal position should be
11 clarified.” The next sentences of the record give us some idea as to why the legal status of the
12 Chagos Archipelago was not as straightforward as Mauritius would have you believe because it
13 continues: “Although these islands were administered by Mauritius and the Seychelles, it did
14 not necessarily follow that they had legal sovereignty over them. This aspect might be of
15 importance when dealing with criticism in the United Nations.” As Judge Greenwood pointed
16 out, advice was sought, and at Tab 44 you have a short note on the legal advice attached to the
17 note by the Colonial Secretary. You will find it immediately after the Colonial Secretary’s note
18 at Tab 44. The note on the first page in paragraph 2 contains the sentence:

19 “The islands in question... are all legally established as being parts of the Colonies of
20 Mauritius or Seychelles. To separate them from Mauritius and Seychelles would require the
21 making of amendments to existing constitutional instruments.” I apologize. I think that is the
22 note of the Colonial Secretary, the covering note as it were. No doubt what was important for
23 politicians was the bottom line – constitutional amendments will be needed, and that is the

² MR, Annex 30, p. 11, subheading (d).

³ MM, Annex 9,

⁴ Transcript, Day 2, pp. 87-89, paras. 22-24 (Macdonald).

1 conclusion of this note by the Colonial Secretary. But in summarizing – and this is critical for
2 our question – the Colonial Secretary did not, in fact, accurately convey the legal advice that he
3 attached. I think we have all had experience of legal advice being summarized and the result
4 being not entirely to our satisfaction. If you look at the second page in **Tab 44**, you will see the
5 ‘Note on legal advice’, it's entitled. Paragraph 2 says that Aldabra, Desroches and Farquhar
6 Islands “form part of the Colony of Seychelles by virtue of the definition of the boundaries of
7 that Colony... in the Seychelles Letters Patent”. The situation for Mauritius was different as the
8 first paragraph says “Section 90(1) of the Mauritius Constitution Order, 1964 defines Mauritius
9 as meaning “the island of Mauritius and the Dependencies of Mauritius”. And "Dependencies"
10 are defined in Section 31 of the Mauritian Interpretation and General Clauses Ordinance, 1957,
11 as being Rodrigues and the Lesser Dependencies, including the Chagos Archipelago.

12 The Note on legal advice then goes on to the constitutional procedures that would then be
13 needed to create the BIOT, in paragraph 3. And, as you will see if you read it, there were
14 different procedures in each case: Seychelles, Mauritius.

15 The Colonial Secretary does not seem to have been greatly concerned by the legal details.
16 His covering note simply says that the Constitution needs amendment, and that what was needed
17 was to convey that to the Americans. And, indeed, that was what was conveyed to the State
18 Department four days later in the telegram that's also at Tab 44 on its first page in Paragraph 3.

19 Here it is put in concrete terms without distinguishing between the legal status of the
20 Chagos Archipelago and the Seychelles islands because that was of no concern to the issue at
21 hand, which was to secure generous compensation for securing the agreement of local
22 governments and changing their constitutions. The Americans, of course, were being asked to
23 contribute to this. But as far as the question of dependencies is concerned, we would say that
24 the legal advice which is at the basis of the exchange is relevant. The Chagos Archipelago, a

1 Lesser Dependency, was in a different position from the islands of the Seychelles. It was not
2 part of Mauritius, but simply attached to it.

3 **The 1965 Order in Council**

4 And in that connection, I would like to draw your attention to the 1965 Order in Council
5 which, in fact, effected the establishment of the BIOT. It's a document that you're already very
6 familiar with, I think, but it's at **Tab 45** and also at Annex 10 of the Counter-Memorial. But if
7 you could turn to Tab 45 you will see that the distinctions that were made in the Note of legal
8 advice that we just looked at can also be seen and seen very clearly in this Order in Council.

9 On the 8th of November 1965, the Order in Council was made under which the Chagos
10 Archipelago, described as "islands which immediately before the date of this Order were
11 included in the Dependencies of Mauritius", together with Farquhar Islands, the Aldabra Group
12 and the Island of Desroches, described as "being islands which immediately before the date of
13 this Order were part of the Colony of Seychelles" formed a separate British overseas territory
14 under the name BIOT.

15 **Question from Judge Wolfrum**

16 Mr. President, Judge Wolfrum noted that we had said that the Chagos Archipelago was
17 not part of the territory of Mauritius and asked a follow-up question: To which territory does it
18 belong? I take it that this is not a question about territorial sovereignty under international law.
19 Under international law, the United Kingdom is the State with territorial sovereignty over all
20 British territory, whether it be the metropolitan territory, the Crown Dependencies or the
21 overseas territories. I interpret the question as relating to the territorial divisions under
22 constitutional law, and here, of course, the position is complex, as you will be aware by now, and
23 may even vary depending on the functions in question. The answer, I think, is that, for certain
24 purposes, for example, for the purposes of treaty application, the Chagos Archipelago seems to
25 have been treated as part of the territory of Mauritius. I shall come in a moment to the

1 questions put by President Shearer and Judge Greenwood. For other purpose, particularly for
2 internal purposes, it was not regarded as part of the territory of Mauritius, unless provision was
3 made to this effect.

4 **Question from Judge Greenwood**

5 Judge Greenwood referred to the recent European Court of Human Rights Decision on
6 Admissibility in the *Chagos Islanders v United Kingdom* case. This was given by a Chamber
7 of the Court in December 2012. And Judge Greenwood thought it suggested that when the
8 United Kingdom extended the European Convention to Mauritius, it took it for granted that that
9 included the Dependencies. And then when the BIOT was established, the United Kingdom
10 took it for granted without actually saying anything that, therefore, they were removed from the
11 application of the European Convention, and he asked whether that was right.

12 Mr. President, I have looked at the United Kingdom's pleadings in this case overnight. They
13 were only written pleadings. There was not an oral hearing, and the point was dealt with very
14 briefly in the United Kingdom's Observations on Jurisdiction and Merits of July 2009. In those
15 Observations, the United Kingdom explained that "[t]he Convention was extended to Mauritius
16 and the Seychelles on the 23rd of October 1953 by Notification duly made under what is now
17 Article 56(1)." To quote Article 56(1) – you see I never go anywhere without a copy of the
18 European Convention on Human Rights – Article 56(1) is the clause that says: "Any State may
19 at the time of ratification or any time thereafter declare by notification addressed to the
20 Secretary-General of the Council of Europe that the present Convention shall, subject to
21 paragraph 4 of this Article, extend to all or any of the territories for whose international relation
22 it is responsible."

23 So, as I say, the United Kingdom's Observations, written observations, stated that the Convention
24 was extended to Mauritius and the Seychelles on the 23rd of October 1953 by a Notification duly
25 made under what is now Article 56(1). It goes on to say: "That extension did not in terms

1 refer to the Chagos Islands which were then a dependency of Mauritius. However, for the
2 avoidance of doubt, the Government accepts that the 1953 Notification had the effect of
3 extending the Convention to the whole of Mauritius and its dependencies, including the Chagos
4 Islands" – "to the whole of Mauritius and its dependencies, including the Chagos Islands."

5 The Observations went on to say that the "Notification lapsed in relation to the Chagos Islands
6 when BIOT was created in 1965, and it lapsed in its entirety when Mauritius achieved
7 independence in 1968." That, I suggest, is the consistent with the position we have described in
8 these proceedings. And I think it also indicates the answer to your more general question, Mr.
9 President, insofar as the application to treaties to overseas territories was done by listing the
10 territories rather than globally, as was also often done, a reference to Mauritius would be taken as
11 having the effect of extending the treaty to the Dependencies. But that carried no implications
12 for the particular status of the islands as a dependency of Mauritius.

13 I'd now like to turn to Judge Wolfrum's question.

14 PRESIDENT SHEARER: Sorry, can I just interrupt, then, Sir Michael, just on
15 that last point?

16 The European Convention, the provision that you read out seemed to me to mean
17 that all Parties to the Convention accepted the extension to all territories for whose international
18 relations were responsible. So, why would it have been necessary to make any formal
19 extension to territories by name?

20 And it follows from that, I wonder how, as a result of the creation of the BIOT,
21 why did this application automatically cease? Because wouldn't it still be subject to that
22 general clause, provision in the Convention that there was an application, automatic extension to
23 all territories for whose international relations a party was responsible? I'm just not clear on
24 that point.

25 Thank you.

1 SIR MICHAEL WOOD: Well, I'm sorry if I was not clear, Mr. President.

2 I think the position – in fact I'm sure the position is that the European Convention
3 on Human Rights applies automatically to the metropolitan territory but that it requires express
4 extension to individual – to other territories. And indeed, at the time it was the thought that you
5 could extend it with variations to take account of the particular circumstances of the territories.
6 And so the United Kingdom sent in a long list, including many, if not – certainly not all, but
7 many of its Overseas Territories and, for example, the Isle of Man expressly stating this now
8 applies, and that's how Article 56 works. Just to repeat, it says: "Any State may at the time of
9 ratification notify the Secretary-General that the present Convention shall, subject to paragraph
10 4," – that's the one about special circumstances – "that the present Convention shall extend to all
11 or any of the territories for whose international relations it is responsible." So, it was a
12 territorial extension clause, if you like, that was included in the European Convention.

13 PRESIDENT SHEARER: Thank you.

14 **Question from Judge Wolfrum**

15 So, to turn to Judge Wolfrum's question, which was about other instances where former
16 colonies have become independent and before that, the boundaries were given a new shape or
17 territories were separated, and he wanted to know whether the Chagos Archipelago was unique
18 or one amongst others.

19 It's quite a broad question. While there were no doubt differences, there are many cases
20 where territories were separated, Dependencies were moved from one colony to another colony
21 or separated to form separate colonies, and this was not only the case with the British system but
22 also, for example, with the French, as we showed in the appendix to Chapter II of our
23 Counter-Memorial, and we included there, for example, a quotation from the judgment of the
24 International Court of Justice in its 2013 judgment in the *Burkina Faso/Niger* case.

25 Colonial administrative units were constantly being changed.

1 We have seen, for example – you'll have seen in the papers the separation of Seychelles from the
2 Colony of Mauritius back in 1903, I think it was, 1903-1904. Mr. President, yesterday I
3 mentioned the Sovereign Base Areas in Cyprus, and I will be coming back to that case later
4 today, but that is perhaps the closest to the BIOT. But there are many other cases where
5 territories have been altered. We have not attempted a comprehensive study, which I think
6 would require a major piece of research into British colonial history and law, a good subject for a
7 Ph.D., perhaps, and I hesitate to go into details, but I will just mention a few examples that come
8 to the mind of those of us enjoying ourselves here in Istanbul.

9 The first case we thought of is New Zealand. New Zealand was originally a dependency
10 of the colony of New South Wales, and then it became a separate British colony. Admittedly,
11 that was some years ago. Coming a little bit more up to date, Norfolk Island, Cocos (Keeling)
12 Islands, Christmas Island, Ashmore, Cartier, McDonald and Heard Islands and the Australian
13 Antarctic Territory were all transferred to Australia.

14 But Cook Islands, Tokelau, and the Ross Dependency were transferred to New Zealand.

15 The Gilbert and Ellice Islands, a single colony became two separate States, Tuvalu and
16 Kiribati upon independence.

17 Sabah – that's North Borneo – and Sarawak were transferred to Malaysia.

18 The component parts of the colony of the Straits Settlements now form part of three
19 independent States: Singapore, Malaysia and, again, Australia.

20 Northern Nigeria and Southern Nigeria were united as one colony.

21 There was in the 1960s a Federation of Rhodesia and Nyasaland which was dissolved and
22 the component parts – Malawi, Zambia, and Zimbabwe – became separate independent States.

23 The Cayman Islands was part of Jamaica until it was separated.

24 The Turks and Caicos Islands were part of the Bahamas until they were separated.

1 And then there is the case of Anguilla. Anguilla formed part of the territory, the colony of St.
2 Christopher, Nevis and Anguilla. After some very difficult events in Anguilla, Anguilla was
3 separated from the colony – or the associated state of St. Christopher-Nevis-Anguilla. St.
4 Christopher-Nevis became an independent State; Anguilla is still an overseas territory. So,
5 those are just a few examples my colleagues came up with.

6 **Question from Judge Greenwood**

7 Mr. Chairman, the last question that I will answer at this stage is a question from Judge
8 Greenwood about the role of the Colonial Secretary in relation to the granting of independence.
9 He asked what was the constitutional convention or the convention about the ultimate decision to
10 grant independence because he said reading some of the internal British papers, he had the
11 impression the Colonial Secretary thought it was a matter for him to decide. Obviously, he
12 said, Judge Greenwood said, in light of the views of the parties at the Constitutional Conference
13 rather than for the Cabinet as a whole. So, his question in short was, as a matter of UK
14 constitutional convention, independence was it ultimately a decision for the Cabinet or ultimately
15 a decision for the Secretary of State acting independently.

16 Mr. President, the Colonial Secretary and, as we have seen now, the Secretary of State for
17 Foreign and Commonwealth Affairs, may have a special constitutional role within the legal
18 system – within the legal system – of an overseas territory, and that's a matter that has been
19 explored in litigation in the English courts. But the granting of independence must be a matter
20 for Her Majesty's Government in London and the Westminster Parliament. In that connection,
21 no doubt the views of the Colonial Secretary would have been of great importance, his
22 assessment of the state of affairs in the territory concerned, et cetera, but the decision as such
23 would have been one for the Government as a whole, and for Parliament.

24 Mr. President, that concludes my answers to some of the questions that were put
25 yesterday. We shall be addressing others in the course of our later speeches.

1 So, at this point, I would turn to my speech on the question of jurisdiction over Mauritius'
2 sovereignty claim.

3 **5. Absence of jurisdiction over Mauritius' sovereignty claim: general**

4 **Sir Michael Wood**

5 Mr. President, we now come to the second part of our oral pleadings, Mauritius' sovereignty
6 claim.

7 **Introduction**

8 1. We have reached what is probably the key issue in the present proceedings, the absence of
9 jurisdiction, we say, under Part XV of UNCLOS, to address Mauritius's claim to sovereignty
10 over the islands of the British India Ocean Territory. Mr. Wordsworth will follow me. He
11 will deal, in some detail, with the way Mauritius seeks to formulate its sovereignty claim in
12 its pleadings. He will show that a claim to sovereignty over the BIOT cannot be somehow
13 shoehorned into the jurisdictional provisions of Part XV of the Convention, as Mauritius
14 seeks to do. Part XV covers only disputes "concerning the interpretation or application of
15 this Convention". And he will show that Mauritius' reliance on the opt-out clause in Article
16 298(1)(a)(i) is misconceived, as is Mauritius' alternative position, a position to which it
17 seems to be giving more and more emphasis as the case proceeds, that it is **a**, not **the**, coastal
18 State, or, as it puts it, that the United Kingdom has recognised that Mauritius has the
19 attributes, or some of the attributes, of a coastal State. Mauritius' terminology seems as
20 uncertain as its underlying ideas.

21 2. We have already stressed, from the outset of these proceedings, the significance of this
22 jurisdictional question for the future of the UNCLOS and for the future of the law of the sea⁵.
23 Mauritius asks you to interpret the dispute settlement provisions of UNCLOS in a manner
24 that is fundamentally at odds with the text of the Convention, fundamentally at odds with the

⁵ UKCM, paras. 1.10 and 4.11; UKR, para. 1.6; Transcript, Day 1, p. 44, lines 3-16 (Grieve).

1 intention of the negotiating States, and that would be unacceptable to existing States Parties,
2 as well as those that may be contemplating joining the Convention.

3 3. But the point goes wider than UNCLOS. Mauritius' attempt to stretch the jurisdiction of
4 courts and tribunals under Part XV would have implications for all such treaty-specific
5 acceptances of compulsory jurisdiction, and could well result in a reluctance on the part of
6 States to accept jurisdiction under such provisions. In short, a finding by this Tribunal that
7 it has jurisdiction over the questions of territorial sovereignty over land territory raised by
8 Mauritius could be a grave set-back to the compulsory settlement of disputes under
9 international law.

10 4. Mr. President, what I shall say will be introductory in nature. After recalling the importance
11 of the dispute settlement provisions within UNCLOS, I shall describe the general structure of
12 the provisions of Part XV of the Convention, to show that they give no support whatsoever to
13 the extraordinary jurisdictional claim that Mauritius urges upon you in these proceedings –
14 quite the contrary. And I shall also explain that Article 293 of the Convention cannot be
15 prayed in aid in support of Mauritius' expansive vision of the jurisdiction of a Part XV court
16 or tribunal. It is an applicable law provision, not a jurisdictional one. On this point at least
17 the parties seem to agree in principle, though we do not seem to agree on the effect of Article
18 293 in practice.

19 5. It is worth recalling at the outset the central role which the Convention's negotiators foresaw
20 for Part XV, and the extraordinary achievement that Part XV represented at the time in the
21 1970s. The position is well stated in a recent book, *The International Law of the Sea*, by
22 Yoshifumi Tanaka. He said:

23 "as many provisions of the LOSC represent a complex balance of the interests of various
24 actors, they are not free from uncertainty in their interpretation and application.

1 Accordingly, the establishment of mechanisms for international dispute settlement is
2 crucial with a view to ensuring the stability and integrity of the Convention.”⁶

3 6. The inclusion in UNCLOS of Part XV was not just some afterthought, the work of a few
4 idealists at the Conference. It reflected a hard-nosed concern not to allow the fragile textual
5 compromises to unravel through ‘auto-interpretation’. The very acceptance of certain
6 language in the substantive provisions of the Convention was predicated on the availability,
7 subject to carefully negotiated conditions and limitations, of compulsory and binding dispute
8 settlement provisions.

9 7. Hence, we say, the importance of a proper interpretation and application of the provisions of
10 Part XV. Hence the grave danger in abuse of Part XV represented by Mauritius’ arguments
11 in the present case. The arguments of Mauritius’ lawyers risk undermining the system of
12 Part XV. They are – no doubt unintentionally – subversive of the project of international
13 courts and tribunals to which they claim to be committed.

14 8. Mauritius urges upon you a thoroughly simplistic, almost emotional approach. Last
15 Friday, Mr. Sands gave you his own version of international dispute settlement in a nutshell,
16 with reminiscences of cases fought and won, and cases lost. He eventually put it this way –
17 “the reality” he said, and I quote, “the reality” was this: “if you take jurisdiction over this
18 case, you will strengthen the dispute settlement structure of the Convention; to decline
19 jurisdiction will be to exacerbate the dispute, to prolong it unnecessarily, and to signal that
20 Part XV serves to perpetuate a colonial era dispute such as this one.”⁷ That, with respect, is
21 a pretty unrealistic view. Mr. Sands seems to be saying, ignore or be cavalier with the
22 limits on your jurisdiction and all will be well. The sky will not fall in. The world will be a
23 better place. Well, we do not see that. To the contrary, this is a Panglossian utopia, where
24 all is for the best. Mr. Sands spoke with fervour of cases where supposedly brave decisions of

⁶ Y. Tanaka, *The International Law of the Sea* (2012), p. 391.

⁷ Transcript, Day 4, p. 430, lines 14-19 (Sands).

1 courts and tribunals had helped to resolve long-standing disputes. I could, but I will not,
2 give just as many examples of cases where they did not.

3 9. I shall touch briefly on one other preliminary point, which concerns Mauritius' selective and
4 self-serving view of authors. First, their critical comments on those who attended the UN
5 Conference on the Law of the Sea as Government delegates. Throughout its Reply,
6 Mauritius seeks to dismiss, effectively as *parti pris*, the writings of those who were
7 government representatives at the Conference, suggesting they merely reflect the views of
8 their authorities⁸. At a stroke, this would eliminate the views of most of those who can
9 comment first hand on what was decided, including oddly enough some of us in this room.
10 That cannot be right. That cannot be right, we say. The suggestion that prominent
11 academics and commentators cannot form views independent of what their given States
12 might have contended for is pretty unseemly. It also has a touch of desperation so far as
13 concerns the views of eminent authorities on the law of the sea such as Professor Oxman,
14 who has stated his firm view that disputes over land territory are excluded from the
15 Convention's dispute settlement system, and did so long before the present case was a gleam
16 in the eye of Mauritius' lawyers.

17 10. And would Mauritius make the same remarks about judges, many over the years sitting on
18 ITLOS and the ICJ, or arbitrators, or perhaps even counsel? In any event, Mauritius itself
19 does not seem to have any inhibitions about citing Conference participants when it finds that
20 convenient, and we would invite you to disregard these rather disagreeable aspersions from
21 our friends opposite.

22 11. The highpoint of Mauritius' literary criticism came when Mr. Sands gave you the benefit of
23 his opinion of the authors listed in paragraph 4.42 of our Rejoinder⁹. These, you will recall,
24 were cited in connection with the discussion of the maritime delimitation 'mixed dispute'

⁸ MR, para. 7.19, 7.44, 7.46.

⁹ Transcript, Day 4, pp. 455-457, paras. 65-74 (Sands).

1 debate. You may think he was being somewhat defensive, as well he might have been in
2 the face of the concurrent opinions of sixteen distinguished authors we referred to, all of
3 whom were of the view that questions of territorial sovereignty were not within the scope of
4 UNCLOS or its dispute settlement system. Mr. Sands sought to dismiss the opinions of
5 these distinguished authors on a series of grounds. First, all but three were dismissed
6 simply because of when they wrote: before the Convention was finally adopted; before 1994
7 when it entered into force; even before the recent case-law¹⁰. On this basis legal writings
8 would have a very short shelf-life. Only three authors escaped this onslaught. Then others
9 were dismissed because they did not include enough reasoning to satisfy Professor Sands. I
10 doubt many authors, however eminent would meet Professor Sands' demanding standards, if
11 their conclusions did not suit him: no reasoning at all beyond a sentence or two', he said, so
12 apparently it is by length that one judges the merits of a legal argument. And then he
13 criticized placing any reliance upon the important 1977 statement by of the President of the
14 Conference. That was castigated. Mr. President, we don't think Mr. Sands' criticisms
15 can be taken seriously.

16 12. A particular point is taken against Professor Oxman, by reference to his suggestion that an
17 expansive approach to determining disputes over land territory might have an impact in terms
18 of accepting compulsory jurisdiction over maritime delimitation disputes. Mauritius argues
19 there has been no step up in Article 298(1)(a)(i) declarations subsequent to the then ITLOS
20 President making his 'mixed disputes' speech at the 2006 informal meeting of Legal
21 Advisers in New York¹¹. That is a very weak point. It makes a lot of assumptions about
22 the way States and their bureaucracies and politicians behave: how alert they are to such
23 matters when they arise in the abstract, as it were; and how easily they would have concluded
24 that it was desirable and domestically acceptable in political terms to make the declaration.

¹⁰ *Ibid.*, para. 68.

¹¹ MR, para. 7.27.

1 13. The absence of a flood of declarations proves nothing. It would, I suggest, be a very
2 different matter if a Part XV court or tribunal were to issue a judgment or award on the basis
3 of the far-reaching - and far-fetched - jurisdiction urged by Mauritius - a jurisdiction that we
4 emphasise is quite different from and goes well beyond the 2006 remarks of Judge Wolfrum.

5 **Part XV of the Convention: general**

6 14. Mr. President, I now turn to look at the structure of Part XV. It need hardly be said that Part
7 XV does not make provision for compulsory jurisdiction over international disputes
8 generally. By becoming Parties to UNCLOS States do not assume an obligation to submit all
9 disputes between them to compulsory adjudication or arbitration. Part XV is not the
10 equivalent of the Optional Clause system under the Statute of the International Court. Part
11 XV is not some General Act for the Pacific Settlement of International Disputes. Counsel for
12 Ghana put it rather well when addressing ITLOS in the *ARA Libertad* case. Addressing
13 Argentina's arguments, Counsel for Ghana said, and I quote –

14 “It was as though you are just a court of general jurisdiction, free to resolve disputes
15 under international law irrespective of what the Convention does and does not say. Where are the
16 UNCLOS rules? They are not to be found in Argentina's application, and we say that they are
17 not to be found anywhere in the Convention ...”¹²

18 We would respectfully agree with that approach, which is also to be found in the Joint Separate
19 Opinion in that case¹³.

20 15. Compulsory jurisdiction under Part XV is limited to disputes concerning the interpretation or
21 application of a specific treaty, the UNCLOS, and even that with carefully negotiated
22 preconditions, limitations and exceptions. In this respect it is similar to the Optional
23 Protocol to the Geneva Conventions on the Law of the Sea of 1958, and the Optional

¹² *ARA Libertad*, ITLOS/PV.12/C20/2, 29 November 2012, p. 19, lines 9-13 (Sands).

¹³ *The “ARA” Libertad Case (Argentina v. Ghana,)* case, Order of 15 December 2012, Separate opinion of Judge Wolfrum and Judge Cot.

1 Protocols to the Vienna Conventions on Diplomatic and Consular Relations, though with the
2 very great advance that it is not optional. It provides only for the settlement of disputes
3 concerning the provisions of a particular treaty. As such it is similar to Article 22 of the
4 International Convention for the Elimination of All Forms of Racial Discrimination, which
5 was at issue in the *Georgia v. Russian Federation* case, or Article 30 of the UN Torture
6 Convention, at issue in *Belgium v. Senegal*. In short, Part XV confers jurisdiction in
7 relation to a particular convention, though it may under certain circumstances be extended to
8 other agreements related to the purposes of UNCLOS, where this is agreed by the parties to
9 those other agreements.

10 16. The purposes of UNCLOS could not be clearer. It is entitled United Nations Convention on
11 the Law of the Sea. In the preamble the States Parties express their desire to settle “all
12 issues relating to the law of the sea”. The purposes of UNCLOS do not include the
13 determination of sovereignty over land territory, which has nothing whatsoever to do with the
14 law of the sea. Yet, listening to Mauritius, one might think otherwise. Mauritius would
15 have you believe that, by becoming party to UNCLOS, States have undertaken to submit to
16 the compulsory jurisdiction of courts and tribunals, leading to binding judgments and awards,
17 across a wide and indeterminate range of matters going far beyond those dealt with in the
18 Convention’s provisions. That is not correct. That is not right.

19 17. In fact, for all its innovation and complexity, in its core provisions Part XV follows a classic
20 model for a jurisdictional clause confined to a particular treaty. So far as concerns
21 compulsory procedures entailing binding decisions, the “key provision which links
22 non-compulsory procedures to compulsory procedures”¹⁴ is the first article of section 2.
23 Article 286 – it's very short, I'll read it – provides that –

¹⁴ Y. Tanaka, *The International Law of the Sea* (2012), p. 394.

1 “Subject to section 3, any dispute concerning the interpretation or application of this
2 Convention shall, where no settlement has been reached by recourse to section 1, be
3 submitted at the request of any party to the dispute to the court or tribunal having
4 jurisdiction under this section.”

5 18. There are three important points to note about Article 286. *First*, that section 2 only comes
6 into play “where no settlement has been reached by recourse to section 1”. Recourse to the
7 mechanisms referred to in section 1 is not optional. It is a precondition. There is a
8 requirement for recourse to any other agreed methods (Article 281); to any applicable
9 general, regional or bilateral agreements (Article 282); and to a prior exchange of views
10 concerning the settlement of the particular dispute (Article 283) to which we shall of course
11 return. This has been described as a ‘two-tier system’¹⁵ - first attempt to agree procedures,
12 only when this has been tried and has failed do the compulsory procedures kick in - that was
13 an essential part of the compromise embodied in Part XV. The dispute settlement system of
14 the Convention has rightly been described as ‘subsidiary’¹⁶. As is stated in the *Handbuch*
15 *des Seerechts*, in my own translation,

16 “The agreement in principle of the participants in the Third UN Conference on the Law
17 of the Sea to obligatory dispute settlement could only be achieved by at the same time
18 taking widely into account the freedom of States to choose the decision-making
19 bodies.”¹⁷

20 And as Tanaka puts it, “as the first step, States Parties must settle any disputes between them
21 concerning the interpretation or application of the LOSC by peaceful means of their own choice.
22 When the disputing States cannot settle a dispute through non-compulsory procedures, that

¹⁵ Y. Tanaka, *The International Law of the Sea* (2012), p. 393.

¹⁶ Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), p. 467 MN 8 (Wolfrum).

¹⁷ *Ibid.*

1 dispute must be settled in accordance with the compulsory procedures set out in section 2 of Part
2 XV.”¹⁸

3 19. The second part, the second point to emphasize from Article 286 is this, that the obligation to
4 accept compulsory procedures entailing binding decisions applies only to disputes
5 “concerning the interpretation or application of this Convention”. We find that expression
6 throughout the provisions of Part XV. The very first article of Part XV, Article 279 setting
7 out the obligation to settle disputes by peaceful means, takes the Principle set forth in Article
8 2(3) of the Charter and applies it to the specific case of “any dispute concerning the
9 interpretation or application of the Convention”.

10 20. And the third point from Article 286 is that jurisdiction is subject to the limitations and
11 exceptions in section 3 of Part XV.

12 21. As I've said, Article 286 is the link between section 1 and section 2. Article 288, paragraph
13 1, is the central provision on jurisdiction. It too covers only disputes “concerning the
14 interpretation or application of this Convention”. And Mr. Wordsworth will come back to
15 that.

16 22. It is self-evident, we submit, that a dispute concerning sovereignty over land territory is not a
17 dispute concerning the interpretation or application of the law of the sea convention.
18 UNCLOS has nothing to say about territorial sovereignty. It refers to ‘land territory’ in its
19 Article 2, paragraph 1, and to ‘land-based sources’ of pollution in its Articles 207 and 213,
20 just as it refers in many places to the ‘coastal State’. But the Convention takes land territory
21 as a fact. Unsurprisingly, the Convention contains no rules on the acquisition and loss of
22 sovereignty over land territory. The acquisition of territory in international law, the modes
23 of acquisition and loss, are governed by customary international law and specific treaties.

¹⁸ Y. Tanaka, *The International Law of the Sea* (2012), pp. 393-394.

1 They have nothing whatsoever to do with the law of the sea. Thus, in the very first
2 paragraph of his book on the subject, Sir Robert Jennings explains: “I shall not be concerned
3 with the question of the legal regime of maritime territory”¹⁹ It is instructive to look at
4 the Parts and Chapters of the latest edition of *Brownlie’s Principles*²⁰. The volume is divided
5 into eleven parts. Part III is entitled ‘Territorial Sovereignty’; Part IV “The Law of the Sea”.
6 Chapter 9 is entitled “Acquisition and Transfer of Territorial Sovereignty”. Chapter 9 is in
7 Part III; it is not in Part IV. It is a very well-organized book. The International Court too has
8 pointed to the clear distinction between the rules relating to land territory and maritime
9 delimitation. Different principles apply²¹. And I refer to the Nicaragua/Honduras Case and
10 the Gulf of Fonseca Case.

11 **II. Article 293, paragraph 1, does not expand jurisdiction under section 2 of Part XV**

12 23. Mr. President, the last and hopefully shorter part of the speech concerns Article 293,
13 paragraph 1. Mauritius’ continues to attempt to invoke Article 293, paragraph 1, of the
14 Convention to support its expansive view of your jurisdiction under Part XV, to expand it
15 beyond UNCLOS, so as to include other conventional and customary rules of international
16 law, not to speak of ‘soft law’ and other matters not found in UNCLOS. It does so while
17 purporting to support what is now the accepted view that jurisdiction and applicable law are
18 two distinct matters, dealt with in different provisions of the Convention. This is an old
19 debate, and one that, quite frankly, we should not be having. The position is perfectly clear,
20 and it has been dealt with by a considerable number of distinguished courts and tribunals, as
21 we set out in our written pleadings²².

¹⁹ R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), p. 1.

²⁰ J. Crawford, *Brownlie’s Principles of Public International Law* (8th ed., 2012).

²¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at 279, para. 234; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 350, at pp. 601-602, para. 405.

²² UKCM, paras. 4.21-4.34 (*MOX Plant; Eurotunnel; OSPAR; Bosnian Genocide; Barbados v Trinidad and Tobago; “ARA” Libertad*).

1 24. Article 293, paragraph 1, reads:

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

5 25. The article is entitled ‘Applicable law’. And that is what it deals with. That is all it deals
6 with. It is the Convention equivalent of Article 38 of the ICJ Statute. It has no connection
7 whatsoever with the quite separate question of jurisdiction.

8 26. The purpose of the reference to “other rules of international law not incompatible with this
9 Convention” is to dispel any doubt that, in interpreting and applying the provisions of the
10 Convention, a Part XV court or tribunal may have recourse to such secondary rules as the law
11 of treaties, State responsibility, diplomatic protection et cetera, and may apply other rules of
12 international law when directed to do so expressly by a provision of the Convention. The
13 application of the secondary rules really goes without saying; the classic case of *renvoi* is the
14 provisions on maritime delimitation, Articles 74(1) and 83(1), which require delimitation to be
15 “on the basis of international law, as referred to in Article 38 of the Statute of the International
16 Court of Justice.”²³ The purpose of the reference to ‘other rules of international law’ is most
17 certainly not to empower a Part XV court or tribunal to decide disputes which have arisen in
18 fields of international law that lie outside the provisions of the Convention.

19 27. Arguments to the effect that Article 293 could be used to expand a tribunal’s jurisdiction
20 have been put forward on a number of occasions, and have not prospered. They were put
21 forward by Ireland in the cases against the United Kingdom concerning the MOX Plant
22 facility at Sellafield, and were correctly rejected. Thus, the MOX Plant Annex VII tribunal
23 agreed with the United Kingdom –

²³ UKR, para. 425.

1 “that there is a cardinal distinction between the scope of its jurisdiction under Article 288,
2 paragraph 1, of the Convention, on the one hand, and the law to be applied by the
3 Tribunal under Article 293 of the Convention, on the other hand.”²⁴

4 28. Similarly, in a Joint Separate Opinion in “*ARA Libertad*” case, there was emphasised, and I
5 quote:

6 “a central point concerning the interpretation of Article 288 of the Convention. According
7 to that provision the Tribunal is mandated only to decide on disputes concerning the
8 interpretation and application of the Convention. In that respect the mandate of the
9 Tribunal is limited compared to the one of the International Court of Justice. Article 293
10 of the Convention provides that the Tribunal may have recourse to general international
11 law not incompatible with the Convention. These two issues have to be separated clearly,
12 ... A dispute concerning the interpretation and application of a rule of customary law
13 therefore does not trigger the competence of the Tribunal unless such rule of customary
14 international law has been incorporated in the Convention.”²⁵

15 29. Mr. President, the relationship between Articles 288(1) on jurisdiction and 293(1) on
16 applicable law is, we say, straightforward. The very terms of Article 293(1) show that the
17 question of applicable law is predicated on the prior existence of jurisdiction. I have already
18 read it out.

19 30. It might superficially seem as though there is now some common ground between the Parties
20 on the meaning and effect of Article 293, paragraph 1, at least on the level of principle. No
21 doubt now faced with the consistent case-law on the interpretation of Article 293, Mauritius
22 graciously concedes to that case-law as being “uncontroversial”²⁶.

²⁴ *MOX Plant case (Ireland v United Kingdom)*, arbitral tribunal, Order of 24 June 2003, para. 19.

²⁵ *The “ARA” Libertad Case (Argentina v. Ghana,)* case, Order of 15 December 2012, Separate opinion of Judge Wolfrum and Judge Cot, para. 7 (UKCM, Authority 41).

²⁶ MR, para. 7.17.

1 31. Yet appearances are deceptive. In practice Mauritius still invokes Article 293, apparently to
2 confirm its expansive view of jurisdiction under Part XV. Mauritius continues to rely on
3 the passage in *M/V Saiga (No. 2)* dealing with the use of force²⁷. But as we explained in the
4 Reply, *Saiga* dealt with the arrest of vessels, a matter provided for under UNCLOS²⁸. The
5 *Saiga* passage, paragraph 156 as well as paragraph 155, was cited in full by ITLOS in the
6 recent *Virginia G* case²⁹. The ITLOS does not seem to have found it necessary to add
7 anything to the earlier case.

8 Mr. President, I have about three or four minutes more to the end of the speech, if
9 I could continue.

10 PRESIDENT SHEARER: I think you should continue.

11 SIR MICHAEL WOOD: Thank you.

12 32. Mauritius also relies on the approach of the arbitral tribunal in *Guyana v Suriname*, but that
13 case involved the application of the provisions of the Convention dealing with maritime
14 delimitation, under which the parties have obligations not to jeopardize or hamper the
15 reaching of final agreement³⁰.

16 33. It is entirely understandable that in applying the provisions of UNCLOS concerning the
17 arrest of vessels, or maritime delimitation, the ITLOS should have regard to considerations of
18 humanity and general principles of law applicable to any use of force. These cases, we say,
19 do not assist Mauritius' in the present case, where it seeks to have the Tribunal apply not the
20 provisions of the Convention but rules of international law that find no echo in the
21 Convention.

22 III. Conclusion

²⁷ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at pp. 61 and 62, paras. 155 and 156.

²⁸ UKR, paras. 4.26-4.27.

²⁹ *The M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment of 14 April 2014*, para. 359.

³⁰ Art. 74(3) and 83(3). UKR, para. 4.28.

1 34. Mr. President, Members of the Tribunal, to summarise, I have covered four points:

2 - **One:** Part XV of the Convention is not a General Act for the Pacific Settlement of
3 International Disputes. It is treaty-specific, limited to UNCLOS itself, except where the
4 States Parties to some other related treaty have agreed to incorporate it by reference into their
5 other treaty relations.

6 - **Two:** Part XV is confined to disputes concerning the interpretation or application of
7 UNCLOS. It concerns UNCLOS and UNCLOS alone. It does not, unless expressly
8 extended, concern other treaties, even other treaties on the law of the sea. Nor does it cover
9 customary international law, even the customary international law of the sea such as is
10 applicable between parties and non-parties or between non-parties.

11 - **Three:** The compulsory procedures entailing binding decisions provided for in section 2 of
12 Part XV only come into play when no settlement has been reached after recourse to the
13 provisions of section 1 and when efforts thereunder have been tried and have failed.

14 And **Four:** Article 293 is an applicable law provision. It cannot be invoked to support an
15 expanded vision of the jurisdiction of a court or tribunal acting under section 2 of Part XV.

16 35. Mr. President, that concludes what I have to say by way of introduction to the main
17 provisions of Part XV relevant to the jurisdictional issues raised in these proceedings, and to
18 the Article 293 point. And after the break Mr. Wordsworth will take over..

19 PRESIDENT SHEARER: Thank you, Sir Michael.

20 So we'll rise now until 10:15.

21 Thank you.

22 (Brief recess.)

23 PRESIDENT SHEARER: Mr. Wordsworth, the Tribunal notes with pleasure
24 that since your last appearance before us in Dubai, you have been appointed as one of Her
25 Majesty's council, so I congratulate you.

1 So, please proceed.

2 MR. WORDSWORTH: I do thank you very much indeed, Mr. President, and
3 Members of the Tribunal for that remark.

4 **Absence of jurisdiction over Mauritius' sovereignty claim: detailed submissions**

5 **Sam Wordsworth QC**

6 Mr. President, Members of the Tribunal, it is a privilege to appear before you on behalf of the
7 United Kingdom.

8 **Introduction**

- 9 1. I plan to cover three broad areas in developing the United Kingdom's objection to the
10 alleged jurisdiction over Mauritius' sovereignty dispute.
- 11 2. I want to start by recalling the history of Mauritius' claim to sovereignty over the islands of
12 the British Indian Ocean Territory, before identifying how that claim has now been
13 formulated by Mauritius as a dispute under UNCLOS. The basic point that I want to get
14 across is that the characterisation of this long-established sovereignty claim as an UNCLOS
15 claim, or as ancillary or incidental to a claim that could correctly be brought under
16 UNCLOS, is untenable. The thrust of my friend Professor Sands' argument last week was
17 to say that Mauritius' sovereignty dispute fits within the wording of Article 288(1), and that
18 it is for the UK to show that it is somehow excluded. Well, of course, we say that starting
19 point is incorrect for it depends on an artificial re-characterisation of the long-standing
20 sovereignty dispute as a 'who is the coastal State' dispute.
- 21 3. I then plan to turn to the details of Mauritius' case that its claim fits within Article 288(1),
22 and its reliance on the concept of mixed disputes and in particular on Article 298(1)(a)(i).
23 That latter provision, on which so much of Mauritius' case rests, in fact provides a very good
24 demonstration as to why the UK is right in its contention that the Tribunal has no jurisdiction
25 over Mauritius' sovereignty claim.

- 1 4. In brief, and I will return to make the point good later, the opt out declaration that can be
2 made under Article 298(1)(a)(i) concerns only “disputes concerning the interpretation or
3 application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those
4 involving historic bays or titles.” That opt out is conditional on acceptance of conciliation,
5 as to which it is provided that “any dispute that necessarily involves the concurrent
6 consideration of any unsettled dispute concerning sovereignty or other rights over
7 continental or insular land territory shall be excluded from such submission” to conciliation.
- 8 5. Now, whatever the import of that last proviso may be where there has been no Article 298(1)
9 declaration, the simple point is that the proviso, like Article 298(1)(a) more generally,
10 concerns only maritime delimitation disputes and disputes over historic bays or titles. Article
11 298(1) simply does not apply in the current context, where Mauritius says that where a
12 coastal State, State A, asserts its rights as a coastal State, State B can challenge that assertion
13 on the basis that State A is not sovereign over the relevant coastal territory; i.e., it is not the
14 coastal State. If a Part XV court or tribunal had jurisdiction over such a challenge, it would
15 be of far, far broader scope than jurisdiction over unsettled disputes concerning sovereignty
16 or other rights over land territory where these arise in maritime delimitation claims.
- 17 6. And yet, on Mauritius’ case, the parties to UNCLOS agreed to this almost unlimited
18 jurisdiction over who is the coastal State disputes without providing for any opt-out along
19 the lines of Article 298(1)(a)(i). That, we say, makes no sense, and offers an illustration of
20 how our argument on jurisdiction is grounded in the actual text of Part XV, and not in policy,
21 as Professor Sands would have you believe.
- 22 7. The final topic I want to deal with is Mauritius’ fall-back position – on which we have now
23 heard very much more than in the written pleadings – that Mauritius is at least a, if not the,
24 coastal State.

25 **Mauritius’ sovereignty claim**

- 1 8. I turn, then, to the origins of the current sovereignty claim; and, as you have already heard,
2 Mauritius first indicated that it claimed sovereignty over BIOT in 1980. It has since repeated
3 that claim on multiple occasions, including before the General Assembly, as to which there
4 is a long series of the statements that Mauritius has made at Annex 95 of its Memorial. At
5 various junctures, Mauritius has threatened legal proceedings, but generally in the broadest
6 terms, and never with reference to UNCLOS. Thus, in October 1991, Mauritius threatened to
7 refer the issue of sovereignty to the United Nations³¹, and in January 2001, it was through
8 recourse to the ICJ that the Mauritian Foreign Minister suggested the issue of sovereignty be
9 resolved³². And as recently as 23 August 2010, that's, of course, just a few months before
10 the date of the notification of claim in this case, Mauritius was threatening to seek an
11 advisory opinion on its sovereignty claim in the ICJ³³.
- 12 9. Now, as you've heard, the declaration of the MPA precipitated an immediate response from
13 Mauritius. But this again was in terms of the sovereignty issue, not a threatened UNCLOS
14 claim. Thus, in the *Note Verbale* of 2 April 2010, Mauritius' objection was firmly rooted in
15 its sovereignty claim, the position being that: "the Chagos Archipelago forms an integral part
16 of the sovereign territory of Mauritius both under our national and international law."³⁴
17 There's no reference there to UNCLOS, of course.
- 18 10. The first intimation that the sovereignty claim was to be an UNCLOS claim came only when
19 the UK received Mauritius' Notification of Claim in these proceedings, on 20 December
20 2010. We'll be coming back to the Article 283 objection later today but, for now, I just recall
21 that this Notification came some 13 years after the United Kingdom had acceded to
22 UNCLOS on 25 July 1997, with the Instrument of Accession extending to the BIOT, but

³¹ Rejoinder, para 6.26; Reply, Annex 101 at para 16.

³² Rejoinder, Annex 56.

³³ MR Annex 164, para 10.

³⁴ MM Annex 167.

1 with no objection either then or indeed since on the part of Mauritius so far as concerns that
2 extension.

3 11. And so that you can track through the transformation of the sovereignty dispute, the
4 longstanding sovereignty dispute, into a ‘not the coastal State’ dispute, we’ve put the
5 Notification of Claim in your Judges’ Folder, at Tab 46.

6 12. We see, obviously, from the first page of that the heading to the dispute, the title of the
7 dispute given by Mauritius in the dispute concerning the marine protected area related to the
8 Chagos Archipelago. And then on the next page, you’ll see just above paragraph 2, it starts
9 on the characterization of the “MPA dispute,” and it said there that the dispute over the MPA
10 ‘arises against the background of longstanding differences,’ between Mauritius and the
11 United Kingdom. But on a close read, the longstanding differences are just the dispute over
12 sovereignty, and they occupy the entirety of the foreground.

13 13. You’ll see over leaf at page 2, the primary complaint is of a so-called ‘dismemberment’ of
14 Mauritius in 1965 by the UK’s establishment of the BIOT.

15 14. At paragraph 3, Mauritius narrates how it has made sovereign claims to maritime zones.

16 15. Then at paragraph 4, there are parallel complaints as to the UK’s assertions of sovereignty
17 over the Chagos Archipelago, including with respect to the declaration of the MPA.

18 You will see there the final sentence of Paragraph 4 the case is put: “The United
19 Kingdom is not in regard to the Chagos Archipelago a coastal State within the meaning of the 1982
20 Convention. With regard to the attempt to prohibit all fishing activity, Mauritius invokes the
21 requirement imposed on the United Kingdom by Article 300 of the 1982 Convention.”

22 But, of course, the assertions of the rights of a coastal State come back to the
23 question of who is sovereign, and the Tribunal is invited to determine that this is Mauritius. And
24 one sees that even from the careful formulation of the dispute in Paragraph 5 of the Notification,
25 and no doubt this is a particular passage of the Notification over which many an hour was spent.

1 The dispute includes, but is not limited to, respective rights to declare and delimit an exclusive
2 zone under Part V of the 1982 Convention under which the MPA has purportedly been established,
3 and the interpretation and application of the term "coastal State" in Part V of the 1982 Convention.

4 And perhaps I could just take you to one other reference, in fact, as one could see
5 the point all the more clearly that this all comes down to sovereignty from Paragraph 1.3 of
6 Mauritius' Memorial, where, of course, it is trying to attract your attention to the essential steps of
7 its claim right up front. And at 1.3 it says: "Mauritius' case is that the MPA is unlawful under
8 the Convention because it is a regime which has been imposed by a State which has no authority to
9 act as it has done." There are two parts to the argument. In fact, it's now said in response to a
10 question from Judge Wolfrum that there are three, but the basic distinction here is being made
11 between the sovereignty claim and the non-sovereignty claim, and it's the sovereignty claim that
12 we're concerned with at this part of our submissions.

13 16. Mauritius explains at 1.3: "The UK does not have sovereignty over the Chagos Archipelago,
14 is not 'the coastal State' for the purposes of the Convention, and cannot declare an 'MPA' or
15 other maritime zones in the area." And one sees the different stages to this argument and all
16 turns on the first step of the argument, which is that the United Kingdom does not have
17 sovereignty.

18 17. And when it comes to the principal relief sought, which you'll see at page 155 of the
19 Memorial, it's telling as to Mauritius' purpose that this has been formulated not in terms of a
20 declaration of breach of UNCLOS, which is what one would expect to see if this were truly
21 an UNCLOS claim. Rather, the principal declaration sought by Mauritius is that the UK is
22 not the coastal State. The declaration sought is at paragraph 1, its principal declaration:

23 18. "The United Kingdom is not entitled to declare an MPA or other maritime zones because it is
24 not the coastal State within the meaning of inter alia Articles 2, 55, and 76 of the
25 Convention."

1 19. And that, Mr. President, Members of the Tribunal, is precisely the longstanding sovereignty
2 dispute, presented as a dispute as to who is the coastal State.

3 20. And, on the way to ordering that primary relief, you are asked to determine:

4 a. That the detachment of the Chagos Archipelago was contrary to a right of self-determination
5 that Mauritius is entitled to assert vis-à-vis the United Kingdom in respect of events from
6 1965³⁵, that is more than three decades before the Convention entered into force for the
7 United Kingdom;

8 b. Also, that there was no valid agreement to the detachment of the Chagos Archipelago³⁶;

9 c. That Mauritius has continuously asserted its sovereignty over the Chagos Archipelago and
10 that the United Kingdom has recognised that sovereignty in certain respects³⁷;

11 d. And, finally, that Mauritius thus has retained sovereignty over the Chagos Archipelago and
12 is the (or at least a) coastal State in respect of the Chagos Archipelago³⁸.

13 21. And to make that critical determination, you are not asked to apply UNCLOS. There was an
14 emphasis last week on interpretation of the term ‘coastal State,’ but that should detain you no
15 more than about 10 seconds, as it means the State with the coast adjacent to the maritime
16 zone with which the given provision of UNCLOS is concerned. The parties appear to be in
17 agreement that this is indeed the correct interpretation of the term ‘coastal State,’ and only
18 part company where it comes to Mauritius’ case that it is the coastal State, or that there can
19 somehow be two coastal States, the ‘Mauritius is a coastal State’ argument.

20 22. Instead of interpreting and applying substantive provisions of UNCLOS in making the
21 determination that is central to the primary relief sought, you are asked to apply and
22 determine controversial issues on a broad range of sources of general international law, that
23 have nothing at all to do with the Convention, namely:

³⁵ MM, paras. 6.10-6.24.

³⁶ MM, paras. 6.25-6.30.

³⁷ MM, paras. 6.31-6.34.

³⁸ MM, paras. 6.34-6.36, and 6.37-6.52 re alleged undertakings.

- 1 a. The principle of self-determination³⁹, to be exercised in accordance with the free will of the
2 people concerned as opposed to under duress⁴⁰;
- 3 b. The reference to territorial integrity in paragraph 6 of General Assembly resolution
4 1514(XV)⁴¹, supported by the principle of *uti possidetis*⁴²;
- 5 c. The competence of the General Assembly to pronounce on rights to self-determination, and
6 specific pronouncements in respect of Mauritius⁴³.
- 7 23. And against that backdrop, I want to make two points going to the correct characterisation of
8 the sovereignty dispute before you. I should say that both parties accept that it is for you to
9 undertake that important exercise of characterisation⁴⁴. I say important because Mauritius’
10 case last week was that we, the United Kingdom, are trying to imply a limitation into Part
11 XV, while it, Mauritius, is merely seeking a straightforward interpretation and application of
12 the term ‘coastal State,’ as would, it says, fall within Article 288(1). Hence, it is said, that the
13 onus is on the United Kingdom to point to some implicit exclusion. But it is the other way
14 round. Disputes concerning matters that are wholly exterior to the Convention do not fall
15 within Article 288(1), and that result cannot be avoided by presenting matters as a dispute
16 over who is the coastal State.
- 17 24. So, my first point on characterisation: by any standards, the sovereignty dispute is not
18 incidental or ancillary to some real dispute under the Law of the Sea Convention. It is right at
19 the heart of the current claim. In its Reply, Mauritius said that the “most fundamental” aspect
20 to the dispute is the “entitlement of the UK to proclaim a ‘Marine Protected Area’ around the
21 Chagos Archipelago,”⁴⁵ but even that is understating it. And a good illustration of that was

³⁹ MM, paras. 6.10-6.14.

⁴⁰ MM, paras. 6.25-6.28.

⁴¹ MM, paras. 6.15-6.18.

⁴² MM, paras. 6.23-6.24.

⁴³ MM, paras. 6.19-6.22.

⁴⁴ See UKCM, paras. 4.1-4.2, and MR, para. 7.6.

⁴⁵ MR, para. 7.7.

1 given in Mauritius' response last week to Judge Wolfrum's question on how the different
2 elements to Mauritius' claim hold together. As Mauritius stated, if the Tribunal were to
3 decide the 'who is the coastal State' issue, that is the sovereignty issue, in favour of
4 Mauritius, then all other aspects of the claim would fall away. There would be no UNCLOS
5 case left for you to decide. And one sees that from the remarks of Professor Sands, day 4,
6 page 466.

7 25. Now, what happens if one compares that result with the ITLOS and Annex VII cases of the
8 past 10 or so years, which Mauritius portrayed last week as part of a brave new world, and
9 suggests have somehow rendered irrelevant all commentary and consideration that has gone
10 before.

11 26. First, *Guyana v Suriname*: well, that case expressly did not address the mixed dispute issue.
12 I refer you to paragraph 308 of the Award. And deciding the use of force issue did not
13 somehow make the maritime delimitation dispute which was as the centre of the claim fall
14 away. Indeed, as is clear not least from the *dispositif*, deciding the disputed use of force
15 issue in favour of Guyana made precisely no difference to the outcome of the maritime
16 delimitation claim, and did not result in the order of any specific relief. And as the tribunal
17 had explained at paragraph 410 of its Award:

18 "This dispute has as its principal concern the determination of the course of the maritime
19 boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the
20 dispute testifies, sought for decades to reach agreement on that common maritime boundary. The
21 CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement
22 activity," may be considered incidental to the real dispute between the Parties."⁴⁶ So, the central
23 issue in the case is a plain UNCLOS issue.

⁴⁶ *Maritime Delimitation (Guyana v. Suriname), Jurisdiction and Merits, Award of 17 September 2007*

(2008) 47 ILM 166, at para. 410, and see also para. 406.

1 27. Secondly, there is *MV Saiga (No. 2)*; and when asked did the determination of ITLOS that
2 excessive force had been used by Guinea somehow make all the more central claims on
3 arrest, hot pursuit and prompt release somehow fall away? Well, of course not. The
4 Tribunal's limited reference at paragraphs 155-156 of its judgment to certain principles
5 commonly applied in law enforcement operations at sea in no way supports a case on the
6 existence of Part XV jurisdiction to achieve the application of principles of
7 self-determination and the like so as to determine a long-standing dispute over territorial
8 sovereignty.

9 28. And one can make precisely the same point on the other Part XV cases you're being pointed
10 to by Mauritius. They are quite different. In all of them, some incidental issue arose in
11 relation to what was plainly a dispute as to the interpretation or application of UNCLOS.
12 And determination of that issue in no sense makes all the other issues in the case fall away, as
13 in the current claim that's before you.

14 29. I turn to the second point on characterisation, which is that the sovereignty dispute that
15 Mauritius seeks to put before you is not a 'mixed dispute,' as that term is generally
16 understood. And that is very important because Mauritius' argument as it was put last week
17 has three basic stages. It says – (i) this is a form of mixed dispute; (ii) an Annex VII tribunal
18 has jurisdiction over mixed disputes – see what certain members of this very tribunal have
19 said in the past; and (iii), with a hop and a skip, it follows that you have jurisdiction over the
20 sovereignty claim.

21 30. Now, our primary position is that this is wrong as to (i) and hence you need not address the
22 debate over (ii), although the position of ITLOS judges in favour of jurisdiction over mixed
23 disputes assist this Tribunal in that, on a close look, they emphasise the radically different
24 and impermissible nature of the jurisdiction that Mauritius now contends for. So, what is
25 said by the judicial or other voices in favour of jurisdiction over mixed disputes?

- 1 31. There are three lines of reasoning, as we understand it from what has been written, and each
2 is based firmly in the specific subject-matter of maritime delimitation disputes.
- 3 32. First, it is said that maritime boundaries cannot be determined in isolation without reference
4 to land territory.
- 5 33. Second, the jurisdiction over mixed disputes is said to be supported by the text of UNCLOS,
6 i.e. by reference to the opt-out declaration for maritime delimitation disputes under Article
7 298(1)(a)(i) and the *a contrario* reasoning that applies on the basis of that provision's
8 reference to sovereignty disputes in the context of conciliation.
- 9 34. And third, it is said that a rejection of jurisdiction over a maritime dispute on the basis of a
10 concurrent territorial dispute would deprive Articles 15, 74 and 83 of their full effect.
- 11 35. And one can see all of those three reasons in the statement of the then-President of ITLOS of
12 23 October 2006, which is, on its own terms, confined to maritime delimitation.⁴⁷ And we
13 put this at Tab 47 of your Judges' Folder. Now, of course, the Tribunal will already be very
14 familiar with this, indeed, and I take you to it only to note the passages that were not read out
15 last week: so, if I can ask you to go to page 5 of the statement, you'll see there, there is a
16 carefully formulated paragraph [top of p. 6], grounding what is being said in Articles 15, 74
17 and 83, and the importance of an adjudicative body being able to truly fulfil its adjudicative
18 function; and then there is the third sentence of the next paragraph, again grounding the
19 position expressed in the substantive provisions of the Convention. You see there, "such
20 issues of sovereignty and the interrelation between land and sea are addressed in several
21 provisions of the Convention, for instance those concerning internal waters, territorial sea",
22 and so on. And you see above at the top of the page in the passage that I'm also asking you to
23 go to, you see how it said, "in this respect it may be noted that the competence of the

⁴⁷ R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, emphasis added. UKCM, Annex 78.

1 Tribunal or any other court or tribunal to deal with the main claim, that's maritime
2 delimitation be effected according to Articles 15, 75, or 83, includes the associated question
3 of delimitation over land or islands. I've indirectly alluded to this point already. This
4 approach is line with the principle of effectiveness and enables the adjudicative body in
5 question to truly fulfil its function." Now, these points, we would respectfully suggest, are all
6 vitally important elements in the reasoning; and they are absent when it comes to Mauritius'
7 attempt to cast its sovereignty claim as a 'coastal State' claim.

8 36. The same points naturally apply where Judge Hoffman reiterated parts of this speech at the
9 61st session of the General Assembly⁴⁸, and the three strands to the reasoning appear also in
10 the expanded treatment of this issue by Judge Rao. You were taken last week to a short
11 passage at the top of p. 892 of his contribution to the 2007 contribution to the Festschrift of
12 Judge Mensah (and that was at p. 473 of Mauritius' judges' folder), and by now you'll have
13 had the opportunity to read this contribution in full, so I just want to refer you to the
14 conclusion at page 896, where the rationale for the views expressed is summarised⁴⁹.

15 37. "It is obvious that disputes concerning the interpretation or application of Articles 15, 74,
16 and 83 relating to sea boundary delimitations fall within the ambit of the dispute-settlement
17 procedures provided for in Part XV of the Convention. The obligations under Section 1 of
18 Part XV are omnipresent and are not cut down in any manner by Articles 74 and 83, which
19 do not lay down procedures for dispute settlement." So, there is nothing remotely
20 contentious about this. Where disputes are not settled by recourse to voluntary procedures in
21 Section 1 of Part XV, compulsory procedures entailing binding decisions are invocable at
22 the instance of any party to the dispute. Even a mixed dispute referred to in Article 298

⁴⁸ Statement by Judge Hoffman, 46th Session of the A-ALCO, Cape Town, 2-6 July 2007, available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/hoffmann_aalco_05_0707_eng..pdf. UKCM, Annex 81.

⁴⁹ P. Rao, "Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures", MR Annex 114, at pp. 891, 896.

1 (1)(a)(i) involves both by way of implication of what is provided for in this said article and
2 also by way of necessary intendment of the Convention the interpretation or Application of
3 the Convention and attracts consequently the procedures under Part XV. Any other view
4 would render Articles 15, 74, and 83 ineffective, and should be eschewed. There is also the
5 opposite view that a mixed dispute falls outside the scope of the interpretive mechanism of
6 the Convention. The issue in this regard has yet to receive judicial attention.”

7 38. And so, the reasoning is again unique to maritime delimitation, and Mauritius is unable to
8 justify its take on mixed disputes by saying that there is any ‘necessary intendment’ or that it
9 is seeking to give effect to substantive provisions of the Convention that would otherwise be
10 rendered ineffective. The Convention contains provisions on maritime delimitation; that is
11 the thrust of all the reasoning that I’ve been taking you to. It contains no provisions on
12 self-determination or the like.

13 39. So, it is evident that each of the three lines of reasoning is entirely dependent on the mixed
14 dispute at issue being a dispute that concerns maritime delimitation. It follows that it is not
15 open to Mauritius to say – look, our dispute is a form of mixed dispute that engages some
16 form of issue under the Convention and also a territorial dispute, and hence the positions
17 expressed on mixed disputes by certain ITLOS Judges apply. Mauritius would have to
18 identify in those positions some line of reasoning that supported jurisdiction over its form of
19 mixed dispute, and it is wholly unable to do that.

20 40. And Mauritius cannot get round that by saying – well, there may not be a dispute as to
21 delimitation, but there is a dispute as to delineation, and that pretty much amounts to the
22 same thing⁵⁰. Well, we would accept that delineation sounds a bit like delimitation, just as it
23 sounds a bit like desperation, but that does not get Mauritius anywhere. The delimitation of
24 the EEZ and continental shelf between opposite or adjacent States, which is dealt with in

⁵⁰ E.g. Prof. Sands, day 4, p. 449, line 25 to 450, line 2.

1 Articles 74 and 83 of the Convention, is wholly different from the delineation by the coastal
2 State of the outer limits of its continental shelf, which, of course, is the subject of the rules
3 and procedures set forth in Article 76 and Annex II.

4 41. The dispute that Mauritius brought up last week over delineation is just a reiteration of the
5 same underlying sovereignty dispute. Were it otherwise, we would like to think that
6 Mauritius would have given us some notice of a new claim. But Mauritius is just saying that
7 there is a dispute as to Article 76(8) because it is the coastal State entitled to submit
8 information under that article. That just adds another provision to the current dispute. It
9 makes no difference whatsoever to the jurisdictional hurdles that Mauritius faces, and
10 likewise does not impact on the fact that Mauritius' form of mixed dispute has nothing
11 whatsoever to do with maritime delimitation. On Mauritius' argument, wherever one of the
12 UNCLOS' provisions referring to the powers of a coastal State – and there are 64 articles of
13 UNCLOS that use the term 'coastal State'⁵¹ – that wherever one of those is invoked in a
14 given claim, a court or tribunal will have jurisdiction under Part XV to resolve all or any
15 disputes over sovereignty to determine whether State A is indeed the 'coastal State,' as
16 opposed to State B.

17 42. Of course, Mauritius seeks to dispel the absence of an outer limit to the jurisdiction that it
18 asserts by spending an inordinate amount of time in saying that its claim is *sui generis*. But
19 the difficulty is that its claim depends on an interpretation of Articles 288(1) and 298(1) that
20 in no way feeds back to its assertions as to the uniqueness of its position as an ex-colony with
21 the benefit of certain allegedly binding undertakings. If Mauritius is correct that Article
22 288(1) encompasses on its ordinary meaning disputes as to who is the coastal State, then it is

⁵¹ This is without including sub-articles. The articles, limited to substantive provisions of the Convention, are: 2, 5, 6, 7, 14, 16, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 35, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 70, 71, 73, 75, 76, 77, 78, 79, 81, 82, 84, 85, 98, 111, 116, 122, 142, 161, 208, 210, 211, 218, 220, 228, 231, 234, 245, 246, 247, 252, 253, 254, 275. To this may be added the many equivalent references to the coastal State in the 1995 UN Fish Stocks Agreement.

1 correct. There is no wording in Articles 288(1) or 298(1) to suggest that they somehow apply
2 differently in different circumstances. No references to the impacts of undertakings or
3 jurisdiction with respect to former colonies. So if Mauritius is correct in its interpretation of
4 Article 288(1), then, as long as the claimant State can plausibly assert that the respondent
5 State is exercising the rights or duties of a coastal State, that claimant State will be able to
6 bring a claim challenging the territorial sovereignty of the respondent State. I see that in
7 formulating the claim, some care might have to be taken to avoid the Article 297 exceptions,
8 but that is it.

9 43. And the Tribunal may recall how, in our Counter-Memorial, we gave a list of a dozen or so
10 well-known territorial disputes as to which a claim equivalent to Mauritius' current claim
11 could easily be constructed, and Mauritius has yet to engage with that list or to explain why
12 we are wrong – other, of course, than by saying that its claim is *sui generis*, which has been
13 said is a position that could no doubt be taken by any claimant in any of the cases we have
14 identified, by reference to whatever unique factual backdrop there might be to the given
15 case.

16 44. The list is at paragraph 4.61 of our Counter-Memorial. It lists the disputes over the
17 Diaoyu/Senkaku Islands, the Falkland Islands, South Georgia and the South Sandwich
18 Islands, parts of Antarctica, Dok-do/Takeshima, the Spratlys, Paracels, Belize, and various
19 others. And it makes no odds that, in certain cases, an Article 298 declaration will have been
20 made in respect of maritime delimitation disputes. The dispute would be formulated by the
21 claimant as a coastal State dispute, not a dispute over delimitation. And so the Article 298
22 declaration would simply have nothing to hold on.

23 **Articles 288 and 298**

24 45. I move on to the details of Mauritius' case that its claim falls within Article 288(1), as
25 supported by Article 298(1).

1 **Article 288**

2 46. Mauritius says that, on the ordinary meaning of Article 288(1), there is a dispute as to the
3 interpretation or application of the Convention. The emphasis is more on the existence of a
4 dispute over the interpretation of the term ‘coastal State’ but, as I have already pointed out,
5 there is little between the parties on this, and Mauritius is evidently seeking very much more
6 than a declaration as to the meaning of the term ‘coastal State.’ It wants a declaration that the
7 United Kingdom is not the coastal State. Can it then be said that this is indeed a dispute
8 over the application of the Convention, because according to Mauritius, the United Kingdom
9 through BIOT is applying certain provisions in a way that it has no right to do because the
10 UK is not the coastal State?

11 47. The answer is that Mauritius is not seeking the application of any provision of the
12 Convention. It is seeking the application of principles such as self-determination that, on any
13 basis, are not governed by the law of the sea. On its ordinary meaning, Article 288(1) is
14 concerned with disputes over the interpretation or application of the provisions of the
15 Convention, which moreover form part of the relevant context. The absence of provisions on
16 determination of territorial sovereignty is decisive in this respect. And, again, I emphasise
17 that we are not concerned with a maritime delimitation dispute, where the position has been
18 that the provisions in question, Articles 15, 74, and 83, form an important part of the
19 Convention, and that the resolution of incidental territorial issues may form part of the
20 mandate to resolve a dispute as to maritime boundaries.

21 48. Now, Mauritius seeks to attract your interest by saying that we, the United Kingdom, are
22 trying to imply a limitation into Part XV, and that if you were the International Court of
23 Justice sitting pursuant to a different treaty regime you would be able to determine the
24 sovereignty claim, as for example in the recent *Peru and Chile* case. It is as if you’re
25 unfairly being deprived of something.

1 49. But this goes nowhere, as this line of appeal simply begs the question as to what is the source
2 of jurisdiction.

3 50. In *Peru and Chile*, the ICJ was merely determining the location of the starting point of a 200
4 mile single maritime boundary, whether it was at point A or point B about a hundred or so
5 metres away, and it expressly did not decide where the land boundary started as it had not
6 been asked to do so⁵². But the more important point is that the Court was in any event
7 exercising jurisdiction pursuant to Article XXXI of the Pact of Bogota, which establishes the
8 State parties' consent in respect of "all disputes of a juridical nature" including expressly
9 "a) The interpretation of a treaty" and "b) Any question of international law." That is consent
10 to jurisdiction in the broadest terms, and there is no parallel whatsoever to Article 288(1) of
11 UNCLOS.

12 51. And it is not Part XV that is unusual in its limitation to "any dispute concerning the
13 interpretation or application of" the 1982 Convention – that is, of course, entirely standard
14 language for a compromissory clause; it is Mauritius' attempt to say that such language can
15 be deployed to determine a dispute on sovereignty that is wholly exterior to the Convention,
16 it is that that is extreme, and indeed untenable. In our Counter-Memorial, we referred to a
17 passage in the Separate Opinion of Judge Koroma in the *Georgia and Russia* case, where he
18 said that "a link must exist between the substantive provisions of the treaty invoked and the
19 dispute. This limitation is vital. Without it, States could use the compromissory clause as a
20 vehicle for forcing an unrelated dispute with another State before the Court".⁵³

21 52. And, we say, that must be right. Mauritius is seeking to use Article 288(1) in precisely that
22 impermissible way. And it is not a sufficient link that 60 or more provisions of UNCLOS
23 include the term 'coastal State.'

⁵² At para. 175.

⁵³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections)*, Judgment, 1 April 2011: Separate Opinion of Judge Koroma, para 7. UKCM, Authority 37.

1 53. While Professor Sands said that the law has evolved, and also suggested that there was no
2 great problem in an interpretation that may not have been at the forefront of the minds of the
3 drafters of the Convention, or indeed in their minds at all⁵⁴, we disagree on both points.
4 There is nothing in Article 288(1) that suggests that an evolutionary interpretation is
5 appropriate. That’s an extraordinarily radical suggestion. And as Sinclair has made clear, it
6 is otherwise “not for the interpreter, under the guise of interpretation, to impose upon the
7 parties obligations which were never in their contemplation at the time they concluded the
8 treaty.”⁵⁵ That, of course, is a reference to Sinclair, Vienna Convention on the Law of
9 Treaties.

10 54. There is also, as I understand it, nothing in or that can be inferred from the *Bangladesh and*
11 *India* case that assists Mauritius in its current argument⁵⁶, but those are confidential
12 proceedings, as to which certain members of the Tribunal will be fully informed, and so I
13 leave the point there.

14 55. I move briefly to the preamble to the 1982 Convention, which likewise supports the UK’s
15 position. This shows how the Convention, which must, of course, include Part XV, is
16 prompted by the desire to settle “all issues relating to the law of the sea.”

17 56. A related point can be made by reference to the immediate context of Article 288(1). Article
18 288(2) recognises that the parties to other international agreements may wish to benefit from
19 the Part XV mechanisms and draft their dispute settlement mechanisms accordingly. But,
20 of course, the door is not left wide open to that. As Article 288(2) establishes, the
21 supplementary jurisdiction can only be exercised where the treaty in question is ‘related to
22 the purposes of this Convention.’ And customary principles of self-determination do not fit
23 that bill.

⁵⁴ Sands, day 4, page 428, lines 6-11.

⁵⁵ Sinclair, Vienna Convention on the Law of Treaties, 2nd, ed., 1984, p. 140.

⁵⁶ Cf. Prof Sands, day 4, p. 427, lines 6-8.

1 57. And it follows that, even if those customary principles had been codified with a
2 compromissory clause expressly referring to the Part XV mechanisms, a court or tribunal
3 under Part XV would not have jurisdiction because the principles do not relate to the
4 purposes of the 1982 Convention. And yet, Mauritius contends, that result can be bypassed
5 through reference to Article 288(1), that is by packaging its sovereignty claim as if it turned
6 on the words ‘coastal State’ in any number of provisions in the Convention.

7 58. Article 288(2) forms part of the context for interpreting Article 288(1), and so does Article
8 297, pursuant to which States parties to UNCLOS have excluded jurisdiction over key forms
9 of exercise of sovereign authority. And yet, according to Mauritius’ argument, those same
10 States were content to have a Part XV court or tribunal decide the anterior and far more
11 sensitive issue as to whether a given State was entitled to exercise that sovereign authority in
12 the first place, i.e. as to whether it was or was not the coastal State. And no plausible
13 explanation can be, or has been, given for that by Mauritius. And again, I should say that
14 this is not a point on interpretation, but arises in the context of jurisdiction over true mixed
15 disputes; that is, disputes in the maritime delimitation context.

16 59. As to the State practice on Article 288(1), such as it is, this points to the absence of the
17 jurisdiction that Mauritius asserts. So far as we are aware, Mauritius is the only State to have
18 asserted the existence of jurisdiction over a claim to sovereignty in this way. The
19 Philippines, in the Annex VII dispute that is well-known to many in this room, expressly
20 disavows the suggestion that it is seeking a declaration over sovereignty, although, of course,
21 China has given that disavowal very short shrift. In the recent position paper, China stated
22 that, “the disputes between China and the Philippines are principally territorial disputes over
23 islands, which are not covered by the Convention.” Now, whether China is correct that the
24 Philippines is trying to re-package a sovereignty claim as a law of the sea dispute, or
25 whether, in fact, the Philippines is right to say that sovereignty issues simply do not arise on

1 its claim, the position of both parties supports the absence of jurisdiction over such territorial
2 sovereignty issues.

3 60. A related point could be made by reference to the 1958 Conventions, where the term ‘coastal
4 State’ was also used on multiple occasions, and there were also provisions for dispute
5 settlement, including through the optional Protocol. On Mauritius’ argument, it would
6 likewise follow that by ratifying the Protocol or indeed the Convention on Fishing and
7 Conservation with the special provisions establishing the Special Commission, I think it’s at
8 Article 9, that by that States were agreeing to jurisdiction over decisions or determinations
9 on who was or was not the coastal State, precisely the same line of argument would have
10 applied in relation to the 1958 Conventions, in other words. And yet, we see no whisper of
11 that anywhere, whether in commentary or State practice, or otherwise.

12 61. And, as a broader point on State practice, one has to note that if Mauritius were right on its
13 current interpretation, the same argument could presumably be run in respect of any treaty
14 where a State exercises rights by virtue of its territorial sovereignty.

15 62. Take the 1944 Chicago Convention, where the compromissory clause is at Article 84 and is
16 likewise limited to disputes relating to the interpretation or application of the Convention,
17 and jurisdiction is ultimately in favour of the ICJ. Pursuant to a number of provisions, States
18 parties exercise rights over airspace by virtue of their territorial sovereignty – the broad
19 principle in that respect being set out in Article 1 of the 1944 Convention, and curiously one
20 notes that the drafters of the 1958 Conventions had that wording in mind when they were
21 formulating what became Article 1(1) of the 1958 Convention on the Territorial Sea. On
22 Mauritius’ argument, a Chicago Convention State could complain that any such exercise of
23 rights over airspace was ill-founded and subject to challenge because the given State was not
24 in fact sovereign over the underlying territory. But the Chicago Convention dispute

1 settlement has not been used to decide such territorial disputes, and no more, we say, can
2 Part XV of UNCLOS be used to such effect.

3 63. As to the *travaux* on Article 288(1), Mauritius has been unable to point to a single statement
4 that suggests that the negotiating parties had in mind the broad jurisdiction that it now contends
5 for. Of course, Mauritius can point to statements showing that one or two representatives did
6 not wish issues of territorial sovereignty to be excluded, but such statements were made in the
7 context of maritime delimitation disputes. I'll come back to the details a little later because
8 the Mauritian team has naturally combed through the *travaux*, and come up with various
9 extracts said to support its case in favour of jurisdiction, focusing in particular on what became
10 Article 298. But, again, it has not been able to point to a single statement from a single State
11 representative to suggest that States understood or intended that jurisdiction over a dispute
12 over territorial sovereignty could fall within Part XV where a State challenged the exercise of
13 the rights of a given coastal State.

14 And, Mr. President, I could either pause here or take us on through to the break.

15 PRESIDENT SHEARER: If it's only a few minutes, please go on, Mr.
16 Wordsworth. Thank you.

17 64. Finally, on Article 288(1) Mauritius placed notably heavy weight on the views of
18 commentators, or, rather, that should be in the singular, a commentator, as if such views
19 could lead to a different result to that obtained through application of the usual rules of
20 interpretation. Leaving aside the commentary on the quite separate matters of mixed
21 disputes in the context of maritime delimitation, Mauritius is left only with the two papers by
22 Professor Boyle, and the time spent on these last week merely emphasises the absence of
23 other writings also said to support Mauritius' case. And what do these two papers go to?
24 Precisely what nuance one asks was intended in the example of a fictitious dispute that
25 involved disputed sovereignty issues when Professor Boyle said that: "A court or tribunal

1 could not easily avoid these questions”? What must Professor Boyle have meant in that 2007
2 talk when he then used the words ‘would appear no longer subject’ in alluding to the impacts
3 of Gormenghast making an Article 298 declaration? Well, the Tribunal could always ask
4 him if it wishes, but we are bemused by the attempt to parse this paper as it were a coda to the
5 1982 Convention.

6 65. And I would note also that Mauritius appears to be backing away from Professor Boyle’s 1997
7 paper, quoting only attractive sounding snippets, but not including the paper in its Judges’
8 Folder despite the reliance on this particular paper, the 1997 paper, in the Memorial and the
9 Reply⁵⁷. It was indeed previously the mainstay of Mauritius’ case on jurisdiction over the
10 sovereignty issue⁵⁸, but now it’s pretty much gone. And this is because, as we explained in our
11 Rejoinder, all Professor Boyle was suggesting is that where an invalid claim is made to an EEZ
12 contrary to Article 121(3) UNCLOS, a resulting dispute will fall within jurisdiction under Part
13 XV. But that is the dispute over whether the territory was or was not a rock within Article
14 121(3), not a dispute over who is sovereign. We ask you to read what Professor Boyle was
15 saying very carefully. Mauritius has now read it very carefully and has backed away from it.
16 And the result of that is that the mainstay to its case on sovereignty is now gone, and Mauritius
17 is left with seeing what it can try to make out of illusions and nuances in relation to
18 Gormenghast, and also, rather oddly, trying to make something of Professor Talmon, who
19 expressly disagrees with the thesis of Mauritius.

20 Mr. President, that would be a useful breakpoint because I now intend to move on
21 to Article 298(1).

22 PRESIDENT SHEARER: Very good, Mr. Wordsworth. We will break for 15
23 minutes and be back at just after five past 12.

⁵⁷ Boyle, “Dispute Settlement and the Law of the Convention: Problems of Fragmentation and Jurisdiction”, 46 *ICLQ* 37, at p. 49 (1997).

⁵⁸ See MR, para. 7.7; also MM, para. 5.30, and the transcript of the bifurcation hearing of 11 January 2013 at pp. 91 and 144.

1 Thank you.

2 (Brief recess.)

3 PRESIDENT SHEARER: Thank you, Mr. Wordsworth.

4 Thank you, Mr. Wordsworth. The Tribunal's apologies for being a few minutes'
5 late, but we will allow the presentations to go five minutes past 1:00, if necessary. Thank you.

6 **Article 298(1)**

7 66. Thank you very much, indeed, and I move on to Mauritius' reliance on Article 298(1).

8 67. In brief, Mauritius says that Article 298(1)(a)(i) contains a specific and limited exclusion of
9 territorial disputes from Part XV jurisdiction from which it is said to follow that, outside the
10 context of that exclusion, territorial disputes may be determined.

11 68. I want to address that argument on two quite separate hypotheses – first, that those who have
12 relied on an *a contrario* interpretation of this provision in the context of maritime
13 delimitation disputes are correct in that interpretation; and, second, that they are incorrect.
14 The point I want to make is that either way, Mauritius' arguments are untenable. And it
15 follows that you do not need to enter into the rights and wrongs over jurisdiction over true
16 mixed disputes.

17 69. So, looking more closely at the first hypothesis, it is inevitably common ground that Article
18 298(1)(a) is concerned only with disputes over maritime delimitation and historic bays or
19 titles. It follows that it has no direct application in the current case, where Mauritius relies on
20 references to the term 'coastal State' in Articles 2, 55 and 76 of the Convention. It likewise
21 follows that, had the UK made a declaration under Article 298(1)(a)(i) excluding Part XV
22 jurisdiction over matters of maritime delimitation, that would have had no impact on the
23 jurisdiction as asserted by Mauritius. Pursuant to the plain meaning of Article 298(1), that
24 declaration could only have impacted on Part XV jurisdiction over matters of maritime
25 delimitation.

1 70. On the basis of its unique *a contrario* interpretation, Mauritius therefore posits an agreement
2 to jurisdiction over all territorial disputes, regardless of whether they fall within the limited
3 ambit of maritime delimitation or the much broader ambit of cases where a State exercises
4 the rights or duties of a coastal State. And there are two responses to that.

5 71. First, it is a notably weak *a contrario* interpretation, if indeed that is what it is at all. It is
6 one thing to say that because jurisdiction can be excluded pursuant to a given declaration in
7 context ‘A,’ it must be included in context ‘A’ absent such a declaration. That is the usual
8 *a contrario* argument in the context of maritime-delimitation disputes, and absolutely one
9 can see the logic of that, and context ‘A’ is, of course, the context of maritime delimitation
10 disputes to which Article 298(1)(a)(i) applies. But, according to Mauritius, the tribunal can
11 safely infer that because jurisdiction can be excluded pursuant to a declaration in context
12 ‘A,’ it must therefore be included in context ‘B.’ And, of course, one asks the question, why?
13 The more obvious conclusion is that it was not included in context ‘B’ in the first place.

14 72. Secondly, Mauritius’ interpretation makes no sense. It posits certain States being utterly
15 unwilling to agree to determine territorial disputes where these arose in the context of
16 maritime delimitation claims, and insisting on the terms of the Article 298 opt-out (which
17 excludes sovereignty disputes even from conciliation), but at the same time those very same
18 States being willing to agree to the compulsory determination of such disputes in the far
19 broader context of claims made wherever the Convention refers to a coastal state. Now, that
20 is inconceivable, and there is nothing anywhere in the Convention or the travaux to suggest
21 that is indeed what States were agreeing to. In simple terms, if Mauritius were right on its *a*
22 *contrario* interpretation, there would be an opt-out for who is the coastal State disputes, just
23 as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes. But there is
24 not, and the absence of any such opt out demonstrates that Mauritius is wrong in its
25 interpretation. Mauritius has never had an answer to this simple point, which is a point on

1 interpretation, not a point on policy, which is, of course, how Mauritius elected last week to
2 portray our arguments.

3 73. Leaving these points to one side, but assuming still that jurisdiction over mixed disputes can
4 be established in the context of maritime delimitation, the proponents of that jurisdiction are
5 not understood to contend that it applies in every case. To the contrary, the position is
6 understood to be that the jurisdiction is incidental, to stop jurisdiction under Articles 15, 74
7 and 83 being defeated. One can get that, for example, from the writings of Judges Treves⁵⁹
8 or Rao, and indeed the 2006 statement at the informal meeting of Legal Advisers.⁶⁰ But
9 Mauritius' territorial sovereignty claim is in no sense incidental to some other claim that
10 finds a home in UNCLOS. It is, as I have already said, at the heart of the current proceedings.

11 74. I move on to the second hypothesis, which is that the proponents of the *a contrario*
12 interpretation in the context of maritime delimitation are incorrect in their reliance on Article
13 298(1)(a)(i). If that is so, then Mauritius' *a contrario* interpretation naturally falls away too.
14 This is because the alternative interpretation of Article 298(1)(a)(i) is that this merely
15 clarifies that the general exclusion of territorial sovereignty disputes from compulsory
16 dispute settlement also applies in the context of mandatory conciliation, and the clarification
17 is needed because conciliation is a quite different form of dispute settlement that may well be
18 broader than the jurisdiction of a court or tribunal under Part XV to make binding
19 determinations. One can see that from Articles 297(2)(b) and 297(3)(b).

20 75. Now, we have emphasized in our written pleadings that the Tribunal does not need to decide
21 this point. That is because Mauritius is contending for jurisdiction that is quite different, that
22 does not have the same underpinnings as I've identified earlier, and that does not have the

⁵⁹ T. Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?" in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77. UKCM Authority 104.

⁶⁰ P. Rao, "Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures", MR Annex 114, at p. 896.

1 same support. The three reasons, the three lines of reasoning I pointed to earlier, are absent in
2 Mauritius' case. And as we read the underlying reasoning, none of the statements of Judges
3 Wolfrum,⁶¹ Hoffman, Rao,⁶² or Treves,⁶³ supports Mauritius' case.

4 76. In short, we say the tribunal in *Guyana v. Suriname* correctly resisted addressing the
5 arguments on mixed disputes when it did not have to do so, and the same result should
6 follow here⁶⁴.

7 **The travaux to Article 298(1)**

8 77. I move on to the *travaux* to Article 298(1).

9 78. Professor Sands invited the Tribunal last week to “look at the real history of what happened”
10 in the negotiating history of Article 298(1)(a)⁶⁵, and he referred the Tribunal to Mr. Adede's
11 commentary on the drafting history⁶⁶. There was said to be a clinching argument in the
12 rejection of an automatic exclusion with respect to disputes relating to land sovereignty⁶⁷.
13 And it was also said, by reference to the comments of Chile and other States, that it simply
14 could not be contended that the issues on jurisdiction over territorial sovereignty disputes
15 were (a) not in the minds of negotiators or (b) only arose in connection with delimitation
16 disputes⁶⁸.

17 79. Now, Mauritius has exhibited extracts of the Adede monograph at Annex 91 to its Reply, but
18 we think it's necessary to be rather more comprehensive, and so we have put at Tab 48 of the

⁶¹ R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006. UKCM, Annex 78.

⁶² P. Rao, “Delimitation Disputes under the UN Convention on the Law of the Sea: Settlement Procedures”, MR Annex 114, at p. 896.

⁶³ T. Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?” in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77. UKCM, Authority 104.

⁶⁴ *Maritime Delimitation (Guyana v. Suriname)*, *Jurisdiction and Merits*, Award of 17 September 2007 (2008) 47 ILM 166, at para. 308.

⁶⁵ Day 4, Sands, 451, line 14.

⁶⁶ Day 4, Sands, 451, line 22.

⁶⁷ Day 4, Sands, 453, lines 14-17.

⁶⁸ Day 4, Sands, 454, lines 1-7.

1 Judges' Folder all the extracts that go to the current issue as we said. And, of course, if our
2 friends on the Mauritian team think we've left something out, then, of course, we will be
3 very pleased to add it in. We are not saying that there is any particular magic to Adede's
4 work, but he did follow closely the dispute settlement work on the conference, and it is a
5 convenient way of working through the negotiating history so far as concerns Part XV.

6 80. And as one works through the relevant extracts, and I regret to say that we do invite you to do
7 just that, we say that the following four points are clear:

8 a. First, maritime delimitation was a most sensitive issue, with the substantive standard and the
9 settlement of disputes closely intertwined. And in 1978, Negotiating Group 7 was created
10 specifically to deal with this difficult area⁶⁹.

11 b. Secondly, a major issue during discussions was whether or not there should be compulsory
12 settlement at all for maritime delimitation cases, an issue that is not before the Tribunal.

13 c. Thirdly, the reference to territorial sovereignty in what is now Article 298(1)(a) was first
14 inserted to avoid the possibility of using the dispute settlement system in relation to maritime
15 delimitation for deciding territorial claims, in the context of a particular fear that, under the
16 guise of a dispute relating to maritime delimitation, a party might bring up a dispute involving
17 claims to land territory or an island.

18 d. Fourthly, against this background we note that (i) the references made to territorial sovereignty
19 in the extracts referred to by Professor Sands last Friday⁷⁰, all concern one meeting to consider
20 a report of Negotiating Group 7 and, contrary to his position, all were made in the context of
21 the hotly debated matter of disputes over maritime delimitation⁷¹, and (ii) it is of no surprise
22 that the President was loathe to upset the delicate balance eventually reached with a last minute
23 suggestion of an automatic exclusion of past or existing delimitation disputes as well as

⁶⁹ Adede, p. 168; also 182.

⁷⁰ Day 4, Prof. Sands, 454, lines 1-5.

⁷¹ Cf Day 4, Prof. Sands, 454, lines 5-9.

1 disputes relating to sovereignty over land. We are entirely right to say that the President of the
2 Conference merely wished to avoid changes of substance, in particular to what is now Article
3 297, in view of time constraints and the need not to upset the delicate compromises that had
4 been very carefully negotiated in Article 297⁷².

5 81. Now, if I can just work through the history in a little more detail, taking you to some of the
6 passages of the Adede monograph along the way, although obviously all that I'm going to
7 say is going to be footnoted in the transcript that you finally receive, so I'm not going to ask
8 you to turn every single page of the monograph.

9 82. And, in fact, the first reference I'm going to give you is to page 56. There is no need to turn
10 this up, because I think it won't be contentious at all, because Adede's just looking at the
11 situation back in 1975, and he explains that, "one of the fundamental issues which the
12 Working Group and later the Conference itself faced in the process of devising the
13 compulsory procedures for settlement of disputes under the Law of the Sea Convention was
14 whether or not States would be willing to submit to such procedures all disputes or only a
15 limited category of disputes"⁷³. And, of course, jurisdiction over maritime delimitation
16 disputes was a hotly debated issue.

17 83. At the 1976 New York session, President Amerasinghe took up the question of dispute
18 settlement himself and prepared an informal paper on the subject, which was then discussed
19 at the Conference, and the task of drafting articles was then assigned to the Informal Plenary
20 of the Conference, with the President as the Chair⁷⁴.

21 84. Article 18(2)(b) of his paper gave States the option of making a specific declaration for the
22 purposes of excluding from the compulsory procedures disputes concerning sea boundary
23 delimitations between adjacent states⁷⁵.

⁷² Rejoinder, para. 4.43(c).

⁷³ See Adede p. 56.

⁷⁴ See Adede p. 71.

⁷⁵ Set out at Adede p. 78.

1 85. And Article 18 then underwent revision during the 1977 session⁷⁶, and Adede comments on
2 the controversies that persisted over the exclusions of sensitive disputes from compulsory
3 procedures, in particular in relation to disputes relating to delimitation of sea boundary
4 disputes⁷⁷. So, throughout the early years, one sees the debate should maritime delimitation
5 disputes be in at all, and, of course, the answer to that is provided in clear terms in the final
6 wording of the Convention.

7 86. It was in that context, the discussion of disputes relating to delimitation and maritime
8 boundaries, that issues of territorial sovereignty were brought to the fore. And at p. 132,
9 perhaps this is the passage that I should take you to. I regret this is not paginated, and it's not
10 easy to find.

11 PRESIDENT SHEARER: Yes, it has been. I have got 132 at the top left-hand
12 corner.

13 MR. WORDSWORTH: We haven't paginated it in an easy way for you to follow
14 in the bottom right-hand corner in our pagination. So, if I can ask you to turn to the fourth full
15 paragraph which starts roughly two thirds of the way down the page, introducing the Article⁷⁸ for
16 discussion, the President observed that paragraph 1(a) of the Article remained as it was in the
17 revision, and that's a reference back to 18(1)(a), which you'll note is at page 129. He also noted
18 that,

19 "there was some apprehension on the part of certain delegates who pointed out that, under
20 the guise of dealing with sea boundary delimitations, territorial claims could also be raised
21 and adjudicated. It was the view of the President, however, that such would not be the case.

22 He explained that territorial claims should be resolved in accordance with the general rules

⁷⁶ See at pp. 104, 107 and 129.

⁷⁷ Adede, p. 157. See also Adede, p. 107.

⁷⁸ The text of the second revision is at Adede, p. 129.

1 of international law. He noted that the Convention on the Law of the Sea was not intended
2 to deal with such disputes.”

3 87. Now, what one sees in the pages that follow is that the apprehension still remains. And the
4 Informal Composite Negotiating Text (‘the ICNT’) was issued at the end of the 1977
5 session. And its Article 297(1)(a) addressed the optional exclusion of sea boundary
6 delimitations⁷⁹. And here we see for the first time, and if I can ask you to turn to this, I think
7 it’s just two pages forward, to p. 157. And you’ll see at the bottom of this page there is the
8 new provision, 297(1)(a) which is starting to look a bit like the provision that we know at
9 298(1)(a)(i). “Disputes concerning sea boundary delimitations between adjacent or opposite
10 States or those involving historic phase or titles, this is what you can exclude by
11 declaration”, provided that the State making such a declaration, shall when such dispute
12 arises indicate, and shall for the settlement of such dispute accept a regional or other third
13 party procedure entailing a binding decision to which all parties to the dispute have access,
14 and provided further that such procedural decisions shall “exclude the determination of any
15 claim to sovereignty or other rights with respect to continental or insular land territory.”
16 And if you could then move to the bottom of the page 158, you can see Adede describing
17 these changes in effect. He refers to four major improvements of which two concern the
18 passage, the new provision I’ve just taken you to. He says first in paragraph 1(a), “it can be
19 seen that the article required the indication of a regional body or third party procedure
20 containing a binding decision to which all parties to the dispute have access.” The
21 emphasized portion of that phrase was added to the problem raised in the earlier versions of
22 the text. It had been observed that there are regional bodies, for example, before which not
23 all parties to a Law of the Sea dispute would have equal access. Thus, according to the
24 ICNT provisions, the crucial criterion for third party procedure outside the system which a

⁷⁹ Adede, p. 157.

1 State must indicate for settling sea boundary disputes is that the procedure must have
2 jurisdiction over all the parties to the dispute and must be one rendering binding decisions.
3 Second, from the same paragraph 1(a), (it must be 1(a), there's a typo there), of Article 297,
4 it can be seen that the competence of the forum chosen must exclude the determination of
5 any claim to sovereignty or other rights with respect to continental or insular land territory.
6 This phrase, not found in the earlier versions of the text, was added in the ICT.

7 "to avoid the possibility of using the disputes settlement system of the Law of the Sea
8 Convention for deciding territorial claims. The possibility of invoking Part XV procedures for
9 settling territorial disputes had been pointed out with respect to the earlier version of the text. The
10 ICNT thus responded by adding the identified clause." One moves forward a little.

11 88. And following a decision by the 90th Plenary, Negotiating Group 7 was established at the
12 1978 session to deal with one of the seven core issues that had been identified⁸⁰, namely
13 delimitation of maritime boundaries between adjacent and opposite States and settlement of
14 maritime boundary disputes⁸¹.

15 89. As Adede notes at p. 168, "there persisted the question as to whether or not the settlement of
16 sea boundary disputes would be subject to any compulsory judicial procedures"⁸². There
17 still is a question as to whether maritime delimitation cases come in at all.

18 90. At p. 175, and this is a passage Professor Sands has focused on, Adede notes the views of
19 some delegates "that the exclusion of any 'claim to sovereignty' would be used as a pretext
20 for completely excluding from the compulsory procedures all legitimate delimitation
21 disputes"⁸³. You can see that that's at the bottom of the penultimate paragraph on this page

⁸⁰ Adede, p. 168.

⁸¹ Adede, p. 167. See also p. 175.

⁸² See also at p. 175 "several delegations maintained their position that all disputes concerning maritime boundary delimitation were inappropriate for settlement through the compulsory judicial procedures of section 2 of part XV of the ICNT. Other also maintained the opposite view calling for the settlement of all boundary delimitation disputes through the compulsory procedures embodied in the Convention."

⁸³ Adede, p. 175.

1 starting “certain basic difficulties persisted”. We simply don’t see how that assists
2 Mauritius at all.

3 91. At this stage, Professor Sohn commenced his work of preparing informal papers, setting out
4 various models which provided options for those who wanted to exclude maritime boundary
5 disputes from compulsory settlement on the one hand, and options for those who wanted all
6 maritime boundary disputes to be subject to compulsory procedures⁸⁴. But time was short,
7 and the substantive standard for delimitation occupied much of Negotiating Group 7’s time
8 at the resumed session in 1979 in New York where, for the first time, Negotiating Group 7
9 held what Adede calls a rather extensive discussion on the question of settlement of
10 disputes⁸⁵. He also notes that, at this time, it was clear that resort to compulsory
11 conciliation was already gaining ground, and we see that in the text around 179 through to
12 185, you see first a US proposal, then a revised proposal, and then a new text from the
13 Chairman. And, in fact, one also sees the Chairman observing that none of the texts found
14 widespread and substantial support⁸⁶, and that the dispute settlement question was proving
15 difficult to solve.

16 92. And turning over the page to p. 182, one can see how all these discussions were tied into
17 maritime delimitation, contrary to what has been suggested by Mauritius, Adede takes stock:

18 “It was clear that, on the one hand there were those who would not accept a treaty provision
19 in which compulsory judicial procedures for settlement of delimitation disputes were included. On
20 the other hand there were those who would have great difficulty in accepting any competing
21 substantive rules on delimitation unless a third party system capable of disposing conclusively on
22 the issues in a delimitation dispute were included.”⁸⁷

⁸⁴ Adede, p. 176.

⁸⁵ Adede, p. 176 and 178.

⁸⁶ Adede, p. 181 final para and p. 182 first para.

⁸⁷ Adede, p. 182. See also at p. 244.

1 93. And, again, one sees at p. 278, there's no need to turn to this now, Adede—he comes back in
2 more of a conclusory chapter, he notes how Negotiating Group 7 “had great difficulties
3 fulfilling its mandate of formulating both the substantive delimitation standard and the
4 associated settlement of dispute settlement procedures.”

5 94. So, with the slightly painful task of working through all this, we say that this is the
6 background against which the references to the views of certain States cited by Professor
7 Sands last Friday⁸⁸ must be considered. It was said, by reference to a footnote that you'll
8 find in Mauritius' Reply⁸⁹, that's footnote 759, that “it simply cannot be contended that the
9 issue [of sovereignty over territory] only arose in connection with delimitation disputes.”⁹⁰

10 Now, that's just plain wrong.

11 95. Now, all the references in that footnote, footnote 759, relate to one meeting, the 58th meeting
12 of the Second Committee on 24 April 1979, the record of which is at Reply, Annex 80. As is
13 clear from the top of the first page, the purpose of the meeting was to consider *inter alia* the
14 reports of the Negotiating Group 7, whose mandate, as you've seen, was the particular issue
15 of delimitation and maritime boundaries and the settlement of disputes thereon. It is to the
16 report of Negotiating Group 7 and to the issue of maritime delimitation to which Peru refers
17 at para 4⁹¹, likewise Greece at para 11⁹², likewise Malta at para 13⁹³ and Pakistan at para
18 14⁹⁴. You'll recall that those are the four States that you were taken to in addition to Chile.
19 Similarly the comments made by Chile in previous meetings included in Reply Annex 80,
20 concerned proposals of Negotiating Group 7⁹⁵, and it is evident that they were likewise
21 focused on dispute settlement in the context of maritime delimitation and nothing else.

⁸⁸ Day 4, 454:1 to 5, citing MR, p. 205 fn 759, referring to Chile, Malta, Peru, Greece and Pakistan.

⁸⁹ See Day 4, fn 118 cites MR fn 759 which cites this meeting.

⁹⁰ Day 4, Sands, 454: 5-7.

⁹¹ 58th meeting of Second Committee 24 April 1979, para 4, at Reply Annex 80.

⁹² 58th meeting of Second Committee 24 April 1979, para 11, at Reply Annex 80.

⁹³ 58th meeting of Second Committee 24 April 1979, para 13, at Reply Annex 80.

⁹⁴ 58th meeting of Second Committee 24 April 1979, para 14, at Reply Annex 80.

⁹⁵ 112th meeting, 25 April 1979, para 28; 57th meeting 24 April 1979 48, at Reply, Annex 80.

1 96. So, we maintain the position that, as said in our Rejoinder, in every extract from the *travaux*
2 relied on by Mauritius⁹⁶, the topic under consideration is disputes over maritime delimitation
3 (and those involving historic bays or titles). Whatever these extracts are intended to
4 demonstrate, they cannot demonstrate that any delegates had in mind (still less intended) the
5 radical extension of jurisdiction that Mauritius now contends for.

6 97. As to the reluctance to revisit matters at the last minute, well, one is hardly surprised by that,
7 particularly as the proposed changes also comprised past and present maritime delimitation
8 disputes. And I'll just read out to you the full explanation given by the President at the time.
9 This is at Annex 81 of Mauritius' Reply, paragraph 6.

10 The course of the negotiations conducted in the informal plenary meetings may be summarized as
11 follows: Informal suggestions – informal suggestions – were made by some of the participants in
12 the course of their interventions. These included suggestions regarding both drafting and
13 substance. In particular, two suggestion were made which touched upon the questions of
14 delimitation, which were firstly that a cross-reference to Article 298-bis of Document ST3 be
15 made in Article 298(1)(a)(ii), so you're not concerned with that; secondly, the exclusion of past or
16 existing delimitation disputes as well as disputes relating to sovereignty over land or insular
17 territories from the compulsory dispute-settlement procedures, and from compulsory submission
18 to conciliation procedures as provided in Article 298(1)(a). These should be included in Article
19 296 with the other exceptions in that Article. The exclusion of future delimitation settlements by
20 declaration would remain in Article 298. Where no settlement had been reached, such disputes
21 would be submitted to conciliation at the request of any party, and the other party would be obliged
22 to accept this procedure. You might think that is a pretty unhelpful and convoluted informal
23 suggestion at the last minute. It is about splitting up into different parts, parts of 298(1)(a), so that
24 resolution with respect to past and present disputes and this territorial sovereignty issue, which go

⁹⁶ MR, paras. 7.29-7.41.

1 into 296, what is now 297, and the rest of it, future disputes, remains in what has become
2 298(1)(a).

3 The President continues, or the note continues, how he responded to that. “The President had
4 stressed in both Document ST3 and at the commencement of these negotiations, the changes of
5 substance should be avoided, in particular any changes concerning the text of Article 296(2) and
6 (3).” That's a reference to what became 297, of course. “Since delicate compromises that had
7 been very carefully negotiated are contained in that Article, reference to what became Article 297,
8 any attempt to raise these questions should be avoided. He pointed out that Article 298(1)(a) was
9 closely linked to the delimitation issue. The President further stressed that attention should be
10 concentrated on the structural changes alone to the exclusion of substantive changes. So far as
11 Paragraph 1(a) was concerned, even structural changes should be avoided.”

12 98. So, we say there is absolutely no knockout blow here for Mauritius. An informal last-minute
13 suggestion is made that would have raised all sorts of headaches in particular for what is now
14 Article 297.

15 99. Now, insofar as the Tribunal needs to go into the precise interpretation of the exclusion at
16 Article 298(1)(a)(i), our position is that the proviso to Article 298(1)(a)(i) merely clarifies
17 that the general exclusion of unsettled territorial sovereignty disputes from compulsory
18 dispute settlement also applies in the context where such a dispute would fall for
19 consideration (consideration that is, not determination) in the context of mandatory
20 conciliation. In this respect, it is to be emphasized that the scope of jurisdiction of a
21 conciliation commission to consider matters under Part XV may well be broader than the
22 jurisdiction of a court or arbitral tribunal under Part XV to make binding determinations, as
23 Articles 297(2)(b) and 297(3)(b) demonstrate.

24 100. As to the further support for that view, I refer you to paragraphs 440-442 of the Reply, and
25 in particular the point that as you've seen, Article 298(1)(a)(i) in its earlier drafts provided not

1 for conciliation, but rather “a regional or other third-party procedure entailing a binding
2 decision”⁹⁷ and, hence, all the more need for clarification. And you also, of course, have the
3 ample commentary that we have referred to at paragraphs 450 to 442 of the Reply, the 16
4 commentators that support the views of the United Kingdom.

5 ARBITRATOR GREENWOOD: Mr. Wordsworth, I'm sorry to interrupt you.
6 You said Paragraphs 440 and 442 of the Reply. Did you mean the Rejoinder?

7 MR. WORDSWORTH: The Rejoinder, I apologize.

8 **Mauritius’ ‘a coastal State’ argument**

9 101. I move on to Mauritius argument that it is ‘a coastal state,’ and the jurisdictional issues that
10 arise there, but here I can be very brief.

11 102. The difficulty for Mauritius is that it again is asking the Tribunal to engage in issues of
12 sovereignty, although it is some sort of reversionary rather than actual sovereignty, and it
13 follows from that that the jurisdictional issues are the same. It’s not the customary law of
14 self-determination that you are asked to enter into, but rather the series of alleged
15 international legal obligations arising from the 1965 understandings, but the basic point
16 remains the same.

17 103. If the reformulated case is not one of sovereignty, but rather of somehow having the
18 attributes of a coastal State, then the Tribunal is still being asked to interpret and apply these
19 alleged sources of international law that do not fit within the limits of Article 288(1).

20 104. Moreover, and this would be a more a matter for the merits, there is no suggestion anywhere
21 in UNCLOS that there could be more than one coastal State in the way that Mauritius
22 contends for. And that, of course, would be a recipe for chaos. One can conceive of very
23 limited exceptions where there is an openly and expressly agreed sharing of the jurisdiction
24 of a coastal State, such as in a condominium, or in the very special case of the European

⁹⁷ M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p. 113, para. 298.9. MR, Annex 94.

1 Union, which is, of course, a party to the Convention and where Annex XI makes special
2 provision for divided competences. But even if Mauritius' case were taken at its highest –
3 that it somehow had a reversionary interest in the BIOT – there is nothing in the Convention
4 to suggest it may establish a situation where there are two coastal States vying over the
5 assertion of rights in a somehow shared maritime zone.

6 105. Mr. President and Members of the Tribunal, that concludes my submissions on this aspect of
7 the jurisdictional objection. I thank you for your kind attention, and ask you to call Sir
8 Michael back to make our further submissions on Mauritius' sovereignty claim.

9 PRESIDENT SHEARER: Thank you, Mr. Wordsworth.

10 Yes, I call on Sir Michael now.

11 7. Mauritius' sovereignty claim fails

12 Sir Michael Wood

13 Thank you, Mr. President, Members of the Tribunal. My speech is entitled
14 "Mauritius' sovereignty claim fails", or I could have said, "It's hopeless."

15 I. Introduction

- 16 1. It is now my intention to respond to Mauritius' claims that it - and not the United Kingdom –
17 has territorial sovereignty over the British Indian Ocean Territory: or, in the now very
18 prominent alternative, that the United Kingdom has somehow by its acts or omissions
19 'endowed' Mauritius with some of 'the attributes of a coastal State' in respect of the BIOT. In
20 the first part of my presentation I shall be responding to what Mr. Crawford in particular had to
21 say last Thursday; and in the second part chiefly to Mr. Reichler and Mr. Loewenstein.
- 22 2. I note in passing, that Mauritius' 'attributes of a coastal State' argument can only be an
23 argument in the alternative, since it is inconsistent with the first argument. The fact that it has
24 been superimposed upon, and now overshadows, the 'sovereignty' claim suggests lack of
25 confidence, either on jurisdictional grounds or on the merits, or both.

- 1 3. It is not particularly easy to see what Mauritius now seeks to have you determine. It shifts its
2 position each time it restates it. The argument is a highly migratory one. Among others they
3 said last week that their task was ‘to demonstrate that the UK is not the coastal state having
4 jurisdiction or, at any rate, exclusive jurisdiction, with respect to the protection and
5 preservation of the marine environment of the Chagos Archipelago and adjacent waters under
6 Article 56 UNCLOS.’⁹⁸ But there are many more variations scattered throughout their
7 pleadings.
- 8 4. I want to be clear at the outset that I am responding to what, for shorthand, I refer to as
9 Mauritius’ sovereignty claims, not because the question of territorial sovereignty falls within
10 your jurisdiction - as we have explained, it is our very firm position that it does not.
- 11 5. Instead, the purpose is twofold. *First*, to ensure that Mauritius’ claims and arguments do not
12 go unanswered at this oral hearing. (We have, of course, already answered them in writing.)
13 We wish to place on record, at this hearing, why the United Kingdom has no doubt about its
14 territorial sovereignty over the islands that form the British Indian Ocean Territory, and why
15 the arguments put forward by Mauritius simply do not hold up.
- 16 6. My *second* purpose is this. When one examines the legal arguments behind Mauritius’
17 sovereignty claim in any detail, it is readily apparent that they have nothing whatsoever to do
18 with the provisions of UNCLOS. The central arguments, their whole case, raise multiple issues
19 that are simply not governed by any of the provisions of UNCLOS. They cannot, by any
20 stretch of the imagination, as Mr. Wordsworth has explained, fall within your jurisdiction,
21 which is to settle disputes concerning the interpretation or application of the Convention. The
22 contrary view, put forward by Mauritius is, we say, perverse⁹⁹, and I use that word advisedly.
- 23 7. In its Reply, Mauritius has somewhat clarified its first argument on sovereignty. In Chapter
24 5, entitled “The UK is not a coastal state entitled to declare the “MPA””, Mauritius makes two

⁹⁸ Transcript, Day 3, p. 233, para. 5 (Crawford).

⁹⁹ Transcript, Day 1, p. 44, lines 11-12 (Grieve).

1 separate arguments, expressed in the alternative. And I quote, “First, the UK does not have
2 sovereignty over the Chagos Archipelago”. The sole reason now given is that, and I’m
3 quoting again, “the detachment of the Chagos Archipelago ... was carried out in contravention
4 of the fundamental right of the people of Mauritius to self-determination.”¹⁰⁰ Other legal
5 arguments, such as *uti possidetis*, no longer feature. *Second*, and again I quote, “as a result of
6 the acknowledgment by the UK of the rights and legitimate interests of Mauritius in relation to
7 the Chagos Archipelago, the UK is not entitled in law under the Convention to impose the
8 “MPA”, or to establish maritime zones, over the objections of Mauritius.”¹⁰¹ In the Reply,
9 this second point was spelt out in just two paragraphs, where it was explained that this follows
10 because, and I quote, “in the eyes of the UK, this is a territory which is at present under its
11 sovereignty but which it has agreed will “revert” to Mauritius in due course”¹⁰². I will return
12 to this alternative argument, which has been much stressed last week, in the second part of this
13 speech.

14 **II. Mauritius’ argument on sovereignty**

15 **A. United Kingdom sovereignty over the BIOT**

16 8. So, the first part will deal with Mauritius’ argument on sovereignty, pure and simple. And the
17 first point I will make is to stress United Kingdom’s sovereignty over the BIOT. We have set
18 our position fully in the written pleadings¹⁰³. We stand by what we said there and I do not
19 propose to repeat it in detail.

20 9. It may be helpful, however, to recall a few key dates:

21 - In 1814 - 200 years ago this year - the United Kingdom acquired sovereignty over the Island of
22 Mauritius, and over its Dependencies, including the Chagos Archipelago, by cession from
23 France.

¹⁰⁰ MR, para. 5.1.

¹⁰¹ *Ibid.*

¹⁰² MR, para. 5.35-5.36.

¹⁰³ UKCM, Chapter VII; UKR, Chapter V.

- 1 - From 1814 to 1965 the Chagos Archipelago was administered from Mauritius.
- 2 - On 8 November 1965 the BIOT was established, by Order in Council, as an overseas territory
3 composed of the Chagos Archipelago, a dependency of Mauritius, together with certain islands
4 that then formed part of the Colony of Seychelles.
- 5 - On 12 March 1968, by Act of the United Kingdom Parliament, Mauritius acquired
6 Independence. The territory of the newly independent State of Mauritius did not include the
7 BIOT.
- 8 - In 1982 by Act of the Legislative Assembly, Mauritius purported to include the Chagos
9 Archipelago within its territory.

10 So, the basic facts, we say, are that the United Kingdom acquired sovereignty over the islands
11 that now form the BIOT by cession from France in 1814, under whose sovereignty they had been
12 *Dépendences* of the *Ile de France* – that, I think, is not disputed. And the United Kingdom has
13 not subsequently relinquished sovereignty¹⁰⁴, nor has it somehow been divested of sovereignty
14 by operation of law (which seems to be what Mauritius is now saying). Mr. Crawford seems to
15 have misunderstood what we were saying in the written pleadings¹⁰⁵, or perhaps, more likely, I
16 have misunderstood what Mr. Crawford was saying. We were not suggesting that the modality of
17 acquisition in 1814 cession was relevant. We were simply saying that the United Kingdom
18 acquired sovereignty in 1814 and had not since relinquished sovereignty.

19 10. A word about the *uti possidetis juris* principle, which fully supports the United Kingdom's
20 position¹⁰⁶.

21 11. In its Memorial, Mauritius cited *Burkina Faso/Mali*. But as that case itself makes clear, in the
22 very passage cited by Mauritius, and I quote,

¹⁰⁴ UKCM, paras. 7.5-7.9.

¹⁰⁵ Transcript, Day 3, pp. 244-245, para. 32 (Crawford).

¹⁰⁶ UKCM, paras. 7.42-7.47.

1 “[t]he essence of the principle lies in its primary aim of securing respect for the territorial
2 boundaries at the moment when independence is achieved”¹⁰⁷.

3 In the very clear and vivid imagery of the Chamber,
4 “By becoming independent, a new State acquires sovereignty with the territorial base and
5 boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery
6 of State succession. International law - and consequently the principle of *uti possidetis* - applies to
7 the new State (as a State) not with retroactive effect, but immediately and from that moment
8 onwards. It applies to the State *as it is*, [and the words “as it is” are emphasized in the judgement]
9 i.e., to the “photograph” of the territorial situation then existing. The principle of *uti possidetis*
10 freezes the territorial title; it stops the clock, but does not put the hands back.”¹⁰⁸

11 And the Chamber goes on to refer to what has been called the “colonial heritage”, i.e., the
12 “photograph of the territory” at the critical date.”¹⁰⁹

13 12. Mr. Crawford suggested that the principle has no application in this case¹¹⁰, despite
14 Mauritius’ reliance upon it in the Memorial¹¹¹. But of course it does. Mauritius is seeking
15 to alter the territory that it inherited upon independence; it is seeking to put back the hands of
16 the clock, to alter the photograph. If Mauritius were to succeed, the stability of frontiers
17 inherited at independence could be subject to endless challenges based on the still vague
18 notions inherent in the application of self-determination in practice. The consequences in
19 many parts of the world are obvious, and I do not need to give examples but there are many.

20 Mr. President, I’m going to move on to the argument based on self-determination. We haven’t
21 synchronized our watches but by my watch, I’m two minutes before 1:00. I think your watch is
22 slightly ahead of us or behind.

¹⁰⁷ *Frontier Dispute (Burkina Faso/Mali)*, I.C.J. Reports 1986, p. 554, at p. 566, para. 23 (MR, Authority 10).

¹⁰⁸ *Ibid.*, p. 568, para. 30.

¹⁰⁹ *Ibid.*

¹¹⁰ Transcript, Day 3, pp. 246-247, paras. 35-36. (Crawford).

¹¹¹ MM, paras. 6.23-6.24.

1 PRESIDENT SHEARER: No, it's one minute before 1:00.

2 If this is a convenient point to break, by all means, but you are entitled to an extra
3 five minutes this afternoon in view of the late return of the Tribunal from the morning break.

4 SIR MICHAEL WOOD: It might be more convenient if we could have the extra
5 five minutes at the end of the afternoon.

6 PRESIDENT SHEARER: Indeed. As you choose.

7 SIR MICHAEL WOOD: Will do.

8 PRESIDENT SHEARER: Thank you, Sir Michael.

9 We will rise now until 2:30.

10 Thank you.

11 Oh, sorry, not so. There is a question before we leave. I'm sorry.

12 ARBITRATOR GREENWOOD: Sir Michael, thank you for your answer to my
13 question about the Secretary of State of the Colonies this morning. In the light of that, I have got
14 a follow-up question which I hope won't be too burdensome for the Parties but I would like to
15 clarify something.

16 In the record of the Constitutional Conference – sorry, I should have prefaced this
17 question by saying it's obviously without prejudice to submissions we have been listening to all
18 morning on jurisdiction – but in the record of the Constitutional Conference at Paragraph 20 – and
19 this is Mauritius Memorial Annex 11 – we find the statement: "The Secretary of State
20 accordingly announced at a plenary meeting at the Conference on Friday the 24th of September his
21 view that it was right that Mauritius should be independent and take her place among the sovereign
22 nations of the world."

23 Now, am I right in assuming that there must have been a cabinet decision to that
24 effect the previous evening? This statement was made on the last day of the Conference, Friday
25 the 24th of September 1965. At 4:00 on Thursday the 23rd of September, Anthony Greenwood

1 left his meeting with Sir Seewoosagur Ramgoolam and his colleagues, saying he had to go back
2 and report back to his colleagues. Do you know whether that report was part and parcel of a
3 cabinet meeting at which there was a decision by Her Majesty's Government to accord
4 independence, subject, obviously, to the final word resting with Parliament to a later stage?

5 SIR MICHAEL WOOD: Well, we will obviously look into that, Judge
6 Greenwood. My immediate reaction is that, as you know, the British Constitution is pretty
7 informal, and provided the Colonial Secretary believed he was speaking for the Government as a
8 whole, he could make his statement like that at the Conference. After all, under the *Carltona*
9 principle, even the most junior official could speak for the Secretariat of State or for the
10 Government. It's pretty relaxed, but we will certainly check if there was anything in between
11 those times that you mentioned.

12 Thank you.

13 PRESIDENT SHEARER: Very good. We'll take the luncheon break now.

14 Thank you.

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

1 AFTERNOON SESSION

2 PRESIDENT SHEARER: Yes, Sir Michael.

3 SIR MICHAEL WOOD: Thank you, Mr. President.

4 Just before the break, I was dealing with the question of the *uti possidetis* principle,
5 and I will now turn to Mauritius' argument based on self-determination.

6 ***Mauritius' argument based on self-determination***

7 13. As I said this morning, the sole basis that Mauritius now gives for its assertion of sovereignty
8 over the BIOT is that the Chagos Archipelago was detached from Mauritius in 1965 in
9 contravention of the right of the people of Mauritius to self-determination. There are, we say,
10 at least five reasons why this argument does not stand up. They go to the law, and to the facts.

11 14. As to the law,

12 - *First*, there was no legal right of self-determination in 1965.

13 - *Second*, there was no such right accepted by and binding on the United Kingdom at that time.

14 - *Third*, even if the right had developed by 1965 and was binding on the United Kingdom, its
15 content was not as asserted by Mauritius.

16 15. But if you did have jurisdiction, which of course we dispute, you might still not need to decide
17 these difficult and controversial questions of law. It would be sufficient to conclude that in
18 any event, Mauritius' self-determination argument is not made out on the facts:

19 - So our *fourth* point is that the BIOT was not part of the Territory of Mauritius for the purposes
20 of the application of any rule of self-determination.

21 - Our *fifth* point, is that even if this were not so, it is plain that the elected representatives of the
22 people of Mauritius agreed in 1965 to the formation of the BIOT, an agreement that was not
23 put in doubt until years after independence; the *ex post facto* argument alleging duress does not
24 correspond to what happened.

1 16. There are also two preliminary questions that would need to be answered, were the tribunal to
2 enter into questions of self-determination. What is the relevant date? And what is the
3 self-determination unit?

4 17. It seems to be common ground between the Parties that the law to be applied is the law as it
5 stood, or may have stood, at some point in the 1960s. In our view, it does not matter whether
6 one takes as the relevant date 8 November 1965 or 12 March 1968. 8 November 1965 was the
7 date of the establishment of the BIOT, and the date upon which Mauritius focuses its
8 complaint. In its Reply, however, and this was I think repeated last week¹¹², Mauritius says
9 (without explanation) that “the date of Mauritius’ independence in 1968 is the relevant date for
10 the assessment of the law.”¹¹³ In which case, they would, I suppose, have to apply the law of
11 1968 to the events of 1965, since it is those events on which they focus their arguments,
12 particularly on duress. Presumably our friends opposite now insist on this later date in 1968
13 because they think that the principle of self-determination hardened into a binding rule of
14 customary international law at some point during the two years and four months that elapsed
15 between the establishment of the BIOT and the independence of Mauritius, between 8
16 November 1965 and 12 March 1968. It did not.

17 18. As for the self-determination unit in 1965 (or in 1968), Mauritius says that this would have
18 been the people of Mauritius, including the inhabitants of the Chagos Archipelago¹¹⁴. That
19 raises a very interesting question, which I do not propose to go into. But Mauritius itself is
20 hardly consistent on the matter, since it prays in aid a Canadian Department of External
21 Affairs’ query to the British Government as to whether they “contemplated some method of
22 direct consultation with the inhabitants of the islands concerned”¹¹⁵, that is the inhabitants of

¹¹² Transcript, Day 3, p. 235, para. 10 (Crawford).

¹¹³ MR, para. 5.16.

¹¹⁴ Transcript, Day 3, pp. 242-243, para. 27 (Crawford).

¹¹⁵ MR, para. 5.24.

1 the Chagos Archipelago. As I say, I don't want to get into that but it is an interesting question
2 on their thesis.

3 19. So I come to the main legal aspects of Mauritius' argument based on self-determination. I
4 have a sentence here saying I can be relatively brief, I'm not sure if that's true. But anyway, I
5 can be relatively brief as is says because Mr. Crawford added little to what we read in
6 Mauritius' written pleadings, to which we have responded fully in writing. I shall just address
7 a couple of the points he made.

8 20. The *first* and most fundamental reason why Mauritius' self-determination argument does not
9 even get off the ground is this. To determine the merits of Mauritius' argument, it would be
10 necessary for this tribunal to determine whether, by November 1965, or on Mauritius' case
11 now by March 1968, a rule of customary international law had emerged, what its precise scope
12 and content was at that time, and whether it was then binding on the United Kingdom. That
13 unenviable task clearly goes well beyond anything in UNCLOS. And in any event, what is
14 clear is that such a rule cannot be said to have been established and accepted by 1965, or by
15 1968.

16 Mauritius itself seems to acknowledge that, in the 1960s, the right of self-determination was only
17 in the process of formation. Even on its own interpretation of the documents and developments,
18 Mauritius can show no more than that in the 1960s the potent (but far from clearly defined)
19 political principle that was self-determination was on its way to becoming a legal principle or rule,
20 that it was – perhaps – emerging as *lex ferenda*. Mauritius cannot name a date in the 1960s, when
21 the principle became a right. It does not really try. It jumps around, dropping a date here, giving
22 an assessment there, but nowhere does it establish that by 8 November 1965 or by 12 March 1968
23 a rule of customary law had emerged that would have precluded the United Kingdom from
24 establishing the BIOT.

1 21. For example, Mauritius claims that there was ‘a general trend’¹¹⁶. But a ‘general trend’ does
2 not amount to what, in relation to another emerging concept of international law, the sole
3 Umpire in the 1951 *Abu Dhabi* case referred to as ‘the hard lineaments or the definitive status
4 of an established rule of international law’¹¹⁷. It’s a pity that we don’t still have Umpires. It
5 puts international dispute settlement into perspective.

6 22. Among other things, Mr. Crawford claimed that, and I quote, “[i]n 1963, the International Law
7 Commission referred to the principle as a contender for peremptory status.”¹¹⁸ Well, that is not
8 exactly what happened. In fact, in the 1960s, when preparing the draft articles on the law of
9 treaties, the Commission was cautious, and –

10 (Electricity outage. Off the record.)

11 PRESIDENT SHEARER: We are ready to resume. I think the Registrar has
12 taken note of the number of minutes we lost, so it will be added to your time for argument.

13 Thank you.

14 SIR MICHAEL WOOD: I was talking about the International Law Commission, I
15 think. I had said that what Mr. Crawford had said was not exactly what happened. In fact, when
16 preparing the draft articles on the law of treaties in the 1960s, the Commission was cautious and
17 did not attempt to include a list in either the draft articles or in its commentary¹¹⁹. Paragraph (3)
18 of the commentary to draft article 50 went no further than giving a short and apparently
19 non-exhaustive, but nonetheless debatable, list of ‘examples suggested’. Thus the Commission
20 listed examples of what had been suggested by individual members or others as candidates for *jus*
21 *cogens* status, without expressing its own view. It was only years later, in connection with the
22 2001 Articles on State Responsibility and the 2006 Fragmentation Study, that the Commission was

¹¹⁶ MR, para. 5.9.

¹¹⁷ *Petroleum Development Ltd v. Sheikh of Abu Dhabi* (1951), 18 ILR 144 at 155.

¹¹⁸ Transcript, Day 3, p. 237, para. 14 (Crawford).

¹¹⁹ YBILC 1966 II 248.

1 bolder and adopted a list as its own (the 2006 text is described in the latest edition of *Brownlie's*
2 *Principles*, which I happily return to again, as the ILC's 'own authoritative synopsis'¹²⁰).

3 23. Mauritius further claims, referring to the negotiation of the Friendly Relations Declaration,
4 that if States changed their position, and I quote, "it occurred earlier [than 1970 when the
5 Declaration was adopted], in 1967 at the latest."¹²¹ And how do they reach this remarkable
6 proposition, they quote Mr. Robert Rosenstock. However, it is worth looking very carefully
7 at what he said: he wrote that what happened in 1967

8 "represents a significant step in the progressive development of international law when
9 compared with the position taken in 1964. Many states had never before accepted
10 self-determination as a right."

11 So Rosenstock was referring to 'a significant step' in the 'progressive development' of
12 international law, and most importantly to a step taken in the course of negotiating an overall
13 document; and he said that many States had 'never before' (that is never before 1967) accepted
14 self-determination as a right, accepted that is as part of the negotiation of the text that in 1970
15 became the Friendly Relations Declaration. Moreover, if correct – and Bob Rosenstock was
16 usually correct – that clearly precludes that any such rule of customary international law had been
17 accepted in 1965.

18 24. Mauritius cites also in this connection the late Sir Ian Sinclair, who was the British
19 representative to the Friendly Relations Committee in August 1967¹²². Again, it is instructive
20 to see what Sir Ian actually said. He referred to a text for eventual inclusion in the Declaration
21 which endeavoured, and I quote his words, 'to reconcile the differences on whether the concept
22 of self-determination was to be regarded as a right or a principle. In the past his delegation
23 had opposed it being formulated in terms of a right The new initiative [by the United

¹²⁰ J. Crawford, *Brownlie's Principles of International Law* (8th ed., 2012), p. 596.

¹²¹ MR, para. 5.12.

¹²² MR, para. 5.14.

1 Kingdom, I think] meant holding in abeyance the views [the United Kingdom Government]
2 has consistently maintained in the past” Holding in abeyance, presumably pending
3 achievement of the package deal that became the Friendly Relations Declaration. That package
4 deal was happily concluded on United Nations Day 1970, 24 October 1970, the 25th
5 anniversary of the entry into force of the Charter.

6 25. The political principle, enshrined in the Charter as ‘the principle of equal rights and
7 self-determination of peoples”, was indeed gradually being transformed in the course of the
8 1960s/1970s. Yet even those who seemed at the time to consider that there might have been a
9 rule of law admitted that “the extent and the scope of the right” was open to debate¹²³ – that is
10 I think is a very British understatement on the part of Rosalyn Higgins.

11 26. What matter is not so much whether self-determination was labelled a ‘right’ or a ‘principle’,
12 but when it became a binding rule of customary international law. As can be seen from the
13 materials cited by Mauritius, and as one would expect, these words, “right” and “principle”,
14 were not used with precise meanings, especially by and within the political organs of the
15 United Nations, where legal aspects are often overlooked. The repeated use of the term
16 “rights” in the Universal Declaration of Human Rights did not mean that its content was legally
17 binding at the time of its adoption. Rather it was with time, and evolving State practice, and
18 *opinio juris* that the content of the Universal Declaration – in part or in its entirety – acquired a
19 legally binding nature.

20 27. *Second*, and notwithstanding Mauritius’ attempts to show otherwise, the United Kingdom,
21 which for obvious reasons was in the 1950s and the 1960s one of the most interested or
22 ‘specially affected’ States, did not then accept the right of self-determination as a rule of
23 international law. Mr. Crawford gave us three pretty unconvincing reasons why the UK could
24 not have been a persistent objector. Of course, such status would anyway only be relevant if a

¹²³ R. Higgins, cited in MR, fn 469.

1 rule of customary international law had already crystalized, which was not the case. But what
2 is more significant for the possible development of a rule of customary international law was
3 the opposition of specially affected States, which included, but was certainly by no means
4 limited to, the United Kingdom.

5 28. The United Kingdom's record of objection was in fact pretty consistent, especially in
6 circumstances where a careful legal position was called for, such as in the legal fora; and the
7 shift which Mr. Crawford finds it possible to discern in 1967 is, as I've shown, illusory.

8 29. The fact that the United Kingdom was prepared to propose and negotiate language for eventual
9 inclusion in the 1970 Friendly Relations Declaration, or in the International Covenants, did not
10 mean that it accepted that the principle had become *lex lata*, or what the precise content and
11 manner of application of the right would be if and when it did crystallise into a rule of law.
12 States frequently propose and accept specific language in the course of negotiations without
13 being committed to that language as a statement of customary law. Mauritius' view of the
14 significance of doing so would obviously have a serious chilling effect on negotiations. Its
15 theory, if accepted, would have rendered impossible the negotiation of the compromises
16 embodied in the individual package deals and overall package deal at the Third United Nations
17 Conference on the Law of the Sea. The Friendly Relations Declaration and the International
18 Covenants were also package deals. And, as with UNCLOS, the commitment of States to
19 new rules of law came not with the minutiae of the negotiating positions, but through the
20 eventual acceptance by States of the overall package – in the one case by the adoption of the
21 Declaration in October 1970, and in the other by their individual ratification of the Covenants.

22 30. Mr. President, last week, Mr. Crawford referred you to paragraph 82 of the *Kosovo* Advisory
23 Opinion, which itself refers back to paragraph 79¹²⁴. Both speak of the evolution or
24 development of the international law of self-determination “during the second half of the

¹²⁴ *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, I.C.J. Reports 2010, p. 405, at p. 436, para. 79.

1 twentieth century”. Paragraph 79 refers to a series of cases, the latest one listed being the
2 *Wall* opinion of 2004, where interestingly in that opinion the Court mentions only the Charter,
3 the Friendly Relations Declaration and Common Article 1 of the International Covenants as
4 instruments in which “the principle of self-determination of peoples has been enshrined”¹²⁵.
5 The Court makes no mention of resolution 1514(XV), even though it had been referred to by a
6 few States in their Written Statements. Considerably more States referred in their Written
7 Statements to the Friendly Relations Declaration. In fact, the proceedings in the *Wall* case
8 give interesting indications of the position of States. Fifteen of the Written Statements
9 submitted by States and Palestine addressed the question of self-determination. Of these,
10 only three referred directly to resolution 1514 (XV). And of these three, only one (South
11 Africa) referred to resolution 1514 as reflecting a right of self-determination. On the other
12 hand, no less than 10 of the 15 referred to the 1970 Friendly Relations Declaration, six of
13 them indicating that in their view that Declaration reflected international law. For example,
14 Palestine said “The existence of the principle of equal rights and self-determination of
15 peoples is no longer a matter of dispute in international law.” This of course was 2004. They
16 went on, “The matter was clearly ascertained by the Declaration on Principles of
17 International Law concerning Friendly Relations and Co-operation among States in
18 accordance with the Charter of the United Nations (Resolution 2525(XXV)).”¹²⁶

19 31. In the *Namibia* opinion, the Court did indeed refer to resolution 1514, but even then rather
20 cautiously as ‘a further important stage in this development’, that is the development in the
21 international law in regard to non-self-governing territories. The bald assertion by Mr.
22 Crawford last week that “[e]ver since the United Nations General Assembly adopted
23 Resolution 1514(XV) ... it has been established that all peoples have the right to ‘freely

¹²⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88.

¹²⁶ Palestine, Written Statement, p. 235, para. 537.

1 determine their political status and freely pursue their economic, social and cultural
2 development’ does not seem to be shared by the Court, or indeed by that excellent book, *The*
3 *Creation of States in International Law*¹²⁷.

4 32. At the end of the day, Mauritius cannot get around the fact that the earliest generally accepted
5 source of positive law regarding the right of self-determination is the October 1970 Friendly
6 Relations Declaration. That is why bodies such as the Human Rights Committee, as well as the
7 International Court, and authors, rely upon the Declaration when discussing the content of the
8 right of self-determination.

9 33. It is also worth recalling that there are substantive differences between resolution 1514 of 1960
10 and the Friendly Relations Declaration of 1970. It cannot be said that the customary law of
11 self-determination became established in the course of the decade of the 1960s. For example,
12 the language of resolution 1514 is absolute about the immediate and unconditional
13 independence for Trust Territories and Non-Self-Governing Territories and for all other
14 territories which have not yet attained independence¹²⁸. The Friendly Relations Declaration, on
15 the other hand, states that “free association or integration with an independent State or the
16 emergence into any other political status freely determined by a people constitute modes of
17 implementing the right of self-determination by that people”.¹²⁹ That is a major difference in
18 substance.

19 34. The Friendly Relations Declaration provides that self-determination is without prejudice to the
20 territorial integrity or political unity of independent States conducting themselves in
21 compliance with the principle of equal rights and self-determination of peoples as described
22 above and possessed of a government representing the whole people et cetera. In other words,
23 remedial self-determination. There is no hint of that in the 1960 resolution. I think that it’s

¹²⁷ J. Crawford, *The Creation of States in International Law* (2nd ed., 2006), pp. 108-115.

¹²⁸ General Assembly Resolution 1514(XV), paras. 3, 5.

¹²⁹ General Assembly Resolution 2625(XXV).

1 fair to say that it is widely considered that the content of self-determination is reflected in the
2 1970 Declaration, not in resolution 1514¹³⁰.

3 35. The negotiating history of these two instruments stands in stark contrast. The 1960
4 Declaration was rushed through, it was a political initiative started by the USSR. If you read
5 the Gromyko speech or note which started it you get taken back to a very different era. And
6 then it emerged from talks behind the scenes among a small group of states; it did not reflect a
7 negotiated consensus. The Friendly Relations Declaration, on the other hand, as we all know,
8 was negotiated with great care over a considerable period with the participation of a large
9 number of eminent lawyers from all parts of the world and represented a true consensus. In
10 any event, the right of self-determination did not include a right of ‘territorial integrity’ such as
11 to require the reversal of territorial changes that had already taken place before independence,
12 to require, in other words, the hands of the clock to be turned back. Mauritius places great
13 weight on paragraph 6 of UN General Assembly resolution 1514. We explained in the
14 Counter-Memorial that that paragraph was at best ambiguous. Different weight and different
15 interpretations have been placed upon it in different contexts¹³¹. But the bottom line, however,
16 is that it is simply a paragraph in a non-binding resolution, certainly not drafted with the care
17 that one would expect of a legal instrument.

18 36. Mauritius now accuses us of inconsistency, citing various passages from the speeches of
19 British representatives in various forums in the United Nations. But the statements in
20 question, like so many at the United Nations, are political. They are not considered
21 statements of law. They have to be read in their own particular political circumstances.

22 37. In its Reply, Chapter 7, Appendix II, Mauritius lists seventeen General Assembly resolutions
23 adopted between 1960 and 1967 that, it says, “address the issue of territorial integrity in the

¹³⁰ J. Crawford, *The Creation of States in International Law* (2nd ed., 2006), pp. 127-128.

¹³¹ E.g., United Nations General Assembly, Fifteenth Session, Official Records, 947th Plenary Meetings, Wednesday, 14 December 1960, 3 p.m., New York. paras. 8-10, 62-65, 158-161.

1 context of self-determination for non-self-governing-territories”¹³². Let us assume, for the sake
2 of argument, that Mauritius is right when it asserts that, under certain conditions, the practice
3 of States in the General Assembly may be of legal significance, i.e., where a practice that is
4 consistent over a period of time is reflected in resolutions passed by a large majority of States
5 intended to create binding law¹³³. This gets Mauritius nowhere. As can be seen from the
6 Appendix to Chapter V of our Rejoinder, which we have included in **Tab 49** in the folders, and
7 if I could invite you just to do no more than just glance at it, you will see that many of the
8 resolutions referred to by Mauritius were not passed with an overwhelming majority, to put it
9 mildly, and the United Kingdom, and others in particular, was often among those voting
10 against or abstaining.

11 38. Mauritius, in its pleadings, ignores the voting record, the statements that were made at the time,
12 and the context of these resolutions. In addition the text of those resolutions when read
13 carefully, shows that for the most part they have nothing to do with the self-determination issue
14 raised by Mauritius. First, the references to territorial integrity seem mainly in the context of
15 the prohibition on the threat or use of force under Article 2(4) of the UN Charter. Some of
16 them refer specifically to aggression¹³⁴. That is, after all, the context in which the term is used
17 in the Charter, as the ICJ noted in the *Kosovo* opinion¹³⁵. Others are in the particular context
18 of the Mandate for South-West Africa¹³⁶. And one appears to be aimed at the territorial
19 integrity of a State claiming sovereignty over an overseas territory¹³⁷. Still others make no
20 reference to self-determination¹³⁸. And the remainder mainly deal in one breath with

¹³² MR, para. 5.20.

¹³³ MR, para. 5.8.

¹³⁴ MR, Chapter 5, Appendix II, Nos. (iv) and (vii).

¹³⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 at para 80.

¹³⁶ MR, Chapter 5, Appendix II, Nos. (iv), (vii) and (xvii).

¹³⁷ *Ibid.*, No. (xiv).

¹³⁸ *Ibid.*, Nos. (vi), (viii), (ix) and (xv).

1 territorial integrity and military bases, which was evidently an important political concern of
2 Indian Ocean littoral States among others.

3 39. Counsel for Mauritius placed particular weight on General Assembly resolutions 2066, 2232
4 and 2357¹³⁹. But these resolutions do not do much more than reiterate the non-binding content
5 of resolution 1514 with respect to various territories¹⁴⁰. They do not add to 1514. The latter two
6 resolutions deal with Mauritius alongside more than two dozen other territories. Resolution
7 2066, which concerns Mauritius specifically, expressed ‘concern’ in light of resolution 1514
8 and invited the United Kingdom to take certain action in accordance with that resolution¹⁴¹.
9 That is quite mild for the General Assembly in the 1960s. It did not condemn, it did not
10 demand.

11 40. A second highly questionable point of substance is Mauritius’ apparent claim that, in the
12 1960s, the right of self-determination required that the people of a territory be consulted by
13 plebiscite or referendum on the future of that territory. That was not so, and it is, I would
14 venture to say, still not positive law. In so far as it may be necessary or desirable to ascertain
15 the views of the people, one way is certainly through a plebiscite or referendum. But it is by
16 no means the only or obligatory route. A people may express its views through their elected
17 representatives.

18 41. Mr. Crawford referred you to the *Western Sahara* Advisory Opinion to make the point that the
19 General Assembly has some special role in developing and implementing the right of
20 self-determination¹⁴². It is noteworthy that the International Court of Justice stressed this in
21 the context of a resolution (3292) that actually asked the administering power to postpone a
22 referendum in Spanish Sahara¹⁴³.

¹³⁹ Transcript, Day 2, pp. 91-92, para. 31 (MacDonald); Transcript, Day 2, pp. 133-135, paras. 65-68 (Crawford).

¹⁴⁰ General Assembly Resolution 2232, para. 4; General Assembly Resolution 2357, para. 4.

¹⁴¹ General Assembly Resolution 2066, preamble and paras. 3-5.

¹⁴² Transcript, Day 3, pp. 243-244, para. 30 (Crawford).

¹⁴³ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, para. 71.

1 42. I now turn to the facts of our case. Mauritius not only fails to make its self-determination point
2 on the law, but as I said earlier, the case is particularly weak on the facts. Mauritius' main
3 complaint of a breach of the right of self-determination seems to be that, in 1965, Mauritian
4 Ministers agreed to the establishment of the BIOT under duress.¹⁴⁴ While not entirely
5 avoiding the word 'duress', Mauritius now seems to be trying to shift the ground (they refer to
6 'a situation of duress, or at least analogous to duress')¹⁴⁵, presumably in recognition that the
7 facts get nowhere near to the standard laid down for duress¹⁴⁶.

8 43. And here I come to Judge Wolfrum's question of yesterday, where he asked what standard
9 applied under international law to determining duress. It would be rather good to hear
10 Mauritius' views on this question, since they are the ones that made the allegation. It is not at
11 all clear what standard Mauritius is asking you to apply in judging the validity of the consent
12 which they accept was indeed given. In the written pleadings they spoke of duress, as I've
13 said. But at the start of his speech Mr. Crawford spoke of 'no sufficient regard or no personal
14 regard at all for the opinion of the population or their representatives.'¹⁴⁷

15 44. I am not sure that duress is a concept that is defined in international law for all purposes. We
16 did our best in the written proceedings to respond to Mauritius by referring to comparable
17 concepts in international law and by referring to some degree to national law on the subject. As
18 everyone is aware, in the law of treaties we can find Articles 51 and 52 of the Vienna
19 Convention on the Law of Treaties. Article 51 is entitled "Coercion of a Representative of the
20 State." And it says, "[t]he expression of a State's consent to be bound by a treaty which has
21 been procured by the coercion of a representative through acts or threats directed at him shall
22 be without any legal effect." I think that the authorities, the commentaries all refer to cases
23 where direct coercion, often physical coercion, was applied to the individual representative of

¹⁴⁴ MR, Part III of Chapter 2.

¹⁴⁵ Transcript, Day 3, p. 248, para. 42 (Crawford).

¹⁴⁶ UKCM, para. 7.38; UKR, para. 5.25.

¹⁴⁷ Transcript, Day 3, p. 233, para. 6 (Crawford).

1 the State. Article 52 deals with coercion of a State. But it is limited to coercion of a State by
2 the threat or use of force. A treaty is void if its conclusion has been procured by the threat or
3 use of force in violation of the principles of international law embodied in the Charter of the
4 United Nations. And that is about it in the Vienna Convention. There is nothing about
5 pressure, nothing about the kind of events that are alleged in this case. I would say that neither
6 of those articles has any application to the facts of this case, it gets nowhere near to what they
7 contemplated.

8 Judge Wolfrum referred as part of his question to the words of Prime Minister Wilson at his
9 meeting with Premier Ramgoolam at 10:00 am on 23 September 1965. I won't ask you to look at it
10 but for reference it's at Annex 18 to Mauritius' Memorial, and no doubt elsewhere. But I will just
11 read in full the paragraph concerned. It says, "The Prime Minister went on to say that in theory
12 there were a number of possibilities. The Premier and his colleagues could return to Mauritius
13 either with independence or without it." And I think that is the sentence that Judge Wolfrum was
14 referring to. It goes on to the defence point, "Diego Garcia would either be detached by Order in
15 Counsel or with the agreement of the Premier and his colleagues. The best solution of all might be
16 independence and detachment by agreement, although he could not of course commit the Colonial
17 Secretary on this point" - which perhaps gets us back to Judge Greenwood's question. That's what
18 the record says. I think firstly, it has to be read in the context of the meeting as a whole. I think
19 secondly, it doesn't begin to approach the kind of act which would under international law, the law
20 of treaties as we've seen, amount to an act that vitiates consent. Negotiations, after all, can be
21 tough, things are said, threats are made. One says, I'm going to walk out, I'm going to leave.
22 Negotiations are off. This is a normal part of negotiating. I can speak from experience that the
23 Lancaster House Conference on Rhodesia, a lot of very tough words were said. The result was an
24 agreement. Pressure, if it were pressure during a negotiation of a treaty for example, if that could
25 then subsequently be raised to vitiate and invalidate a treaty, that would be an extremely serious

1 state of affairs. It would lead to the instability of treaties since most negotiations involve pressures
2 of one side or another. I do not think that the record in this case shows anything like it or it would
3 be our submission that the record in this case shows nothing like the kind of duress, call it duress,
4 call it what you will, that might invalidate consent.

5 In fact, if you look at the negotiations or the position, as a whole, of this independence
6 constitutional conference and the negotiations that took place, the impression you get, I believe, is
7 that the United Kingdom clearly wanted Mauritius to move to independence. That was the policy
8 of the United Kingdom and it did everything it could to overcome possible obstacles. These
9 possible obstacles were of a political nature arising on the Mauritius side. The dynamics of the
10 conference, we would suggest, are essentially that.

11 45. I just go back – at least I think I’m going back to it – to the *Nauru* judgment of the International
12 Court, which is quite instructive in this regard and makes an interesting contrast with the facts
13 of this case. Unlike Mauritius, Nauru stated its position clearly on the rehabilitation of the
14 phosphate lands on the very day of independence, and it repeated that position from time to
15 time during the 16-year period that was under consideration by the Court.

16 46. Mauritius, by contrast, admits that its first public sovereignty claim over BIOT did not occur
17 until 1980 in the General Assembly¹⁴⁸. Professor Crawford made the argument last week that
18 Mauritius’ silence over this long period should be disregarded. As in the Reply, he sought to
19 explain this silence by saying that Mauritius was “a new State, a developing nation with a weak
20 economy” and heavily dependent on the United Kingdom¹⁴⁹. In any event, he argued, the UK
21 was aware of Mauritius’ legal stance and he referred to British and American documents
22 discussing the possible effects that ceding certain islands of the BIOT to Seychelles would
23 have on the political position of Mauritius¹⁵⁰.

¹⁴⁸ Transcript, Day 2, p. 140, paras. 82-83 (Crawford).

¹⁴⁹ Transcript, Day 2, p. 138, paras. 73-74 (Crawford).

¹⁵⁰ *Ibid.*, pp. 138-140, paras. 76-80.

1 47. But what does that mean? That the United Kingdom contemplated possible scenarios and
2 ramifications for political decisions to be taken is not surprising, and it is not relevant. What
3 matters is not what the United Kingdom was considering might occur, what matters is the
4 silence of Mauritius for 15 years with respect to sovereignty over the BIOT. What matters is
5 that Mauritius itself did not protest, in fact it said nothing at all on this issue, leaving the United
6 Kingdom to speculate.

7 48. To give but one example of the strength of this argument, Mr. Crawford referred you to Annex
8 75 to the Memorial, which records consultations between the United Kingdom and the United
9 States in November 1975. And he quoted part of the record where it is stated that ceding the
10 islands to Seychelles might encourage Mauritius to press for the rest of the BIOT. He then
11 quoted from the text that ceding islands to Seychelles would place Prime Minister Ramgoolam
12 “in a very awkward position”¹⁵¹.

13 49. He did not take you to the sentences between those two quotes, which read:

14 “Ramgoolam had every opportunity to raise the question of the defence facilities on Diego
15 Garcia and the return of the Chagos Archipelago during his visit to London in September.
16 [September 1975] He said nothing on either matter.”¹⁵²

17 50. Returning to the *Nauru* case, it is by contrast noteworthy that the Nauru Local Government
18 Council, despite the nature of its relations with its big neighbour Australia, as pointed out by
19 Professor Crawford, was not afraid to voice its demand for rehabilitation and make that
20 position clear in the lead up to independence. It was also careful not to waive its rights in its
21 agreement with Australia prior to independence¹⁵³. The contrast with our case is obvious.

22 51. In our case, the facts are clear. I went over them on Wednesday. The Parties seem to agree
23 that in 1965, Mauritian Ministers, indeed the Council of Ministers, consented to the

¹⁵¹ *Ibid*, pp. 139-140, paras. 79-80 (Crawford).

¹⁵² MM, Annex 75.

¹⁵³ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, at paras. 12-21, 24-36.

1 establishment of the BIOT. The agreement of Mauritian Ministers to the formation of the
2 BIOT, given on 5 November 1965, followed consultations extending over a five-month period.
3 To satisfy the wishes of some political parties in Mauritius, guarantees were given by the
4 United Kingdom to sign an external defence agreement and the assurance of assistance with
5 internal security on independence. I note that an agreement on mutual defence and assistance
6 was signed and came into force between the two States on 12 March 1968¹⁵⁴. Guarantees for
7 minorities and electoral provisions in the outlined constitutional framework were also sought
8 to secure sufficient support for independence and ease local communal tensions. This is all
9 clear from the contemporaneous record.

10 52. Even in the early 1980s, when the issue of the BIOT became a heated topic of debate in
11 Mauritius internal politics, the discussions reveal that the Mauritian officials involved
12 conceded that they gave their consent to its creation. For example, and this is one of many,
13 Prime Minister Ramgoolam admitted that he agreed to this move, although he said that this
14 was “because he could not then assess the strategic importance of the archipelago which
15 consisted of islands very remote from Mauritius and virtually unknown to most Mauritians.”¹⁵⁵

16 53. Consent was given. It cannot and has not been shown that consent was vitiated by duress¹⁵⁶.

17 54. As I explained yesterday, the main document relied upon by Mauritius seems to be the Private
18 Secretary’s covering note to briefing provided by the Secretary of State to the Prime Minister
19 in advance of the latter’s meeting with the Mauritian Premier on the morning of 23 September
20 1965. With all due respect, this note is of no consequence when, as I explained yesterday, the
21 record of the meeting itself reveals that the creation of the BIOT was not a condition for
22 independence. Detachment was not secured at the end of the meeting, nor was it sought from

¹⁵⁴ Agreement between the United Kingdom of Great Britain and Northern Island and the Government of Mauritius on Mutual Defence and Assistance, Port Louis, 12 March 1968, United Nations Treaty Series, vol. 648, p. 3 (No. I-9267).

¹⁵⁵ MM, Annex 97, para. 25A.

¹⁵⁶ See UKCM, paras. 7.35-7.40, UKR, paras. 5.23-5.25.

1 Premier Ramgoolam alone. The Colonial Office wished to secure the agreement of the
2 Mauritian Council of Ministers, the willing agreement of the Mauritian Council of Ministers,
3 and this was not forthcoming until 5 November 1965. Yes, the Premier may have felt under
4 political pressure at the time to come away from the 1965 Constitutional Conference with an
5 agreement on Independence without a referendum, in accordance with his party's policy. But
6 negotiations, as we said, are a give and take, and taking into account political pressures and
7 ambitions are at the heart of any international or domestic political negotiation. There is no
8 evidence whatsoever that the Premier was under duress in any legal sense of the word. What
9 the evidence does show, in contrast, is that detachment was agreeable to the Mauritian
10 Ministers because their interests lay in securing a new source of income for their economy.

11 55. Finally, on this limb of Mauritius' argument, it is important to recall that there was an election
12 for the Mauritius Legislative Assembly on 7 August 1967, seven months before Independence,
13 and 21 months after the establishment of the BIOT. As I said yesterday, it does not seem that
14 the Chagos Archipelago was an election issue. The election resulted in the re-election of a
15 government whose policy had been to accept detachment of BIOT at the time of the
16 independence negotiations. Mauritius' argument on duress simply does not stand up to
17 scrutiny.

18 **III. Mauritius' alternative argument: 'a coastal State'**

19 56. Mr. President, Members of the Tribunal, I shall now turn to the alternative 'sovereignty'
20 argument that Mauritius offers you, that Mauritius is 'a coastal State' or some such thing. As
21 I said, the argument is looming ever larger in Mauritius' pleadings. Last Thursday, Mr.
22 Reichler argued that the 1965 'undertakings', as he calls them, and I quote, "irrevocably endow
23 Mauritius with the attributes of a coastal State under the 1982 Convention.", and that this
24 proposition, and I quote, "flow[ed] inevitably" from the proposition that 'the undertakings are

1 legally binding on the United Kingdom.”¹⁵⁷ Later he used a different formula: that “the
2 United Kingdom ... vested Mauritius with important attributes of a coastal State under the
3 Convention”¹⁵⁸, and Mr. Crawford in his turn referred to ‘the attributes, or at least some of the
4 attributes, of a coastal State’¹⁵⁹ Mr. Crawford, that same day, put it differently again, that
5 “the UK has recognised, as a minimum, that it does not have unfettered sovereignty over the
6 Archipelago”¹⁶⁰. That’s a curious term; I would have thought that under modern international
7 law no State has ‘unfettered sovereignty’.

8 57. Mr. Wordsworth will deal with the binding nature of the undertakings. I shall deal with what
9 we might call Mr. Reichler’s ‘attributes of a coastal State’ argument¹⁶¹, which is, it seems, the
10 last iteration of the ‘a coastal State’ argument.

11 58. The undertakings’ upon which Mr. Reichler relies are those concerning fishing rights¹⁶²,
12 concerning the benefit of minerals and oil¹⁶³, and – ‘especially important’ he says – the
13 undertaking on what he terms ‘reversion’¹⁶⁴. He adds to the pot Ms. Yeadon’s internal use of
14 the expression ‘temporary freeholder’, and what he asserts is the fact that UK “allowed
15 [Mauritius], with its encouragement, to make submissions to the CLCS”. To get the flavour
16 of his argument, and to see its inherent weaknesses, allow me to refer you to a passage from
17 Mr. Reichler’s speech last Thursday – at page 279 of the transcript, and I quote:

18 “Because of the U.K.’s undertakings, the situation of Mauritius in respect of the Chagos
19 Archipelago is unique. There is none like it anywhere in the world. There is no place else where
20 sovereignty is disputed and one of the claimants has endowed the other with de facto sovereign
21 rights over both the living and non-living resources in the territorial sea, exclusive economic zone

¹⁵⁷ Transcript, Day 3, p. 255, lines 19-22 (Reichler).

¹⁵⁸ Transcript, Day 3, p. 282, lines 7-10 (Reichler).

¹⁵⁹ Transcript, Day 3, p. 234, para. 7 (Crawford).

¹⁶⁰ Transcript, Day 3, p. 233, para. 5 (Crawford).

¹⁶¹ Transcript, Day 3, p. 272, line 5-p. 282, line 18 (Reichler).

¹⁶² *Ibid.*, p. 272, lines 5-12.

¹⁶³ *Ibid.*, p. 272, lines 13-p. 273, line 10.

¹⁶⁴ *Ibid.*, p. 272, line 15.

1 and continental shelf; has acknowledged as legitimate the future interests of the other State in the
2 disputed territory and its adjacent waters; and has pledged to restore sovereignty to the other State
3 at some future date.

4 Nor is there any other place in the world where one of the claimants has allowed the other
5 claimant, with its encouragement, to make submissions to the Commission on the Limits of the
6 Continental Shelf, in respect of the delineation of the outer continental shelf emanating from the
7 disputed territory.”¹⁶⁵

8 59. Those are the strands of Mr. Reichler’s argument and I shall take them one by one.

9 60. First, the fishing rights. For one State to licence another State’s vessels to fish in its territorial
10 waters or in waters beyond where it enjoys sovereign rights cannot, on any basis, “irrevocably
11 endow [the fishing State] with the attributes of a coastal State under the 1982 Convention.”
12 You only have to state the proposition to see that it is untenable. The idea that granting
13 fishing licences for the territorial sea or the exclusive economic zone might create joint or
14 some form of shared sovereignty is fundamentally at odds with UNCLOS, for example with
15 the provisions on access to fisheries set out in articles 62, 69 and 70. States frequently commit
16 themselves to afford fishing rights to other states and their nationals. That does not mean that
17 they have recognized the other state as ‘a coastal State’ or having ‘the attributes of a coastal
18 State’. Indeed (and this applies to all the strands of Mauritius’ argument) it is the State that
19 confers the rights that is exercising sovereign rights. The fact of these so-called ‘undertakings’,
20 and Mauritius’ invocation of them, prove the exact opposite of what it argues.

21 61. Second, the minerals and oil. Mauritius seems to be saying that the UK has recognized that
22 Mauritius has, here and now, sovereign rights in the continental shelf appertaining to the
23 Chagos Archipelago. You only have to read the terms of the 1965 understanding (and this has
24 not materially changed in its subsequent reiterations) to see that this is not what the United

¹⁶⁵ *Ibid.*, p. 274, line 16-p. 275, line 4.

1 Kingdom has said or done. The understanding was “that the benefit of any minerals or oil
2 discovered in or near the islands should revert to the Mauritian Government”. This does not
3 say that Mauritius has sovereign rights for the purpose of exploring the continental shelf of the
4 BIOT and exploiting its natural resources. It refers, rather, to ‘the benefit of any minerals and
5 oil’ – ‘the benefit’. In practice, it seems that the mineral resources of the shelf appertaining to
6 the BIOT will not be exploited before the BIOT is ceded to Mauritius in due course. There is
7 no suggestion that before that time Mauritius has any sovereign rights.

8 62. That brings me to what Mr. Reichler terms his ‘especially important’ point, his argument that
9 Mauritius is *a* coastal State for UNCLOS purposes because the UK has undertaken to cede the
10 BIOT to Mauritius when it is no longer needed for defence purposes. That has no merit
11 whatsoever. But this important statement, which has been welcomed by Mauritius, is wholly
12 incompatible with Mauritius’ position that it, and not the United Kingdom, has current
13 sovereignty, or that it is a coastal State; and it in no way assists its argument to the effect that
14 Mauritius is here and now endowed with the attributes of a coastal State. The statement is
15 perfectly clear. It means that the United Kingdom is now sovereign, but will cede sovereignty
16 to Mauritius upon the fulfilment of the stated precondition. Mauritius’ own argument
17 presupposes the United Kingdom has sovereignty as of today. Only the territorial sovereign
18 has a sovereign title that can be ceded.

19 63. Mauritius seems to argue that, because this situation is ‘in a category of one’¹⁶⁶, *sui generis*
20 (that’s a sure sign of a weak or over-reaching argument), it follows that it is endowed with the
21 attributes of a coastal State. This argument, if it can be called an argument, does not withstand
22 scrutiny. There are situations that are not so different from the one before this tribunal. An
23 example would be the Sovereign Base Areas in Cyprus (the ‘SBAs’). They are sovereign
24 British territory – like BIOT, an overseas territory, in fact - excluded for defence purposes from

¹⁶⁶ Transcript, Day 4, p. 431, para. 11 (Sands).

1 the Republic of Cyprus at the time of independence in 1960. The UK made a Declaration, a
2 unilateral Declaration, regarding the Administration of the SBAs, and you will find this at **Tab**
3 **50** in your folders. I would draw your attention in particular to points 2(I) and 3(10). If I can
4 find it. As you can see, Mr. President, I'm not very good with tabs. In point 2(I), the United
5 Kingdom declared the intention not to develop the SBAs for other than military purposes; and
6 in point 3(10), Cyprus benefits from any royalties or taxes on minerals obtained in the SBAs,
7 and fees in respect of mining and prospecting licences. None of this affects British territorial
8 sovereignty.

9 64. Since Mauritius challenged us to come up with comparable situations, I should recall there is
10 nothing particularly unusual with a State promising to cede sovereignty in certain
11 circumstances or at some future date. This has happened in all cases where a metropolitan
12 power has agreed to grant independence to an overseas territory. Independence does not
13 come immediately, but after a period. In the meantime, the metropolitan power remains
14 sovereign. That was the position in the case of Mauritius itself, between the Constitutional
15 Conference in 1965 and Independence in 1968. During these intervening years, the United
16 Kingdom, and the United Kingdom alone, had territorial sovereignty over Mauritius. Another
17 example, this time governed by treaty, was the position of the Island of Hong Kong (but not
18 Kowloon or the New Territories) in the 13 years between the signing of the Anglo-Chinese
19 Joint Declaration¹⁶⁷ on 19 December 1984 and 1 July 1997. During this period, on the United
20 Kingdom's legal position at least, Hong Kong Island remained British sovereign territory and
21 only came under Chinese territorial sovereignty at the end of that 13-year period.

22 65. I had better say a quick word about the expression "temporary freeholder", which has been
23 used on a couple of occasions within the FCO, by Ms Yeadon, an official who is not a lawyer.
24 The other side have made so much of her use of this expression - according to Mr. Kasdan's

¹⁶⁷ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984.

1 excellent index there were no less than 9 references last week. Indeed, they seem to have
2 elevated Ms. Yeadon's comment to a statement of the British Government's legal position¹⁶⁸.
3 One might be forgiven, at this point, for recalling the dangers of domestic law analogies in
4 international law, particularly perhaps between English land law and the public international
5 law of territorial sovereignty. In any event, I do not believe that the expression "temporary
6 freeholder" has any meaning in English land law. The term "freeholder", of course, conveys
7 the highest entitlement anyone has to land, a fee simple, a domestic equivalent of sovereignty if
8 you like. While the words bear vestiges of feudalism, in English law the freeholder has the
9 fullest entitlement to the land. I suppose, in ordinary language, if I promise to transfer my
10 freehold to another person, say by a contract of sale, or if I am bound to transfer it upon the
11 fulfilment of a certain condition, I might then be seen to be a 'temporary freeholder', since my
12 ownership of the land would then be time-limited. But until the transfer takes place I remain
13 the full legal owner. So in fact, the term "temporary freeholder" is not a bad layman's
14 description of the position we were in. But the main point is that one shouldn't attach particular
15 importance to a phrase used on a couple of occasions by a non-legal officer in the Foreign
16 Office and internal limiting.

17 66. The last point that Mauritius makes in an effort to establish that it is *a* coastal State, or that it is
18 'irrevocably endowed with the attributes of a coastal State', concerns the events surrounding
19 Mauritius' submission of *Preliminary Information* to the Commission on the Limits of the
20 Continental Shelf¹⁶⁹. And I'm afraid this will take me a little while. In its Memorial,
21 Mauritius sought to rely on the absence of protest by the United Kingdom, an argument that
22 was answered fully in the Counter-Memorial¹⁷⁰. Among other reasons, there was no need for
23 action by the United Kingdom to protect its position, because - as we shall see - everything was

¹⁶⁸ Transcript, Day 1, p. 21, lines 1-4 (Sands).

¹⁶⁹ MM, annex 144.

¹⁷⁰ UKCM, paras. 7.51-7.58.

1 being done under an express sovereignty umbrella and, in any event, Mauritius itself had
2 informed the CLCS that there was a land and maritime dispute. Paragraphs 5.10 and 7.51 to
3 7.58 of the Counter-Memorial set out no less than five reasons why a protest was not needed.

4 67. But Mauritius now goes further. It asserts that we encouraged Mauritius to make the
5 submission. That is a peculiar reading of the record, as I shall show. And, having tried to
6 make a point about our lack of protest, Mauritius now feigns surprise at the statement in the
7 Rejoinder that, and I quote, “Mauritius is not the coastal State in respect of BIOT and as such it
8 has no standing before the CLCS with respect to BIOT.”¹⁷¹, and accuses us – yet again - of bad
9 faith. Mr. Reichler made much of this matter, as did many of his colleagues, in particular Mr.
10 Loewenstein. It ran like a *Leitmotiv*, a rather uninspired *Leitmotiv*, throughout their oral
11 pleadings. And so I shall have to examine it in a little detail.

12 68. Mr. Reichler put it this way. The United Kingdom, he said, had “allowed – *allowed, that was*
13 *his word* – [Mauritius], with its encouragement, to make submissions to the Commission on
14 the Limits of the Continental Shelf, in respect of the delineation of the outer continental shelf
15 emanating from the disputed territory.”¹⁷²

16 69. I first need to recall, briefly, the legal framework for submissions to the CLCS. Mr.
17 Loewenstein described some of the provisions last Thursday¹⁷³. You are familiar with the
18 main provisions of Article 76 and annex II to the Convention, which have to be read with the
19 decisions of the Meetings of States Parties recorded in documents SPLOS/72 and SPLOS/183.
20 But Mr. Loewenstein did not take you to the Rules of Procedure, at least I think he didn’t, the
21 Rules of Procedure of the CLCS, which is document CLCS/40/Rev.1. These are central to
22 understanding what happened in the present case. And you will find the relevant extracts at
23 Tab 51 in your folder.

¹⁷¹ UKR, para. 8.39.

¹⁷² Transcript, Day 3, p. 275, lines 1-4 (Reichler).

¹⁷³ Transcript, Day 3, p. 343, line 10-p. 344, line 17 (Loewenstein).

1 As we explained in the Counter-Memorial¹⁷⁴, the CLCS Rules of Procedure make express
2 provision for land and maritime disputes in rule 46 and Annex I, you will find these on the first and
3 second page after the cover sheet in the folder. Both of these are entitled “Submissions in case of
4 a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or
5 maritime disputes”. Rule 46 is in section XI of the Rules entitled “Submission by a coastal State”.
6 Rule 46 is itself entitled “Submissions in case of a dispute between States with opposite or adjacent
7 coasts or in other cases of unresolved land or maritime disputes”. Paragraph 1 of the Rule reads:
8 “In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent
9 States *or in other cases of unresolved land or maritime disputes*, submissions may be made and
10 shall be considered in accordance with Annex I to these Rules”.

11 So we turn to Annex I, which contains two relevant paragraphs. Paragraph 1 says: “1.
12 The Commission recognizes that the competence with regard to matters regarding disputes which
13 may arise in connection with the establishment of the outer limits of the continental shelf rests with
14 States.”

15 It’s not the Commission’s business to get into such disputes. Then the key provision is paragraph
16 5. And if you look at paragraph 5, it says:

17 “5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider
18 and qualify a submission made by any of the States concerned in the dispute. However, the
19 Commission may consider one or more submissions in the areas under dispute with prior consent
20 given by all States that are parties to such a dispute.”

21 And it goes on to say in (b):

22 “(b) The submissions made before the Commission and the recommendations approved by
23 the Commission thereon shall not prejudice the position of States”.

¹⁷⁴ UKCM, paras. 7.51-7.58.

1 70. So the key provision, really, is 5(a), which says that where there's a land or maritime dispute,
2 the Commission shall not act; however, it may act with prior consent given by all the States
3 parties to the dispute.

4 71. What then are the facts? Mr. Reichler took you back to each side's record of the 14 January
5 2009 bilateral meeting at the FCO¹⁷⁵. After reading short extracts from the records – and you
6 can see what those extracts he read in the verbatim transcript - Mr. Reichler stated: “Mauritius
7 quite rightly interpreted [*quite rightly interpreted*] this offer of cooperation as an
8 encouragement to go ahead and submit preliminary information to the CLCS to beat the May
9 2009 deadline and stop the clock so that the two States could work together on a joint full
10 submission without being time-barred.”¹⁷⁶

11 72. If that was Mauritius' interpretation, it was mistaken. If you read the two records carefully,
12 and I will take you to them, and in full, it is difficult to see how Mauritius could draw the
13 conclusion that it does concerning the alleged vesting of Mauritius with important attributes of
14 a coastal State or how it came to suppose it was being encouraged to go ahead unilaterally.
15 Mauritius relies on one sentence in its own record, a sentence that, as I will show, does not bear
16 the weight they give to it. It is clear that, at least the UK representatives had been talking
17 throughout about joint action vis-à-vis the CLCS, a joint action under a sovereignty umbrella.

18 73. I would like to take you first to the UK record of the meeting¹⁷⁷, which is at Tab 52. I shall
19 refer you to some passages that Mr. Reichler did not take you to last week. We see at the very
20 beginning, under the heading ‘Introductory Statements’, the second bullet point:

21 “The British position ... was that the UK was not prepared to negotiate on the issue of
22 sovereignty. ... As we had reiterated on many occasions, we have undertaken to cede the
23 Territory to Mauritius when it is no longer needed for defence purposes.”

¹⁷⁵ Transcript, Day 3, p. 275, line 7 - p. 277, line 7 (Reichler); p. 285, line 18 - p. 287, line 9 (Reichler).

¹⁷⁶ Transcript, Day 3, p. 277, lines 1-4 (Reichler).

¹⁷⁷ MR, Annex 128.

1 The third bullet point is important and it reads:

2 “The UK was ready to explore whether there were areas regarding BIOT where both sides
3 saw merit in discussion without prejudice to our respective positions on sovereignty.”

4 74. Then on the second page, the second paragraph down, we read that –

5 “Both delegations agreed that whatever passed at the meeting would be without prejudice
6 to the United Kingdom and Mauritius’ positions on sovereignty.”

7 In other words, everything was under an express sovereignty umbrella. That is, Members of the
8 Tribunal, we all know, a very useful diplomatic device, to be found, for example, in the Antarctic
9 Treaty.

10 75. This was restated in the clearest possible terms in the agreed communiqué issued at the end of
11 the talks¹⁷⁸. And you have that at Tab 53 of the folders. As you will see, and this on the
12 second page, the third paragraph from the top, both Governments agreed that “nothing in the
13 conduct or content of the present meeting shall be interpreted as a change in the position of
14 [either State] with regard to sovereignty over the BIOT/Chagos Archipelago”, and that “[n]o
15 act or activity carried out ... as a consequence or an implementation of anything agreed to in
16 this present meeting or in any similar subsequent meeting shall constitute a basis for affirming,
17 supporting, or denying the position of the United Kingdom or Mauritius regarding sovereignty
18 of the British Indian Ocean Territory/Chagos Archipelago.”

19 76. Against this background, may I ask you to turn back to the key passage in the UK record of the
20 meeting of 14 January 2009. This was at Tab 52. It is on the fifth page. My pages are not
21 numbered so I hope you can find the fifth page. There’s a heading ‘(2) Continental Shelf’, and
22 it’s at Tab 52. Mr. Reichler and Mr. Loewenstein each took you to some of this section, but
23 not to all of the key passages for present purposes. As you will see, the first paragraph begins,
24 “The UK opened up the possibility of co-operating with the Mauritians, under a sovereignty

¹⁷⁸ MM Annex 137, Joint Communiqué, Bilateral talks between Mauritius and the UK on the Chagos Archipelago, 14 January 2009.

1 umbrella, on an extended continental shelf agreement (i.e., a joint submission to the
2 Commission on the Limits of the Continental Shelf).” In the next paragraph, we can see that
3 “[t]he Mauritian delegation welcomed the UK statement about a joint submission but was
4 concerned that the deadline was [13] May 2009.” The UK then said (in the next paragraph)
5 that “all that was needed by May was an outline submission. What we were talking about
6 was legal [*legal*] and political co-operation” The Mauritians then asked a question about
7 the joint submission, and the UK explained that they “should not see our position as a sign of
8 weakness or obligation. We wanted to be helpful where we could within the limits set out on
9 sovereignty and treaty obligation.” The comment just below notes that the Mauritians “did
10 reiterate their willingness to a joint submission on the continental shelf.”

11 The fuller Mauritian record¹⁷⁹ which you saw last week is essentially the same on the points of
12 concern to us, the sovereignty umbrella and the references to a joint submission. What I shall just
13 mention in passing are two statements by Mr. Doug Wilson, the FCO legal adviser who was
14 present. And I’m afraid we didn’t include this in the tabs but I will give precise references so you
15 can check. On page 23, in the middle, he is recorded as saying that “we wanted to open up the
16 possibility to produce a joint submission to claim an extended continental shelf.” ‘A joint
17 submission’. And on page 24, talking of the 13 May deadline for the submission of preliminary
18 information, he said “[O]n the deadline we [*please note, ‘we’, not ‘you’*] can put in an outline
19 submission and following that we may proceed.”

20 77. That statement by the legal adviser was immediately followed by the single, short sentence
21 from Colin Roberts, around which Mauritius’ whole case on Thursday seemed to revolve. As
22 you will recall, Mr. Roberts is recorded as saying, and I quote, “You may wish to take action
23 and we will provide political support.” But it is worth looking at the context of that, including
24 the preceding sentence, which says that, “We recognise the underlying structure of this

¹⁷⁹ MR, Annex 129.

1 discussion. You may wish to take action and we will provide political support.” And the
2 discussion concluded, on page 26, with the Mauritian side stating: “we reiterate again our
3 willingness to join the UK on the joint submission”

4 78. Mauritius now reads into that statement by Mr. Roberts consent and even encouragement to the
5 unilateral submission of *Provisional Information* and apparently also now to the unilateral
6 submission of a formal submission. Mr. Loewenstein put it this way: “Mauritius got the
7 message: the UK did not seem keen on making a [submission], so Mauritius therefore
8 proceeded to prepare and then submit the required preliminary information by itself on the 6th
9 of May 2009, at its own cost.”¹⁸⁰ That is to read a great deal into a few words. In fact, what
10 Mr. Roberts said, taken in context, is entirely consistent with what Mr. Wilson had just said, in
11 other words that the UK was prepared to assist Mauritius by agreeing to the joint submission of
12 *Provisional Information*, if Mauritius decided that it wished to go ahead. The UK as we know
13 had no direct interest, so it was up to Mauritius to decide if it wished matters to be taken
14 forward at the CLCS; but if it did, the UK would have to join in to get political and legal
15 support in order to overcome the obstacles that would otherwise arise, and we’ve seen from the
16 Rules of Procedure at the CLCS that they would arise, not least the existence of the sovereignty
17 dispute.

18 79. So a careful reading of the records of both sides shows three things. *First*, the discussion was
19 not clear between the *Preliminary Information* and the formal *Submission*. Two quite
20 separate stages. The term used throughout was ‘submission’, but the deadline referred to was
21 May 2009 for the *Preliminary Information*. *Second*, the talk throughout was of joint
22 submission. And *third*, it was clear, and repeatedly so, that the talks as a whole, and
23 co-operation in connection with the CLCS, would be under a sovereignty umbrella.

24 Mr. President, is this the time we would normally take a break?

¹⁸⁰ Transcript, Day 3, p. 345, lines 16-18 (Loewenstein).

1 PRESIDENT SHEARER: It is, if it's convenient to you.

2 SIR MICHAEL WOOD: It is.

3 PRESIDENT SHEARER: Very well. We will take the 20-minute break and be
4 back at 10 past 4 o'clock.

5 SIR MICHAEL WOOD: Thank you.

6 (Brief recess.)

7 PRESIDENT SHEARER: Sir Michael, before you resume, as you know, we have
8 allowed a few extra minutes. In view of the interruptions today and so on. Whether you want to
9 take that extra time beyond 5:30 today or whether you prefer to hold it over until tomorrow, I leave
10 entirely to you or to your team.

11 Thank you.

12 SIR MICHAEL WOOD: Well, thank you very much, Mr. President. We are
13 very grateful for that, and I think would be for Mr. Wordsworth to make a judgment call when it
14 comes to 5:30. I hope he will, anyway. I hope I'm through by then. Mr. President, before the
15 break, I was dealing with this matter of the CLCS, and I nearly finished that, I do have one or two
16 things to say about that.

17 80. I would like to invite the Tribunal to look at the *Preliminary Information* submitted by
18 Mauritius¹⁸¹. You will find an extract at **Tab 54** in the folders. This is the *Preliminary*
19 *Information* submitted by Mauritius in May 2009. And I would ask you to look at point 6,
20 which is on page 11, the only page we have included. Point 6 of Mauritius' *Preliminary*
21 *Information* is headed 'Unresolved Land and Maritime Disputes' – the heading is a clear echo
22 of the provisions of the Rules of Procedure of the CLCS that we looked at just now. In point
23 6, Mauritius begins by asserting "that the Chagos Archipelago is and has always formed part of
24 its territory". But it then goes on, in the same paragraph, "to inform the Commission,

¹⁸¹ MM, annex 144.

1 however, that a dispute exists between the Republic of Mauritius and the United Kingdom over
2 the Chagos Archipelago.” And it adds that “Discussions are ongoing between the two
3 governments on this matter”, and as you will see, refers to the bilateral talks of 14 January
4 2009.

5 81. Given that clear official statement by Mauritius, in the *Preliminary Information*, the United
6 Kingdom saw no reason to protest. The effect of Mauritius’ statement is, of course, that under
7 the CLCS’s Rules of Procedure that we looked at earlier, the Commission will be unable to
8 proceed to consider any submission that may, at some future date, be made in respect of the
9 delineation of the outer margin of the extended continental shelf generated by the Chagos
10 Archipelago, unless the parties to the dispute cooperative in the matter. That is precisely what
11 the UK representatives were proposing in January 2009.

12 82. I would like to turn back now to the significance of these events concerning the CLCS for
13 Mauritius’ main argument, that it has been ‘irrevocably endowed’ by the United Kingdom with
14 ‘the attributes of a coastal State under the 1982 Convention’. In connection with the events
15 just described concerning the CLCS, Mr. Reichler last week concluded as follows:

16 “These statements and actions [he said] between January and July 2009 evidence a clear
17 recognition by the United Kingdom that Mauritius is in a special category, that it is to be treated, at
18 least for certain important purposes, as a coastal State. Under Articles 76(7) and 76(8) only coastal
19 States may delineate an extended continental shelf and make submissions with respect thereto to
20 the CLCS. Mauritius has done so and the United Kingdom has given its encouragement and
21 support. Since May 2009, Mauritius has been preparing its full submission in respect of the
22 Chagos Archipelago region, in reliance on the representations made by the U.K. in January and
23 July 2009. It will be filed later this year.”¹⁸²

¹⁸² Transcript, Day 3, p. 279, lines 9-16 (Reichler).

1 83. This calls for at least two remarks. First, the United Kingdom does not agree that Mauritius is
2 a coastal State entitled under UNCLOS to make a submission in respect of the Chagos
3 Archipelago. That UK position was in fact already clear from the *Preliminary Information*
4 submitted by Mauritius itself. What we said at paragraph 8.39 of the Rejoinder was nothing
5 new, and should not have come as a surprise to our friends opposite. I shall return in a moment
6 to the purpose and significance of the statement in the Rejoinder.

7 84. The second comment is this. We offered to join Mauritius in a joint submission to the CLCS.
8 Mauritius welcomed that. If, therefore, Mauritius has indeed “been preparing a full
9 submission in respect of the Chagos Archipelago region,” as Mr. Reichler said, and intends to
10 file a submission later this year, it would presumably be a joint submission. However, Mr.
11 Reichler has now suggested, in his answer to a question from Judge Wolfrum, that it would be
12 a unilateral submission, for what are completely inadequate reasons¹⁸³. His arguments also
13 completely overlook the fact that everything is being done under the sovereignty umbrella.

14 85. Mr. Reichler compared our lack of protest at Mauritius’ *Preliminary Information* to the
15 United Kingdom Note sent in 2009 to the UN Secretary-General when Argentina made
16 submissions to the CLCS. The two situations are simply not comparable. In the case of
17 Mauritius, the document was a *Preliminary Information*, and it contained a clear statement that
18 there was a dispute. In the case of Argentina, what had been sent in was a submission under
19 article 4 of annex II, following which the CLCS would, in the normal course of events, begin
20 formal consideration of the Argentine submission. Also there was no sovereignty umbrella in
21 relation to the Argentine submission. It was therefore necessary for the United Kingdom to
22 send a note in order to bring into play the provisions of the Rules of Procedure concerning
23 disputes in the Argentine case. This is clear from the terms of the Note that we sent, which
24 stated the “The United Kingdom therefore rejects those parts of Argentina’s submission which

¹⁸³ *Ibid.*, 286, line 19 – p. 287, line 9.

1 claim rights to the seabed and subsoil of the submarine areas appurtenant to the Falkland
2 Islands, South Georgia and the South Sandwich Islands, and requests that the Commission
3 does not examine those parts of the Argentine submission ...” And our subsequent Note in
4 2012 was in similar terms.

5 86. I will now return to the statement in paragraph 8.39 of the Rejoinder, about which so much was
6 said last week. As you will recall the passage reads:

7 “In accordance with the terms of Article 76(7), only the coastal State may delineate the
8 outer limits of the continental shelf. In accordance with Article 76(8), only the coastal State
9 may submit information to the CLCS on the limits of the shelf beyond 200 miles. Mauritius
10 is not the coastal State with respect to BIOT and as such has no standing before the CLCS
11 with respect to BIOT.”¹⁸⁴

12 87. Mr. Loewenstein suggested last Thursday that this passage gave rise to a new dispute under
13 Article 76”¹⁸⁵ He suggested that the United Kingdom had changed its position. He and his
14 colleagues have interpreted it as saying what it does not say, that “the filing is a nullity”¹⁸⁶, that
15 if we were correct the clock had not stopped, that they were irrevocably barred from making a
16 submission to the CLCS, and that when they had been ‘promised their inheritance’ (an
17 interesting expression in these proceedings). Mr. Crawford linked this to article 300, and
18 announced on Friday that “Mauritius will be asking for an order from this Tribunal that the
19 United Kingdom not object to the full submission by virtue of Article 300.”¹⁸⁷

20 88. Mauritius mischaracterises the statement in paragraph 8.39, ignoring both context and content.
21 First, it is a single sentence forming part of a legal argument made by one party to another in
22 the course of arbitral proceedings. As Mauritius rightly points out, the United Kingdom has not
23 protested to the United Nations. Second, it was a statement that Mauritius itself had provoked,

¹⁸⁴ UKR, para. 8.39.

¹⁸⁵ Transcript, Day 3, p. 347 line 17-p. 348 line 22 (Loewenstein).

¹⁸⁶ *Ibid.*, p. 342, lines 7-8.

¹⁸⁷ Transcript, Day 4, p. 390, para 35, lines 18-20 (Crawford).

1 by its arguments in these arbitral proceedings. The UK was reacting, in the context of these
2 legal proceedings, to Mauritius' argument that "[t]he absence of protest on the part of the UK
3 appears to be a clear recognition that Mauritius has sovereign rights in relation to the
4 continental shelf."¹⁸⁸

5 89. On content, Mauritius places an absolute interpretation on the statement in the Rejoinder. It
6 means, they say, that the submission of the *Preliminary Information* is a nullity; that the clock
7 has not been stopped and cannot now be stopped. That is not the position. In any event, as the
8 Agent said yesterday, we now hear that Mauritius may be in the position to make a full
9 submission later this year. If so, we look forward to discussing with Mauritius how this might
10 be taken forward. If a State puts in an objection to another State's submission to the CLCS, that
11 is not the end of the matter. Objections can always be lifted. In fact, the practice in the CLCS
12 suggests that an objection can be the start of a dialogue, part of an ongoing diplomatic process
13 between the States concerned. Moreover, the CLCS's backlog is so great that many years are
14 likely to elapse before the Commission would be ready to proceed to consider a new
15 submission and the situation then might be very different. During that period it would
16 incumbent on the United Kingdom and Mauritius to discuss how to take the matter forward, as
17 the Agent indicated yesterday.

18 **Conclusions**

19 Mr. President, Members of the Tribunal,

20 90. To sum up this section of our pleadings, as Mr. Wordsworth and I have shown:

- 21 - There is no basis for this tribunal to take jurisdiction over the question of territorial
22 sovereignty. Indeed, what Mauritius is urging upon you would be, as the Attorney General
23 said last week, in our respectful submission, a perverse decision, and one that is unacceptable
24 to the United Kingdom and we believe unacceptable to many other parties to UNCLOS.

¹⁸⁸ UKR, para. 7.51.

- 1 - In order to determine the question of territorial sovereignty, based on Mauritius' arguments,
2 the tribunal would have to determine and then apply some of the most controversial and
3 difficult issues of international law, including issues involving the history and detailed
4 application of the rules on self-determination as they may have stood some 50 years ago, in the
5 1960s. These rules are not reflected or even referred to, directly or indirectly, in the provisions
6 of the United Nations Convention on the Law of the Sea.
- 7 - In fact, the United Kingdom's sovereignty over the islands of the BIOT is long-standing
8 (dating back to 1814, exactly 200 years ago). Nothing that has happened in the intervening
9 200 years has changed that sovereignty. In particular, sovereignty did not pass to Mauritius
10 upon the grant of Independence in 1968 since the islands of the BIOT were not included in the
11 grant of independence.
- 12 - Mauritius' claim to have sovereignty based on an alleged violation of a right of
13 self-determination in 1965, or in 1968, is wrong in law, and has no basis in fact.
- 14 - Mauritius' far-fetched claim that it is irrevocably endowed with the attributes of a coastal State
15 under the 1982 Convention and is somehow *a* coastal State likewise has no basis in law or fact.

16 91. Mr. President, Members of the Tribunal, that concludes what I have to say on this subject. I
17 regret to say that I am also the next speaker. I am to address you on the law relating to Article
18 283.

19 **8. Article 283(1) UNCLOS: the applicable legal test**

20 **Sir Michael Wood**

21 Mr. President, Members of the Tribunal, we are now turning to the more general
22 jurisdictional issues and particularly to Article 283, paragraph 1 of UNCLOS, and my task is
23 briefly to address the applicable legal test. Mr. Wordsworth will then follow, applying that test
24 to the facts of this case.

25 **Introduction**

1 1. It is our submission that Mauritius has failed to meet the requirements of Article 283,
2 paragraph 1, which is in section 1 of Part XV of UNCLOS, and that this tribunal is therefore
3 without jurisdiction under section 2. Mauritius has failed to do so in respect of all of its
4 claims, in respect of its ‘sovereignty’ claims (which are in any case outside UNCLOS) and its
5 ‘non-sovereignty’ claims. For this reason, among others, the Tribunal is without
6 jurisdiction over any of Mauritius’ claims in these proceedings.

7 2. So let us look at Article 283. It is an interesting provision, unique to UNCLOS. It has
8 been the subject of some case-law, in ITLOS and before annex VII tribunals. But the
9 case-law is not entirely satisfactory, and, in our view, would benefit from further
10 consideration. That partly explains why we have decided to devote a short speech to the
11 law on the matter. As you're very well aware, Article 283 is entitled “Obligation to exchange
12 views”. And its paragraph (1) reads:

13 “When a dispute arises between States Parties concerning the interpretation or application
14 of this Convention, the parties to the dispute shall proceed expeditiously to an exchange
15 of views regarding its settlement by negotiation or other peaceful means.”

16 3. The first thing to note is that this is a very specific requirement. It is a requirement ‘to
17 exchange views’. The two or more parties to the dispute must exchange views, not merely
18 make their views known in some public way. And they must proceed to do so
19 ‘expeditiously’. Most importantly, they must exchange views on a quite specific matter:
20 they must exchange views regarding the settlement of the dispute by negotiation or other
21 peaceful means. This, we believe, is all well explained in a helpful article by Judge
22 Anderson¹⁸⁹, which you will find at Tab 55 in your folders.

¹⁸⁹ D. H. Anderson, “Article 283 of the UN Convention on the Law of the Sea”, in T.M. Ndiaye, R Wolfrum (eds.) *Liber Amicorum Judge Thomas A. Mensah*, pp. 847-866, reproduced in D. Anderson, *Modern Law of the Sea. Selected Essays* (2008), pp, 591-608 [hereinafter: Anderson].

1 4. Clearly aware that it is on weak ground in respect to Article 283, Mauritius seeks to
2 downplay its importance within the scheme of Part XV - “not an onerous burden”, according
3 to Mauritius in its written proceedings¹⁹⁰ and repeated. It dealt with the requirements of
4 Article 283 in a cursory fashion in its Memorial, referring in a single paragraph to three cases
5 to establish that the State was not obliged to pursue proceedings under section 1 of Part XV
6 when it concludes that the possibilities of settlement have been exhausted¹⁹¹. It went into a
7 bit more detail in its Reply¹⁹² - though the various cases it cites directly on Article 283
8 (*Guyana v Suriname*; *Land Reclamation*; and *M/V Louisa*) turn on their own particular facts
9 and do not assist its case.

10 5. To take *Guyana v. Suriname* for example, the passages quoted by Mauritius¹⁹³ concerned
11 specific claims relating to threats of use of force that Suriname alleged Guyana did not raise
12 prior to initiating the arbitration. The Tribunal rejected this Article 283(1) claim as this
13 particular aspect of the dispute was subsumed by the wider dispute regarding their maritime
14 boundary. As stated by the Tribunal in its Award,

15 “This dispute has as its principal concern the determination of the course of the maritime
16 boundary between the two Parties – Guyana and Suriname. The Parties have, as the
17 history of the dispute testifies, sought for decades to reach agreement on their common
18 maritime boundary. The CGX incident of 3 June 2000, whether designated as a “border
19 incident” or as “law enforcement activity”, may be considered incidental to the real
20 dispute between the Parties. The Tribunal, therefore, finds that in the particular
21 circumstances, Guyana was not under any obligation to engage in a separate set of

¹⁹⁰ MR, para. 4.67.

¹⁹¹ MM, para. 5.39.

¹⁹² MR, paras. 4.64-4.78.

¹⁹³ Maritime Delimitation (*Guyana v. Suriname*), Jurisdiction and Merits, Award of 17 September 2007 (2008), paras. 408-410.

1 exchanges of views with Suriname on issues of threat or use of force. These issues can be
2 considered as being subsumed within the main dispute.”¹⁹⁴

3 6. Last week, Ms. Macdonald dealt with the requirements of Article 283(1) very briefly,
4 scarcely more than a series of bullet points¹⁹⁵. Again, as in the written pleading, so too Ms.
5 Macdonald last week played down the significance of the article. She reiterated the
6 dismissive formula used in writing, ‘not an onerous burden’¹⁹⁶, though at one point she did
7 add the word ‘are not particularly onerous’¹⁹⁷. And she did accept the importance of the
8 provision when she acknowledged that the requirement of 283, and I quote, “form a threshold
9 jurisdictional requirement to ensure that parties are not taken by surprise by the initiation of
10 proceedings”¹⁹⁸. But for the rest her propositions scarcely did justice to what is a provision
11 of considerable importance. It is politically important as a key to the agreement on
12 compulsory dispute settlement in Part XV. And it is legally important, as a precondition to
13 compulsory jurisdiction, which has the objective of avoiding surprise.

14 7. Ms. Macdonald fails to distinguish between the case law dealing with the requirement of
15 prior negotiations, and the much more specific objective of the 283 exchange of views. Since
16 the exchange of views must concern the modalities of settlement of disputes, that is not
17 something that can sensibly be discussed without identifying the specific treaty and
18 provisions concerned, since the range of settlement means available will depend upon the
19 provisions at issue.

20 8. As a Member of this Tribunal reminded us in the *M/V “Louisa”* case, the ITLOS had
21 “emphasized more than once the importance of an exchange of views amongst the parties”
22 and that the “distinct purpose” of Article 283 was “to solve the dispute without recourse to

¹⁹⁴ *Ibid.*, para. 410.

¹⁹⁵ Transcript, Day 4, pp. 399-402, paras 7-9 (Macdonald).

¹⁹⁶ Transcript, Day 4, p. 400, para. 8 (Macdonald).

¹⁹⁷ Transcript, Day 4, p. 402, para. 9 (Macdonald).

¹⁹⁸ Transcript, Day 4, p. 402, para. 9 (Macdonald).

1 the mechanisms set out in Section 2 of Part XV of the Convention”¹⁹⁹. In an earlier case,
2 Judge Rao emphasised that the obligation to exchange views was “not an empty formality, to
3 be dispensed with at the whims of a disputant.”²⁰⁰

4 9. I shall describe, *first*, the importance of Article 283, within the dispute settlement system set
5 forth in Part XV; *second*, the nature of the requirement that Article 283 imposes before
6 compulsory procedures may properly be instituted; and, *third*, the test to be applied by a
7 court or a tribunal applying Article 283, including in the light of the case-law, particular that
8 of ITLOS. I can be brief, since we dealt rather fully with these matters in our written
9 pleadings²⁰¹.

10 10. In particular, I would refer you to what we said in the Counter-Memorial about the recent
11 case-law of the ICJ, including *Georgia v. Russian Federation*²⁰². I will just add that the
12 approach taken by the ICJ in that case has been followed and relied on by other international
13 arbitral tribunals²⁰³. As was stated by one arbitral tribunal:

14 “As also the International Court of Justice has emphasized on several occasions,
15 provisions directing the parties to consult or negotiate may well constitute legally binding
16 obligations, non-compliance with them having legal effects, including the dismissal of
17 the case. Whether and to which extent they set forth binding obligations, is a matter of
18 interpretation of the relevant provisions.”²⁰⁴

19 The references will be in the footnotes.

¹⁹⁹ *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum, para. 27.*

²⁰⁰ *Order of 8 October 2003, Case concerning Land Reclamation by Singapore in and around the Straits of Johor, Separate Opinion of Judge Sek. Rao, para. 8.*

²⁰¹ UKCM, paras. 5.4-5.12; UKR, paras. 6.7-6.28.

²⁰² UKCM, paras. 5.7-5.10, 5.12.

²⁰³ *Ambiente ufficio S.P.A. and The Argentine Republic*, Decision on Jurisdiction and Admissibility (ICSID Case No. ARB/08/9), paras. 571-580; *ICS Inspection and Control Services Limited (United Kingdom) and the Argentine Republic*, Award on Jurisdiction, 10 February 2012 (PCA Case No. 2010-9), paras. 243-250; *Burlington Resources INC. v. Republic of Ecuador*, Decision on Jurisdiction, 2 June 2010 (ICSID Case No. ARB/08/5), paras. 284-340.

²⁰⁴ *Ambiente ufficio S.P.A. and The Argentine Republic*, Decision on Jurisdiction and Admissibility (ICSID Case No. ARB/08/9), para. 579.

1 This is exactly what is before this Tribunal. A jurisdictional precondition is required to
2 have been met by Mauritius before initiating these proceedings, and the content is to be found in
3 the specific wording of Article 283.

4 ***(i) The importance of Article 283(1) within the dispute settlement system set forth in Part XV***

5 11. Members of the Tribunal are very familiar with the structure of Part XV. The inclusion of
6 Part XV in the Convention has been described as ‘an outstanding achievement’²⁰⁵. This was
7 so not least when one remembers when the negotiations took place, in the 1970s. Many
8 States at that time were reluctant to accept compulsory dispute settlement by courts and
9 tribunals; indeed some important groups of States were opposed as a matter of principle. So
10 Part XV inevitably embodied important compromises, compromises which retain all their
11 importance today. One of these was the inclusion of Article 283 imposing a precondition of
12 ‘an exchange of views regarding the settlement of the dispute by negotiations or other
13 peaceful means’ in order to satisfy States that were hesitant to conform to a compulsory
14 adjudication scheme. That was well described by Judge Anderson in his piece in the *Liber*
15 *Amicorum* for Judge Mensah²⁰⁶, which is the article at Tab 55, reproduced in another book,
16 where he states that “Article 283 was part of the “package” on dispute settlement.”²⁰⁷.

17 You'll find that statement at the end of the first paragraph on page 596.

18 12. On the specific purpose of Article 283 within this dispute settlement “package”, Mr. Adede,
19 stated that

20 “As originally conceived by the Working Group, the article was aimed at encouraging
21 States to exchange views expeditiously for the purposes of agreeing on a suitable
22 settlement procedure. Its application was intended to prevent an automatic transfer of a

²⁰⁵ A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea. A Drafting History and a Commentary* (1987), p. 242.

²⁰⁶ Anderson Essay.

²⁰⁷ *Ibid.*, p. 596.

1 dispute from either the non-compulsory procedures to the compulsory procedures, or
2 from one forum of compulsory procedures to another”.²⁰⁸

3 The representative of the Malagasy Republic stated that
4 “As far as the participants were concerned, exchanging views was designated to make it
5 easier to decide on a means of settlement acceptable to both parties rather than to resolve
6 the dispute.”²⁰⁹

7 That's quoted in Anderson's article on page 594 in the footnote, and I will return to this
8 useful article in a few moments.

9 13. Jurisdiction under section 2 of Part XV, which makes provision for compulsory procedures,
10 applies only, as I explained this morning, “where no settlement has been reached by recourse
11 to section 1”. That is the link, the umbilical cord, between the general provisions of section
12 1 and the compulsory procedures of section 2. This fundamental condition is to be found in
13 Article 286, the provision entitled ‘Application of procedures under this section’. The
14 requirement for prior attempts to settle disputes without recourse to compulsory procedures
15 was seen as a central element in the negotiations that led to the acceptance of Part XV by the
16 Conference, and it is central to Part XV as adopted. The subjection of compulsory
17 procedures to a requirement of prior recourse to diplomatic methods was regarded as crucial.
18 All of the provisions of section 1 of Part XV are part of this overall deal.

19 14. In the very first provision in section 1, Article 279, States Parties undertake to settle any
20 dispute between them concerning the interpretation or application of the Convention by the
21 means indicated in Article 33 of the UN Charter. Mauritius has signally failed to respect
22 this provision.

²⁰⁸ A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea. A Drafting History and a Commentary* (1987), p. 93..

²⁰⁹ Anderson Essay, p. 594

1 15. Paragraph 1 of Article 283 is an important element of Part XV, and is pivotal to its structure.

2 It is, to adopt the apt metaphor of Vice-President Nelson, addressing the scheme of the
3 dispute settlement system contained in Part XV in the *MOX Plant* case, “a hurdle which has
4 to be crossed before the procedures in section 2 of part XV can be invoked”²¹⁰; Judge Nelson
5 further stated that “the bar created by these articles can only be circumvented when the
6 requirements are met.”²¹¹ The *Virginia Commentary* recalls that a similar text had been
7 inserted in the informal texts, as early as 1975, I quote, “as a result of the insistence of certain
8 delegations that the primary obligation should be that the parties to a dispute should make
9 every effort to settle the dispute through negotiation.” The importance attached to
10 proceeding to a mandatory exchange of views is emphasised by the fact that, as paragraph 2
11 of the Article 283 makes clear, it is “a continuing obligation applicable at every stage of the
12 dispute”²¹². In his book on Part XV, Adede refers to Article 283 as “an important provision
13 obligating the States parties to a dispute to exchange views expeditiously regarding the
14 suitable means for settling it peacefully”, and goes on to say that

15 “The drafting history of Article 283 of the Convention in which the exchange of views
16 requirement is stipulated shows that its proper application was also aimed at preventing
17 automatic transfer of a dispute from one mode of settlement (non-compulsory) to another
18 (compulsory) through manoeuvres of one party to the dispute.”²¹³

19 Onerous or not, it is a legal obligation that must be met, and one cannot get around it by
20 belittling it. And, if one takes the position that the obligation is not onerous, it is all the less
21 understandable that Mauritius failed to fulfil it in any way before commencing this arbitration.

22 So I turn to the nature of the requirements imposed by Article 283.

²¹⁰ *MOX Plant (Ireland v. United Kingdom), provisional measures, Order of 3 December 2001, ITLOS Reports 2001, Separate opinion of Vice-President Nelson, para. 4, Also cited in UKCM, para. 5.11.*

²¹¹ *Ibid.*, para. 6.

²¹² *Virginia Commentary*, Vol V, p. 29, para. 283.3.

²¹³ A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea. A Drafting History and a Commentary* (1987), p. 247.

1 (ii) *The nature of the requirement imposed by Article 283(1)*

2 16. As I said, it is entitled “Obligation to exchange views”.

3 17. A first point to note about the Article is that it is a special conventional provision. It is not a
4 reflection of general international law, though there may be a general trend to impose express
5 treaty requirements to this effect as a precondition before turning to compulsory dispute
6 settlement mechanisms. Such a trend is no doubt in part inspired by UNCLOS. But in the
7 absence of specific provision, there is no requirement to exchange views before commencing
8 proceedings before an international court or tribunal. And Judge Treves made this point at
9 some length in the *M/V Louisa* case.

10 18. Judge Treves further stated that “[t]he requirement set out in Article 283 of the Convention
11 was introduced in order to facilitate the settlement of disputes without the need to resort to
12 judicial or arbitral proceedings. It must be taken seriously, he said. The question addressed
13 in the Orders of the Tribunal was whether these could be deemed sufficient for the Applicant
14 to conclude that all possibilities for reaching an agreement had been exhausted.”²¹⁴

15 19. I have already referred to the opinion of Judge Wolfrum in the same case.²¹⁵

16 20. In the most recent case to apply Article 283, *Arctic Sunrise*²¹⁶, Judge *ad hoc* Anderson
17 explained the function of Article 283 in the following terms:

18 “When a dispute arises concerning the interpretation or application of the Convention,
19 Article 283 calls for “an exchange of views regarding the settlement of the dispute by
20 negotiation or other peaceful means”. The emphasis is more upon the expression of
21 views regarding the most appropriate peaceful means of settlement, rather than the
22 exhaustion of diplomatic negotiations over the substantive issues dividing the parties. The
23 main purpose underlying Article 283” – said Judge Anderson – “is to avoid the situation

²¹⁴ *Ibid.*, para. 10.

²¹⁵ *Ibid.*, *Dissenting Opinion of Judge Wolfrum*, para. 27.

²¹⁶ *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013.*

1 whereby a State is taken completely by surprise by the institution of proceedings against
2 it.”²¹⁷

3 21. The purpose of the Article 283, we say, is absolutely clear. It is to allow every opportunity
4 for an amicable settlement, or for agreement to be reached on a method of settlement, before
5 proceedings are commenced unilaterally under section 2. The Respondent State should not
6 be taken by surprise; on the contrary, the potential Respondent should be given an
7 opportunity to understand the precise dispute and there should be consultations on its
8 resolution by agreed means, or at least there must be a good faith exchange of views on the
9 best method of reaching a resolution²¹⁸. (An earlier draft of this provision mentioned good
10 faith, but this was dropped on the recommendation of the Drafting Committee when Article
11 300 was included in the convention²¹⁹.)

12 22. Before moving to the actual requirements under Article 283, I would like to take a few
13 moments to return to Judge Anderson’s piece at Tab 55. It begins by surveying the drafting
14 history of Article 283, the first draft of which appeared in the 1975 Working Group on
15 Dispute Settlement of the Third United Nations Conference on the Law of the Sea²²⁰. The
16 drafting history is at pages 592 to 596, but I won’t take you through that.

17 23. As I indicated, Ms. MacDonald did state last week that the purpose of the article is for States
18 not to be taken by surprise²²¹. But she did not mention another key object of Article 283; that
19 is, in the words of Judge Anderson, to allow a State to rectify any possible wrongdoing or
20 violation of the UNCLOS prior to the initiation of an interstate dispute.

21 24. Judge Anderson, and this is at page 595, the last three lines, the penultimate paragraph
22 towards the end of the page, recalls that Article 283 was included as a “reassurance [for

²¹⁷ *Arctic Sunrise* Order, para. 3.

²¹⁸ See also *Burlington Resources INC. v. Republic of Ecuador*, Decision on Jurisdiction, 2 June 2010 (ICSID Case No. ARB/08/5), para. 315.

²¹⁹ Anderson Essay, pp. 593-594.

²²⁰ *Ibid.*, pp. 592-596.

²²¹ Transcript, Day 4, p. 402, para. 9 (Macdonald).

1 States] “that they would not be taken before a court or tribunal by surprise or before they had
2 been alerted to the risks facing them by an exchange of views about the possible means of
3 settlement.”²²²

4 25. Anderson then concludes on page 607, at the end of the paragraph, in the middle of the page,
5 that “Article 283 is an unusual provision”²²³ and that “[t]he whole article may be unusual,
6 but it forms part of the Convention and it was part of the price of securing consensus on Part
7 XV as a whole.”²²⁴

8 26. He then moves on to provide a textual and contextual analysis of the rule embodied in Article
9 283²²⁵. This is really at pages 596, 597. He notes that an exchange of views may reduce
10 friction in bilateral relations as uncertainty can exacerbate disputes²²⁶. That's page 596 at the
11 end of the paragraph in the middle: an exchange of views may reduce friction in bilateral
12 relations as uncertainty can exacerbate disputes. And in this context he adds that it can
13 clarify the positions of the parties. And, he continues on page 597, at the top of the first
14 paragraph, “Article 283 is concerned with the identification of the appropriate means of
15 settlement of disputes”²²⁷.

16 27. This is then followed by a survey of the case-law concerning the application of Article
17 283²²⁸, and I won't take you through all that, but he has some interesting critiques, to put it
18 mildly, of some of the case law, for example, the *Land Reclamation Case*. I'll just highlight
19 some of the points he made. He touches on the *Southern Bluefin Tuna case*.²²⁹ He looks at
20 the background for the very short conclusion of the Annex VII Tribunal that the conditions

²²² Anderson Essay, p. 595.

²²³ *Ibid.*, p. 607.

²²⁴ *Ibid.*, p. 606.

²²⁵ *Ibid.*, pp. 596-597.

²²⁶ *Ibid.*, p. 596.

²²⁷ *Ibid.*, p. 597.

²²⁸ *Ibid.*, pp. 597-606.

²²⁹ *Southern Bluefin Tuna, New Zealand v Japan, Order on Provisional Measures of 27 August 1999, ITLOS Reports 1999.*

1 had been met. He emphasises the fact that both Australia and New Zealand had been very
2 clear with Japan that they were not interested in settling their respective disputes via
3 mediation or arbitration under the Southern Bluefin Tuna Convention of 1993, but were
4 inclined to commence procedures under Part XV²³⁰. In that case, and then I'll just highlight
5 his commentary on the *Mox Plant* case²³¹. This is on page 601 at the end of the first
6 paragraph.

7 “Article 283 does not in terms require the parties to seek to reach agreement, let alone
8 exhaust the possibilities. It simply obliges them to indicate a view on the most
9 appropriate means of settlement in the circumstances existing at the time, in the context
10 of consultations.”²³²

11 28. Coming to his conclusions, and this is on page 608, the fourth line from the top, Anderson
12 states the following on the place of Article 283 within the dispute settlement system of
13 UNCLOS:

14 “The LOS Convention has created new jurisdictional possibilities, including compulsory
15 procedures leading to binding decisions. However, there are some qualifications,
16 including the duty to exchange views on the available means of peaceful settlement prior
17 to having recourse to one of them unilaterally. In actual litigation, the applicant’s failure
18 to comply with Article 283 could be invoked as a preliminary objection concerning
19 jurisdiction and admissibility.”²³³

20 It was so invoked.

21 I'll now go on to the test for fulfilment of the requirements of Article 283.

22 ***(iii) The test for fulfilment of the requirements of Article 283(1)***

²³⁰ Anderson Essay, p. 599.

²³¹ *MOX Plant Case, Ireland v United Kingdom, Order on Provisional Measures of 3 December 2001, ITLOS Reports 2001.*

²³² Anderson Essay, p. 601.

²³³ *Ibid.*, p. 608.

1 29. We stated in the Counter-Memorial, and this was at paragraph 6.10:

2 “the essential point that Article 283, in practical terms, requires as a first step
3 communication by one party, received by the other party which results in a shared
4 understanding as to what the dispute or disputes are and likewise that they are under the
5 1982 Convention. This is implicit from the requirement that the parties exchange views
6 over its peaceful settlement or negotiation: they must have a shared understanding about
7 what they are talking about in order to exchange views on it.”²³⁴

8 30. Mauritius adopts an extraordinarily cavalier attitude to the obligation under Article 283. In
9 its Reply, Mauritius argued that it was not obliged by Article 283 to refer expressly to the
10 1982 Convention and/or to the specific provisions of the 1982 Convention which form the
11 subject-matter of the dispute it now brings before this tribunal²³⁵. It seemed to be saying
12 that it could have engaged in an exchange of views as prescribed by Article 283 even without
13 raising a dispute concerning the interpretation or application of UNCLOS²³⁶. That cannot
14 be right.

15 31. It follows from the very wording of the provision that, in order to determine whether the
16 requirements of Article 283 have been met, three matters need to be addressed in turn:

- 17 - There must be a “dispute” between the States Parties to the Convention;
18 - The dispute must concern “the interpretation or application of the Convention”;
19 - And the parties to the dispute must have “proceeded expeditiously to an exchange of views
20 regarding its settlement by negotiation or other peaceful means”.

21 32. The first requirement is that there must have been a dispute between the parties to the
22 litigation, that is, “a disagreement on a point of fact or law, a conflict of legal views or of
23 interests between two persons”²³⁷. This goes without saying, since only when a specific

²³⁴ UKCM, para. 6.10.

²³⁵ MR, para. 4.2.

²³⁶ *Ibid.*, para. 4.2.

²³⁷ *Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A), No 2, 11.*

1 dispute has been identified can the parties to that dispute proceed to an exchange of views
2 regarding its settlement. “The requirements for the existence of a dispute with respect to the
3 interpretation or application of the Convention must be satisfied at the time when the
4 application is filed.”²³⁸ That is a quote from the opinion of Judge Treves in the “*Louisa*”
5 *Case*. More generally, in considering whether there has been an exchange of views over a
6 dispute in accordance with Article 283, the conduct of the parties after the initiation of
7 proceedings cannot, logically, be taken into account. The critical date for these purposes is
8 the date of the Notification and Statement of Claim,²³⁹ that is to say in this case, December
9 2010.

10 33. As Judge Treves rightly said, while the obligation set out in Article 283, paragraph 1, “applies
11 equally to both parties to the dispute”²⁴⁰, -

12 “It nevertheless seems reasonable to assume that the claimant State has the burden to state
13 its claims and to invite the other party to an exchange of views, which, in order to constitute
14 a good-faith request, must be open to the possibility of a settlement “by negotiation or other
15 peaceful means”.”²⁴¹

16 34. The second requirement is that the dispute must be one concerning the interpretation or
17 application of the Convention, and we have gone into that at considerable length earlier, but
18 this was very much the approach adopted in *Southern Bluefin Tuna*, where the arbitral tribunal
19 said –

²³⁸ *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Treves, para. 6.*

²³⁹ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, at p. 344: “... it is to be noted that the alleged impossibility of settling the dispute obviously could only refer to the time when the applications were filed”. (MR, Authority 2)*

²⁴⁰ *Case concerning Land Reclamation (ITLOS Reports 2003, p. 10 ff., at paragraph 38).*

²⁴¹ *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Treves, para. 13.*

1 “Since in the course of those negotiations, the Applicants invoked UNCLOS and relied
2 upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions,
3 those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of
4 Article 283,”²⁴²

5 The Tribunal, as can be seen, emphasized that Australia and New Zealand invoked specific
6 UNCLOS provisions and thus satisfied the requirements of the Article.

7 35. Judge Anderson, taking a realistic and balanced approach as he often does, has pointed out in
8 the conclusions of his article that the requirements of fulfilling the obligation contained in
9 Article 283 can be satisfied easily, by taking the steps I have just mentioned. This you find on
10 page 608, at the end of the second paragraph:

11 “It may be sufficient to draw attention to some facts, to invoke specified provisions in the
12 LOS Convention, to point to the existence of a defined legal dispute under the Convention,
13 and to express a preference from among the various means of settlement.”²⁴³

14 Easily fulfilled or not, Article 283 imposes an important precondition, a precondition whose
15 purpose is to avoid surprise, a precondition that - as Mr. Wordsworth will now show - Mauritius
16 has signally failed to fulfil.

17 36. Mr. President, Members of the Tribunal, I thank you for your attention, and unless there are
18 questions, I'd be grateful if you would invite Mr. Wordsworth to the podium.

19 PRESIDENT SHEARER: Thank you, Sir Michael. There appear to be no
20 questions at this stage, so I call upon Mr. Wordsworth to present his submissions.

21 **Article 283: application in this case**

22 **Sam Wordsworth QC**

23 **A. Introduction**

²⁴² *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)*(“SBT”), Decision of Annex VII Arbitral Tribunal, 4 August 2000, RIAA, Vol. XXIII, p. 1, para. 55 (MR, Authority 16).

²⁴³ Anderson Essay, p. 608.

- 1 1. Mr. President, Members of the Tribunal, there are three introductory points to make before
2 turning to the details of the case put to you last Friday that the requirements of article 283
3 have been met in this case.
- 4 2. First, in any case where it is said that a dispute has been identified for the purposes of
5 article 283, as followed by the required exchange of views, the order of events will be (i)
6 there is some measure or act by State A that State B considers to be in breach of the
7 Convention, (ii) State B identifies the existence of what is then understood to be a dispute –
8 that is, an UNCLOS dispute – and (iii) there is the required exchange of views.
- 9 3. Strikingly, however, virtually all of the documents on which Mauritius relies in its article
10 283 argument pre-date the declaration of the MPA in April 2010, and many of them
11 pre-date even the decision on the part of the UK to consider establishing the MPA. That's
12 in May of 2009. So the order of events that Mauritius is contending for is (i) dispute, then
13 (ii) announcement of the governmental measure, and it is left rather unclear how or if (iii),
14 the exchange of views, fits in at all. But the general point is to ask how the multiple
15 documents relied on that pre-date the UK's consideration of the MPA can assist Mauritius,
16 that is, how can the dispute have been raised and views exchanged prior to the MPA even
17 being considered by the United Kingdom.
- 18 4. The same basic issue on the required order of events – that is, (i) governmental act, (ii)
19 identification of dispute, (iii) exchange of views – arises on Mauritius' case on futility.
20 Whatever then Prime Minister Brown said in November 2009, that could not impact in
21 terms of the required compliance with article 283 when, five months later, the MPA was
22 announced. Even on Mauritius' case, Gordon Brown was not saying – we are going ahead
23 with the MPA, there is no point in negotiating, and if you want to bring a claim then you
24 will have to serve a notification in accordance with the annex VII procedures of Part XV,

1 and that is what Mauritius somehow contends for at least implicitly in its case on futility,
2 and I will return to that a little later, of course.

3 5. Secondly, the particular facts of this case precisely support the submissions that Sir
4 Michael has just been making on the importance of compliance with article 283.

5 6. As the Tribunal has seen, the greater part of the allegations of breach of the Convention
6 concern allegations of failures to consult or to cooperate. Professor Boyle will be coming
7 back to that tomorrow on the merits. Now, in instances where a State considers there has
8 been a breach of such procedural obligations, it is particularly apt that there should be early
9 identification and the opportunity provided to remedy any alleged failings. In this context,
10 article 283 serves a pragmatic role in ensuring that such matters can be resolved efficiently;
11 and you will recall how Judge Anderson has explained that one function of article 283 is to
12 allow a State to rectify any possible wrongdoing or violation of the UNCLOS prior to the
13 initiation of any inter-State dispute. And, yet, the facts of this case show that the United
14 Kingdom was deprived of any such opportunity. The first it heard of the alleged breaches of
15 articles 63, 64 and the like was when the Notification of Claim was received, and we invite
16 Mauritius to identify the documents which establish otherwise.

17 7. And, in fact, the point goes further than this, as one sees from the use that Mauritius has
18 made – in these proceedings – of the supposed encouragement by the United Kingdom at
19 the meeting of January 2009 to Mauritius' filing of preliminary information to the
20 CLCS²⁴⁴, and then of the failure to object when such information was filed in May 2009.
21 Thus one sees how it is argued by Mauritius, for example in the Memorial, that this
22 demonstrates an acceptance that United Kingdom that Mauritius is the only coastal State
23 entitled to make a submission to the CLCS²⁴⁵.

²⁴⁴ Day 2, Reichler, 172: 9-12.

²⁴⁵ E.g. MM, paras. 1.17 and 1.24.

- 1 8. And, yet, one sees Mauritius now relying on this same January 2009 meeting, alongside the
2 July 2009 meeting, as establishing the existence of a dispute and the requisite exchange of
3 views. It is as if State A can say nothing as to the existence of a dispute, and then say
4 ‘Gotcha!’ when State B acts in ignorance of the legal position that State is planning to
5 adopt, and that is precisely the sort of surprise that article 283 is intended to eliminate.
- 6 9. But Mauritius did not raise any dispute under UNCLOS, the United Kingdom did not have
7 the opportunity to consider its position in light of any such alleged breach of UNCLOS;
8 and it is now in the unhappy position of having its good faith support used against it in
9 litigation, support that was offered during what the UK understood to be positive and
10 friendly bilateral talks, not an exchange of views under article 283.
- 11 10. By contrast, any true compliance with article 283 would have required Mauritius (i) to
12 raise in these meetings a claim that the BIOT proclamation of maritime zones, and then the
13 proposed MPA, were inconsistent with UNCLOS because Mauritius, not the United
14 Kingdom, was the coastal State, (ii) to establish that this was a matter in dispute, such that
15 (iii) there could be an exchange of views, and (iv) thus enabling the United Kingdom to
16 respond as it then considered appropriate in light of steps then taken by Mauritius that
17 might be used by Mauritius to further its position in legal proceedings. But, of course, none
18 of that happened.
- 19 11. My third introductory point is to note that, as of Friday afternoon last week, Mauritius
20 divides its case into three strands, and says that article 283 has been satisfied with respect
21 to each. The strands are (i) the sovereignty claim, (ii) the breaches of specific provisions of
22 the Convention, and (iii) the violation of specific undertakings given to Mauritius²⁴⁶.
- 23 12. Now, the obvious point here is that it is not enough to say we have raised and negotiated a
24 claim as to sovereignty, or we have raised and negotiated a claim as to breach of the

²⁴⁶ See Prof. Sands, day 4, p. 466.

1 undertakings, even if that could be made out on the facts. Each strand still has to be tied
2 back to the 1982 Convention.

3 13. So, to take strand (iii) on the alleged undertakings, article 283 requires that Mauritius
4 identify a claim that, as a result of the undertakings, it has certain of the attributes of a
5 coastal State which means that the United Kingdom cannot declare the MPA, then it would
6 wait for objection such that a dispute is indeed crystallized, and then it would make
7 proposals with respect to an exchange of views. And the same is required where it is said
8 that failure to comply with the alleged undertakings would lead to a breach of specific
9 provisions of the Convention, such as article 2(3), to the extent that that is not already
10 encompassed and established within Mauritius' second strand.

11 14. But the difficulty for Mauritius is that none of this ever happened.

12 15. I move on to the details. We have put together all the documents that Ms. Macdonald
13 referred to in Mauritius' article 283 speech last Friday either orally or by way of footnotes.
14 You recall she made the point that a lot of the documents would be incorporated by way of
15 footnotes in the transcript, and we put those at Tab 56 of our Judges' Folder. And of
16 course we do invite Mauritius to add to that as it wishes in the second round, and we do
17 this because, although there are not too many documents, they are spread around the
18 annexes, and as we see it the easiest way for you to get on top of the question of whether
19 there was or was not an UNCLOS dispute and an article 283 exchange of views is just by
20 working through all the documents that Mauritius relies on.

21 16. And the scale of the task before you, in terms of working through those documents, is
22 fortunately on a far reduced scale compared to that undertaken by the International Court
23 of Justice in, for example, the *Georgia v Russia* case.

24 **Sovereignty claim**

25 **Pre MPA**

1 17. I start then with what has become strand 1 of 3 strands, the claim that Mauritius is ‘the’ or
2 ‘a’ coastal state. It is common ground that Mauritius has for many years disputed
3 sovereignty over BIOT²⁴⁷. The question is whether it has identified a claim in the terms
4 put forward in the current claim, i.e. of whether it is ‘the’ or ‘a’ coastal state for the
5 purposes of UNCLOS such that the United Kingdom could not validly declare the MPA.

6 18. Last Friday, Ms. Macdonald cited just two communications from Mauritius addressed to the
7 United Kingdom that referred to UNCLOS²⁴⁸. Those two communications were dated 2003
8 and 2004 respectively, and they concern objections to the United Kingdom declaring the
9 EPPZ, and contain assertions by Mauritius that it was sovereign, including one express
10 assertion that it was the coastal State.

11 And you will see the documents; they are pages 1 and 4 of the clip that we put in. There
12 is no particular need to turn to those now, but if it's of use, I would just identify page 1, 7th
13 November 2003. And you will see the documents. They are at Pages 1 and 4 of the clip that
14 we've put in, but there is no particular need to turn to those now, but if it's of use, I would just
15 identify Page 1, 7th November 2003. You see that the Minister, the Mauritian Minister, Mr.
16 Gayan, is writing to the Foreign Secretary in the context of the FCO letter of 13th August 2003,
17 conveying the intention of your government to issue a proclamation establishing the EPPZ
18 around the Chagos Archipelago, and there is a reference to Article 75.

19 And Paragraph 3, you may recall when, in 1991, the UK authorities established the
20 FCMZ around the Chagos Archipelago, Mauritius had protested. And then there is a recount of
21 matters as then seemed important to Mauritius. I absolutely ask you to read through all that in
22 your time, in your reading time.

23 Paragraph 11 is probably where Mauritius would pick up: In view of the above, I
24 earnestly request the UK Government not to proceed with the proclamation establishing an EPPZ

²⁴⁷ Day 4, Macdonald, 402: 21-23.

²⁴⁸ Day 4, McDonald, 404: 9 to 404:3. Those communications were as follows: MM, Annex 122 (letter dated 7 November 2003); MM Annex 127 (Note Verbale dated 20 April 2004).

1 around the Chagos Archipelago and not to deposit a copy thereof together with copies of the
2 relevant charts and coordinates with the UN under Article 75 of the UNCLOS. As you are
3 aware, Article 75 falls under Part V which deals solely with EEZs. Depositing copies of
4 relevant charts and coordinates with the UN under Article 75 would in effect amount to a
5 declaration of an EEZ around the Chagos Archipelago, something the UK undertook not to do in
6 the letter of 1st July 1992, referred to at Paragraph 4 above.

7 Now, that letter is, in fact, at Annex 103 of Mauritius' Memorial, but there is no need to
8 take you to that, partly because I'm only including this clip the documents so far that Mauritius
9 has relied on. But you can anyway see it conveniently set out in the next letter that Mauritius
10 relies on, which is the letter of 28th April 2004 from the Mauritian High Commission.

11 And you see there – and I think this is probably the high point of Mauritius' case on the
12 coastal State dispute, the second paragraph in particular, the Government of the Republic of
13 Mauritius has issued a protest statement with the UN against the deposit by the UK Government
14 on the establishment of an EPPZ around the Chagos Archipelago. Mauritius is of the view that
15 the legal consequences of the proclamation and deposit of chart and coordinates of an EPPZ
16 made under Article 75(2) of UNCLOS by the UK Government implicitly amounts to the exercise
17 by the UK of sovereign rights and jurisdiction within an EEZ which only Mauritius, as coastal
18 State, can exercise under Part XV of the UNCLOS.

19 And if you turn over the page, you will see there is the reference to the letter of 1 July
20 1992, which is relied on as establishing an undertaking that the EPPZ would not be declared, and
21 you see Mr. Howell saying, "the British Government also reaffirms its undertakings that there is
22 no intention of permitting prospecting for minerals and oils while the islands remain British,
23 there are no plans to establish an EEZ around the Chagos Islands." It's an actual fact that letter
24 does not go that far at all, in terms of saying that the UK will not establish an EEZ.

1 In the paragraphs that follow, you will then see there is the reiteration or the iteration of
2 Mauritius' sovereignty case.

3 Now, the obvious point is that that was many years before the Parties' discussions as to
4 the proposed MPA in July 2009, and obviously still more so before the actual announcement of
5 the MPA in April 2010.

6 19. And in any event, those references to UNCLOS must be read in the context of Mauritius's
7 steady stream of routine affirmations of sovereignty, from 1980 onwards. When the legal
8 position of Mauritius was set out in detail by Sir Ian Brownlie in January 2009, UKCM
9 Annex 92, he referred to "principles rooted in public international law", citing
10 self-determination, the UN Charter, general international law, GA resolutions and an OAU
11 resolution. But there was no reference to who is 'the' or 'a' coastal State, or even to
12 UNCLOS more generally.

13 20. Ms. Macdonald stated last week that Mauritius's position as to the UK's right to declare an
14 MPA is "inherent" in its continuous assertions of sovereignty²⁴⁹, and that this was
15 sufficient. Well, that is to suggest the wrong test. The question is not whether the United
16 Kingdom could have worked out what Mauritius' legal response might have been, although
17 one notes that there is nothing whatsoever in the UK internal documentation to suggest that
18 the UK got to the answer – there may be a claim under Part XV of UNCLOS. The test is
19 whether a claim was raised, objected to such that there was a dispute, and whether there
20 was then an exchange of views as to means of settlement.

21 21. Indeed, the need to be specific is all the more present where there is a pre-existing
22 long-standing sovereignty claim that does not fall within the substantive provisions of the
23 treaty then relied on.

24 **Post MPA**

²⁴⁹ Day 4, Macdonald, 405: 6-12.

1 22. I move on to the documents relied on subsequent to the MPA becoming under
2 consideration by the United Kingdom. And the July 2009 talks when the MPA proposal
3 was discussed would have been the ideal forum to raise any issue under UNCLOS.

4 23. Ms. Macdonald explained that the MPA was in fact on Mauritius's radar as of February
5 2009 when it had read a newspaper article on the subject²⁵⁰. So Mauritius had some five
6 months prior to the July 2009 talks to prepare its position on the MPA, to identify any
7 relevant provisions of UNCLOS and to consider how it would pursue a case in the
8 exchanges of views which would need to follow insofar as the parties were in dispute.

9 24. But there is no reference whatsoever to an UNCLOS claim in those July 2009 talks.
10 Notably, it was Mauritius that proposed the agenda for those talks²⁵¹, so one would expect
11 to see a reference to UNCLOS in that agenda if that were at issue. And one would have
12 expected a statement to the effect of the UK was not the coastal state and could not declare
13 MPA. However, this is not what you see. There is a reference on the agenda to EEZ
14 delimitation, but nothing can be made of that. And more to the point, the record portrays no
15 claim and naturally no shared understanding that Mauritius was raising a dispute under
16 UNCLOS.

17 25. Ms. Macdonald's explanation as regards the lack of any reference to UNCLOS in the joint
18 communiqué²⁵² that was then issued was to say "at that stage it was – or at least it
19 appeared to be, as Mauritius was told by the UK – nothing more than a proposal which
20 needed to be worked up"²⁵³.

21 26. That is absolutely fine. But in that case Mauritius must locate the necessary dispute and
22 exchange of views to some later date. According to Mauritius' Reply, the UNCLOS dispute
23 continued to be raised²⁵⁴ – a curious formulation in light of its position on the joint

²⁵⁰ Day 4, Macdonald, 408: 8-11. See MM, Annex 139.

²⁵¹ MR, Annexes 139-140.

²⁵² UKCM, Annex 100.

²⁵³ Day 4, Macdonald 410: 4-7.

²⁵⁴ MR, para. 4.45.

1 communiqué – in Notes Verbales of 3 and 10 November 2009, and by letter of 30 December
2 2009. The references are MM, Annexes 151, 153, 155, 157 and 158 to Mauritius' Memorial.
3 And we ask you to go to these in your reading, and they're at 66 through to 71 of tab 76, with
4 a particular eye to Article 283. Nowhere in these communications is there any
5 communication of a claim that Mauritius is 'the' or 'a' coastal State.

6 I should just note in passing, you will recall there were two documents dated 30th
7 December 2009. The one in your bundle is the Note Verbale. It's also the letter from Mr.
8 Boolell of 30th December 2009, which received some attention yesterday, and that may be a
9 useful document to add into this clip so that you could take that into account in your
10 read-through, but it wasn't a document referred to by Mauritius last Friday.

11 27. Then there was a formal protest made by Mauritius to the announcement of the MPA in April
12 2010, and that's at Annex 167 to the Memorial, Page 85 of the bundle. That's clearly a
13 particularly important document, so it may be worth your going to that now.

14 28. And you will see in the third paragraph, Mauritius is stating that it wishes to recall that on
15 several occasions following the announcement by the British authorities for International
16 Consultation on their proposal for the creation of an MPA in the waters of the Chagos
17 Archipelago, the Government of Mauritius conveyed its strong opposition to such a project
18 being undertaken without consultation and the consent of the Government of Mauritius, and
19 you will see there is a then a reference back to certain letters, and I believe that is – no, there
20 is a reference back to the Note Verbale, in fact, rather than to the letter of 30th December
21 2009 from Mr. Boolell, and that's perhaps interesting because it says the position of the
22 Government of Mauritius was also conveyed directly by the Prime Minister of Mauritius to
23 British Prime Minister Gordon Brown during the Commonwealth Heads of Government
24 Meeting, CHOGM in Port-of-Spain last November, and earlier to British Foreign Secretary
25 David Miliband over the phone. The Minister of Foreign Affairs, Dr. Boolell, also

1 communicated the position of Mauritius to the Foreign Secretary during CHOGM in
2 Port-of-Spain and to the British High Commissioner at several meetings. So, in fact, it
3 doesn't appear that there is a reference to the particular letter of 30th of December 2009.
4 And the references to breach of General Assembly resolutions and international law cannot
5 somehow be read as raising a dispute as to breach of UNCLOS, a treaty that, without wishing
6 to belabor the point, says nothing on the acquisition or transfer of territorial sovereignty.

7 29. Now, Mauritius has stated that the sentence in the penultimate paragraph of its 2 April 2010
8 letter that it will look into legal and other options that are open to it is a clear reference to the
9 possibility of disputing the dispute-resolution procedures under Part XV of the Convention.
10 That is Reply Paragraph 4.57. Well, that very submission highlights the dearth of material
11 that Mauritius has to put before you. States cannot be possibly expected to speculate as to
12 what precisely what legal and other options another State may have in mind. And we are in
13 any event a world away from satisfying the clear terms of Article 283. Precisely the same
14 points can be made in relation to the other documents that are around this period, and you
15 could see those at Pages 83, 87, and 89 of this bundle. 83 is the email which deals with the
16 conversation that took place on the 1st of April 2009. Paragraphs 1, 2, 3 deal with what the
17 Foreign Secretary was saying. Paragraph 4, Ramgoolam said that he was disappointed there
18 had been no bilateral discussions. He asked if it might be possible to delay the
19 announcement until after the Mauritius elections. It was a controversial issue in Mauritius.

20 And then you may recall, over the page, there is another passage, Paragraph 6.
21 Unfortunately in the version here, this has been redacted, but we will include the non-redacted
22 version, which is at Annex 67 of the United Kingdom Rejoinder, and that says Ramgoolam said
23 that he had to take the line that Mauritius disagreed with the decision on the MPA but would like
24 to say he and the Foreign Secretary talked about sovereignty. The foreign Secretary stressed
25 that the sovereignty issue had not changed. Ramgoolam should not seek to suggest that that

1 was purpose of the phone call. If it would help, Ramgoolam could say that if both governments
2 were re-elected, then there could be early bilateral talks on the implementation of the MPA.

3 Again, it's a world away from announcing the existence of any claim as to UNCLOS, let
4 alone allowing the United Kingdom to resist a claim so that there is an understood dispute, let
5 alone, of course, any exchange of views.

6 30. And in your reading time, if I could ask you to read the letters of 87 and 89 of this bundle,
7 two letters dated 8 April 2010²⁵⁵ to which Ms. Macdonald referred²⁵⁶ last Friday. And you
8 will see exactly the same points arise: Mauritius did not raise any dispute as to who was "a"
9 or "the" coastal State for the purposes of UNCLOS, and nor did it raise any other aspects of
10 an UNCLOS dispute. And I will come back a little later to the argument that a general
11 reference to disappointment as to the absence of bilateral discussions amounts to establishing
12 the existence of a dispute under UNCLOS. Mauritius did not raise any dispute as to who
13 was 'a' or 'the' coastal state for the purposes of UNCLOS. And nor did it raise any other
14 aspect of an UNCLOS dispute, and I'll come back a little later to the argument that a general
15 reference to 'disappointment' as to the absence of bilateral discussions amounts to
16 establishing the existence of a dispute under UNCLOS.

17 31. The final point I want to make at the moment I'm just trying to focus on the sovereignty
18 disputes, strand one, as it were. Strand two will hopefully go a lot quicker because basically
19 the documents are the same. But even assuming that a dispute as to who was "a" or "the"
20 coastal State for the purpose was UNCLOS had been raised by Mauritius in April 2010 or in
21 the following months, the question has to be answered: Where is the exchange of views?
22 The simple answer to that is there is no such exchange of views, and Mauritius has been
23 unable to suggest that there was one. There is merely the misconceived futility argument

²⁵⁵ MR, Annexes 159 and 160.

²⁵⁶ Day 4, Macdonald, 414:16-17; see also her fn. 73.

1 run by reference to Mauritius' understanding of the remarks of Gordon Brown five months
2 earlier²⁵⁷.

3 32. So, in conclusion on the coastal State claim, there was no identification of the claim, *a*
4 *fortiori* there was no dispute, and as a further *a fortiori*, there was no exchange of views.

5 Mr. President, I see that is a useful, perhaps, pausing point, as it were, because I'm
6 going to move on to strand two of three. If the Tribunal were feeling sufficiently patient, then I
7 would continue, but I think that may be trying on the Tribunal's patience because I'm going to be
8 certainly another 20 minutes.

9 PRESIDENT SHEARER: I think it would probably be better that we adjourn
10 for the day and you take that up tomorrow morning, Mr. Wordsworth.

11 Very well. We will adjourn then until 9:30 tomorrow.

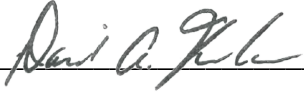
12 (Whereupon, at 5:37 p.m., the hearing was adjourned until 9:30 a.m. the following
13 day.)

²⁵⁷ MR, Annex 161 cited at Day 4, Macdonald 415: 4-10.

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.

A handwritten signature in cursive script, appearing to read "David A. Kasdan", is written over a horizontal line.

DAVID A. KASDAN

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