PERMANENT COURT OF ARBITRATION

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

x

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

PCA Reference MU-UK

-x

Volume 7

HEARING ON JURISDICTION AND THE MERITS

Friday, May 2, 2014

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

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

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

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Registrar
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C O N T E N T S

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PROCEEDINGS

PRESIDENT SHEARER: Well, good morning, everyone. I think we are ready to start the day's proceedings, and Mr. Wordsworth will begin.

Thank you very much.

MR. WORDSWORTH: Mr. President, Members of the Tribunal, thank you.

Article 283: application in this case

Sam Wordsworth QC

Non-sovereignty claims

You will recall that I was taking you through the question of the application of Article 283, and I've already taken you taken you to documents which Mauritius is relying on to say there was an UNCLOS dispute with respect to the existence of its "we are the coastal State" or "we are a coastal State" argument. And I was taking you through the documents that Mauritius relied on last Friday, which you will recall are all at Tab 56 of our Judges' Folder, and I will be taking you to some of these documents again, but obviously not in relation to the case that there has been a presentation of an UNCLOS coastal State claim, but in relation to the second and third strands of Mauritius' claims. And strand 2, you will recall, is Mauritius' claim that the MPA is incompatible with a multitude of different rights and obligations under UNCLOS[1], including, we note, in relation to sedentary species under article 78, which was notably raised for the first time in its Mauritius' Reply[2].

33. And the simple point here is that there is nowhere any Statement from Mauritius that challenges the legality of MPA on the basis of UNCLOS provisions x, y, and z, and then concludes with an invitation to discuss some form of exchange of views. And there is nothing in this record that could be treated as somehow of equivalent effect.

Pre MPA

[1] UKCM para 5.16.
[2] Rejoinder paras. 6.4 and 7.78.

34. So, again, Ms. Macdonald divided the communications into two categories, those dated before the MPA proposal and those dated after the MPA proposal "emerged"[3]. That was her word: "emerged". That is a rather more easy division to follow than the new division between strands 2 and 3. You will recall, that is strand 2, alleged breaches of UNCLOS, and strand 3, alleged breaches of legally binding undertakings. Indeed, so far as I can see, all the documents that Mauritius relies on to establish the existence of a dispute and an exchange of views for the purposes of its breach of UNCLOS strand concern fishing rights, which is also the principal element in the new strand 3 to the claim. That is on breach of undertakings.

35. And you already have the point that we do not understand how a dispute regarding breach of UNCLOS can have been raised, and views exchanged, prior to that MPA even being proposed, and Ms. Macdonald did characterize the 'pre MPA' exchanges here as forming "part of the background"[4].

36. Ms. Macdonald's submissions on these pre-MPA exchanges are heavily reliant on references to Mauritius's historic fishing rights[5]. Ms. Sander has addressed the Tribunal on this matter, and has explained to the Tribunal that when Mauritius responded to the various restrictions on its ability to fish over the years, it did not object on the grounds that the UK was acting in breach of UNCLOS but cast its case in terms of its sovereignty claim, which, as already discussed, was not with reference to UNCLOS. Now, you were taken to a letter between Prime Ministers dated 1st December 2005, and that's the first document that I would like to take you to this morning, at Page 6 of Tab 56. You will see the pagination is in manuscript, in the bottom right-hand corner. This is Mauritius' Annex 132. It's a letter from the Prime Minister of Mauritius to Prime Minister Blair of 1st December 2005; and as you cast your eyes down this text, you will see it's all about sugar, and first page all about sugar, second

[3] Day 4, Macdonald 406: 5 and 13.
[4] Day 4, Macdonald, 406:7
[5] Day 4, Macdonald, 405: line 20 and following.

page all about sugar, its sugar quotas within the context of the European Union. And then you come to Page 3 of the letter, which is Page 8 of this bundle, and you will see there that there is the sole reference to fishing rights that is being relied on, which is in the last substantive paragraph:

> "As you would recall at our meeting we also discussed the issue of the Chagos Archipelago. While there is no need for us both to pursue the discussion further, I am glad that you consented to our proposal for an official of the Government of Mauritius to be on board the vessel that will take the Chagossians on a visit to Diego Garcia. I look forward to discussing with you in the near future the important issue of fishing rights of Mauritius in the Chagos waters. This has become particularly important in view of the plans of my Government to turn Mauritius into a seafood hub."

And one turns over the page to page 9 of this bundle to Mr. Blair's letter of 4th January 2006 in response, and he says, "Thank you for your letter of 1st December regarding the reform of the EU sugar regime, and the potential impact of that reform on Mauritius".

So clearly Prime Minister Blair has understood this to be all about sugar.

And then you will see on page 2, which is tab 56, page 10, again he's understanding it to be all about the ACP sugar protocol. But in the last paragraph you will see:

> "The question of fishing rights in the Archipelago and its implications need to be talked through. I'm pleased that good progress is being made in arranging the planned humanitarian visit by the Chagossians to the islands."

So, there is absolutely no hint there of any dispute, any dispute in relation to fishing rights, any dispute in relation to UNCLOS, still less what would be required for the purposes of 283.

The next document relied on is overleaf at page 11 of this bundle, and you will see this is extract from an information paper. This is one of the five Mauritius-U.K. internal documents that's

being disclosed: Commonwealth Heads of Government Meeting of 29th November 2007. And you will see the relevant passage is at paragraph 18.

> "I also brought up the question of the exercise of our fishing rights over the Chagos waters, i.e., the Chagos Archipelago, excluding Diego Garcia, where there is an American presence. This will enable Mauritius to contribute meaningfully in the conservation of fish stocks and the exchange of commercial fisheries data."

So, again, exactly the same point. Not a hint of any reliance on binding undertakings on fishing. Not a hint of how this somehow might be squeezed into a breach of UNCLOS.

You see overleaf page 12 of the bundle, there is then a letter from Dr. Ramgoolam, 13th December 2007, to Prime Minister Gordon Brown, saying it was a pleasure to meet him in Kampala. And then you will see at the bottom:

> "During our meeting, I also raised with you the question of our fishing rights in the waters of Chagos Archipelago excluding, of course, the immediate vicinity of Diego Garcia for obvious security reasons. Mauritius has historically exercised such rights over the waters of the Chagos Archipelago."

And so, I'm not going to reiterate the same point every time.

And you can see how that letter was then understood, at page 14, which gives you the response from Prime Minister Brown. That's at 7th February 2008, and you will see there he refers back to the letter of 13th December 2007, says:

> "It was a pleasure to have the opportunity to talk with you in the margins of the Commonwealth Heads of Government Meeting in Kampala. While the United Kingdom has no doubt about its sovereignty of the BIOT, as I said during our conversation in Kampala, I'm happy to establish a dialogue between the Mauritian High Commission in London and officials at the FCO. During the talks we will need to bear

in mind the UK's treaty obligations and our ongoing need of the BIOT for defense purposes."

And then one comes to the bit about fishing, which is what is being emphasised by Mauritius in context of Article 283: "There are certainly many other issues relating to the British Indian Ocean Territory that we can discuss, such as fishing. My officials will be in touch soon to arrange a first meeting."

So again, where, we say, where is the suggestion that there is in fact a breach – an allegation, I should say – a breach of UNCLOS, and where is the shared understanding of the existence of a dispute in relation to UNCLOS? And we say it's nowhere to be found.

Now, the next stop in the documentation, as we understood it, was the January 2009 talks.

37. And Ms. Macdonald said that the United Kingdom officials involved were "well aware that Mauritius had raised these specific rights". That is a reference to fishing rights in the Archipelago[6]. Well, as to the United Kingdom officials' understanding at that time, you have got the Statements of Ms. Yeadon[7] and Mr. Roberts[8], and you have seen the contemporaneous records of those meetings[9] and we've included them in the tab. I obviously don't ask you to go through them now because they actually comprise most of the tab. That's why this tab is, let's say, 2 centimeters thick instead of 1 centimeter thick, but they're there at pages 17 and 52.

38. It is common ground that "fishing rights" were referred to, but the United Kingdom's understanding was that those references were in the context of Mauritius's sovereignty claim, and related to joint issuing of licences and sharing of licence fees. In any event, you'll recall, there was again no suggestion of any breach of UNCLOS.

Post MPA proposal

[6] Day 4, Macdonald, 408, lines 1-2.
[7] Rejoinder, Annex 73, para. 9.
[8] Rejoinder, Annex 74..
[9] UKCM, Annex 94; MR, Annexes 128 and 129. See also MR, Annex 144 at p. 4.

39. So I turn to the documents that are relied on at the time the MPA was under consideration from May 2009, and you already have the point that there is no suggestion of a claim to breach of UNCLOS at the July 2009 meeting. There was a reference to "access to natural resources of the maritime zone / fishing" on the agenda, and your attention was drawn to this[10]. But you have seen the record of the discussions[11], and there is nothing there to suggest the existence of the UNCLOS dispute that is now alleged. In fact, Mauritius is slightly defensive about that.

40. I move then to the documents that you were taken to in the period after the July 2009 talks.

41. Ms. Macdonald stated that Mauritius continued to "make clear its opposition to the MPA and to the UK's unilateral approach" at a meeting between the Prime Minister Ramgoolam and the British High Commissioner on 22 October 2009[12]. Now, the document in relation to 22 October 2009 is the document that you were taken to on Wednesday by Ms. Nevill, and that's at tab 14 of our Judges' Folder, but we've also obviously included it in this clip at page 64 because it's one of the documents of one of the meetings that's being relied on by Mauritius to establish Article 283 compliance. So, if I can ask you to turn to that. And, as I understand this record of what is said at the meeting in the e-mail, the meeting was just between the Mauritian Prime Minister and the British High Commissioner. And you'll see there, in the first substantive paragraph there is a reference to what the High Commissioner has been saying, and then it gets into what we, as it were, were agreeing. That's he and the Mauritian Prime Minister.

42. And it is plain from the email recording the meeting, which was written by the British High Commissioner, immediately afterwards, that neither UNCLOS nor any claim was discussed. Indeed, there was no suggestion of any claim at all.

[10] Day 4, Macdonald, 408: 20.
[11] MR. Annex 143 and UKCM Annex 100.
[12] Day 4, Macdonald: 410: 13-15; see UKR, Annex 60.

43. Notably, it is recorded that: “We agreed that it was for the best if GoM could find its way to being positive about the consultation, were it to be signed off by SoS”.

44. We observed that any consultation would be genuine and would not reflect a pre-existing decision on a course of action.

Consultation in Mauritius would be constructive and reflective of Mauritius' unique position vis-à-vis BIOT and so on. I ask you at a quiet moment to work through these bullet points.

And you will see at the end:

> “In short the PM could see the advantages in coming out in support of the consultation. This would, however, require some political footwork locally.”

And then also you will see at end there, there is a reference:

> “I reassured Ramgoolam that if SoS approved the draft consultation, it would not be made public until my return to Mauritius, thereby giving us another chance to discuss face to face before any consultation hit the streets, assuming SoS agrees to the drafts. I'm likely to meet the PM's Chief of Staff, former Mauritian ambassador in Washington, in Washington tomorrow to discuss further.”

45. And you will see that in fact that meeting did take place from the next page of this bundle. And you may recall the discussions at this meeting, and particularly in the third paragraph, you can see, Kailesh took this ‘in his stride’. He personally was ‘1000% committed to the idea’. He understood and agree with the science. It made sense for Mauritius. He would seek to persuade the Prime Minister of the merits of embracing the idea on environmental grounds alone. So, again, where is the hint of the dispute in any of this? How does this show Mauritius "continuing to make clear its opposition to the MPA and to the UK's unilateral approach"?

46. And if I can take you then to the next document that I understand is being relied on, you will see this is at page 66 of the bundle. It's a record of a telephone conversation between the British Foreign Secretary and the Mauritian Prime Minister, Tuesday 10th November 2009. And you will see there the Foreign Secretary said that he understood that the UK and Mauritian officials had been talking very productively about a marine protected area being created during the bilateral discussions on areas of mutual cooperation on BIOT. He wanted to reassure PM Ramgoolam that "the public consultation being launched was on the *idea* of an MPA and it was only an *idea* at this point".[13]

And you will see the important point for present purposes is really how and what Prime Minister Ramgoolam is saying. And you will see there in the two central paragraphs that what he is saying is not, of course, oh, this is going to be a breach of UNCLOS, but rather he's talking about the consultation document. He says environmental protection was an important subject for him. He had a few problems with the consultation document, which he had only just seen and would be sending a Note Verbale on this.

His first problem was on page 12:

> "We, Mauritius, have agreed in principle to the establishment of an MPA. This was not the case. Could we amend the consultation document?

In addition, Mr. Ramgoolam said that the consultation document completely overlooked the issue of resettlement, a total ban on fishing would not be conducive to resettlement. Neither was there any mention of the sovereignty issue. PM Ramgoolam did not want the MPA consultation to take place outside of the bilateral talks between the UK and Mauritius on Chagos. So, it's a complaint about the consultation document. And insofar as it's raising anything else, it's resettlement and sovereignty. It's not about an UNCLOS dispute.

[13] Emphasis in the original.

And precisely the same thing comes out of the Note Verbale that is then sent on the same day. That's at page 68 of this tab. And unsurprisingly you get that from the second, third, and fourth paragraphs, complaint in relation to the consultation document, it's Page 12, which is really at issue. And you will see: "The Ministers of Foreign Affairs, Regional Integration and International Trade, therefore, requests that the FCO accordingly amend its consultation document to accurately reflect the position of the Government of the Republic of Mauritius."

And then overleaf there is the letter of 23rd November 2009, page 69 of this tab, from the Mauritian MFA, and we were criticized last Friday for the lack of comment on this. But we are perplexed by that, because again one sees in the second paragraph that there is a reference there to the consultation document and how the complaint is about the consultation document.

And then you will see towards the end of the next paragraph, it's being said that:

> "The Government of the Republic of Mauritius believes it is inappropriate for the consultation on the proposed MPA as far as Mauritius is concerned to take place outside this bilateral framework."

And then:

> "The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources and the economic development of the islands in a matter which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project, would not be compatible with the long-term resolution of our progress in the talks on the sovereignty issue."

So, again, you see it's all coming down to the sovereignty issue, and you will see there the reference to the long-term resolution of the sovereignty issue which absolutely ties in with what I was saying to you yesterday morning on jurisdiction. This is all about trying to fit within

UNCLOS a reference to the long-term sovereignty dispute between the Parties. And it can't be done either by saying that this is somehow there is an UNCLOS dispute with relation to who is the coastal State or by saying in relation to strand 2, this is somehow articulating an UNCLOS dispute.

And precisely the same thing comes overleaf; you'll see the letter continues overleaf. If you read that, the first two paragraphs, you will see there is a reference to "the existing framework for talks should not be overtaken or bypassed by the consultation." And there you see Mauritius wishes to reiterate the sovereignty of Mauritius over the Chagos Archipelago, including Diego Garcia, and its non-recognition of the so-called BIOT.

ARBITRATOR GREENWOOD: Mr. Wordsworth, I'm sorry to interrupt you. Help me with this, please: This is a reference back to the existing framework of talks by which I presume is meant the January 2009 and July 2009 talks. But both of those discussed fishing rights under a sovereignty umbrella.

So, is the context here that their fishing rights are being raised separately from sovereignty?

MR. WORDSWORTH: I don't see that, no. Because what is being said here is that the total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of or progress in the talks on the sovereignty issue. So, it appears very much to be saying access to fisheries is part of the sovereignty issue. It doesn't appear to be saying independent of the sovereignty issue there is an issue in relation to binding undertakings that you gave us back in 1965 in relation to fishing rights and those separately give rise to potential breaches of UNCLOS. There isn't a first limb reference to the allegedly binding undertakings. There isn't the second limb anywhere, the reference to UNCLOS.

47. The final document relied on here, at 72, is 19 February 2010, and from there Mauritius moves on to documents that are subsequent to the declaration of the MPA, and you already have the point from what I was saying yesterday, that there is no whisper of any alleged breach of UNCLOS there. The basis for the protest is the sovereignty issue. And you'll recall that Ms. Macdonald sought to glean something from the complaint on the absence of consultation that one sees in the Mauritian note verbale of 2 April 2010[14], and she also took you to a reference to unhappiness with "unilateral FCO consultation" in a Joanne Yeadon memorandum of a few days earlier[15].

48. The final document relied on here, at 72, is 19 February 2010, and from there Mauritius moves on to documents that are subsequent to the declaration of the MPA, and you already have the point from what I was saying yesterday, that there is no whisper of any alleged breach of UNCLOS there. The basis for the protest is the sovereignty issue. And you'll recall that Ms. Macdonald sought to glean something from the complaint on the absence of consultation that one sees in the Mauritian note verbale of 2 April 2010[16], and she also took you to a reference to unhappiness with "unilateral FCO consultation" in a Joanne Yeadon memorandum of a few days earlier[17].

49. But these references cannot somehow be characterized as an allegation of failures to consult on, for examples, straddling stocks or highly migratory species in breach of the 1982 Convention. There is no hint of any UNCLOS claim. The complaint, as formulated on 2nd April, in terms of consultation, is an entirely general complaint, pinned back to the sovereignty issue, and it's not an issue of a failure to consult under provisions of UNCLOS.

And one sees from these documents that Mauritius' position going forward continues to be grounded in the sovereignty claim, and that appears from the meeting of 9th June 2010, which is

[14] MM, Annex 167.
[15] MR, Annex 152.
[16] MM, Annex 167.
[17] MR, Annex 152.

at page 91 of this tab, and actually it's worth taking you to this really for two reasons because you will see that it is an extract of an information paper: Official mission to France and the United Kingdom of 9th June 2010. And you will see it's about a meeting with the new British Foreign Secretary Mr. Hague, and there are two points that flow from it: First, the position of Mauritius is grounded in the sovereignty claim, not in breaches of UNCLOS; but, second, when you look at this document and you read it, you think, well, how on earth can it be being said that it was futile for Mauritius to engage in an exchange of views? It makes absolutely no sense at all because what you see as actually happening is the MPA being declared on the 1st of April 2010 and you will see that the parties are then – or Mauritius is then precisely raising it with the British Foreign Minister at the date of this meeting 9th of June 2010. Of course, it didn't think it was futile to raise these matters. It raised the MPA. It simply did not engage in any exchange of views under Article 283, as Sir Michael has demonstrated it was required to do so.

Now, you will see 37 there: "Mr. Hague gave me an insight into the functioning of the new coalition Government and expressed his delight to work together with Mauritius on several issues." So, he's hardly putting up the barriers.

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

Now just pausing there for a moment, of course, that's a reference to the Gordon Brown – what Mauritius says, is an undertaking, and now what we see is the use of that undertaking, or alleged undertaking, by Mauritius to make a particularly serious allegation of breach of UNCLOS. It is

said the failure to comply with that alleged undertaking means that there is a breach of Article 300, so clearly as serious as it gets in terms of the 1982 Convention.

And yet where is the hint of anything there? Where is the opportunity for the United Kingdom to understand that there was a dispute by reference to what Gordon Brown is alleged to have said so that it could respond? So, at least once the dispute crystallized, there could be the exchange of views. Clearly nothing of that.

And then you see from Paragraph 40, again the whole thing is ultimately grounded in the sovereignty issue. On the sovereignty issue:

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

Mr. Hague conceded he was not fully conversant with all the issues concerning the Chagos Archipelago. He stated that he would revert to me on this matter in due course. So, it all comes down to sovereignty, and not a hint of anything there that could support Mauritius' case on futility.

And one sees precisely the same points that come out of the next document that was relied on, which is at page 93 of this tab, and, of course, this is an extract from parliamentary debates in Mauritius, so it wouldn't meet the first hurdle of announcing the existence of an UNCLOS breach to the United Kingdom. But, in any way, when you look at the passage relied on, which is page 96 of this bundle, it's precisely the same two issues that have been raised on the 9th of June. You will see at the top there, there is a passage on sovereignty, and then you will see, in the third paragraph on this page, there is a reference to: "The honorable Prime Minister

expressed concern over a decision of the former UK Government to establish an MPA around the Chagos Archipelago, despite the undertaking given by the former Prime Minister that the project would be put on hold." And so on. I think it's more or less the same wording.

Now, it was not for the United Kingdom to stitch together miscellaneous references to access to fisheries resources or broad assertions of sovereignty, or reference to the alleged Gordon Brown Statement, and then to understand that Mauritius was asserting, for example, that there had been abuse of rights under the Convention or that the UK had failed to cooperate to agree on measure necessary for the conservation of straddling stocks or there had been a breach of 65 undertaking which fed into Article 2(3) and Article 56(2) of the Convention.

And, of course, and any event, even if it had been possible to discern the existence of an UNCLOS dispute, and it was not, Mauritius is unable to point to any exchange of views in relation to a claim of alleged breaches of UNCLOS.

50. Mauritius has highlighted some references (i) by Mauritius to possible legal challenge (ii) by the United Kingdom to the "threat of legal action"[18]. But we simply do not see what that adds. There is no suggestion UK representatives somehow understood that Mauritius had an UNCLOS claim in mind. To similar effect, as I noted earlier yesterday, when at various junctures Mauritius has threatened legal proceedings, it has generally been in the broadest of terms[19], and certainly not with reference to UNCLOS.

51. Indeed, the references made by the United Kingdom to a possible legal challenge are instructive; it shows an understanding that any reference to legal action related to Mauritius's sovereignty claim, which it was anticipated might be brought before the ICJ for an advisory opinion[20], and with no understanding that UNCLOS might be invoked. And you may recall how one member of the Mauritian delegation at the meeting of 24 July 2009 made the 'usual sovereignty/ICJ mutterings', although that was apparently ignored by

[18] Day 4, Macdonald, 399: 1, citing Ms. Yeadon on 31 March 2010 (Reply, Annex 156).
[19] E.g. UK Rejoinder, Annex 54.
[20] See MR, Annexes 133, 164; also UKCM Annex 119.

the rest of the Mauritian delegation, and that's at tab 12 of our Judges' Folder, at paragraph 14 of the particular note. And that of course is not as polite as one might wish, and that is why this record was initially redacted. And the point is that UK representatives did not understand that a claim was being made, let alone an UNCLOS claim.

52. Now, so far as concerns strand 3 – stand 3 is, as we understand it, allegations of breach of allegedly binding undertakings which would somehow feed into an UNCLOS claim. There is actually very little to add. Professor Sands referred you to tabs 8.4, 8.6, 8.10 and 8.11 of its Judges' Folder, but that is the records of the January and July 2009 meetings, and also the July 2009 joint communiqué. I have already touched on these. They do not establish the existence as to a claim of breach of the alleged undertakings, still less that this amounted to a breach of articles 2(3) and 56 of the 1982 Convention, or that such undertakings accorded to Mauritius the attributes of a coastal State such that any declaration of the MPA would be impermissible.

53. And, again, as follows inevitably, the documents relied on do not establish the existence of an exchange of views.

54. And, for good measure, I should add that the alleged 1965 undertakings do not even receive a mention in Mauritius' carefully formulated Notification of Claim initiating these proceedings. The case that they were raised as a dispute sometime in 2009, and that there was the required exchange of views, reflects a post-claim attempt to make the facts fit what was not then perceived as a claim at all, let alone a claim under UNCLOS.

Alleged futility

55. I move on to Mauritius' case that a "further" exchange of views was futile by December 2010, and that case is, at best, misconceived. Ms. Macdonald's submissions actually seemed to tail off at this point, but it appears that the case on futility is made on the basis

that the United Kingdom allegedly proceeded with the MPA contrary to Prime Minister Brown's alleged commitment to put it on hold[21].

56. Well, the Tribunal already has our case on what was actually said, but I leave that to one side, and make three short points on the argument of futility.

57. First, there is nothing in the background to the exchange, and likewise the record and witness Statement that Mauritius has tendered, to show that the Mauritian Prime Minister was seeking to raise with Gordon Brown any UNCLOS dispute, still less to discuss means of settlement of that dispute.

58. Secondly, and following on from the above, there was no basis of any kind on which Mauritius could consider that an actual exchange of views on an actual UNCLOS dispute would be futile once the MPA was in fact declared. I note that this is all the more so in circumstances where a new Government came into power in the United Kingdom in May 2010, i.e., shortly after the MPA had been declared.

59. And, thirdly, the contention is plain wrong on the facts in light of the fact that governmental contacts did not somehow cease after the MPA was declared, and one can see how, at the meeting of 9 June 2010 with the new British Foreign Secretary, Mauritius did consider it worthwhile to raise and discuss the issue of the MPA.

And, in fact, you can see – again, if I could just ask you to turn to one last document in this tab – you will see that there was then a later meeting where, far from considering it futile to discuss the MPA, Mauritius again raised it.

If I could ask you to turn to page 97 of this tab, and you will see there is again a reference to the debate or it is in Hansard of 9th November 2010 this time in Mauritius – and again I'm only taking you to documents that Mauritius was relying on last Friday – and you will see from this at page 100, there is a description being given of a further meeting, this time on 22nd July,

[21] Reply, para. 4.79; See also Day 4, 411:1 to 7. Reliance was also placed on UKCM, Annex 87.

and it says: "The Honorable Minister of Foreign Affairs, Regional Integration and International Trade had a meeting with the Honorable Bellingham on 22nd July 2010 in Kampala." And you will see from the preceding paragraph that there is a reference to the Honorable Henry Bellingham, Minister for Africa and Overseas Territory at the UK FCO:

> "Had this meeting in the margins of the AU Executive Council meeting. During the meeting, Minister Boolell reiterated the sovereignty of Mauritius over the Chagos Archipelago as well as our objections to the unilateral establishment by the UK of a Marine Protected Area around the Chagos Archipelago."

In response, Minister Bellingham indicated that the new British Government would have handled the issue of the Marine Protected Area differently.

And you will see time passes, that was 22nd July 2010, and speaking as of 9th November 2010, it's being said:

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

60. But, clearly, there was a time when Mauritius did not consider that was the view when Mauritius did consider it worth raising with the United Kingdom's representatives, and yet Mauritius did not seek to engage in any change of views for the purposes of Article 283.

61. So, in short, there was never any basis for regarding anything Gordon Brown said as rendering futile a true Article 283 exchange, and the current contention on futility is plainly inconsistent with the facts.

Conclusion

62. Mr. President, Members of the Tribunal, I have sought to take you to all the documents that Mauritius relied on last week. We say that the real and important requirements of Article 283 have not been met. The United Kingdom was indeed taken by surprise by the

institution of UNCLOS proceedings against it on 20 December 2010. And, certainly, one of the purposes of Article 283 is precisely to avoid such a situation.

63. Mr. President, Members of the Tribunal, that concludes what we have to say on Article 283. So if I could now ask you to hand the floor to Professor Boyle, who will be setting out our case on Article 297 of the Convention, the jurisdictional objection there.

PRESIDENT SHEARER: Just before you leave the podium, Judge Greenwood has a question.

ARBITRATOR GREENWOOD: Could we go back to the letter of the 30th of December 2009 that I asked when about when Ms. Nevill was speaking about the other day. I'll move the microphone and hope that I can be heard. That's Mauritius Memorial Annex 157, and that was the letter that finished from Dr. Boolell to Mr. Miliband:

> "You will no doubt be aware that in the margins of the last Commonwealth Heads of Government Meeting our prospective Prime Ministers agreed that the Marine Protected Area project be put on hold and that this issue address the during the next round of Mauritius-United Kingdom bilateral talks."

Now, obviously that next round of Mauritius-United Kingdom bilateral talks never took place; I understand that, and I also understand the other points you have made about the alleged Gordon Brown undertaking.

But was there ever a reply? Because it strikes me as odd from this record that here you have the Foreign Minister of Mauritius writing to the Foreign Minister of the United Kingdom saying that there was an agreement at Prime Ministerial level – it's even higher than a unilateral undertaking – that the MPA project be put on hold, and there doesn't appear to be a reaction.

MR. WORDSWORTH: It has just been whispered to me, helpfully by Professor Boyle, that he is going to be dealing with that point shortly. When I say "shortly", I think it

may be this afternoon, because he is first going to be addressing you on jurisdictional issues but then he will be taking you to merits issues on consultation in the context of which he will be addressing – making some submissions on that particular point.

ARBITRATOR GREENWOOD: That's absolutely fine. I'm sorry. I thought it was something that came within your remit, Mr. Wordsworth.

MR. WORDSWORTH: I don't think it's a jurisdictional issue. Insofar as it is, then I will certainly revisit it over lunch and feed a line or two to Professor Boyle.

ARBITRATOR GREENWOOD: No, it was the fact that you had gone through the train of correspondence that made that I should ask the question again.

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

MR. WORDSWORTH: Thank you.

PRESIDENT SHEARER: And I call on Professor Boyle.

PROFESSOR BOYLE: Thank you, Mr. President. And I can assure Judge Greenwood we have followed up the correspondence and I will be dealing with it this afternoon.

Mr. President, Members of the Tribunal, it's a pleasure to appear before you again and do so on behalf of the United Kingdom.

Mauritius v United Kingdom

The absence of jurisdiction over Mauritius' claims with respect to the MPA

Professor Alan Boyle

A. Mauritius' case on the MPA and the United Kingdom's response

1. Mr. President, members of the tribunal. In its Reply and in its submissions last week Mauritius invited you to hold that the United Kingdom's declaration of a marine protected area around the BIOT is incompatible with various obligations under the Convention, including Articles 2, 55, 56, 63, 64, 194, and 300, as well as article 7 of the Fish Stocks Agreement.

2. Mauritius argued that even if the United Kingdom is the coastal State it has acted unlawfully by proclaiming the Marine Protected Area and by banning commercial fishing in that area. Mauritius says that the Marine Protected Area and the fishing ban are inconsistent not only with the 1982 Convention but also with the rights which Mauritius claims to possess in the waters now covered by the Marine Protected Area.

3. In this speech I will respond to the arguments Mauritius uses to justify its assertion that you have jurisdiction over these claims. I will make four points.

4. First, Mauritius' challenge to the legality of the ban on commercial fishing – the only new element that was introduced by the MPA declaration – is necessarily, we would say, a challenge to the legality of a measure whose purpose and effect is to conserve and manage the marine living resources of the Marine Protected Area – or more specifically the fish stocks, the sharks, the coral reefs, the biodiversity in which that marine protected area is richly abundant. To claim, as Mauritius does, that the ban on commercial fishing has an environmental purpose does not alter or undermine that conclusion in any way.

5. Second, I will argue that Article 297(1)(c) provides no basis for jurisdiction over the declaration of an MPA or the ban on commercial fishing. Mauritius says that because the purpose of the MPA is environmental the dispute therefore falls within Article 297(1)(c). But on its own terms that article is inapplicable to this dispute, which does not concern, we would say, the breach of any "specified international rules and standards for protection and preservation of the marine environment" as provided in that article. Characterising the Marine Protected Area or the ban on fishing as environmental is for that reason irrelevant: there are no specified international rules and standards applicable to the declaration of an MPA or a ban on commercial fishing within the limits of national jurisdiction.

6. Third, I will argue that Mauritius' case is inevitably excluded from compulsory jurisdiction over fisheries disputes by the second limb of Article 297(3)(a). Because the declaration of an

MPA and the ban on commercial fishing relate to conservation and management of living resources, and within the Exclusive Economic Zone, the dispute, we would say, falls fairly and squarely within this exclusion. Mauritius says that Article 297(3)(a) does not apply to environmental disputes within Article 297(1)(c). But this is unsustainable. Even if the MPA or the ban on commercial fishing have environmental purposes, that simply does not alter the plain fact that the dispute relates to, and I quote, "sovereign rights with respect to living resources in the Exclusive Economic Zone, or their exercise…" On that basis, it clearly falls outside your jurisdiction by virtue of Article 297(3)(a).

7. Finally, I will deal briefly with jurisdiction over other claims made by Mauritius, including fishing in the territorial sea, the harvesting of sedentary species on the continental shelf, fishing for straddling and highly migratory fish stocks, marine pollution, and abuse of rights.

Let me then turn to the characterisation of the MPA dispute.

B. Characterisation of the MPA dispute

8. Throughout its pleadings and in the arguments you heard last week Mauritius has sought to persuade you that this is an environmental case and to invest that characterisation with jurisdictional significance. Its reasons for doing so are obvious: were it to accept that the dispute is about the sovereign right to conserve and manage living resources in the EEZ it would also have to accept that the dispute is excluded from your jurisdiction by Article 297(3)(a). Yet it is of course precisely the termination of its alleged fishing rights that most obviously affects Mauritius and about which it has expressed most concern. Almost everything else is hypothetical apart from sovereignty.

9. The United Kingdom's White Paper on Overseas Territories published in 2009 sets out British policy on BIOT and other UK overseas territories. It identifies the following aims and objectives, and I would highlight two, in particular:

a. First, "To promote sustainable use and management of the Overseas Territories' natural and physical environment, for the benefit of the local people";

b. Second, "to protect fragile ecosystems such as coral reefs from further degradation and to conserve biodiversity in the Overseas Territories."[22]

And the 2012 White Paper on the Overseas Territories confirms that policy with respect to BIOT and other uninhabited territories.[23]

10. The United Kingdom does not dispute that the purpose of the MPA is "environmental" if that term is understood to include conservation and management of living resources, biodiversity, ecosystems of coral reefs and their surrounding seas. The MPA brings under one umbrella and strengthens both the environmental and resource conservation objectives previously addressed by the two overlapping maritime zones, the Environmental Protection and Preservation Zone and the Fisheries Conservation and Management Zone.

11. The Attorney General and Ms. Nevill have explained the science supporting the establishment of the MPA and the ban on commercial fishing. The scientific literature shows that the BIOT MPA is of exceptional importance for its unpolluted ecosystem, the extensive coral reefs, and the abundant biodiversity which it supports.[24] The Chagos reef system has the highest biomass of coral reef fishes anywhere in the Indian Ocean. And a no-take marine protected area is beneficial firstly for the protection and preservation of the reef system. After the Great Barrier Reef, the Chagos Banks are the second largest reef system in the world, and they are the least polluted.

12. But, secondly the MPA is important for the recovery of commercially exploited pelagic fish stocks which are under heavy pressure from poorly regulated fishing elsewhere in the Indian

[22] Command paper Cm 4246, UKCM, Annex 71, para. 8.5.

[23] White Paper, "Overseas Territories: Security, Success and Sustainability", Command Paper CM 8374 (June 2012), UKCM, Annex 127, p. 46.

[24] National Oceanography Centre final report of workshop held on 5-6 August 2009, UKCM, Annex 102.

Ocean. A ban on commercial fishing eliminates the elasmobranch by-catches, which exercised Judge Greenwood's curiosity on Wednesday. These, of course, are the valuable but endangered species such as sharks, rays and skates. The impact of commercial fishing on these species is particularly severe in the Indian Ocean and this is one of the key reasons for the no-take MPA. And it might be worth noticing at this point that, according to the IOTC, 2318 tonnes of shark were landed at Port Louis in Mauritius in 2012.[25] All of this is unlicensed by-catch from tuna fishing in Mauritius' Exclusive Economic Zone and surrounding waters. That figure takes no account of un-landed or unreported by-catch.

13. Taking into account the potential impact on fish stocks of the MPA, the Chagos Conservation Trust summarises the economic benefits as follows. It says: "In the long-term, the Chagos Marine Reserve will contribute to a richer ocean and should benefit people living in and around that ocean, such as the coastal countries of East Africa and elsewhere."[26]

14. So is a dispute about the creation of a no-take MPA an environmental matter as Mauritius alleges? And if so, does it matter? Mauritius points to similar language in the proclamations establishing the EPPZ and the Marine Protected Area, and it claims that neither of them refers to the conservation or management of living resources. But this is to ignore entirely the science, the negotiations between the parties, the public consultation, the implementing measures, all of which presuppose and make explicit the close relationship between conservation of biodiversity, coral reefs, endangered species, and the biomass of depleted fish stocks. The first question asked in the public consultation document was whether commercial fishing within the MPA should be banned.[27] Is this a question about environmental protection? Or about unsustainable exploitation of living resources?

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[25] IOTC, *Report of the Sixteenth Session of the Scientific Committee*, IOTC–2013–SC16–R[E], p. 64 UKAF, Folder 2, Tab 59, full report at http://www.iotc.org/sites/default/files/documents/2014/01/IOTC-2013-SC16-RE.pdf.

[26] http://chagos-trust.org/about/chagos-marine-reserve.

[27] Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory, UKCM, Annex 111, question 1(i).

15. Mauritius can have been in no doubt that the MPA was intended to conserve fish stocks and living resources. A press release about the MPA public consultation issued by the British High Commission in Port Louis explained the point very clearly. And you will find this press release at tab 57 in your folder. It says: "The idea is that creating a marine park where fishing is tightly controlled or prohibited enables the ocean environment and fish stocks to recover." It goes on: "Recovering fish-stocks then help replenish fisheries even in areas outside the protected zone — to the benefit of the wider economy and environment."[28]

16. Mr. President, members of the tribunal. It seems to me that if a ban on fishing is not a measure relating to conservation and management of living resources, then I must be Humpty Dumpty. The point seems elementary. But even if there were no ban on fishing, an MPA whose aims include conservation of coral reefs, and sharks and other endangered species, and biodiversity, must still be a measure intended to address the management and conservation of marine living resources. And the National Oceanographic Centre Report to which you've been referred and which was annexed to the public consultation document makes that abundantly clear.[29] That Report can be found, to remind you, at Tab 17 in your folder.

17. So the issue here is not whether the measures taken by the UK in creating the MPA - or the measures that will be taken in future - are in some general sense "environmental". There is a chapter on fisheries conservation in a well-known textbook on international environmental law. But the important question is in this context whether this dispute is environmental for the purposes of jurisdiction under Part XV of the Law of the Sea Convention. And that is not a question that can be answered by reference to the MPA Proclamation or its wording. To answer it, we have to look carefully at the wording and the totality and the context of Article

[28] UKCM, Annex 109.

[29] National Oceanography Centre final report of workshop held on 5-6 August 2009, UKCM, Annex 102, UKAF Folder 1, Tab 17.

297 in order to understand how that article deals with disputes relating to the environment, and to fisheries and other living resources.

Mr. President, Members of the Tribunal, I am going to take you to Article 297 and spend a little time looking carefully at its wording.

PRESIDENT SHEARER: May I just interrupt, Professor Boyle. We normally take a break at about this time. Would this be a convenient point?

PROFESSOR BOYLE: That would be a perfect moment at which to take a break, Mr. President.

PRESIDENT SHEARER: Very good. Thank you.

(Brief recess.)

PRESIDENT SHEARER: Yes, Mr. Boyle.

PROFESSOR BOYLE: Mr. President, I was threatening to take you to the text of Article 297, which I think you will now see before you.

18. Although the heading is "Limitations on the applicability of section 2" – that is, limitations on compulsory jurisdiction - in reality this article also confers jurisdiction over certain categories of dispute as provided for in paragraphs (1), (2), and (3).

19. Paragraph (1) goes on to list three categories of dispute all concerning the exercise by the coastal State of its sovereign rights or jurisdiction that are, pursuant to that article, subject to the procedures in section 2 of part XV. The wording of each of these merits careful reading, and I'm hoping you're going to see 297(1)(a). Let me begin with that one:

a. The point of sub-paragraph (a) is to protect the rights of *other* States within the Exclusive Economic Zone from interference by the costal State. You will note that the rights to which it refers are limited to navigation, to overflight, to laying of cables and pipelines, and other lawful uses of the sea related to those freedoms as set out in article 58. You will also notice that Article 297(1)(a) says nothing about any right of other States to fish in the Exclusive Economic

Zone, or to exploit other living resources. And had there been any intention to extend the protection of Part XV to foreign fishing or the harvesting of other species in the Exclusive Economic Zone, you might have expected Article 297(1)(a) to say something about that, and it does not.

b. If we move then to 297(1)(b): the point of sub-paragraph (b) is to allow *the coastal State* to sue other States which have exercised the rights of navigation, of overflight, and the laying of cables and pipelines – referred to as "the aforementioned freedoms, rights or uses" - in contravention of the Convention or of coastal State laws. Again, there is nothing here about fishing or the exploitation of other living resources in that article.

c. Finally, we move to sub-paragraph (c), which obviously is the crucial one for Mauritius. Mauritius says this provision gives you jurisdiction over environmental disputes, including this dispute. But you will notice that sub-paragraph (c) refers only to disputes where the coastal State has acted in contravention of "specified international rules and standards for the protection of the marine environment". We say that the purpose of this provision, like paragraph (1) as a whole, is to protect freedom of navigation, or the other freedoms referred to in Article 58, against misuse by the coastal States of their power to regulate marine pollution. It does not cover environmental disputes in general, and specifically it does not cover this dispute. It does not do what Professor Sands says it does.

20. So, how we interpret the phraseology used in Article 297(1)(c) is plainly crucial for Mauritius' case. Unless a dispute relating to the creation of an marine protected area or a ban on commercial fishing within that MPA involves the contravention of specified international rules and standards it will not fall within 297(1)(c), and there will then be no basis for the jurisdiction which Mauritius claims that you possess. My simple point is that Mauritius' interpretation of Article 297(1)(c) is novel, and reflects neither the ordinary meaning of the words used, nor the context in which the article as a whole applies.

21. I would invite the Tribunal to start by looking briefly at that context, including the other provisions of Article 297(1). As you will recall, Articles 297(1)(a) and (b) are about navigation, overflight, cables, and pipelines. They would, for example, cover a claim by Mauritius that the MPA interfered with freedom of navigation by imposing a requirement, shall we say, of compulsory pilotage, or by banning navigation entirely within the MPA. That we would accept. They would also cover a claim by the United Kingdom that, for example, a pipeline had been laid across the MPA by Mauritius without first conducting an environmental impact assessment.

22. But that is the context in which we have to interpret Article 297(1)(c). And if we take that context seriously we would expect Article 297(1)(c) also to be relevant to disputes about navigation, pipelines and so on. But we would think it perhaps surprising if a dispute about fishing or the conservation and management of living resources were within 297(1). Such a dispute has nothing to do with navigation or overflight or cables or pipelines, and so on. It obviously falls outside the context of Article 297(1) read as a whole. If there is jurisdiction over a dispute of that kind, we would expect to find it not in 297(1)(c) as Mauritius argues but in some other part of Article 297 – and we would suggest Article 297(3) is the obvious place to locate it.

23. And that brings me to my second and equally obvious point, which will take a little longer to develop: that when we consider the ordinary meaning of the terms used in Article 297(1)(c), in context, it is abundantly clear that they cannot confer jurisdiction over the creation of the BIOT MPA or the ban on fishing in the BIOT MPA. So, even if we do characterise the MPA and the ban on commercial fishing as having an environmental purpose, this will not be sufficient to bring the present case within Article 297(1)(c). Last Friday, reference was made to a Chapter by Judge Mensah in support of the opposite view, but having re-read that chapter, it's obvious that there is nothing in his text that supports the very broad reading that was given to Article

297(1)(c) by Mauritius. The learned judge does not address the issues we are debating here today, or he does so at best only in the broadest of terms.

C. Absence of jurisdiction under Article 297(1)(c)

24. So, the heart of the issue is that the text of Article 297(1)(c) refers only to disputes concerning "specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State". Now, Mauritius argues at this point that the other articles of the 1982 Convention on which it relies constitute "specified international rules and standards" for this purpose. We say that argument is untenable, for two reasons.

25. First, it does not fit the wording used in Article 297(1)(c) or the context in which the phrase is employed. Mauritius claims that articles 55, 56, 63, 64 and 194 are "specified international rules and standards" "established by the Convention" simply because they are part of the Convention. But if that is what 297(1)(c) means, why would any half-decent negotiator or draftsman use the phrase "specified international rules and standards" to achieve this result? He or she would surely have referred instead to "contravention of other provisions of the Convention for the protection and preservation of the marine environment". That would make far more sense.

26. The phrase "international rules and standards" is employed throughout Part XII, notably in articles 211, 213, 214, 216, 217, 218, 219, 220, 222, 226, 228, and 230. These articles collectively empower or require coastal States, flag States, or port States to regulate and enforce regulations for the prevention of marine pollution from ships, aircraft, and seabed activities. In in that context, international rules and standards provide a common standard for national regulations to follow. Obviously without that common standard, freedom of navigation would be impaired: ships, like aircraft, have to operate internationally, and there is no use having different national standards in different countries. But none of these articles

covers anything resembling a marine protected area whose purpose is to manage and conserve living resources in the EEZ, nor is there any comparable policy reason for doing so.

27. Moreover, it is well understood that the relevant international rules and standards for preventing marine pollution from ships are those negotiated at the International Maritime Organization and laid down in very considerable detail in the annexes of the 1973/78 MARPOL Convention, and of the annexes of Safety of Life at Sea Convention, the SOLAS Convention. So, if you want to build or operate an oil tanker the applicable international rules and standards on safety and prevention of pollution are in those annexes. The 1996 London Dumping Convention does the same for the dumping of waste at sea. But none of these annexes, or the London Dumping Convention, deals with the conservation of living resources.

28. The same phraseology, the use of the term "international rules and standards", or variants of it, occurs elsewhere in the Convention, including Article 21 on the regulation of ships in innocent passage, article 39 on the duties of ships in transit passage through straits, article 41 on sealanes and traffic separation schemes, article 53 on archipelagic sealanes, article 60 on artificial islands, in the EEZ, article 94 on the duty of States to regulate ships flying their flag, and Article 271 on marine technology. Now, with the exception of articles 60 and 271, all of these articles are also concerned with the regulation of ships. None of them covers anything resembling a marine protected area whose purpose is to manage and conserve living resources.

29. Fishing and the conservation and management of living resources in the Exclusive Economic Zone are dealt with in Part V of the Convention. But apart from article 60, the phrase "international rules and standards" is not found anywhere else in Part V. It is not used in articles 55 or 56. Indeed, far from endorsing any commitment to international regulation, in Part V it is the laws of the coastal State that prevail. Take, for example, Article 62(4), which requires nationals of other States fishing in the Exclusive Economic Zone, and I quote, to "comply with the conservation measures and with the other terms and conditions established in

the laws and regulations of the coastal State." And no attempt is made in article 62(4) to harmonise these laws with other States or specify their content with any provision.

30. Let me emphasise that word "comply" with coastal State laws in article 62(4). That wording contrasts starkly with article 56(2) on which Mauritius has relied and which merely requires the coastal State to have due regard for the rights of other States in the Exclusive Economic Zone. None of this supports the proposition that any of the articles on which Mauritius relies constitute "specified international rules and standards" for the purposes of Article 297(1)(c).

31. Now, there is a second objection to Mauritius' argument and it's that the very general wording of articles 55, 56, 63, 64, and 194 also contradicts any suggestion that they could constitute "specified international rules and standards." Professor Oxman has written most helpfully about this subject on the meaning of international rules and standards, and you will find the most relevant page of his article – at Tab 58 in your folder - and his analysis entirely contradicts the argument made by Mauritius. He points out that the duty to respect international standards, he says, "is typically expressed in connection with a duty (or right) to adopt national laws and regulations governing a particular matter."[30]

32. And he carries on. I think there are three points which follow from his analysis of this relationship and I'll quote the relevant sections. On that page of his article - you will find them towards the bottom, the bottom half - first, he says that while a 'standard' need not be fundamentally normative in character, "it should inform the precise content of …national laws and regulations." Second, he says that clauses requiring States to cooperate, or to take into account, or endeavour to do something "normally do not introduce precise rules of conduct to be observed uniformly." And, thirdly, he concludes that, for these reasons, "many provisions

[30] B. Oxman, The Duty to Respect Generally Accepted International Standards, 24 NYUJ Int Law & Pol (1991-2), p. 109, UKCM, authority 87, p. 5252 "(MS. page numbering), UKAF, Folder 2, Tab 58.

of international instruments adopted by international organizations or diplomatic conferences would not be relevant …even if the instruments were very widely accepted."[31]

33. Now, we say that the articles of the Convention on which Mauritius relies for this purpose do not conform to the definition of international rules and standards identified by Professor Oxman. None of them – none of those articles – is capable of informing "the precise content of …national laws and regulations". Several of them are scarcely even relevant to a dispute about "protection and preservation of the marine environment", as Mauritius would allege. And we can turn briefly to look at the text of the articles themselves.

34. Article 55, well, it simply defines the Exclusive Economic Zone and indicates that: "the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." This is not an international rule or standard in the same way that the annexes of the MARPOL Convention or the London Dumping Convention are international rules and standards, nor is it even primarily directed at protection and preservation of the marine environment.

35. And if we turn to article 56, in the language of the Virginia Commentary, "The purpose of article 56 is to indicate the general nature of the rights, jurisdiction and duties of the coastal State in the [exclusive economic] zone."[32] It confers sovereign rights with respect to exploration, exploitation, conservation and management of natural resources. And it provides the legal basis for the United Kingdom's right as a coastal State to regulate the Exclusive Economic Zone of BIOT and, in particular to regulate conservation and management of living resources, but it specifies no particular international rules and standards for doing so.

36. Article 56 also confers jurisdiction with regard to protection and preservation of the marine environment, but it says only "as provided for in the relevant provisions of this Convention".

[31] Ibid.
[32] *UNCLOS 1982 Commentary*, vol. II, p. 525.

The relevant provisions are those set out in detail in Part XII. And as we have seen, they do not cover conservation and management of fish stocks or living resources.

37. Article 63 requires States "to agree upon the measures necessary to coordinate and ensure conservation and development" of straddling fish stocks. Article 64 requires them to cooperate directly or through appropriate international organizations, and we'll come back to these articles this afternoon. But neither article identifies specific international rules and standards: at best they encourage States to negotiate such rules and standards, and Professor Oxman would, I think, say these are not international rules and standards by his criteria.

38. Finally, Article 194 sets out the obligation of States parties to take measures necessary to prevent, reduce and control pollution. In effect this article articulates the general obligation of due diligence with respect to the environment, or the marine environment, but its precise content is specified in more detail by the provisions articles 207 – 222 of the Convention. So, while it may provide a basis for international regulation of marine pollution, article 194 does not itself constitute or incorporate specified international rules and standards; indeed it makes no reference to them.

39. So, what does this survey of the Convention tell us about the phrase "international rules and standards for the protection and preservation of the marine environment," when used in Article 297(1)(c)? It tells us, we would submit, that this phrase refers to rules and standards for the prevention, reduction and control of marine pollution, as specified in the various articles of Part XII. It is not a reference to the other articles of the Convention on which Mauritius relies.

40. Thus, to reiterate my opening explanation, the point of Article 297(1)(c) – and this is entirely consistent with articles 297(1)(a) and (b) – is to protect freedom of navigation, or the other freedoms referred to in Article 58, against misuse by coastal States of their power to regulate marine pollution. And that interpretation is consistent with the two previous sub-paragraphs and it reflects their focus on navigation and pipelines and it reflects the wording of the article

itself. But bringing articles 55, 56, 63, 64 and 194 into the ambit of Article 297(1)(c) achieves neither coherence nor contextual consistency with the rest of Article 297(1).

41. I think, Mr. President, Members of the Tribunal, the conclusion inevitably follows that Article 297(1)(c) does not exist in order to confer compulsory jurisdiction over a dispute about conservation and management of fish stocks or marine living resources. There are no internationally agreed rules and standards on those subjects, none on the conservation and management of marine living resources which could fit within the terminology used in Article 297(1)(c) and the other articles of the Convention to which Mauritius refers do not do so. There is no fisheries equivalent of MARPOL or SOLAS or the London Dumping Convention.

42. Mauritius has also tried to portray its case, in part, as a pollution dispute under article 194, and it is true that the United Kingdom does regulate pollution within the waters of the MPA. But, again, for you to have jurisdiction over that aspect of the dispute, Mauritius must still point to some violation of "specified international rules and standards. It has signally failed to do so. Does it plead a violation of the MARPOL, Convention or the SOLAS Convention or the London Dumping Convention? No. These international rules and standards are mentioned nowhere in Mauritius' arguments on article 194.

43. Mr. President, members of the tribunal. I have taken you through Article 297(1) in some detail, and if you may feel that I have been stating the obvious on a Friday morning at some length, I apologise. But Mauritius has insisted that this article provides you with jurisdiction over the MPA dispute, and that argument merited a serious and detailed response. The conclusion, I would suggest, seems overwhelmingly clear. Article 297(1)(c) is concerned with international rules and standards which regulate marine pollution.

44. Simply put, it's irrelevant to this case. If you have any jurisdiction over a dispute about fish stocks or conservation of marine living resources, it can come only via Article 297(3), to which I will now turn.

D. Mauritius' MPA case is excluded from compulsory jurisdiction by Article 297(3)

45. My third point, therefore, is that a dispute relating to conservation and management of fish stocks and other living resources in the Exclusive Economic Zone is excluded from compulsory jurisdiction by Article 297(3)(a) unless the coastal State agrees. This provision, we would say, is fatal for Mauritius' challenge to the ban on commercial fishing within the BIOT MPA. And it is fatal even if the MPA's purpose is characterised as environmental, since the wording of Article 297(3)(a) takes no account of the purpose for which the discretionary powers of the coastal State have been exercised. That a ban on commercial fishing within the MPA should fall within the exclusion carved out by Article 297(3)(a) seems straightforward and obvious. It is unambiguously within the ordinary meaning of that provision.

46. Last Friday, my good friend Mr. Loewenstein made one argument that can be disposed of immediately. He claimed that Article 297(3)(a) only excludes jurisdiction over the exercise of sovereign rights by the coastal State within its EEZ, and he said that it does not exclude jurisdiction over fishing within the EEZ by other States. But that is an absurdity. The two go together: any assertion of sovereign rights over living resources in the EEZ will impact on the ability of foreign States to exploit those resources and vice versa. The whole point of the exclusion from jurisdiction in Article 297(3)(a) is to prevent other States from challenging that exercise of sovereign rights in respect of their activities in the Exclusive Economic Zone. So let me explain.

47. Article 297(3)(a) also does two things. First it confers compulsory jurisdiction over, and I'll quote, "Disputes concerning the interpretation or application of the Convention with regard to fisheries…" But second, it exempts coastal States from any obligation to accept compulsory jurisdiction over "any dispute relating to its sovereign rights with respect to the living resources in the Exclusive Economic Zone or their exercise…" Put simply, high seas fisheries disputes are within compulsory jurisdiction, EEZ living resources, quite deliberately, are not.

48. The article then goes on to specify that the exclusion of jurisdiction covers, among other things:

- the coastal State's discretionary powers for determining the allowable catch in the EEZ
- its harvesting capacity in the EEZ
- the allocation of surplus EEZ stocks to other States
- and the terms and conditions for conservation and management of living resources in the EEZ

Those are all excluded from compulsory jurisdiction.

49. In limited circumstances an EEZ living resources dispute may be submitted to compulsory conciliation under Article 297(3)(b), and I will come back to that a later on, but that merely emphasises that Article 297(3)(a) provides and was intended to provide almost complete exclusion from the jurisdiction of an UNCLOS court or tribunal. But I will return to that, as I indicated.

50. But you will notice firstly that the exclusion from jurisdiction is broader than the inclusion. Fish are living resources, but not all living resources are fish. So it follows that while in principle there is jurisdiction over a fisheries dispute, this does not extend to a dispute that relates to other types of marine living resource. Thus, even if it were right about jurisdiction over access to EEZ fish stocks, Mauritius cannot use Part XV proceedings to challenge an MPA insofar as it relates to conservation and management of living resources other than fish. Mauritius has not argued that coral reefs or endangered species are not living resources for the purpose of Article 297(3)(a) – and indeed it would be impossible to do so. So, for that reason its claim against the declaration of the Marine Protected Area, we would say, must be dismissed..

51. But, secondly, you will also notice that the coastal State's powers to conserve and manage fish stocks and other living resources within the EEZ are effectively put beyond the jurisdiction of an UNCLOS tribunal by the very broad terms of Article 297(3)(a). The detailed terms of that

article in effect leave coastal States free to set the allowable catch at zero, to refuse other States access to any surplus stocks, and to set their own terms and conditions for conservation and management of fish stocks and other living resources in the EEZ. And those are exactly the powers used by the United Kingdom when it banned commercial fishing in the MPA. It was thereby exercising its sovereign rights in the EEZ. If there is any remedy, it lies in compulsory conciliation under Article 297(3)(b). Again, I'll come back to that.

52. So, if you are satisfied that a ban on commercial fishing in the MPA falls within the second limb of Article 297(3)(a) [i.e. the jurisdictional exclusion] that should be sufficient to dispose of Mauritius' claim that you have jurisdiction over that part of the dispute.

53. Mauritius has two responses to this seemingly decisive obstacle. First, it argues that many negotiating States at the UNCLOS III conference did not want to exclude fisheries disputes from compulsory jurisdiction and that they therefore favoured a narrow reading of Article 297(3)(a). Second, Mauritius also says that the environmental purpose of the MPA precludes it from being a dispute relating to living resources for the purposes of that article.

54. Neither argument is persuasive. Article 297(3)(a) is unambiguous and there is no basis for looking beyond its clear terms. But in any case the negotiating record simply does not support Mauritius. As we all know the 1982 Convention was negotiated by consensus as a package deal. Many States put forward different positions on various issues, including EEZ fisheries disputes, and Mauritius cites some States that wanted those disputes to be included within compulsory jurisdiction. And we have cited other States who advocated the opposite position.[33]

55. At UNCLOS III, Mauritius strongly favoured excluding fisheries disputes – Exclusive Economic Zone fisheries disputes – from compulsory jurisdiction. Here is what the Mauritian delegate, Mr. Gayan, said during the 62nd session: "the reasons for not having a compulsory

[33] UKR, para 7.8.

procedure for dispute settlement in areas of national jurisdiction were overwhelming". "Were that to happen, needless tension and bad feeling would be created among neighbouring States." He was very prescient, Mr. Gayan. Coastal States, he said, "should be the only competent forums for the settlement of [EEZ disputes]": and "the principle was intrinsic to the basic notion of State sovereignty".[34]

56. Many other States were also of the view that disputes relating to the exercise of sovereign rights in the EEZ should not be subject to compulsory judicial settlement or arbitration. Again, I can quote the delegate from Madagascar – these are all set out in the Rejoinder. That delegate was a certain Dr. Raymond Ranjeva, who I'm sure many people in this room will know, and he made the same argument as the Mauritian delegate. He said, "the only matters not amenable to dispute settlement procedures were those falling within the exclusive competence of the State in question." Well, I might note in passing that the powers exercised by the United Kingdom with regard to the BIOT MPA are powers which fall within its exclusive competence. Such disputes, Dr. Ranjeva said, "would fall within the jurisdiction of the coastal State, and not that of the machinery for the settlement of disputes".[35]

57. Until the final vote on adoption of the text, the UNCLOS III negotiations had proceeded on a consensus basis. So the text thus represents a compromise which no negotiating State, including Mauritius, opposed during its elaboration. It is this text of the Convention which has to be interpreted, in accordance with its ordinary meaning and taking into account the context in which it was negotiated. To start reinterpreting UNCLOS by reference to the views of some States rather than by reference to the ordinary meaning of the text would quickly unravel the

[34] UNCLOS III, Summary Records of the 57th-65th Plenary Sessions, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65, 62nd Meeting, pp. 36-37, para. 10.

[35] UNCLOS III, Summary Records of the 57th-65th Plenary Sessions, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65, *61st Meeting*, pp. 33-4, para. 43.

whole Convention. It is fundamentally misguided. But in any event, reference to *travaux préparatoires* of this kind simply cannot help Mauritius, for two obvious reasons.

58. First, *travaux préparatoires* are only relevant when the ordinary meaning is "ambiguous or obscure", or when it would produce a result which is "manifestly absurd or unreasonable"[36]. Well, there is nothing ambiguous or obscure about the ordinary meaning of Article 297(3)(a), nor is the exclusion from jurisdiction of disputes relating to living resources manifestly absurd or unreasonable. The reasons for that exclusion were well known in the 1970s, are set out in the records and they remain as valid and powerful today as they were in 1980 or 1982. They were in fact reiterated in 1995 when the UN Fish Stocks Agreement was adopted and it incorporates exactly the same provisions on dispute settlement as UNCLOS.

59. Second, the views of States arguing for or against any particular position cannot be decisive when interpreting an agreed text. Such material is only useful if it provides clear confirmation of the meaning of that text[37]. The contradictory material which both parties have cited in their written pleadings does not confirm any particular reading of Article 297(3)(a). On the contrary, it confirms that the text finally adopted represents a compromise between several competing visions, and it is that compromise which must be interpreted and applied here.

60. Mauritius' other response to the logic of Article 297(3)(a) is to argue that the dispute is an environmental one within Article 297(1)(c) and that so long as you have jurisdiction under that article, you can ignore Article 297(3). I have already explained why Article 297(1)(c) cannot give you jurisdiction over this dispute.

[36] 1969 Vienna Convention on the Law of Treaties, Article 32.

[37] See *Maritime Dispute (Peru/Chile)*, Judgment, I.C.J. Reports 2014, paras. 65-66 (UKR Authority 18); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625 (UKR Authority 11), para. 53; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 6 (UKR Authority 5), para. 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, para. 55, (UKCM Authority 12).

61. But let's assume momentarily, and merely for the sake of argument, the implausible hypothesis that Mauritius persuades you that Article 297(1)(c) might possibly give you a more extensive jurisdiction over environmental disputes than the wording allows. The question then is whether a dispute which indisputably involves conservation and management of fish and other living resources can be extracted from Article 297(3)(a) and relocated to this more environmentally friendly version of Article 297(1)(c), the one imagined by Mauritius and relocated merely because the MPA has a broadly defined environmental purpose.

62. The answer in our view is still no, the dispute cannot be extracted from Article 297(3)(a). And the environmental purpose of the MPA and the ban on fishing are irrelevant to the unambiguous wording and scope of that article. Why would the purpose of the fishing ban remove the dispute from the exclusion provided by Article 297(3)(a), even if that purpose is one of protecting and preserving the marine environment? We can characterise the ban on fishing in the MPA as "environmental," but it does not follow that it therefore ceases to be about conservation and management of living resources, or that the environmental purpose prevails over the conservation and management purpose for jurisdictional purposes, or that it falls outside the very broad terms of Article 297(3)(a) as I've already explained.

63. On the contrary, almost any modern fisheries conservation and management measure will serve the multiple objectives described above. In our Rejoinder we explain at some length that the UN Fish Stocks Agreement of 1995 has environmental objectives. Indeed it has even been described as the first "environmental" agreement relating to fisheries conservation and management in the literature.[38] But does that mean that EEZ fisheries disputes are now outside the Article 297(3)(a) and inside compulsory jurisdiction under Article 297(1)(c)? Even on Mauritius' reading of Article 297(1)(c) we would say no. The parties to the Fish Stocks Agreement would be very surprised if the answer was yes.

[38] UKR, fn. 609 (para. 7.51)..

64. Mauritius' argument ignores the obvious point that jurisdiction over disputes relating to fisheries is established, expressly, by the opening line of Article 297(3)(a), not by Article 297(1)(c), which makes no reference to fisheries. Even if Article 297(1)(c) somehow represents the general principle on jurisdiction over all environmentally-related disputes, which we say it does not, Article 297(3)(a) obviously represents the exception to that principle with respect to disputes about conservation and management of living resources in the EEZ. And if disputes concerning conservation and management of living resources in the Exclusive Economic Zone are within the exception provided by Article 297(3)(a), then Mauritius' argument gets it nowhere, however broadly we construe Article 297(1)(c). So, even if you want to be progressive, even if you want to be evolutionary, we would still say that fisheries disputes, that disputes concerning the conservation management of marine living resources, are extracted from or fall outside your jurisdiction by virtue of Article 297(3)(a).

65. The exclusion from compulsory jurisdiction under that article is very broad. It applies to "any" disputes with respect to "living resources" and we would say that includes conservation and management of biodiversity, with coral reefs, endangered by-catch species, as well as commercial fish stocks. All of these are "living resources" in the terms of that article[39], whose "conservation and management" fall within the "sovereign rights" and "discretionary powers" of the "coastal State", i.e. the United Kingdom. In our submission a ban on fishing aimed in part at conservation of fish stocks and in part at protecting other living resources falls squarely and unambiguously within the exclusion provided by Article 297(3)(a) and the fact that it may have "environmental" purposes is irrelevant.

66. Moreover the conclusion that you have no jurisdiction over conservation and management of the EEZ living resources or fish stocks is entirely consistent with the UNCLOS negotiating

[39] See *United states – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO WT/DS58/AB/R (1998), paras. 130-131, where turtles and biological resources are treated as "living resources"(**UKR Authority 8**)

record. The Virginia Commentary sets out clearly the reasoning which led to the exclusion of EEZ fisheries and living resources disputes from compulsory jurisdiction. Let me refer you to the Commentary for Article 297. The relevant pages are Authority 85 in the Counter-Memorial, but I will read the very brief key passages.

67. The very first paragraph notes: "The acceptance by many participants in the Third UNCLOS of the provisions for the settlement of disputes was, from the very beginning, conditioned on the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision." And the Commentary goes on then to show how successive drafts of the Convention all excluded in some form or another disputes arising out of the exercise of discretionary powers and sovereign rights in the EEZ.

68. The final draft convention contained what is now Article 297(3). The Commentary notes in this respect that it says: "Disputes relating to marine scientific research and fisheries were divided into three categories: those that would remain subject to adjudication, those that would be completely excluded from adjudication…. and those that would be subject to compulsory conciliation."[40] It then says: "to the second group" – that's those excluded from adjudication – "belong primarily disputes relating to the exercise by a coastal State of those powers with respect to which the substantive provisions of the Convention granted such State complete discretion."[41]

69. And it is to that second group that the powers exercised by the United Kingdom in relation to the BIOT MPA belong. And what this shows is that the argument made by Mauritius with respect to Article 297(3)(a), like its argument under Article 297(1)(c), wholly lacks support in the Commentary, in the *travaux*, in the wording of the Convention, or, indeed, in the jurisprudence.

[40] At para. 297.19, UKCM Authority 85, p. 5230 (MS page numbering).
[41] Ibid.

70. Mr. President, members of the tribunal. In advocating an evolutionary and environmental interpretation of Article 297 Mauritius invites you to overturn a clear policy preference of the negotiating States at UNCLOS III, a preference reiterated and endorsed in 1995 when the UN Fish Stocks Agreement adopted and incorporated exactly the same dispute settlement provisions, mutatis mutandis. As such Mauritius is challenging both the consensus of States parties and the inter-related package deal on which the Convention text rests. And this is exactly, we would say, the kind of unilateral challenge to the Convention that the dispute settlement machinery was designed to prevent, not to promote.

71. Counsel opposite have drawn attention to some of my writings on this subject. I would normally not do so myself, and I have made no mention of theirs. But in the circumstances it may be appropriate merely to point out that my 1997 ICLQ article takes exactly the same view of fisheries disputes and Article 297(3)(a) as I have articulated before you this morning, and Mauritius has not identified a single writer who takes a different view.

Mr. President, I could offer you a break at this point or I could carry on until about 12 o'clock. I'm in your hands.

PRESIDENT SHEARER: Yes, do you have questions?

ARBITRATOR WOLFRUM: Yes. Professor Boyle. May I ask you a general question on the interpretation of Article 297, and I raise that question to really full understand your reasoning. The question I'm raising is on Article 297 in connection with Article 56 of the Convention, which is not too astonishing.

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: May I draw your attention, Professor Boyle, to Article 56(1)(b(iii).

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: There is a reference to the jurisdiction, I take it from the first line, of the coastal State concerning the Protection and Preservation of the marine environment.

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: Let us now turn to Article 297(1)(c).

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: In your interpretation, if I followed you correctly – and please correct me – this is providing jurisdiction only for disputes when it is alleged that the coastal States has violated international rules or standards in connection or concerning the Protection of the Marine Environment.

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: What do we do with disputes which don't allege the violation of international rules and standards but of the Law of the Sea Convention? Is that not covered by (1)(c)? Is that, so to speak, an area where the coastal State may take whatever measure without or perhaps being challenged by dispute-settlement procedure? That's the first question. In my view, I always thought that 297 has to reflect 56, but if you give (1)(c) a very narrow reading, then there may be gaps at the end of the day.

I have a second question.

PROFESSOR BOYLE: Well, could I perhaps answer the first question –

ARBITRATOR WOLFRUM: No, no – let me – and take your time.

I would rather also bring up a second question at that moment. It's much easier to answer probably. Let us now turn to 297(3)(a). Perhaps I have not followed you with sufficient attention, but, in my view, 3(a) consists of two different parts, the first ending roughly at the third line or something, with Section 2, and then it continues, "except that." Therefore, we have a general indication there is jurisdiction in cases of dispute, but this is not so for the second part of

that particular sentence, which is referring to – (unclear) is not going to accept submission to such resources, Exclusive Economic Zone, then there comes a couple of example, allowable catch, harvesting capacity, et cetera, and then establishment in its conservation and management, laws and regulations. I assume that was your main point, the last part.

PROFESSOR BOYLE: Yes.

ARBITRATOR WOLFRUM: For we have no dealing with surplus, trade (unclear) .

PROFESSOR BOYLE: Yes, but I'll do my best.

ARBITRATOR WOLFRUM: Now, may I ask you whether this latter part of 297(3)(a) refers to everything done in the – concerning the conservation and management of living resources or does it only refer to activities of the coastal State under Article 61 and 62? Here again my question is: The correlation between 297(3)(a) and the competences of the coastal State, as outlined in Part V.

PROFESSOR BOYLE: I understand your point.

ARBITRATOR WOLFRUM: Thank you.

PROFESSOR BOYLE: And it's a good one. And, if I may, I'll simply treat those as one question because I think the two go together.

My understanding of this has always been that there is a correlation between 56(1)(a) and 297(3), and there is a correlation between 56(1)(b)(3) and 297(1)(c). And if we take protection and preservation of the marine environment, I would interpret that as, in substance, a reference part XII of the Convention, which is headed: Protection, Preservation, of the Marine – so it's, in substance, about rules on pollution. You could broaden that a little bit, but I would suggest that however broadly you want to read it, it simply doesn't include conservation and sustainable use of living resources, which seem to me to fall within 56(1)(a) and, therefore, in jurisdictional terms, in 297(3).

Now, there is obviously a deliberate distinction here. It is going to be much easier to challenge coastal State laws that regulate pollution or that interfere with navigation. In substance, if you want to ban, shall we say, single hull oil tankers from navigation in your EEZ, then you need to be able to demonstrate that that's consistent with international rules and standards. You just can't do it unilaterally. So you've got to be able to show the IMO has banned single hull oil tankers, or if you want to ban any discharge of pollution in your EEZ, you're again going to have to show that that's allowed for by the MARPOL Convention, which in some situations it might be.

So, what the articles are trying to do is to ensure that if the coastal State regulates pollution excessively, that it can be taken to court, and that will be subject to compulsory jurisdiction in order to protect freedom of navigation, which is one of the key issues that the dispute settlement section was designed to protect.

Now, I would say, and I think this is entirely consistent with the negotiating record, that there was a great deal of concern that having created the Exclusive Economic Zone, having given extensive powers to manage and conserve and exploit fish stocks and living resources in the Exclusive Economic Zone to coastal States, taking those away from distant water fishing nations, who were not happy with this outcome, as we all know. This was a major battle in the Law of the Sea in the 1970s, and the outcome was very much beneficial to coastal States, many of them Developing States without fisheries of their own, and many of them were deeply concerned with the possibility that if they were then subjected to compulsory jurisdiction over fisheries disputes, they would effectively be bullied by the same distant water fishing States that had been bullying them previously.

And the object of this whole provision, particularly 297(3), is to keep coastal State fisheries disputes out of court as far as possible. That's what coastal States wanted, particularly Developing States, when they asked for creation of the Exclusive Economic Zone.

I hope that's an answer to your question. It might be that you could probably parse very minute gaps between this and that, and clearly the negotiation of a convention of this complexity over such a long time, the wording doesn't always quite match up, like the maritime boundary between England and Scotland which doesn't quite match up either, but don't tell any fishermen. It may not match up, but I think the differences you're going to find are extremely small, and the message which I've always taken from 297(3), indeed, this is what I was taught by those who taught me Law of the Sea, is that 297(3) takes EEZ fishery disputes out of compulsory jurisdiction – full stop.

ARBITRATOR WOLFRUM: Thank you.

PRESIDENT SHEARER: Professor Boyle, I think this might now be a convenient point at which to take the short break, and we will be back at 12 noon.

Thank you.

(Brief recess.)

E. Jurisdiction over Mauritius' claims with respect to straddling and highly migratory fish stocks

72. Mr. President, I can now deal much more briefly with the remaining aspects of Mauritius's claims, and I'll begin with articles 63 and 64 of UNCLOS and article 7 of the Fish Stocks Agreement. Here essentially Mauritius claims that when adopting the MPA the United Kingdom failed in its duty to cooperate with or to consult Mauritius and the Indian Ocean Tuna Commission[42]. For all the reasons that I've already addressed, we would say that these articles on cooperation are not "specified international rules and standards for the protection and preservation of the marine environment." So Article 297(1)(c), we would say, cannot provide a jurisdictional foundation for them.

[42] MM, paras. 7.63-4.

73. Nor, I would suggest, can Article 297(3)(a) provide you with jurisdiction. The most obvious reason is that Mauritius is again challenging the discretionary exercise by the coastal State of its sovereign rights over living resources, "the allocation of surpluses" and "the terms and conditions established in its conservation and management laws and regulations". So, as such that dispute is excluded by Article 297(3)(a) from compulsory jurisdiction.

74. To argue as Mauritius does that the fish stocks occur in the fisheries zones of both States would not change that conclusion, even if it were true. As we pointed out in the Rejoinder, on four separate occasions in their judgment the *Barbados/Trinidad*, the arbitral tribunal found that disputes about straddling fish stocks in adjacent EEZs were outside their jurisdiction.[43]

75. Quoting from the judgment, the Tribunal said "Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal 'any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the Exclusive Economic Zone'.

76. But, unlike Trinidad and Tobago and Barbados, BIOT and the Mauritius fisheries zones are, at their closest point, over 500 miles apart, so article 63 would be applicable only if Mauritian vessels fished for straddling stocks in waters adjacent to the BIOT MPA, and article 64 would be applicable only if it fished for highly migratory species in the same region.

77. As we also pointed out in the Counter-Memorial and the Rejoinder, there is no evidence that Mauritius does. Mauritius' own national report to the Tuna Commission in 2011 indicated that there were four Mauritian fishing vessels targeting swordfish and tuna between 12^0 and 23^0 south latitudes and longitudes 52^0 and 63^0 east[44]. And hopefully there is a map coming on the screen right now. The report notes that Mauritius concentrates on fish processing and issues

[43] UKR, paras 7.15-17.

[44] IOTC, *Mauritius National Report to the Scientific Committee of the Indian Ocean Tuna Commission*, 2012, IOTC–2012–SC15–NR18 Rev 1, Executive Summary, p. 2. (UKCM, Annex 130)

licences for foreign boats to fish in its Exclusive Economic Zone, and you will find that report at Annex 130 of the Counter-Memorial. The coordinates referred to in that report are shown on screen now – they are the larger of the two red boxes, which you see down in the left-hand – I should say the southwest corner of the map. It's obvious they are far to the southwest of the BIOT MPA.

78. The most recent IOTC Scientific Committee report, the one for 2013, is available online.[45] You will find the entry for Mauritius – that's page 64 – at Tab 59 in your folders. It sets out in summary the totality of Mauritian fishing for that year. The fishing areas were between latitudes 9°S and 26°S and longitudes 56°E and 62°E. That is the small red box on the screen, and, again, it's nowhere near BIOT. There is also reference in the report to Mauritian coastal fishing around fish aggregation devices. Anticipating a possible question, these devices are stationary. They facilitate the catching of tuna, but they also facilitate catching juvenile fish, and they are particularly harmful to sharks, turtles and other large non-target species.[46]

79. But we would say that what Mauritius has the burden of proving if it's to bring a claim under these articles is that Mauritian vessels fish in high seas areas adjacent to the BIOT MPA or in the same region. And unless it can do so it has no standing to invoke a dispute under either of those articles. And the evidence of fish catches which it offers in the Reply[47] relates only to fishing within waters of BIOT and is irrelevant to the application of article 63 or 64.

80. Second, if there is a dispute about cooperation with the IOTC under either of those articles or under the Fish Stocks Agreement article 7, that dispute is one which bears directly on the participation and the conduct of both States in the IOTC. In accordance with articles 2(3) and 56(2) Mauritius itself argues that UNCLOS parties are required to exercise their respective

[45] IOTC, *Report of the Sixteenth Session of the Scientific Committee*, IOTC–2013–SC16–R[E], p. 64 UKAF, Folder 2, Tab 59.

[46] Bureau of Rural Sciences, *A Review of the impact of fish aggregating devices (FADs) on tuna fisheries* (Canberra, http://data.daff.gov.au/brs/brsShop/data/PC12777.pdf), see esp. p. 3 and section 6.4."

[47] MR, p. 61.

rights and responsibilities in the territorial sea and in the EEZ "subject to" or "with due regard to" the rights of other States. We would say that must include the rights of all parties to the IOTC Agreement. Following the logic of Mauritius' own argument, the IOTC Agreement is applicable law in these proceedings in accordance with Article 293.

81. So I would draw your attention therefore to Article XXIII of the IOTC Agreement. You will note that article says that any dispute regarding interpretation or application of the agreement "shall be referred for settlement to a conciliation commission procedure." And we would suggest that if Mauritius wishes to complain about a lack of cooperation by the United Kingdom with the IOTC, it must first use the conciliation procedure envisaged by article XXIII of the IOTC Agreement, failing which the parties may then resort to the ICJ or any other agreed procedure, including the procedures agreed under Part XV of UNCLOS. Mauritius has made no attempt to invoke the article XXIII conciliation procedure.

82. UNCLOS dispute settlement is of course residual in character; that is it defers to any other method of dispute settlement chosen by the parties. And in accordance with articles 281 and 282 an Annex VII tribunal will have no jurisdiction if the terms of those articles are satisfied.

83. Article 282 excludes resort to dispute settlement where there is an alternative procedure involving a binding decision.

84. Alternatively, if article XXIII of the IOTC agreement does not satisfy the requirements of Article 282, we would suggest that it will satisfy the requirements of Article 281 as interpreted and applied in the *Bluefin Tuna Case*. That decision, you will recall, concludes that "the intent of the dispute settlement provision of the Bluefin Tuna Convention is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution not accepted by the parties to the dispute."

85. But we would say that if Article XXIII of the Tuna Commission Agreement falls within the terms of Article 282, then *a fortiori* the Tribunal has no jurisdiction, but with respect to Article 281 the reasoning of *Bluefin Tuna* is equally applicable. Either way, it follows that Mauritius must proceed to conciliation under the terms of the IOTC agreement and not to arbitration under UNCLOS Part XV.

That brings me, and again, very briefly, to jurisdiction over fisheries access disputes under articles 2(3) and 56(2).

F. Jurisdiction over fisheries access under articles 2(3) and 56(2)

86. Mauritius' argument for jurisdiction over its claim to fish in the territorial sea amounts to no more than saying that nothing in Article 297 excludes it. With respect it is not quite so simple.

87. Mauritius' claim to fish both in the territorial sea and elsewhere in the MPA rests on the agreement which it claims the parties reached in 1965. That alleged agreement makes no provision for dispute settlement. And our straightforward response is that a dispute concerning the status and interpretation of a fisheries access agreement is not a dispute concerning interpretation and application of UNCLOS unless there is a provision for dispute settlement meeting the terms of Article 288(2) of UNCLOS.

88. And both parties agree that there is no such provision in the alleged agreement reached in 1965. And we would say that is decisive of the point; it deprives you of jurisdiction both with respect to fishing in the territorial sea, and fishing elsewhere in the Marine Protected Area. Mauritius says the point is irrelevant because the alleged access agreement is incorporated into the Convention via articles 2(3) and 56(2). For that reason they say it is within your jurisdiction to interpret and apply those articles thus reinterpreted.

89. But with respect to EEZ fish stocks, the logic of article 62, which is the article on access to fish stocks in the EEZ, combined with Article 297(3) on fisheries disputes, is that an agreement on

access to EEZ stocks is, we would say, subject to compulsory jurisdiction only if it so provides in accordance with Article 288(2).

90. Mauritius' contrary view based on article 56(2) would surprise the many developing countries in Africa and the Pacific that have opened their EEZs to foreign fishing pursuant to article 62. It would leave them vulnerable to compulsory dispute settlement even if their access agreements make no provision to that effect. And we would say therefore that Mauritius' interpretation of article 56(2) is incompatible with the Convention and with the State practice under fisheries access agreements.

91. As regards the territorial sea, not surprisingly, there is no provision of UNCLOS which expressly regulates foreign fishing in the territorial sea and there is no provision which expressly provides for, or excludes, jurisdiction over disputes relating to fish stocks in the territorial sea. On the face of it, why would you make such provision? The coastal State has sovereignty in the territorial sea, subject only to a right of innocent passage. Foreign fishing vessels have no right of access to the territorial sea save by agreement of the coastal State and that has always been true. Why would the drafters of UNCLOS say anything about territorial sea fisheries disputes?

92. Article 2(3) provides only that sovereignty in the territorial sea is exercised "subject to the Convention." We say that also means subject to the Convention's provisions on fisheries access disputes, including Article 288(2). The obvious inference is that any agreement on access to territorial sea fisheries must likewise provide for dispute settlement if it is to fall within UNCLOS compulsory jurisdiction. And a fortiori there must be an agreement. Well, of course we say there is no agreement, but both Parties do agree that if there is, it doesn't provide for dispute settlement. But either way, we would suggest there is no jurisdiction under Article 288(2) over fishing in the territorial sea.

93. Mauritius attempts to evade these points by again incorporating its alleged access agreement within Article 2(3) and then relying on Article 288(1) for jurisdiction, but this is as flawed in this context as it was under article 56. We say that whether the alleged agreement is viewed separately from Article 2(3) or as part of Article 2(3), there must still be provision for dispute settlement in accordance with Article 288(2) in order for that dispute about a fisheries access agreement to fall within Part XV jurisdiction. And we would say that accordingly there is therefore no jurisdiction under Article 288 (1).

94. Of course, we would also observe, and I will come back to this this afternoon - we're not going to get away from article 56 - but we would observe that article 56(2) is of course different from Article 2(3). It merely talks about having "due regard" for the rights of other States and acting "in a manner compatible with the provisions of the Convention". Now, in our view, having "due regard" means what it says: It means take account of, give consideration to, do not ignore. The Virginia Commentary notes that: "The significance of this provision [art 56(2)] is that it balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the Exclusive Economic Zone."[48]

95. And the key word here is "balances". Article 56(2) is concerned in particular with balancing the sovereign rights of the coastal State with the freedoms of navigation and other article 58 freedoms exercisable by other States in the Exclusive Economic Zone. If there are good reasons for overriding the rights of other States in the EEZ, then article 56(2) allows that, and indeed that is expressly confirmed by article 58(3). And for that reason it cannot be read in clinical isolation from its context.

96. Now, in the present context articles 61 and 62 are the most relevant provisions, and Mauritius has said almost nothing about those two articles. Well, we would say that article 62 gives the coastal State ample power to regulate and terminate foreign fishing rights in the Exclusive

[48] *UNCLOS Commentary 1982*, vol. II, p. 543.

Economic Zone on conservation grounds. And we would say that Article 297(3)(a) leaves that judgment exclusively to the coastal State, subject only to conciliation in cases of arbitrariness or abuse. What is missing from Mauritius' reading of article 56(2) is any sense of a coherent relationship between that article and articles 58(3), 61, 62, and 297(3).

97. And that leads me to the obvious conclusion on jurisdiction over this element of the dispute. Mauritius and the United Kingdom never agreed any mechanism to settle disputes with respect to Mauritian fishing in the territorial sea or in the waters out to 200 nm, and UNCLOS Part XV cannot now be invoked to solve that omission or the legal consequences that flow from it. That conclusion is consistent with the terms of section 2 of part XV, and it ensures, as Mauritius' does not, coherence and consistency between the treatment of the territorial sea and the EEZ fisheries access disputes. In both cases, we would argue, a Part XV court or tribunal will only have jurisdiction over that access dispute only insofar as the parties to the access agreement have provided accordingly.

98. And this not an absurd or unreasonable conclusion. On the contrary, there would have been little point in negotiating a complex and balanced fisheries regime for the EEZ, with specific rules on jurisdiction designed to protect the coastal State's sovereign rights from litigation by distant-water fishing States, if that regime could then be undermined via claims to fish in the territorial sea. And to hold that you have jurisdiction over territorial sea fishing while you have none over EEZ fishing truly would be an absurd and unreasonable conclusion.

That brings me to jurisdiction over claims with regard to the continental shelf.

G. Jurisdiction over continental shelf claims

99. Mauritius claims the Marine Protected Area contravenes its alleged right to seabed minerals and sedentary species. It invokes article 78 of the Convention. The United Kingdom of course does not accept that Mauritius has any right – any current right – to exploit continental shelf resources within the MPA, nor does it accept that such a claim involves interpretation or

application of the Convention. At best this claim, it seems to us, requires interpretation of the understanding reached in 1965, an issue that falls outside the scope of your jurisdiction under Article 288 of the Convention for reasons already explained.

100. In any case, as pointed out in the Counter-Memorial, the MPA has no bearing on the exploitation and exploitation of seabed minerals. It has not altered the longstanding policy of not granting any licences for exploration or exploitation of the seabed. Mauritius has not explained how the creation of an MPA or the ban on commercial fishing can have interfered with the oil and mineral rights which it claims to have.

101. Mauritius offers no evidence that its nationals have ever harvested sedentary species in the MPA. Even if it could be said that there is a dispute about those species, which we rather doubt, it would not be a dispute about fisheries, as Mauritius contends[49], but a dispute about BIOT's continental shelf resources. And it would not be about interpretation or application of UNCLOS but about interpretation and application of the 1965 understanding. That too falls outside your jurisdiction under Article 288.

I'm almost at the end. That brings me to article 194.

H. Jurisdiction over Mauritius' article 194 claims

102. I suppose for the sake of completeness, I should say something about this. The conclusion is obvious. It too is outside your jurisdiction.

103. Mauritius relies on article 194 to advance a claim that essentially, if I understand it correctly, future regulation of marine pollution in the Marine Protected Area may unjustifiably interfere with its right to fish. It also argues that the United Kingdom must consult Mauritius in order to harmonize its policies on marine pollution with those of Mauritius.

104. At present the MPA involves no new laws or policies on marine pollution. The laws already in force when the MPA was created remain in force. Mauritius has never challenged

[49] MR, para 7.74.

the compatibility of those laws with UNCLOS, nor has it previously asserted that they violate its claimed rights. Its case as outlined last week seemed to focus on the possibility that future legislation on marine pollution might interfere with fishing.

105. It's a little difficult to identify a dispute here over which the tribunal could have jurisdiction. And moreover, although article 194 is undoubtedly concerned with protection and preservation of the marine environment, it does not constitute the "specified international rules and standards" whose contravention comes within your jurisdiction under Article 297(1)(c), for all the reasons I set out earlier, and it seems unnecessary, I think, to pursue this point any further. There is manifestly no basis for jurisdiction.

That brings me to the last claim: Abuse of Rights.

I. Abuse of Rights

106. Mauritius accepted last week that this Tribunal would have jurisdiction over its abuse of rights claim only to the extent that it already has jurisdiction over a dispute concerning other provisions of the Convention. So, if Article 297(1)(c) does not give you jurisdiction over the MPA declaration or the fishing ban, or if Article 297(3)(a) excludes jurisdiction, then there is likewise no jurisdiction over the related article 300 claim.

107. But the relationship between jurisdiction over the merits of its case, and jurisdiction over an article 300 claim, does not quite end there. It's a little more complicated than Mauritius may have suggested. The core of Mauritius' case on abuse of rights is the denial of fishing rights, and the Convention has its own special regime for abuse of rights claims in that context – that's Article 297(3)(b). I said earlier this morning I would come back to that and now I am. Article 297(3)(b) mandates compulsory conciliation as the remedy for abuse of coastal State rights over fishing.

108. Mauritius has said nothing about Article 297(3)(b). Compulsory conciliation was included precisely in order to deal with abuse of rights by coastal States with respect to EEZ fisheries

access. So Article 297(3)(a) is not a complete withdrawal of any remedy because Article 297(3)(b) does make compulsory conciliation available, and it applies – as you will see now on the screen - where the coastal State has, among other things, "arbitrarily refused" the request of another State either to determine the total allowable catch or to allocate part of any surplus to that State. Now, if, as Mauritius claims, the MPA has indeed been adopted for ulterior political reasons – as it argued last week – if it is not justified on fisheries conservation grounds, then it might well be that there is a case here for characterising the withdrawal of fishing licences and the ban on commercial fishing as arbitrary. It's not for me to explore the parameters of that case.

109. But Mauritius has not requested the determination of allowable catch for the BIOT Marine Protected Area. It has not requested the allocation of any surplus. Presumably it is not interested in conciliation for that purpose, or perhaps it is not interested in fishing. Either way, it cannot then turn round and use article 300 to make what is essentially the same claim concerning denial of fishing rights.

110. So, even if it had a good case on the merits of this claim, Mauritius cannot evade Article 297(3)(b) simply by repackaging that claim as one based on article 300. In our view, insofar as its claims with regard to fishing rights have any substance – we don't think they do – the article 300 claim made by Mauritius falls within the confines of Article 297(3)(b) and is subject to compulsory conciliation. It is therefore not within the jurisdiction of this tribunal.

111. Mr. President, members of the tribunal. Even by the standards of international litigation Mauritius has presented a remarkably fragmented, disjointed and selective account of the UNCLOS dispute settlement regime and its relationship to the substantive provisions of the Convention. But the Law of the Sea Convention is not an à la carte meal. It is a package deal. It has to be taken whole.

a. That concludes my arguments for this morning – no, it is the afternoon. I beg your pardon. And that concludes my arguments for this part of the afternoon, and I therefore invite you to hold first that: Mauritius' claims with respect to articles 55, 56, 63, 64, 78, and 194 of UNCLOS, and article 7 of the Fish Stocks Agreement, are not within your jurisdiction under Article 297(1)(c), and

b. that insofar as these claims relate to conservation and management of living resources of the Exclusive Economic Zone they are removed from your jurisdiction over fisheries and living resources by articles 297(3)(a) and (b), and

c. that Mauritius' claims with respect to articles 2(3), 56(2) and 78 of UNCLOS are not within your jurisdiction pursuant to Article 288(1), 288(2), or otherwise, and

d. that Mauritius' claim under article 300 is not within your jurisdiction by virtue of Article 297(3)(b).

Mr. President, Members of the Tribunal, thank you for listening. And I would ask you to call Mr. Wordsworth to the podium.

PRESIDENT SHEARER: Thank you very much, Professor Boyle.

PROFESSOR BOYLE: Unless I can assist any Member of the Tribunal.

PRESIDENT SHEARER: Are there any questions?

No.

Thank you very much.

The 1965 understandings; alleged breach

of articles 2(3) and 56(2) UNCLOS with respect to the alleged fishing rights

Sam Wordsworth QC

A. Introduction

63. Thank you, Mr. President, Members of the Tribunal, we shift to the merits. I'm going to be looking at some detail at Mauritius' case that a series of binding undertakings were given by

the British Government in 1965, with a particular focus on the alleged undertaking with respect to fishing rights, as that has come to occupy very considerable space in Mauritius' claims in these proceedings.

64. The claim on fishing rights has, of course, to be made out by Mauritius at two levels: first, by Mauritius establishing the existence of rights under international law arising pursuant to a binding undertaking contained or reflected in the minutes of the meeting of 23 September 1965, or pursuant to alleged traditional fishing rights; and secondly, by establishing that the declaration of the MPA cuts across the asserted fishing rights in such a way as to lead to breach of Articles 2(3) and/or 56(2) of UNCLOS. And I'm going to be looking at the two stages to the claim in that order, and Professor Boyle will then be coming back later this afternoon to deal with the alleged breaches of UNCLOS on consultation, although, in fact, as you may have picked up already, he is making some of the, or he is taking the running, the principal running on the legal submissions on Article 56(2).

65. But, I should say at the outset that, as follows from a close look at the key documents, you never get to the provisions of UNCLOS that are relied on, because there never was any intention on the part of the United Kingdom to be bound by reference to what was and always has been a non-binding understanding on fishing rights.

B. The 1965 record

66. I wish to start with the precise wording of the record of the meeting of 23 September 1965, as that, as is agreed between the parties, reflects what was subsequently accepted by the Mauritian Council of Ministers. We say of course that this record contains a series of understandings, not legally binding obligations, while Mauritius argues the contrary. But, and Mr. Reichler appeared to approve of this last week to some extent[50], we think that what matters is not so much what labels are used, but what the wording in the record of 1965

[50] Transcript, Day 3, 256 to 257.

establishes, with a particular emphasis on the question of whether there was an intention to be bound.

67. To that extent, we note that there was something faintly quixotic about Mauritius' arguments last week, with Ms. Macdonald saying repeatedly on day 2 that what matters is not what label has been used in the past by UK officials, but rather the reality[51], and then Mr. Reichler taking you by contrast to every internal document he could find to highlight where UK officials had used the term 'undertaking' not 'understanding,' and, of course, he was asking you to draw firm conclusions from the use of the former term.

68. Now, before I ask you to take up the 23rd September 1965 record with a particular eye to the alleged undertaking on fishing rights, I wish first to recall the background to the meeting of 23 September, and this was as follows:

a. The fishing as of 1965 was limited to fishing for the domestic needs of the then inhabitants of the islands. In that light, it is unsurprising that the issue of fishing rights appears to have received only very limited attention in the exchanges between the British Government and the Mauritian Council of Ministers.

Secondly – and Ms. Sander has taken you to the relevant facts and the relevant documents on all these background points, so at this stage I'm not going to ask you to turn to any particular documents, but I will give you the references in the Judges' Folder.

Secondly, the reference to fishing rights was a late addition to the text appearing only on 1st October 1965. That's Tab 29 of our Judges' Folder. It was not a matter discussed on 23rd September 1965, and you can see the original record at Tab 61 of our Judges' Folder. Rather, as we saw, it was subsequently added into the record in light of the handwritten letter from Sir Seewoosagur Ramgoolam on 1st October 1965.

[51] Transcript day 2, page 82 lines 22-24, page 83 lines 3-4, and page 92 lines 20-22.

ARBITRATOR GREENWOOD: Mr. Wordsworth, can we just be clear about that. I was going to ask both Parties about this. I realize it may be impossible to answer this question, but is your case that this was an amendment to what had been agreed put forward by Sir Seewoosagur Ramgoolam at a later stage, or is it rather that he was seeking to correct the draft minutes on the basis that he thought they didn't properly reflect what had been said at the meeting? Since I presume everybody who attended the meeting is now dead and has been dead for some time, I doubt we can answer this question, but I'd like to know how each Party puts that point.

MR. WORDSWORTH: I think to the extent that one can answer it, it's going to have to be by reference to that manuscript note because we have virtually—well, as far as I'm aware, we have nothing else that tells us what happened subsequent to the 23rd of September, so far as concerns this point on fishing rights. That manuscript letter, I should say, rather than note, it's at Tab 29 of your Judges' Folder, and I think in light of Judge Greenwood's question, I will have to ask you to turn to that.

Sorry, I should have made clear. You've now got two volumes in our Judges' Folder. I do apologize. This is Volume 1. I'm very sorry.

So, you see there at the top from Sir S. Ramgoolam, you will see underneath that, underneath the address of the Strand Palace Hotel, I presume it's acknowledged in manuscript, it looks to be on the same date. Dear Mr. Trafford Smith: "I and Mr. Mohamed have gone through the enclosed papers on the question of Diego Garcia and another near island, i.e., two altogether, and we wish to point out the amendment that should be effected to Page 4 of this document. The matters to be added formed part of the original requirements submitted to H.M.G. We think that these can be incorporated in any final agreement."

So, I think it's fair to characterize that what is happening here is that the original record of 23rd September has been received by the Mauritian delegation. They've gone through that record, and they've said no, we want to add something, and what they wanted to add – and they

are effectively, they say, to point out the amendment that should be effected, "the matters to be added formed part of the original requirements submitted to H.M.G. These can be incorporated in any final agreement." Well, of course, that makes sense because at this stage you're still, I think, six, five weeks ahead of the acceptance of what is recorded in this document, the Agreement – in fact, said in a very loose term – by the Mauritian Council of Ministers on 5th of November.

ARBITRATOR WOLFRUM: Mr. Wordsworth, that's an important element. Here there is a reference in this letter, this handwritten letter, to the original requirements. To what does it refer to?

MR. WORDSWORTH: Judge, that refers back to the requirements as stated by Mauritius on 30th of July 1965, and with your leave, perhaps I will take you to that, and that is Tab 30. So, in fact, it's the next tab.

Now, you can follow through, I think I can take you to a document which takes you through the chronology of what is happening, and that establishes that the requirements that are being referred to in the 1st of October can only be as stated here as 30th of October, and what you will see there in Paragraph 2, the references to Ministers objecting to detachment which would be unacceptable to public opinion in Mauritius, they therefore asked that you consider with sympathy and understanding how UK, U.S. requirements might be reconciled with the long-term lease; e.g., for 99 years. That's not relevant for present purposes. They wished also the provision should be made for safeguarding mineral rights to Mauritius and ensuring preference for Mauritius if fishing or agricultural rights were ever granted. So, that is what the Mauritian delegation is seeking on the 1st of October.

ARBITRATOR GREENWOOD: Mr. Wordsworth, you said the 30th of October. I think you meant the 30th of July. On the 1st of October they are referring back to the 30th of July.

MR. WORDSWORTH: Yes. That's exactly right.

ARBITRATOR GREENWOOD: Mr. Wordsworth, this is again one of the points I wanted to – to go back to the first question I asked, what you're saying is that, although we can't be sure, Sir Seewoosagur was seeking to introduce on the 1st of October something that had not been agreed on the 23rd of September. He wasn't simply trying to correct the minutes better to reflect that discussion.

MR. WORDSWORTH: Well, no, I would actually put it slightly higher than that because we can be sure that was not agreed on the 23rd of September.

So, if I can take you to a different annex – and I apologize for doing this, because this is in Volume 2 – I will just double-check before I ask you to pick it up – yes. It's Volume 2 of the Judges' Folder, Tab 61. Now, this is Annex 8 to the United Kingdom Rejoinder, and this is the original minute, as we understand it, of the meeting on the afternoon of the 23rd of September, and what you will see there is largely it's the same wording, so you'll recognize the wording in the second paragraph; for example, Mr. Reichler very much focused on the sentence at the end of this paragraph. "He had throughout done his best to ensure that whatever arrangements were agreed should secure the maximum benefit for Mauritius." And my friend Mr. Reichler kept coming back to that.

But you'll see that what follows is four paragraphs which doesn't include the supposed binding undertaking on fishing rights, and then you'll see that this is set out in record form, and if I can ask you to turn to the third page of this, you will see towards the bottom, summing up the discussion, the Secretary of State asked whether he could inform his colleagues that Dr. Ramgoolam, et cetera, were prepared to agree to the detachment of the Chagos Archipelago on the understanding that he would recommend to his colleagues the following, and there you see the original two, three, four, five and six, and then there is a seven which somebody has added in manuscript, "amendments enclosed."

ARBITRATOR GREENWOOD: That could just be that Sir Seewoosagur thought the draft minutes he had been sent didn't properly reflect what they had agreed on the 23rd of September. What I'm trying to get at is this: Was the manuscript letter from the Strand Palace Hotel an attempt to correct an otherwise deficient minute or an attempt to renegotiate the package, albeit in a relatively restricted compass?

MR. WORDSWORTH: I think it's an extremely difficult question to answer from the documents, as I understand them, because it's difficult to pick up pointers in the 1st of October manuscript letter, so what I'd like to do is a little bit of homework over the lunch adjournment and see if I can come back to help you on that.

ARBITRATOR GREENWOOD: Thank you.

And while you're doing that, there is another question, which I was going to ask anyway, and that is that the Tab 30, the letter you had just taken us to from the Governor, dated the 30th of July, which I think you entirely understand to be tied in to Sir Seewoosagur's letter of the 1st of October, this refers to ensuring preference for Mauritius if fishing rights were ever granted. In other words, it seems to me to be looking to something that wasn't happening in 1965. Its preference in relation to something that might be granted in the future, whereas other documents talk about perpetuating a practice that already existed, and I must say it seems to me the inconsistency between the two runs through the documentation for the whole of that period of the mid-sixties, and it characterizes the documents put forward by both Parties in this case, but I, for one, would find it helpful to hear both Parties' submissions on whether what was meant by fishing rights was a perpetuation of what was already in existence, or protection for Mauritius to get something that had not yet been granted.

MR. WORDSWORTH: Now, I think – I mean, our submission would be that, yes, it's difficult to pin down with absolutely clarity on that question because one can say

preference in relation to rights were ever granted could be looking forward to the future, whatever rights were granted in the future.

But what one does not see is any evidence here – and absolutely I accept that the evidence we're looking at is fairly reduced. One sees no evidence here that they are looking forward to prospectively to whatever fishing rights were ever going to be granted. And one can say also that there is a tension, if the interpretation is correct, that this is for preferential rights if ever granted whatever those rights are going to be in the future, there is a tension there between what one sees in Paragraph 22(6) of the September record, which I will come back to a little later, you will recall that says – it refers to facilities that would remain available, and the use of the term "would remain available" suggests they're simply referring to what limited fishing there happened to be at the time, and that's consistent also with the fact that fishing wasn't such a big issue. It's a huge issue in this case, but it was not a big issue back in September 1965.

But I would also make the point that ultimately what the case on fishing rights comes down to is Mauritius making out a case under *Nuclear Tests*, and the tests under *Nuclear Tests* is not just about, or as part of requiring that there be an intention to be bound, it has to show clarity as to what the undertaking, the alleged undertaking, actually provides for. So, although we will come back to you this afternoon, perhaps, maybe a little more in relation to your question, the running is on Mauritius to show that there is a binding undertaking here that sets out its case in clear terms.

ARBITRATOR GREENWOOD: Yes, I understand that. Leave aside the question of whether whatever was said has a legally binding quality for a moment, and just look at the question of what the content of any agreement or any undertaking might have been. On the one hand, you have the view put by, I think it's Monsieur Forget, speaking on behalf of the Prime Minister in the Mauritius Legislative Assembly a few weeks after the November Council of Ministers decision, where, if I remember rightly, he essentially says, as far as I'm aware, the only

fishing is domestic fishing by the people who are resident in the Archipelago, and as they're all going to be removed, that's coming to an end.

Now, if that is all that's meant by fishing rights, then presumably it comes to an end with the departure of the last Chagossian from the islands, but neither Party seems to have treated it as such because they go on corresponding about fishing rights long after the last Chagossian leaves – it's in 1973, isn't it? I really would –

MR. WORDSWORTH: Yes.

ARBITRATOR GREENWOOD: I would really welcome some help. I put the point to you because I think the United Kingdom needs to make its position clear, but I would also like to hear from Mauritius on this in the second round, and obviously you will have the opportunity to respond to them.

MR. WORDSWORTH: Yes. My point on *Nuclear Tests* was simply to emphasize that it's for Mauritius to establish in the requisite clear and precise terms that one sees as required by *Nuclear Tests*, its meaning, so it's perhaps a slightly separate point to a general, is there an intention to be bound issue. It is about content and not just about the general status of understandings.

But I'll come back to Forget perhaps a little later, but I think again one has to be looking at the position that is being put forward by Mauritius, which is there is an undertaking here.

Now, the subsequent practice doesn't provide quite such a clue in quite such sharp terms as might be supposed from the fact that, yes, of course, then the UK authorities or BIOT did issue licenses for increasingly large zones, because that subsequent practice could just as easily have been done by reference to a non-binding political commitment as it could have been done by reference to a binding legal obligation. We know that Mauritius at every step wants to portray the United Kingdom as an ex-colonialist which is not acting in good faith, but actually that doesn't

reflect the reality of what was happening here, and the fact that the United Kingdom then goes on in good faith to offer more to Mauritius than is placed here within the confines of this 1965 understanding does not, we say, establish its case. It's not subsequent practice in the usual sense that one might be looking at it in the confines of 31(3)(b).

PRESIDENT SHEARER: Mr. Wordsworth, I'm sorry to add to the burden of questions, but something struck me again when reading at Tab 61 the record of discussion of the 23rd of September, and we go to those, the summary, the Secretary of State summary, one, two, three, four, five, little six Roman, and then we have handwritten, seven to ten amendments enclosed. So, I just want to get a full picture of what was discussed or agreed or put forward. Do we have those amendments anywhere, seven to ten? The fact that there were some is indicated by the Colonial Office dispatch to the Governor of Mauritius in the next Tab, 63, which refers in Paragraph 6 to H.M.G. of taking careful note of Point 7 and 8; nothing is said about nine and ten. So, I just wonder whether we should have those or whether they are relevant to our understanding.

MR. WORDSWORTH: You do have those. They are at the back of the manuscript letter, so there in Tab 29 on the third page of Tab 29, and you will see that what is being referred there, can you see –

PRESIDENT SHEARER: It's in there, okay.

MR. WORDSWORTH: It's before it at seven, eight, nine and ten. Of course, that's not how it appears in the agreed record.

PRESIDENT SHEARER: Yes. Well, thank you very much for that clarification.

I see now that we're getting close to lunch. What will be a convenient point for you to break, Mr. Wordsworth?

MR. WORDSWORTH: Well, if the Tribunal would be willing to sit a little bit early, it may make sense to break now before I continue.

PRESIDENT SHEARER: Yes. Well, I ask because I've just got a couple of matters to raise with the Parties before the luncheon break, so just in a few minutes we will do that. They're not directed specifically to you, but generally to the agents.

First of all, on the question of the publication of annexes, which we decided we recommended the Parties try to agree on which annexes to the pleadings could be made available for publication, and I'm just wondering whether any progress had been made on that and perhaps something could be said or a report could be given when we return from lunch. If the Parties have been unable to agree, well, then I think the Tribunal may have its own observations to make on that matter.

The second thing relates to the Transcripts, and the Tribunal would be greatly assisted if a corrigendum list could be made, not of the whole transcript, but to especially the references, the footnotes. It said that the Tribunal can work on those or have those references before we get the final version of the Transcript, if that would be possible before too long.

And the other thing is I'm not sure whether both Judges Greenwood and Wolfrum asked some questions yesterday. I'm not sure whether they have all been answered. If there are any unanswered questions from the UK side, we'd be grateful if they could be dealt with before the end of today. Yes. Thank you very much.

Well, with that, I think we should take the – yes, Mr. Whomersley.

MR. WHOMERSLEY: I just was going to say on the first point, there have been consultations between the agents, and obviously we are very busy, as you appreciate, but I hope that we'll be able to report back hopefully quite soon to you and Members of the Tribunal. I think that's agreed between the two of us.

PRESIDENT SHEARER: Yes, Professor Sands.

PROFESSOR SANDS: I think just to assist the Tribunal a bit further so that you know that we – and I ask Mr. Whomersley's position to just let you know roughly where we are, I

think it will provide reassurance, and I stand to be corrected if I have in any way got this wrong, but as we understand it, the position of the Parties is that everything can be made public with immediate effect, subject, during the course of today, subject to two caveats: Firstly, in relation to Annex 185, we are working through the various documents. We have reached agreement on what to do in relation to almost all of them, but not all of them, and we're trying to do that. So, our understanding is that the sensible way to proceed is to make everything public without 185 at all, so that we don't hold everything up as we try to work out 185.

And the only other caveat, but I think it may now have passed because it's Friday, as I recall, there were five documents that as a courtesy Her Majesty's Government wished to make available to sitting Ministers today to alert them that they were going to be made public at some point today or thereafter, and I don't know whether that position has now been resolved, but we made a lot of cooperative progress.

PRESIDENT SHEARER: Thank you, Mr. Sands.

Yes, Mr. Whomersley.

MR. WHOMERSLEY: I'm grateful to Professor Sands. I mean, that is accurate. I just wanted to add one thing, which is that some of the documents in Annex 185 are also annexed elsewhere in the Mauritius documentation, so obviously what's said about Annex 185 applies to those, if there are annexed elsewhere.

I could also say that on the second point, for which we are grateful for understanding on, we understand that all of the relevant persons have now been informed that these documents are likely to be made public. So, that issue has now fallen away and been resolved. Thank you.

PRESIDENT SHEARER: Very good, then.

Well, that takes us to exactly 1:00, so we'll break for lunch and return at 2:30. Thank you.

(Whereupon, at 12:59 p.m., the hearing was adjourned until 2:30 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT SHEARER: Yes, Mr. Wordsworth. Thank you.

MR. WORDSWORTH: Mr. President, Members of the Tribunal, if I can first just address Judge Greenwood's two questions, first, what is the status of the 1st October letter? Is it a correction of a deficient minute or renegotiation of the package, and we say it must be the latter, and this is because, one, there's no mention in the original Record of the Meeting of 23rd September 1965 to fishing at all; i.e., if you look at Tab 61 – I don't ask you to do that now but just for your record – you will see that nowhere in the body of the minute is there any reference to fishing rights.

Second, the letter of 1st October 1965 itself does not say or in any way suggest there was an omission in the record that had then been received, but instead it refers to amendment and that the matters to be added formed part of the original requirements submitted to HMG. If the matter of fishing rights had been negotiated on 23rd September 1965, Sir Seewoosagur would presumably have referred to that, and he would have said, we think that these must be incorporated in our agreement. He did not say that. He said, we think that these can be incorporated in any final agreement.

And another third point for your record is also a reference to these matters being added on 1st October 1965, and that's at Tab 60 of your Judges' Folders at Page 6.

I move to answer Judge Greenwood's second question with respect to the UK's case on what the intention was with respect to future fishing rights, and we consider that the 1965 understanding reflected what Sir Seewoosagur had been seeking, preference for Mauritius if fishing rights were ever granted. Now, I've already taken you to the 30th of July document and the 1st of October document, so I just want for you to recall that there was also a meeting of 13th September where the Mauritian delegation led by Sir Seewoosagur stated that, "They would like preferences in any fishing rights in Diego Garcia waters." And that's also at Tab 60 of this Judges'

Folder. Now, we consider that the underlying intention and what the 1965 understanding covers is preference for Mauritius if fishing rights were ever granted, to include future fishing rights if such were granted by the United Kingdom.

So, if I can ask you then to move on to the actual document at issue, which is the text of the Record of the Meeting of 23rd September 1965, as amended, and that's in Volume 1 of your Judges' Folder at Tab 8. And if I can ask you to turn on in that tab to Paragraph 22, which is really the issue of concern for us and, of course, it's Paragraph 22(6) that we are focused on. And you'll see when one looks at that, the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable.

69. The first and foremost obvious point is that the commitment, such as it is, is to use 'good offices.' Now, according to Mr. Reichler on day 3, it would make absolutely no sense to interpret this provision so as to obligate the US to endeavour to obtain US consent to Mauritian fishing rights, but then, after this consent was obtained, to allow the UK unilaterally to choose not to give effect to those rights, or to do so briefly, and then abolish them. And that, he said, would have been bad faith[52].

70. Now, that is to address what is an interpretative difficulty for Mauritius by positing an extreme case on the facts that never happened. Mauritius contends for the existence in these words of the grant of an absolute and perpetual right to fish. But such words are absent. They are not suggested by a commitment to use 'good offices,' and the actual words cannot be read out of existence by saying that good faith performance could only be achieved by construing the words as if it read, and it does not read this, but this is Mauritius' case, "the British Government would ensure that the following facilities in the Chagos Archipelago

[52] Mr. Reichler, day 3, p. 268, line 23 – p. 269, line 4.

would remain available to the Mauritius Government, subject always to consent from the US Government." But that's not an exercise in construction, that is an exercise in re-drafting.

71. The difficulty for Mauritius is that there is nothing to suggest in the actual wording that the United Kingdom was handing away its own discretion in terms of granting fishing rights, and it would not have been bad faith for it to desist in making any grant of fishing rights as of November 1965, just as it was not a breach of anything to cease issuing fishing licences to Mauritian vessels from April 2010.

72. The object of the 'good offices' is 'to ensure that the following facilities … would remain available'; and the Tribunal will have noted that it may appear odd to refer to 'fishing rights' as a form of facility, and one sees that the reference to 'fishing rights' has been slotted in with what are more obviously facilities, i.e. navigational and meteorological facilities, and use of an airstrip. You can obviously see that at the top of the following page.

73. But, on closer inspection, this is nonetheless a good fit for the reference to 'fishing rights.' What was being sought by the Mauritian delegation was in no sense absolute or sovereign rights, but a permission to use or have access to certain aspects of what was to remain UK territory and under UK sovereignty.

74. And this is one oddity of the Mauritian interpretation. It assumes that the term 'fishing rights' in the 1965 record was intended to be given the broadest conceivable meaning as a matter of international law; that is, as if it were intended to mean 'absolute and indeed sovereign rights over fishing, and harvesting sedentary species and the like.'[53] But there is no basis for that assumption. There is no hint of this in the wording. And the assumption is radically at odds with what the Mauritian delegation had been seeking. They sought preference with respect to fishing rights to the extent such were granted, and that grant would be pursuant to domestic, not international, law. In effect, they were seeking preference with

[53] As would follow from e.g. Mr. Reichler, day 3, p. 274, lines 17-22.

respect to fishing licences if and when granted, and that is how the use of the term 'fishing rights' should be understood, not as rights to fish under international law.

75. I move on to the qualifier 'as far as practicable.'

76. On any case, there was no absolute obligation, and this is entirely consistent with what the Mauritian delegation had been seeking; that is, if, within the realms of what was practicable, fishing rights were to be granted by the United Kingdom, Mauritius was entitled to benefit from these.

77. Now, as I understood Mr. Reichler's submissions, Mauritius is saying that this phrase reflects no more than the fact that the UK was not in a position to grant an absolute right, in that this was subject to what the US would permit by reference to its defence interests in respect of Diego Garcia[54]. The obvious difficulty with that analysis is that this is not what paragraph (vi) says. The wording could very easily have been, but is not, 'subject always to consent,' or 'so far as is acceptable to the US.' What was to be considered practicable was evidently not a matter left to the USA, and that again is entirely consistent with what Mauritius was in fact seeking – preference if fishing rights were ever granted.

78. Finally, one comes to the reference to 'fishing rights,' a term which Mauritius seeks to portray as unqualified and unambiguous[55]. But the term cannot be construed in isolation, divorced from the qualifier 'as far as practicable,' and the natural meaning in this domestic law document is in any event rights to fish as permitted as a matter of domestic law; that is, licences.

79. And, when one comes to the practice of the United Kingdom and Mauritius, it is evident that Mauritius did not consider that it had absolute or sovereign rights to fish. It accepted that such rights as it had were domestic law rights, as permitted by BIOT, in other words, as designated or licensed. As follows from Ms. Sander's presentation, Mauritius did not stop its

[54] E.g. Reichler, day 2, pp. 149-150.
[55] E.g. MR, para. 6.47.

fishermen applying for licences issued by BIOT as any State with absolute or sovereign rights would have done. It did not voice its opposition when the domestic rights that it was accorded were restricted by the BIOT, for example by reduction of the number of available licences or by exclusion from closed areas (even where such closed areas were not related to US defence needs).

80. In short, much as Mauritius now wishes the contrary, sub-paragraph (vi) does not say: "fishing rights within the area within which Mauritius would be able to derive benefit, but for change in sovereignty should remain with the Mauritius Government, subject always to what is acceptable with respect to the defence interests of the US Government." It's not what it says, and it is beyond us to see how it is clear that this is what was intended, which is what Mauritius needs to establish for its *Nuclear Tests* argument.

81. Now, before coming to the question as to the nature of the agreed record at paragraph 2 as a matter of international law, one first needs to follow through the course of events up to 5 November 1965.

82. The record of 23 September 1965, as amended pursuant to the manuscript letter of 1 October, was despatched by letter of 6 October. And you can see that at Tab 62 of the second volume of your Judges' Folder.

83. Now, Mr. Reichler took you to this, and he focused in particular on Paragraph 2, the reference there towards the end on Britain should now take the necessary steps to detach the Chagos Archipelago from Mauritius on the conditions enumerate in 1 to 8 in Paragraph 22 of the enclosed records. But to draw your attention at Point 5, Paragraph 5, it says, as regards points four, five, and six, the "British Government will make appropriate representations to the American Government as soon as possible. You will be kept fully informed of the progress of these representations." And that, of course, is entirely consistent with the commitment being to use good offices.

84. And then you see at Paragraph 6 is the rather elliptical reference to H.M.G. "having taken careful note of Points 7 and 8", and 7 and 8 are the understandings in relation to session and oil and minerals.

85. And then there is the response from the Mauritian Council of Ministers, and if I can ask you to turn to Tab 64, you'll see the telegram that was coming back, I think from the Mauritius Governor, and this is a document you now know well, the telegram of 5th November 1965:

a. Under paragraph 1, you see that agreement is confirmed 'on the conditions enumerated,' but one has to note the clarifications that are sought. You'll see there is a clarification sought in relation to paragraph 6 that I've just taken you to. So, the Council of Ministers is confirming agreement on the understanding that (1) "the statement in paragraph 6 of your despatch, HMG have taken carefully note of points 7 and 8 means HMG have, in fact, already agreed to them". The point here is that there is nothing equivalent regarding paragraph 5 of that 6 October despatch. There is no statement that all fishing rights are to be taken as having been accorded to Mauritius because they had not been.

b. And you already have the point under paragraph 3 of this document, the dissatisfaction being reflected there with 'mere assurances' about 5 and 6, so a dissatisfaction with mere assurances. And a note for your record, you'll see from page 8 of Tab 31 of your Judges' Folder, that, 'categorical' assurances were then contemplated, but so far as we can see they were not pressed for, and just a point of clarification here, please note that the word "mere" appear in the telegram, but not the record of meeting which is at Tab 63 of the Judges' Folder, so this particular telegram as might be said is reflecting how the Governor understood matters. The basic point is that the Council of Ministers was dissatisfied.

c. And I'll come back to Judge Wolfrum's question on assurances in a moment.

86. So, pausing there, there is, as it were, offer and acceptance, subject to certain unilaterally formulated understandings by the Council of Ministers, and one comes to the question of the status of the documentation as a matter of international law.

87. Is there an international agreement, a treaty? No. I think there is largely agreement on that, although Mr. Reichler might have been suggesting the contrary on day 3[56], in answer to the question posed by Judge Hoffmann.

88. Is there nonetheless what my good friend Professor Crawford called a 'binding commitment'? His argument was that international law required free consent to any dismemberment of a Chapter IX territory, such that, as I understood it, conditions attached to such consent would be subject to international law[57].

89. But, as to this submission, Professor Crawford elected not to deploy his customary eye for teasing apart matters governed by different systems of law. At a general level, certain international law rules might, of course, have been binding on the United Kingdom in respect of its relations with its then colony. But that has no bearing on the separate question of whether the arrangement or agreement that was reached was subject to international law, or whether elements thereof have an existence as a matter of international law. And the answer to that question is as stated in Hendry and Dickson, an extract of which we've put at Tab 65 of Volume 2, your Judges' Folder. And you'll see there Hendry and Dickson, British Overseas Law, 2011, and there's a passage that deals with agreements between territories or between a territory and the United Kingdom. "It is not possible for overseas territories to conclude an agreement binding under international law with another overseas territory or for one or more overseas territories to conclude such an agreement with the United Kingdom. This is because internationally the Territories are not legal entities separate from each other or from the United Kingdom." And if I can ask you to look through

[56] Mr. Reichler, day 3, p. 287 line 10 - 288 line 2.
[57] Transcript, day 3, p. 253, line 7 et seq.

the rest of that in your own time, but to come back to the last two sentences. "To draft an instrument between the United Kingdom and an overseas territory in the form of an international agreement is very unusual and not desirable as it leads to confusion and uncertainty, not just between the participants, but for others, too. But regardless of the form they take, probably the most that these instruments could be is a contract binding upon the Parties under domestic law."

90. Now, it follows that, in assessing the status of the 1965 understandings, one needs to look not to international law, but British law, including British constitutional law. And it's clear that under British law the understandings were not legally binding or otherwise intended to have legal effect. Those involved in the understandings were, on the one side, the British Ministers in London, and, on the other, Mauritian Ministers (the Council of Ministers of the Colony of Mauritius). Under British constitutional law, arrangements of this sort between, to put it at its most formal, the Crown in right of the United Kingdom and the Crown in right of the Colony of Mauritius, could not be legally binding. They were at most political understandings, not enforceable in the courts.

91. So, yes, of course one could in principle look to international law to see whether consent to detachment was needed, and if so whether consent was validly given; but that does not somehow elevate all aspects of a document containing to given consent to matters of international law. Of course not.

92. And the same underlying reasoning in Hendry and Dickson would also deal with respect to any suggestion that, as of 1965, any *Nuclear Tests* type analysis can be applied. Statements made by the British Government to a part of the United Kingdom are not governed by international law, and the *Nuclear Tests* line of jurisprudence has nothing to bite on. That jurisprudence is predicated on a statement being made by State A to State B or States B and

C, as one can see for example from paragraphs 46 and 51 of *Nuclear Tests* (*Australia and France*)[58].

93. And so, in terms of how one would qualify legally the reference to assurances in the two documents of 5th November 1965, there are two points: First, there's a preliminary question as to the applicable system of law, which is domestic, not international law, and there is no binding effect. Secondly, in any event, one has to look at the record as a whole and not to the word "assurance" out of context. And from that record, we say it is clear that no legally binding commitment was given and none was understood to be given.

94. So what of the position post-independence?

95. You'll recall that the Mauritian Prime Minister's Office of 19 November 1969 wrote to the United Kingdom on 19 November 1969, and there's an affirmation there of what is referred to as an agreement on excision, and if I could ask you to turn to that, that's at Tab 66 of your Judges' Folder, the next tab. Sorry, it's from the Prime Minister's office to the British High Commission. And you see there the Prime Minister's office External Affairs decision presents its compliments to the British High Commission and "has the honour to refer to the agreement between the Government of Mauritius and the British Government whereby the Chagos Archipelago was excised from the territory of Mauritius to form the British Indian Ocean Territory. This excision, it will be recalled, was made on the understanding, inter alia, that the benefit of any minerals or oils discovered on or near the Chagos Archipelago would revert to the Government of Mauritius." Mr. Reichler took you to this document, you will recall, because of what then follows, the fact that Mauritius was saying that it intended to introduce in the near future legislation vesting in its ownership the seabed and the subsoil of the territorial sea and the continental shelf of all the islands under its territorial jurisdiction. "The Government of Mauritius wishes to inform the British Government that

[58] UKCM, Authority 8.

it will at the same time vest in its ownership any minerals or oil that may be discovered in the offshore areas of the Chagos Archipelago." Now, what you weren't taken to was the next document, at Tab 67, which is the response to this from the British Government of 18th December 69 through the British High Commission. You will see from the top the "British High Commission presents their compliments to the Prime Minister's Office and have the honour to refer to their Note of the 19th of November 1969 regarding one of the understandings reached between the British Government and the Government of Mauritius in 1965, when the Chagos Archipelago ceased to be a part of Mauritius." The understanding in question was that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Government of Mauritius, and the British Government then goes on to note what Mauritius is planning to do. And you will see overleaf the response of the British Government: The sovereignty of the United Kingdom over the Chagos Archipelago extends to the territorial waters of the Archipelago, including the seabed and subsoil under those waters. The United Kingdom is also entitled to exercise in accordance with Article 2 of the Convention on the continental shelf exclusive sovereign rights over the continental shelf of the Archipelago for the purpose of exploring it and exploiting its natural resources. In the absence of any agreement to the contrary, the enactment of legislation or issue of a license by another State which purports to relate to the ownership, exploration or exploitation of minerals and oil in those areas would be an infringement of the sovereignty or sovereign rights of the United Kingdom. The British Government feels bound to state that they consider the Government of Mauritius have misconstrued the understanding set out in the second paragraph of this note, which was only to the effect that the Government of Mauritius should receive the benefit of any minerals or oil discovered in or near the Chagos Archipelago. It is not considered that the wording of

the understanding can be construed as indicating any intention that ownership of minerals or oils in the area in question should be vested in the Government of Mauritius," and so on.

ARBITRATOR WOLFRUM: Mr. Wordsworth, thank you for that explanation very much, but you were at the point of explaining that before independence, the arrangements, as you put it, between Mauritius and the United Kingdom Government could not be qualified as international agreements or agreements or arrangements covered or governed by international law. We are now in the period after independence. My question is: Is this reference here what you're quoted or well-understood, does that mean that this commitment, which was still in the air, so to speak, after the islands are not any use anymore, that this is binding? It's a different question you are dealing with in the moment.

MR. WORDSWORTH: What I would like to, with your leave, Judge, is just to move forward a little bit in the record because what I wanted to do was to precisely address that question, but to address it by reference to the document that my learned friend Mr. Crawford focused on, and that, in fact, is a document of 1976, which refers to certain assurances. With your leave, what I'd like to do is just to show you two or three more documents and then to –

ARBITRATOR WOLFRUM: I want to you come back to that question, yes.

Thank you.

96. MR. WORDSWORTH: So, just moving forward a little bit, what one sees is that there then appears to be a period of calm, before the Mauritian Prime Minister's letter of 4 September 1972 saying that Mauritius has all sovereign rights relating to minerals, fishing, prospecting and other arrangements, and that's a document that Mr. Reichler took you to at Annex 67 of the Memorial. And there was also the Mauritian Prime Minister's letter of 24 March 1973. You may recall this as Ms. Sander took you to it, which was re-formulating the terms of the understanding in relation to fishing rights. That is Memorial Annex 69, at Tab 34 of our first volume. And of course, that attempted reformulation – you will recall there is

a reference to fishing rights being reserved to Mauritius – was not acceptable to the United Kingdom, and you've seen the UK internal document on that, Counter-Memorial at Annex 23, which Ms. Sander took you to. That's at Tab 34 of our Volume 1. And the letter of 3rd May 1973 that was then sent to the United Kingdom, you've seen in which it gave, "an assurance that there is no change in the undertakings given on behalf of the British Government and set out in the record as then agreed of the meeting at Lancaster House on 23rd September 1965". Tab 68 of our Judges' Folder.

97. And I'll come back to that in a moment. As I just said, Professor Crawford built his argument on Mr. Rowland's letter of 23 March 1976, which is Tab 69 of our folder. That's Memorial Annex 78, and you'll see there the critical paragraph is the third paragraph, and it's roughly halfway down. "I also take this opportunity to repeat my assurances that Her Majesty's Government will stand by the understandings reached with the Mauritian Government concerning the former Mauritian Islands now forming part of the British Indian Ocean Territory. And in particular that they will be returned to Mauritius when they are no longer needed for defence purposes in the same way as the three ex-Seychelles Islands are now being returned to Seychelles." And I have to say I'm quoting it again as the Mauritian allergy to the word 'understandings' is so strong that in actual fact the word 'undertakings' appeared instead of 'understandings' when this document was read out at day 3, p. 256, line 10, of the transcript.

98. Now, there are two points to make on these two UK letters – of 3 May 1973 and 23 March 1976.

99. First, they were not met by any complaint from Mauritius to the United Kingdom. Mauritius did not in subsequent correspondence persist in the attempt to re-formulate paragraphs (vi) and (viii) of the September 1965 record, as it had by the letter of 24 March 1973. And I should clarify that Mauritius does not now contend that the letter of 24 March 1973 provides

an accurate rendition of what had been agreed in 1975, and yet, curiously, its contentions on interpretation of the 1965 record come down to repeating the same inaccuracies.

100. Secondly, the statements contained in the two UK letters of 1973 and 1976 were evidently made to another State, and so Mauritius' *Nuclear Tests* case can in principle be applied to these. So, the question is, where does this get Mauritius so far as it concerns its case on a binding commitment, in particular in respect of fishing rights?

101. Now, Professor Crawford referred only to the second of these two letters, and that no doubt reflects the fact that the 3 March 1973 letter is concerned with correcting and establishing in accurate terms, and as a matter of fact, the contents of the record of the Lancaster House meeting. Yes, the word assurance was given. Do we accept that this is a factor to be taken into account in applying the *Nuclear Tests* criteria? But the question remains as to why the term was used and in what context. We say it was used in the context of correcting, and the purpose was to correct an incorrect rendition of the 1965 record.

102. By contrast, the March 1976 letter contains express assurances "that the British Government would stand by the understandings that had been reached." So, Mauritius has focused on this later letter in its legal submissions which, although it makes sense from the perspective of *Nuclear Tests*, makes its fondness for the use of the term 'undertaking' all the more puzzling. For the document on which it has elected to focus so far as concerns the matter of confirmation of the 1965 record post-independence refers to the "understandings reached," not the "undertakings made." And as to this, one thing is for sure – on Mauritius' case, reference to an understanding does not suggest the existence of a legally binding commitment.

103. And, in any event, any renewal of the 1965 statements post-independence would bring one back to the agreed record, as to which the criteria established in the ICJ jurisprudence and reflected in the 2006 ILC Guiding Principles would not be met, not least because there was

never any intention to be bound. As to this, you already have my points on the wording of paragraph 22, in particular, of course, subparagraph (vi), and I don't repeat them.

104. The next hurdle for Mauritius would be to show that the commitment on fishing in the 1965 record was clear and specific in nature[59], which is another of the criteria established in the ICJ jurisprudence, although Mauritius elected in its first round to pass over this, and to pretend that all were agreed that all that had to be shown was an intention to be bound and nothing more.

105. Our case is that the 1965 statement on fishing rights is hedged about with soft language and qualifications, with fishing rights being described as a form of 'facility.' And, of course, our case is that it reflected what Mauritius had been seeking, preference for Mauritius if fishing rights were ever granted. Now, the requisite clarity is absent, at least so far as concerns any commitment on the lines of what Mauritius now contends for, that is a perpetual and absolute right to all such fishing rights as could be granted as a matter of international law as it developed, even going so far as to qualify those rights as sovereign rights.

106. By contrast, what is clear is that what the Mauritian Ministers had been seeking was preference if and when fishing rights were granted, and that is only consistent with the UK's interpretation of this language.

107. As to the circumstances in which the statement was made, another of the established criteria in the ICJ jurisprudence[60], we say that the key factors are: (i) what the Council of Ministers was in fact seeking, and (ii) that there was only limited and "casual" fishing as of

[59] *Nuclear Tests Case (Australia v. France)* at paras. 43, 51, and *Nuclear Tests Case (New Zealand v. France)* at paras. 46, 53. See also *Case concerning Armed Activities (Congo v. Rwanda),* Judgment, ICJ Reports 2006, paras. 50 and 52; and Principle 7 of the 2006 ILC Guiding Principles.

[60] *Nuclear Tests (Australia v. France)*, para. 51; *Nuclear Tests (New Zealand v. France)*, para. 53.

1965[61] such that (iii), as appears from the negotiations, fishing rights were a far less important matter to Mauritius than, say, sugar quotas[62].

108. Now, Mauritius says we're missing the point, and that the truly important factor was that this was all part of a deal in which the Council of Ministers was agreeing to the detachment of the Chagos Islands. Well, yes, that is important, but, unlike the language actually used and the factors that I have pointed to, this is not a factor that tells one much, if anything, about the substance of the conditions or whether there was any intention to be bound with respect to fishing rights. Just because detachment was an important matter, it does not follow that there was any request for, and still less any agreement to, an absolute and perpetual legal right to fish within territorial or other waters, subject only to the consent of the USA.

109. Finally, it is well-established that a restrictive approach must be applied where interpreting unilateral undertakings. One gets that from the *Nuclear Tests* cases: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[63] That's paragraph 44 of *Nuclear Tests*, Australia and France. And the same rule is reflected at Principle 7 of the ILC Guiding Principles.

110. And that doubt is apposite here in circumstances where the text on fishing rights was a late addition, where there is no evidence of the content of any negotiation on this, and I should say that the absence of any negotiation is consistent with the absence of any intent to be bound and also the fact that the Council of Ministers was relatively moderate in its demands: it sought only preference as and when fishing rights were granted.

[61] See e.g. Mr. Forget's reply before the Mauritius Legislative Assembly dated 21 December 1965, and the letter of the Governor of Mauritius dated 25 April 1966. UKCM, Annexes 15 and 17.

[62] See e.g. Annexes MM, annexes 16 and 18 and UKR. Annex 6.

[63] *Nuclear Tests Case (Australia v. France)* para. 44, and *New Zealand v. France* para. 47.

111. And one final word on Mauritius' case on *Nuclear Tests*, which arises in light of Mauritius' response to the question put by Judge Hoffmann. On Mauritius' case, it has to show that, in writing the 23 March 1976 letter or such other communication that Mauritius now relies on, the United Kingdom evinced an intention to be bound by the 1965 understandings regardless of whether Mauritius itself stuck by the agreement to detachment which led to the existence of paragraph 22 in the first place. And we say that the existence of any such intention is implausible, and we leave it to Mauritius to identify the documents that it relies on in this respect in its second round.

112. Now, I have been focussing in the above on the understanding on fishing rights. But Mauritius also has a case on the understandings in respect of cession and oil and minerals. But for our part, we don't see how any of this assists Mauritius.

113. Whether or not the understandings on cession and oil and minerals are binding, what they do is emphasise that the UK is and Mauritius is not sovereign – and Sir Michael has set out our case on that.

114. Your attention has also been drawn to supposedly significant changes in the language in what the UK has said over time, and it is not clear to us even in what form Mauritius contends there is a legally binding undertaking. So, as this is becoming a big part of Mauritius' claim, we will wait to hear precisely what case is being made by reference to the *Nuclear Tests* jurisprudence.

(iii) Subsequent practice

115. I move on to the subsequent practice on fishing rights, and I just want to highlight three themes coming out of Ms. Sander's consideration of the facts.

ARBITRATOR GREENWOOD: Mr. Wordsworth, before you go to that, could I just ask you a question about what you just said. Am I to understand, therefore, that the United Kingdom's position is that none of the undertakings given at Lancaster House – I use the word

undertakings without wishing to pre-judge their legal status – that none of those undertakings is legally binding upon the United Kingdom today, so, for example, the United Kingdom would be free to cede the Chagos Archipelago to a third State. It's not legally as opposed to politically obliged not to do that. You might want to take instructions, and I'm quite happy for you to do so.

MR. WORDSWORTH: Thank you.

But the way I put it is, in order for us to be in a fair position in responding to that question, we would like to be seeing what Mauritius' position in terms of which specific statements it is relying on. It's put forward the case that there has been a significant change in those statements. It's highlighted to you. It changed from return to cede. I think it's highlighted to you inclusion of language in relation to in accordance with international law. Now, the understandings or undertakings in relation to cession and oil and minerals were not a big part of Mauritius' case before this hearing. The focus on the pleadings in the pleadings has been on the understanding on fishing rights or the alleged undertaking. Now, we wait for Mauritius to put its case in relation to these other alleged undertakings, and then I'll be in a position to respond.

116. I move on to the subsequent practice on fishing rights, and I just want to highlight the two themes coming out of Ms. Sander's consideration of the facts. First, the practice shows that there have been multiple proclamations of a regime pursuant to which licences have been issued for Mauritians to fish off the Chagos Islands, yet those changes have met with no objection on the part of Mauritius due to the alleged existence of fishing rights pursuant to the 1965 understanding. This is even the case where Mauritian fishermen have been excluded from certain areas for environmental reasons[64], or when the number of available licences has been reduced[65].

117. Secondly, and following on from the above, Mauritius has not exploited fishing rights as if it had sought, and now has the benefit of, the absolute and perpetual entitlement that it is

[64] 8 July 2003, MM, Annex 119.
[65] UKR, para. A.83; MM, Annex 107.

contending for. For example, on its current analysis, Mauritius would have been expected to insist that it had all rights to fish, and that it should be entitled to sub-licence its rights to the nationals of third States, thus securing a source of revenue. Yet it did not claim to do so.

118. It is not correct that Mauritius has consistently reminded the UK of the binding nature of the 1965 understanding on fishing rights, as Mr. Reichler aimed to show. It is correct that in the early 1970s Mauritius was saying that it was entitled to "all sovereign rights relating to fishing," which is pretty much the claim that is now being made. But that claim was not accepted by the United Kingdom[66], as we have shown, and Mauritius did not persist with this claim in its communications with the United Kingdom.

119. And this leads in turn to two important legal points on subsequent practice.

120. First, subsequent practice is a tool used in the interpretation of treaties[67]. It is of a quite different and reduced utility where it comes to the question of whether a given document establishes political commitments or binding legal obligations. The fact of subsequent performance in line with that document is consistent both with the existence of a political commitment, which one assumes will be taken seriously, and with the existence of a legal obligation.

121. Secondly, where relevant to an issue of interpretation, subsequent practice must of course be comprised of overt acts – how else could it otherwise establish the existence of an agreement on interpretation. One can see that, for example, from paragraph 74 of the *Kasikili/Sedudu* case[68] where the International Court noted that, for there to be relevant subsequent practice, the Bechuanaland authorities would have had to be "fully aware" of how the

[66] MM, annex 67.
[67] VCLT, Art. 31(3)(b).
[68] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999(II)*, p. 1087, para. 74.

Caprivi authorities had been acting, and have also accepted this as a confirmation of the disputed treaty boundary.

(iv) Mauritius' reliance on UK internal documentation

122. As to the legal significance of the UK internal documentation other than as subsequent practice, you have our position that the documentation on which Mauritius has placed so much weight is not material. And that is not a defensive position. We might be feeling defensive if we could see Mauritius' internal documentation, and if we could see that this was consistent with what Mauritius is now saying. But we do not have that luxury, and the Tribunal will recall how Mauritius chose to make its case in its Memorial without submitting one single Mauritian internal document.

123. The point is that it is for an international tribunal to determine definitively the meaning of a given international instrument. The internal processes of a State prior to its coming to a concluded view which it then defends in legal proceedings merely represent steps along the way to that concluded view.

124. The concluded view of the United Kingdom, as of 2009-2010, was that there was no binding obligation on it with respect to Mauritian fishing rights[69]. That is either right or wrong, and the internal views of Tony Aust of 40+ years ago could carry no weight before a court or tribunal that then has to interpret all the relevant documentation and to come to its own views on the existence of a binding legal obligation and its content.

125. And suppose Tony Aust had said – 'no binding obligation' 40+ years ago – would Mauritius be saying that was a material factor for the Tribunal to weigh against its current case? One very much suspects not. So why would it be different because Mauritius considers that something was said that was helpful to its current legal position?

[69] Ms. Yeadon's statement at UKR Annex 73; Mr. Roberts statement at UKR Annex 74.

126. Evidently, internally expressed views do not qualify as statements against interest, and Mr. Reichler's reference on day 3 to the *Argentina-Chile Frontier case* was quite inapposite[70]. Doctrines of estoppel or preclusion cannot conceivably be brought into play where there has been no communication of an alleged legal position, let alone any form of reliance thereon. And you already have our point, as explained by Ms. Sander, that on a closer read, the UK internal documentation is much more of a mixed bag of imprecise views than Mauritius contends for.

127. And so we are left puzzled as to why Mauritius considers the UK internal documentation to be of such interest. I should say that it's not supported by such jurisprudence as there is on the point. We referred in our Rejoinder to the *Pedra Branca/Pulau Batu Beteh* case[71], and also to the First State Award in *Eritrea/Yemen*. There a tribunal chaired by Sir Robert Jennings and comprising Judges Schwebel and Higgins, and also Dr El-Kosheri and Keith Highett said as to internal documentation of the UK Foreign Office and the Italian Foreign Office that:

"internal memoranda do not necessarily represent the view or policy of any government, and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment: it is not always easy to disentangle the personality elements from what were, after all, internal, private and confidential memoranda at the time they were made".[72] And we note that the reticence that's expressed there was in the rather different context of seeking to establish what the British and Italian governments were doing or saying in terms of claims to or possession or use of the islands at issue, not to establish agreement as to meaning of a particular instrument as a matter of international or domestic law.

[70] Mr. Reichler, day 3, p. 262, lines 12-18.

[71] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore*), Judgment, I.C.J. Reports 2008, at para. 197, and at para. 224. UKRej, Auth. 14.

[72] UKR, Authority 7, para. 94.

And one might wonder, and in fact, one does wonder, what has happened to the Mauritian internal documentation, and I should say that no explanation has been given, and perhaps that will come in the second round. But the key point for now is that whatever reason, the Tribunal has no insight into the internal workings of Mauritius. It has no inkling of what Mauritian officials have said over time on the existence of fishing rights or on the validity of its claim to sovereignty, and in light of these one-sided circumstances, the Tribunal should be very wary of placing weight on the partial picture it had through sight of just the UK internal documentation.

(v) Miscellaneous points

128. I wish to pick up on three separate matters before turning to the provisions of UNCLOS on which Mauritius relies when it comes to alleged fishing rights.

129. First, suppose a binding unilateral undertaking on fishing rights had been made by the United Kingdom in or subsequent to 1965. The UK would still have been entitled to revoke this. This entitlement is reflected in Principle 10 of the ILC Guiding Principles, which says that, "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily."

130. In the present case there would have been no arbitrary revocation. Following a consultation exercise, and bilateral consultations that Mauritius elected to bring to a halt, the United Kingdom declared the MPA, banning commercial fishing and thereby – on this alternative argument – revoking a binding undertaking. There had been no reliance by Mauritius in the bilateral consultations on the existence of a legally binding undertaking, and the reality was that fishing in BIOT waters was of minimal importance to it. The introduction of the MPA, by contrast, provided an entirely rational basis for revocation, and it's recalled that the MPA is ultimately to the benefit of Mauritius and the region as a whole. And Professor Boyle will be returning to the issues on consultation and the science shortly.

131. Secondly, Mauritius has a separate contention that it has the benefit of traditional fishing rights, although there was notably no discussion of the necessary factual underpinnings for such rights in Mauritius' presentations on the facts.

132. That is not surprising. The simple point is that there was no fishing at all as of 1965, save for the very limited fishing for the domestic purposes of the Chagossians, and subsequently fishing was as permitted by BIOT Ordinance. There has never been a tradition of Mauritian vessels fishing in Chagos waters, let alone any form of historic dependence as the cases suggest might be protected in certain circumstances.

133. Finally, there is the alleged undertaking made by Gordon Brown. And you already have our case that Gordon Brown did not say the words "relied on," and Professor Boyle will be coming back to this in the context of what happened next following the letter of 30 December 2009.

134. As to the relevant legal principles, the record comes nowhere near to establishing a binding unilateral undertaking that satisfies the requirements of the *Nuclear Tests* line of authority. Despite the huge emphasis, Mauritius did not even seek to show how such requirements were met, including as to demonstrating the required clarity as to what was meant by 'put it on hold' – put what on hold, and for how long? If and when Mauritius does develop its legal case on this, we will return to this issue in our second round.

ARBITRATOR WOLFRUM: Mr. Wordsworth, before you proceed to this point, may I come back to a point you just made a minute ago. If I didn't misunderstand you, you referred to the undertaking – I'm still using that word, but you can also understand it as understanding – as unilateral Declaration. That comes up a little bit out of a sudden, so to speak, for don't you take into consideration that this understanding or undertaking together with the others on mineral resources and the return of islands after they are not anymore needed were given in the context of this Lancaster House Conference and through this one receives the

consent of the Mauritian Ministers. Therefore, to speak of unilateral Declaration is striking me as needing further explanation, let's put it this way.

MR. WORDSWORTH: Well, I was referring to the binding undertaking in the context of *Nuclear Tests* and Gordon Brown.

ARBITRATOR WOLFRUM: You did it on fishing.

MR. WORDSWORTH: I did it on fishing.

ARBITRATOR WOLFRUM: The same applies to the others.

MR. WORDSWORTH: But it's the same point in relation to the other commitments. Now, you see our case that there was no binding international agreement as of 1965. And so what Mauritius has to do is to tie the allegedly binding undertakings that it relies on back to some further statement from the United Kingdom. It has to say, on such-and-such a date, such-and-such a statement was made, and that meets the test as a *Nuclear Tests*. And that's the way it's put its claim in its Memorial and Reply. It hasn't put its claim by reference to the existence of a Treaty. So we are dependent on Mauritius identifying the particular documents it's relying on, and then we think, by reference to those documents one has to apply the *Nuclear Tests* criteria, but until we actually see what Mauritius is saying, it's very difficult, indeed, to apply the criteria, and this is the case that Mauritius has to make out. It's the Claimant, it's the one relying on these binding undertakings. It's not the United Kingdom.

ARBITRATOR WOLFRUM: I understand your point quite well, but I want to understand the construction. Isn't there the possibility to look upon that differently; namely, to take into account after independence of Mauritius and these undertakings, understandings were repeated, that they still come within the context of the Lancaster House meeting, let's put it this way, therefore, it was a quid pro quo? The notion what is bothering me at the moment is the word "unilateral."

MR. WORDSWORTH: But, sir, I absolutely understand the point because this is a slightly unusual situation because what you have is the 1965 record which reflects undoubtedly some form of arrangement. There are two Parties, one can call it commitments, agreements, whatever it is. And that's the package, a very important part of the package, that you are going to be looking at. But it's not the only part of the package because the when it comes to applying the ICJ jurisprudence and meeting the case that I understand is being put by Mauritius, one has to see how that package is then put forward on the international plane, and that actual process of putting forward, as I understand it, as it's argued, is by reference to a binding unilateral undertaking. A unilateral undertaking. When Mr. Crawford is referring to the letter of 23rd March 1976, I understand him as saying you, United Kingdom, are saying I assure that I will stand by those commitments, and that has two levels to it. There is the unilateral binding, unilateral binding element of it, I assure, and then there is the other part of it, which I absolutely see you're focusing on, which is the what was actually agreed in 1965.

ARBITRATOR WOLFRUM: I don't think we speak about the same point. Let me try it the other way around. You said that you had a package and you described the package under British national law in the Lancaster House arrangement. I believe on that respect we are on firm grounds.

Aren't these statements made later, so to speak, transfer this national law-oriented package on to the international law level?

MR. WORDSWORTH: That's an argument or that's a position that I hope I was understood as saying one looks at the document relied on by Mauritius and does that transfer this on to a State-to-State level. We look at the 23rd March 1976 letter, it refers to understandings, and we say, well, it may well make the fishing understandings or the other understandings go on to the international level, yes, we accept that *Nuclear Tests* applies, but we don't accept then that suddenly shows the requisite intention to be bound.

ARBITRATOR GREENWOOD: Mr. Wordsworth, I can't resist the temptation to come back to this point. What Judge Wolfrum has just said is what's troubling me as well. The agreement that was reached at Lancaster House and as described in the minutes as an agreement could not at that time have been a treaty under international law. I understand your case on that point, I'm not saying whether I agree with it – I understand it – but it produced effects on the plane of international law because it has the vital effect that according to your Government's case, the detachment of the Chagos Islands from Mauritius was with the consent of the representatives of the people of Mauritius, and, therefore, and I grant you there are several contingencies here. If there was a right of self-determination, binding in the terms of Resolution 1514(VI) upon the United Kingdom at the time, then this is the answer to that point. You have the Agreement of the representatives of the people of Mauritius, so at the international level, the United Kingdom gets the benefit of what was Mauritius' side of the bargain, as it were, but the consideration for that bargain was a series of undertakings given by the United Kingdom. This is what I'm grappling with. Is it really right to analyse it in terms that what Mauritius gave was in the past, and what the United Kingdom continues to give after 1968 has to be seen entirely in isolation from that?

MR. WORDSWORTH: Well, I will wait to see how Mauritius puts its case, but yes, I think the answer has to be yes, because you're looking at the question of whether that consent, which is consent in a domestic law context, is sufficient for the purposes of international law to establish consent, let's say consent is required as a matter of international law. That doesn't somehow elevate everything within what was agreed to the level of international law.

ARBITRATOR KATEKA: Mr. Wordsworth, since you have described the 1965 understanding or undertaking, at one stage there is a contract, I wish to get some more clarification on the status of this understanding when related to the detachment agreement. In the written pleadings, the United Kingdom repeats several times that the understanding was reached with the then colonial Mauritius, and then earlier you referred in your Statement to something could be said

about the validity of the detachment, agreement and so on. I wonder if you have some comments to make on the fact that these two agreements or understandings were made with the then Colony of Mauritius, and they were approved by the Council of Ministers, in one case said the representatives of the directed people, that is where strictly speaking a colonial regime, they were not free. If you look at the pleadings, you find that the Governor could appoint members of the legislative council, he could preside over the Council of Ministers.

So, I wonder if you have any comment to make on the two agreements to make further comments on this.

MR. WORDSWORTH: I will respond to that, but I would, by saying that that's certainly not a question I could answer on the hoof because that seems to be also to be going into the constitutional background, and that's Sir Michael Wood's special subject area.

Mr. President.

ARBITRATOR WOLFRUM: Mr. Wordsworth, I see your point in referring it to Sir Michael is okay, but still I don't believe that the questions raised by Sir Christopher Greenwood and by Judge Kateka and myself have been properly addressed. Our argument, practically at the moment of Sir Christopher Greenwood and mine is, you have had a package as the Lancaster House contract as Judge Kateka put it, let's call it an agreement, and I have the feeling – let me be very open – that now, after independence of Mauritius you unravelled the package and do not consider what was given by Mauritius in the Lancaster House arrangement or agreement, but only look into fishing as commitments of the United Kingdom on fishing, mineral resources and return of the islands. I believe still after the independence of Mauritius has remained the package, which, due to the various interventions from both sides, has been lifted or transferred to the international level as a package; therefore, you can't dissect them. That is the problem.

Therefore, it's not so much a constitutional law problem, it's an international law problem. Although I'm awaiting the constitutional law explanations by Sir Michael Wood.

MR. WORDSWORTH: Thank you, judge, for clarifying that. I did understand that a separate point was being raised by Judge Kateka in relation to the constitutional issue.

ARBITRATOR WOLFRUM: Okay.

MR. WORDSWORTH: But what I do take from that is that this is a question that it would be useful for me to pause on and to take instructions and come back with later.

PRESIDENT SHEARER: I think it might be time for the break anyway, Mr. Wordsworth, if you would like to consult with your colleagues on some of those questions.

I didn't want to come in on my colleagues on this, but another thing that I don't really require an answer to, but might be considered, especially in relation to Judge Kateka's question. As I understand it for the period of one, two or three years before independence, there was always a sort of a semi-autonomous phase that colonies went through. For example, they were always consulted as to whether treaties should be applied to them, things like that, and I don't know whether that's a factor that you would want to meld into your answers.

But anyway, I think that's a good point to take our break.

MR. WORDSWORTH: Mr. President, with your leave, I think Sir Michael just wanted to raise a point very briefly, if that's okay.

PRESIDENT SHEARER: Yes, of course. Please.

SIR MICHAEL WOOD: Thank you very much, Mr. President.

I won't try to respond immediately to Judge Kateka, I will have another look at Hendry and Dickson and come back with answers, but what I did want to do with your leave was to reply very briefly to a question from Judge Greenwood yesterday.

Judge Greenwood referred to the official report to the Parliament on the Constitutional Conference, and to the statement there that the Secretary of State accordingly announced at the plenary meeting at the difference on Friday, the 24th of September, his view that it was right that Mauritius should be independent and take her place among the sovereign nations

of the world. Judge Greenwood asked if he would be right in assuming that there must have been a Cabinet decision to that effect the previous evening.

And he pointed out that at 4:00 p.m. on the 23rd of September the Colonial Secretary left his meeting with the Premier and his colleagues saying he had to go back and report to his colleagues, the Colonial Secretary's colleagues. And Judge Greenwood asked whether the reporting back was part and parcel of a Cabinet meeting, at which there was a decision by Her Majesty's Government to accord independence subject obviously to the final word resting with Parliament at a later stage, and I would add also subject to the final word resting with the people of Mauritius and elected Legislative Assembly, et cetera.

We checked with London. There was not a meeting of the Cabinet itself, but there was a meeting of the Defence and Oversea Policy Committee, which a Cabinet Committee, chaired by the Prime Minister, at 4:00 p.m. on the 23rd. At the meeting, the Colonial Secretary reported to his colleagues on progress of the conference and explained what he proposed to do the next day.

We have received from London, from the Public Record Office, the official record, the minutes of this meeting. We have already given copies to our friends opposite, and we understand from them that they see no difficulty with the production of this document. We have copies available for the Tribunal which I could hand in during the break.

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I do not propose to address the document at this stage since we've really passed this stage, as it were. The relevant passages are on pages 5 and 6, and quite short, and in my view self-explanatory. Thank you.

PRESIDENT SHEARER: Thank you very much.

Thank you, Sir Michael. Well, we might then take our 20-minute break, and we will return.

Thank you very much.

(Brief recess.)

PRESIDENT SHEARER: Mr. Wordsworth, we threw a lot of things at you at before the break, and we owe the UK some minutes from yesterday as I recall, so if your side needs to go a bit beyond 5:30, the Tribunal would be quite content with that.

MR. WORDSWORTH: We are very grateful indeed for that. I will try to crack on as fast as I can with my submissions on Article 2(3), a few words at the end on Article 56(2).

C. Article 2(3)

135. Mauritius' case on Article 2(3) is, of course, that this establishes, so far as concerns the exercise of sovereignty over the territorial sea, a general and justiciable obligation of compliance with the Convention and, in a 'broad and open-ended' sense[73], and that was my friend Professor Sands, day 3, page 299, line 3, as well as other rules of international law.

136. If I can ask you to turn to Article 2 in your copies of the Convention, there are a few introductory points to make as to how we see what Article 2 is intended to do.

137. Now, as you'll see from your copies of the Convention, Article 2 is, in fact, the only provision in section 1, "General provisions," and Article 2 is then headed, "Legal status of the territorial sea, of the airspace over the territorial sea and of its bed and subsoil." And we would say there's no suggestion there of general obligations of compliance and, we would say that is consistent with our case that Article 2(3) is merely descriptive of an element of

[73] Prof Sands, day 3, p. 299, line 3 and 296, lines 5-6.

legal status. And, as a third point on immediate context, Articles 2(1) and 2(2) do no more than establish or codify the extent of sovereignty over the territorial sea.

138. One then comes to Article 2(3), and there are two points of disagreement – over the meaning of 'is exercised' and, then, over the intended scope of 'other rules of international law.' You see there the sovereignty over the territorial sea is exercised subject to this convention and to other rules of international law.

139. And, as to this first issue, the question is whether the UK is right to draw conclusions from the fact that this is the formulation used, instead of "shall be exercised," as would be in line with the use of "shall take place in conformity with this Convention and with other rules of international law" as in Article 19(1). There is then a debate over ordinary meaning – we say that "it exercised" is descriptive rather than executory, and that if a State, say, breaches Article 24 by hampering the right of innocent passage, it does not separately breach Article 2(3).

140. Now, pausing there, so far as concerns the reference in Article 2(3) to exercise being subject to the Convention, Mauritius' argument involves introducing into Article 2(3) an obligation of compliance that is redundant. If a State is already breaching Article 24 or whatever, there is no need and no purpose for the additional level of obligation that Mauritius contends for. And so, it would follow, that if an additional level of obligation was intended to be present, it would most obviously have been introduced with a view to giving effect to the 'other rules of international law.'

141. And if I can ask you to turn to the ILC Commentary behind Article 1(2) of the 1958 Convention that Professor Sands took you to, it is important to read that with an eye to looking for some such intent. And that's behind Tab 70 of your Judges' Folder.

142. And you'll see the relevant passage starts at paragraph (3) – and Professor Sands emphasised the use of 'cannot' in paragraph 3. Clearly sovereignty over the territorial sea cannot be

exercised otherwise then in conformity with the provisions of international law. But we can't see what the use of "cannot" there adds. The drafters of the Commentary saw Article 1(2) as something of a statement of the obvious. That is more suggestive of the wording being descriptive as opposed to establishing any obligation of compliance.

143. Moving to paragraph 4, and Professor Sands skipped over this, saying that it just "provides more descriptive material by way of background in relation to the non-exhaustiveness of the limits." Well, maybe, but we think this merits a close read. Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their Application to the territorial sea. That is why other rules of international law are mentioned in addition to the provisions contained in the present articles.

And so, that's where our focus comes from on general rules of international law, and that's the second element for our case, you will recall

144. And then one sees that paragraph 5 deals with specific bilateral rules of international law which, if Mauritius is right on its undertakings case, is where those undertakings would fit. It may happen that by reason of some special relationship, geographical or other between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any way any more extensive Right of Passage or other right enjoyed by States by custom or Treaty.

145. And the key words there are – 'It is not the Commission's intention to limit …'. The suggestion is not of any intention to give effect to such rights, but merely of there being no

intention to limit them. In other words, Article 1(2) was intended to be neutral as to such bilateral rights.

146. And the point that, I hope, comes out from the Commentary to Article 1(2) is that, in interpreting the ordinary words of Article 2(3), there has to be a balance, and that Mauritius is contending for two extremes of interpretation that do not fit together.

147. If the intention were to establish an obligation of compliance with 'other rules of international law,' that would make sense only to the extent that these are interpreted as general rules that cover incidents in the territorial sea, and that are only not to be found within the Convention because the Convention is not exhaustive. Any other interpretation would be to create an entirely open-ended obligation of compliance with the entirety of international law in the territorial sea, as to which there is nothing to suggest that this was the intention of the drafters. And in this respect, I recall how Professor Sands repeatedly emphasised how the words 'other rules of international law' were 'broad and open-ended' and 'very open-ended.'[74]

148. If the intention is not to establish an obligation of compliance, but merely to be descriptive, then according Mauritius the 'broad and open-ended' meaning to 'other rules of international law' would not be so unworkable.

149. But Mauritius seeks to have it both ways, and we say that is supported neither by the commentary nor by the language used.

150. Now, Mauritius cannot avoid that by saying it is not seeking the implementation of specific bilateral undertakings, but is just seeking application of general international law rules, like the obligation to comply with undertakings as founded in the general duty of good faith[75]. But such formulations simply bring in the whole of international law through the back door. Most obviously, on Mauritius' logic, you can say that the obligation to comply with any

[74] Prof Sands, day 3, p. 299, lines 3-12.
[75] Prof Sands, day 3, p. 300, from line 9-11.

given treaty is a general rule of international law as that is founded on the general international law rule of *pacta sunt servanda*.

151. In sum, the attempt to cast bilateral undertakings as general rules of international law goes against the 1956 commentary, just as against the specific words used in Article 2(3).

152. There are three more specific points on interpretation.

153. First, Mauritius points to a string of other provisions said to be comparable, and suggests that it is absurd to be making so much of the use of 'is' or 'shall' or 'must.' But of course, with each individual provision one must be looking at that provision with respect to its specific wording, and in its context.

154. Of the provisions that Mauritius referred to last week, only Article 34(2), which forms part of the general provision describing the legal status of straits, is truly analogous. Article 38(3) on transit passage and Article 49(3) on archipelagic waters are not analogous because they refer only to non-transit activity, or to sovereignty, being subject to the Convention. There is precisely no reference to 'other rules of international law.' Articles 78(2) and 87(2) use clearly mandatory terms in relation to a defined object within the Convention: – 'must not infringe … navigation and other rights and freedoms of other States as provided for this Convention'; 'shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.' So we just don't see where the reference to this string of particular provisions takes Mauritius.

155. Secondly, Mauritius has sought to meet our arguments by reference to the other language texts of the Convention, although oddly it appeared to be suggested that this was a point that we had introduced[76].

156. As we understand it, the argument is that the French text to Article 2(3) uses the present tense "*s'excercent*", as does the Russian text, and hence there is an obligation of compliance.

[76] Prof Sands, day 3, p. 296, from line 4.

And, in response to Mauritius' reliance on the French language text, we pointed out how the use of the mandatory 'shall take place in conformity with' in Article 19(1) does not appear in the French text through use of the present tense, but rather as '*doit s'effectuer en conformité avec*", again, we say, clearly mandatory language.

157. We were taken to task for this last week, and told that this was hardly a persuasive argument, hardly a persuasive argument as a linguistic matter because: "The verb 'devoir' is not the one that is usually employed in the French language to convey legal obligation in international agreements" and likewise it was said by Professor Sands, "If anything, that word usually connotes a weaker commitment than the use of the present tense in French."[77] Well, that is a point that someone should have made to the drafters of the French text of the Vienna Convention on the Law of Treaties, as to which Article 26 provides: "*Tout traité en vigueur lie les parties et doit être exécuté par elles de bonne foi.*" One sees the same use of devoir in Article 31 of the Vienna Convention, and indeed the verb is used multiple times in both the Vienna Convention and UNCLOS, generally as the French version of the English 'shall' or 'must.'

158. Thirdly, Professor Sands relied on the 2011 Advisory Opinion of the ITLOS Seabed Disputes Chamber to support the case that the reference to other rules of international law in Article 2(3) has a broad and open-ended meaning. But all the Chamber was doing was to interpret Article 293(1), coming to the conclusion that this encompassed customary and conventional rules of treaty interpretation[78]. We would very much agree, but we do not see how that assists Mauritius in its interpretation of Article 2(3).

159. Finally, on Article 2(3), Mauritius says that its asserted traditional fishing rights fall within the scope of the provision. I will deal with this briefly, as Mauritius has no traditional fishing

[77] Prof Sands, day 3, p. 297, lines 15-16.

[78] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, para. 57.

rights, and it is anyway unable to show any intention to protect such rights within the scheme of the 1982 Convention. The fact that such rights are expressly covered so far as concerns archipelagic States, in Article 51(1), serves to highlight the absence of any intention to bring them indirectly within the ambit of Article 2(3) so far as concerns the territorial sea. And in this respect we refer you to paragraph 8.33(a) of our Counter-Memorial.

D. Article 56(2)

160. I move very briefly indeed to Article 56(2), but simply to say that Professor Boyle is now going to pick up again on the issues of interpretation here. Our basic point is that the formulation 'shall have due regard to' does not somehow mean 'shall give effect to,' and we see that as a rather straightforward point on interpretation.

We do not see Mauritius' case on Article 56(2) as raising any discrete issues on facts so far as concerns fishing rights.

161. Mr. President, Members of the Tribunal, I thank you for your kind attention, and ask you to call Professor Boyle to the podium.

PRESIDENT SHEARER: Thank you, Mr. Wordsworth.

And I call Mr. Boyle.

Mauritius v United Kingdom

Alleged breaches of UNCLOS, the UN Fish Stocks Agreement and Abuse of Rights

Professor Alan Boyle

A. Mauritius' case on the merits

1. In this speech, I want to respond to the main thrust of Mauritius' arguments on the remaining allegation of violations of the Convention. If I do so selectively in some places it should not be assumed that the United Kingdom thereby accepts any of the claims advanced by Mauritius in its written pleadings or in the oral argument: it does not.

2. Last week Mauritius repeated the claims that it made in the written pleadings. And broadly these fall into five groups: first, non-consultation with respect to the declaration on the Marine Protected Area; secondly, non-cooperation with respect to fisheries; third, non-coordination of policy on marine pollution; fourth, violation of alleged continental shelf rights; and then finally, abuse of rights.

3. I will make seven points in response. Firstly, I will argue that the creation of an MPA, within what is in UNCLOS terms the exclusive economic zone, is not a matter that would normally fall within any of the situations where coastal states would have an obligation in international law to consult other states before acting. My point is that there is no general obligation to consult when exercising sovereign rights under the Convention and if there were the Convention would say so, and in a number of places for particular rights, it does.

4. My second point will be that even if you reject the first argument, the most that can be said is that international law requires timely consultation at an early stage. Consultation is not an endless process, nor does it entail seeking the consent of the State consulted. These points, I will argue, are accepted customary international law.

5. My third point, leading on from that, is that if we do judge the United Kingdom's relations with Mauritius in 2009 and 2010 by that standard, then there has been no breach of any obligation to consult, whatever its basis. In our view, any tribunal reading the documents disclosed by both parties in this case can come to no other conclusion.

6. Turning then to the specific articles of UNCLOS relied on by Mauritius for consultation, my fourth point will be that in the circumstances of the present dispute there was no legal obligation under Articles 2(3) or 56(2) to consult with regard to the MPA, but that, if there was, that obligation, for the reasons already set out, has been satisfied.

7. My fifth point is the United Kingdom has complied fully with articles 63 and 64 of the Convention and article 7 of the Fish Stocks Agreement. I may reduce that a little bit as we go through since I've already dealt with some of those points this morning.

8. My sixth point, will be that I will address very briefly the argument made by Mauritius that it currently has rights over the continental shelf – which, of course, we deny.

Seventh, I will deal even more briefly with the arguments on article 194 concerning marine pollution. These are exceptionally weak.

9. And then finally, I will explain why the abuse of rights claim made by Mauritius is without any foundation in fact or law. Given the terms of article 297(3)(b) of the Convention we say that this part of Mauritius' case is misconceived. And I think that adds up to eight points, I promised seven to begin with.

B. Consultation regarding the MPA

(a) No applicable rule on consultation in customary international law

10. So, let me begin with consultation and the general rule. The essential point of Mauritius' case on consultation, at its broadest, is that by virtue of a binding undertaking, it shares the rights of a coastal State over the natural resources of the MPA, and that it must be consulted before any decision is taken which interferes with those shared rights. As, authority for its argument it relies on the *Lac Lanoux Arbitration*[79] and on the *Icelandic Fisheries Cases*.[80]

11. There are two responses to that argument. First, if you decide that Mauritius has none of the rights it claims, then its case on consultation disappears.

12. The second response is to ask whether the precedents on which Mauritius relies have any relevance to the present case. Even Mauritius says that this case is unique. Certainly, it is not a case about shared natural resources or common property resources as those concepts are normally understood.

[79] *Lac Lanoux Arbitration*, 24 ILR (1957) 101.

[80] *Fisheries Jurisdiction Cases (UK and Germany v. Iceland)* ICJ Reports 1974, p. 3 and p. 175.

13. *Lac Lanoux* concerns international watercourses in which all riparians share the right to make equitable use. The *Pulp Mills Case*[81] to which some reference was made also falls into that category. The *Icelandic Fisheries cases* are about the equitable allocation of common property in high seas fish stocks. And in that case, and I think it applies to all of these cases, the ICJ said, "It is implicit ….. that negotiations are required in order to define or delimit the extent of those rights….." (para 74).

14. The *Lac Lanoux case* has been applied to activities which pose a risk of transboundary harm. In that context the law was codified by Principle 19 of the Rio Declaration on Environment and Development. I won't bother reading that one out but the I will come back to this, so the text will stay there for the moment.

But again, this precedent does not apply to the facts of the present case, which obviously do not involve transboundary harm.

15. So, Mauritius is unable to cite any precedent requiring states to consult about the conservation and management of natural resources which fall within the exclusive sovereignty or sovereign rights of the coastal state, in other words, in this case, the United Kingdom. The most that Mauritius can say is that exceptionally it benefits from an undertaking or perhaps an agreement to allow access in limited circumstances to those otherwise exclusive resources, either now or at some time in the future. At best its claim exemplifies the limited possibility – I won't call it a right since it is not – of access to surplus EEZ fish stocks as set out in article 62 of the Convention. Mauritius has been remarkably coy about article 62. But the essential point that I am making is that the precedents on which it relies do not support the existence of a general rule of consultation before sovereign rights are exercised in the EEZ.

(b) Consultations regarding the MPA

[81] *Case Concerning Pulp Mills on the River Uruguay*, ICJ Reports 2010, p. 14, Judgment.

16. That brings me to my second point. Let us suppose for the sake of argument that I am wrong and that there is some obligation to consult in these circumstances. What would the parameters of that obligation be? Even though it is otherwise inapplicable, the nearest analogy, and probably the most useful for this purpose, is the rule on consultation in cases of transboundary harm codified by Principle 19 of the rule that you see in front of you on the screen. You will note what it requires: "provide prior and timely notification and relevant information"; "consult with those states at an early stage and in good faith."

17. If consultations were required before establishing the MPA, we would say that no more can be expected of any coastal state than the criteria set out here. The key points are surely that consultation must be at an early stage and it must be informed. So, with that in mind, we can now return briefly to Ms. Nevill's account of relations between the parties in the crucial period beginning with the January 2009 bilateral talks and ending with the declaration of the MPA in April 2010.

18. I propose only to summarise the key points in order to show that the United Kingdom did in fact consult Mauritius fully, at an early stage, with adequate information, and well before declaring the MPA. So we would say that if there is any legal obligation to consult before exercising sovereign rights, which obviously we do not accept, then there has been no breach.

19. The salient facts, I would suggest, are these. First: the Marine Protected Area proposal was initially drawn up by the Chagos Environmental Network and other NGOs, and their public campaign was launched on 9 March 2009. Second: the Secretary of State for Foreign and Commonwealth Affairs decided on 6 May 2009 that consideration should be given to that proposal for a large-scale marine reserve. Third: the MPA proposal was then discussed during the second round of bilateral talks with Mauritius in July 2009, and in meetings between the British High Commissioner in Port Louis in October 2009, with the Foreign Minister on 12 October, with the Mauritian High Commissioner in London on 13 October, the Prime Minister

on 22 October and with the Prime Minister's Chief of Staff on 23 October, and at that meeting the draft of the public consultation document, which contained 3 options for a large scale MPA, was outlined. Fourth: information about the MPA had also been given to Mauritius in the July talks, and it was supplemented as requested by Mauritius in the October meetings. Fifth: the Marine Protected Area was formally established on 1 April 2010, that is a full eleven months following the Foreign Secretary's May 2009 decision and nine months after the second round of bilateral talks. And indeed six months after the meetings in October, at which all of the final information was conveyed to Mauritius.

20. Against this timetable, Ms. MacDonald's idea that the United Kingdom should have consulted Mauritius about the MPA during the first round of bilateral talks in January 2009 is surely fantasy: the government was at that point still considering its policy options and talking to the NGOs. Mauritius complains that it learned of the MPA proposal from a leak to the newspapers in February 2009, but that was the NGO campaign launched a few weeks later, it's not the United Kingdom's proposal. So January 2009 is really too early for consultation to start. And the cases, including *Lac Lanoux* and *Pulp Mills*, show there has to be a plan, a proposal, a policy or a decision to consult about. In January there was none.

21. But once the Foreign Secretary had taken his decision in May 2009, there was a plan – or at least a proposal. And we would say this is the right moment to seek consultations. And indeed that is what happened. The Foreign Office arranged for the MPA proposal to be explained and discussed during the second round of bilateral talks in Port Louis on 21 July 2009. Ms. Nevill has given you a full account of that meeting, which also considered joint management of fish stocks and the possibility of a joint submission to the CLCS. On the same day the Mauritian Foreign Minister was given a briefing on the proposed MPA, as was the Cabinet Secretary, Mr. Seeballuck.[82]

[82] UKCM, paras 3.42-52.

22. Mauritius was told that the proposal under consideration was a large-scale Marine Protected Area that would cover all of BIOT's waters. As regards fishing, Mauritian officials were also told that there were three options, one of which was a ban on fishing throughout the MPA. And you will find that document – I think I've got the wrong tab number here but that document is at a tab in your folder. And I apologize for that.

23. In our view, the July meeting was timely, it ensured that –I think that is actually probably Mauritius' Tab 3.12 that I'm referring to at Paragraph 8, and I'm sorry I can't be more definite on that. In our view, the July meeting was timely. It ensured that Mauritius was fully informed about the MPA proposal, including the proposed ban on commercial fishing, and it was at an early enough stage to allow Mauritius to ask for further information – as it did – and to make meaningful representations. And what was the outcome of that July bilateral meeting? It was a joint communiqué in which the Government of Mauritius welcomed in principle the MPA proposal. And you will find the communiqué in your folder at Tab 56.[83] If you read that, you will see there were no complaints about inadequate consultation. There were no complaints that Mauritius could not get its views across or had been ignored. We would say that tested by the standard of consultation expected in *Lac Lanoux* or *Pulp Mills* it is quite clear that the United Kingdom would easily pass the test on these facts.

24. So, given that conclusion, if I'm right, it follows that as a matter of law the subsequent contacts between the two governments are not relevant to the question whether there was consultation. Now, they might be relevant if Mauritius alleged some later agreement, or they might even help us explain why relations between the two governments broke down in the end. But that was also true in *Lac Lanoux* and the *Pulp Mills* case.

25. The purpose of consultation is simply to convey the necessary information and to allow for a response and a reasoned exchange of views. But it does not have to continue indefinitely, it

[83] MM, Annex 148; UKAF, Tab 56, p. 69; UKCM, para 5.29 a.

does not have to continue until the other party is happy, any more than consultations under article 283 have to carry on indefinitely. But there does come a point when, after listening to and trying to accommodate the other side, it is entirely legitimate for a government to proceed and to make a decision. The *Lac Lanoux* case makes that point in a variety of ways in slightly quaint language. But perhaps the key passage here is where the arbitrators say: 'the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorisation of states which may possibly be threatened'.[84] Put simply, there is no need for agreement. And it's therefore not necessary to carry on consultations when everything has been done.

26. So, what was done? Well, following the July meeting, there were follow-up meetings in September, in October and November as detailed by Ms. Nevill. I have referred to some of them. Additional information explaining the MPA options was provided to Mauritius, and I will take you back to some of that correspondence in a moment. It shows repeated attempts to get Mauritius to agree a date for a further round of bilateral talks about the MPA, until Mauritius finally made it clear that it would not agree to any further consultations. But in our view the necessary consultations took place in July, and what occurred after that is not material to Mauritius' case.

27. Perhaps this is the point at which I could respond to Judge Greenwood's question about the relationship between the Public Consultation conducted by the Foreign Office between November 2009 and March 2010, and the consultations with Mauritius. Let me explain first, that the Public Consultation was a process whose sole purpose was to allow the public to express a view on the proposed MPA. And that's not necessarily the British public, it was also the Chagossians, indeed it was an international Consultation. In certain instances, of which this is one, British Government policy is to allow for public comment before proceeding with significant legislative or regulatory changes. The BIOT MPA consultation was a very large

[84] 24 *ILR* (1957) 101, at 126.

one, and it was over an unusually long period of six months, but a Consultation of this kind in principle is by no means unusual. In answer to Judge Wolfrum's question about how many Mauritians responded to the consultation, you can pursue this up to a point in the Facilitator's Report, which is at Annex 121 of the Counter-memorial, we have been through that. It is not particularly helpful, but it does reveal that 450 individuals responded, of whom we can identify only one who quite clearly has an address in Mauritius. You can draw your own conclusions from that. But I can also say that several Chagossian groups responded as well.

28. Second, coming back to Judge Greenwood's question, I should make clear that the Public Consultation was in no sense a substitute for bilateral consultations with Mauritius, and in our view it is not relevant to the argument made by Mauritius, nor does Mauritius say that it is. Mauritius was invited by Mr. Roberts to join with the United Kingdom in the public consultation, not as a consultee, but as a joint promoter of the MPA. And you can see that in paragraphs 20 and 21 of his witness statement which is at Annex 74 of the Rejoinder.

29. If I could take you to Tab 15 in your first folder. You will see there a document about a meeting on the 22 October 2009 between the British High Commissioner who met Mr. Ramgoolam to discuss Mauritius' attitude to the public consultation.[85] And I simply note the fact that that's what he was meeting Mr. Ramgoolam to discuss. The following day he had a follow-up meeting with the Chief of Staff of the Prime Minister to discuss "the likely shape of the anticipated consultation." He also pointed out that the consultation "couldn't now be delayed."[86] And you will find that document at Tab 15 in the folder. These are all documents that Ms. Nevill referred you to on Wednesday.

30. Now, if I could ask you to refer to the second volume, to Tab 71. This is a *note verbale* of 11 November 2009, in which the United Kingdom indicated again that the purpose of the public consultation was to gain views on the proposal, that no policy decision had yet been taken, and

[85] UKR Annex 60.
[86] UKCM Annex 104.

that it envisaged further bilateral talks with Mauritius on the issue.[87] The note also shows that the public consultation document was given to the Mauritian Cabinet Secretary, and changes were made as a result of representations by the Mauritian Prime Minister.[88]

Now if you can turn to Tab 42 in your folder, you will see there a *note verbale* from Mauritius dated 23 November 2009[89]. In that, Mauritius made clear that it really could not proceed with any further Consultations. If I may read out the key passage, it says: "…. an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. [And it concludes,] A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in, the talks on, the sovereignty issue".

31. And then finally, if I could take you to Tab 72 of your folder, you will see that's the letter from the Mauritian Foreign Minister, Mr. Boolell, dated 30th December 2009, and you have already been taken to that several times.[90] The key thing there is his conclusion, "it was inappropriate for the British authorities to embark on consultations on the [MPA] outside the bilateral Mauritius-UK mechanism for talks on issues relating to the Chagos Archipelago." So, in other words, what he is saying is that by virtue of proceeding with the Public Consultation, Mauritius felt obliged to withdraw from any further bilateral consultations with the United Kingdom. There is also a Note Verbale of the same date making the same point. I won't read that one out, it's at Annex 158 of the Memorial.

32. What we suggest, is that these documents provide, we hope, the answer to Judge Greenwood's questions: the two processes, the Public Consultation and bilateral consultation with Mauritius,

[87] MM, Annex 154; UKCM, para 8.52(f).
[88] UKCM, paras 3.62-63.
[89] MM, Annex 155; UKCM, para 5.29(c).
[90] MM, Annex 157; UKCM, para 8.52.

proceeded in parallel but independently of each other. Plainly, Mauritius ultimately decided it was not in its interest to endorse the Public Consultation. It was prepared to engage, it would appear, in bilateral consultations, but it did not want the Public Consultation to proceed at the same time in disregard of its sovereignty claim. So, in effect, you might say that Mauritius was putting a gun to the Foreign Secretary's head. He could have one or the other consultation but he could not have both.

33. I will also now try to answer the ongoing question from Judge Greenwood about the follow-up to Mr. Boolell's letter of 30 December. You will recall that the British Foreign Secretary wrote to Mr. Boolell on 15 December to allay any misunderstanding about the Ramgoolam-Brown meeting. I would ask you to look again at Mr. Boolell's reply at Tab 72. You will see that right at the end he says: "our respective Prime Ministers agreed that the MPA project be put on hold and that this issue be addressed during the next round of Mauritius-United Kingdom bilateral talks." So the response from Mr. Boolell on 30 December very clearly envisaged that the matter would be discussed at the next round of bilateral talks.

34. Now, if I could ask you to turn to Tab 73. The UK then wrote to Mauritius on three occasions seeking a date for those further talks. There is first a note verbale of 15 February seeking an indication of dates, secondly, there is a letter of 19 March from the High commissioner to Mr. Seeballuck, and thirdly, there is a further note verbale of 26 March. And in all of these the UK emphasises, as it had before, that the public consultation should not be regarded as an obstacle to further consultations with Mauritius. The United Kingdom's Note Verbale of 15 February responds to the Mauritian Note Verbale of 30 December, which was sent the same day as Mr. Boolell's letter, but it does not refer to any commitment by Gordon Brown or to the CHOGM meeting. You will find that at Annex 158 of the Memorial. Now, there is, so far as we can tell, only one reply from Mauritius, and you will find it at Tab 56, only one reply to these three communications from the United Kingdom. At Tab 56, what you have is a letter from Mr.

Seeballuck, Secretary of the Cabinet, on 19 February, responding to the Note Verbale, in which he indicates that Mauritius could not discuss the MPA unless the public consultation was terminated[91]. The High Commissioner responded in his letter of 19 March, with his assurances that the public consultation did not preclude, bypass or overtake the bilateral talks. And the United Kingdom tried again on the 26 of March in a further Note Verbale. But at no point was Mauritius willing to agree further bilateral consultation. And there the matter of Dr. Boolell's letter, I think, peters out.

ARBITRATOR GREENWOOD: Mr. Boyle, it doesn't quite peter out as far as I'm concerned, I'm afraid. If I could just come back to it for a moment. I remain rather surprised about this correspondence, I must say. The letter from the Foreign Secretary to Mr. Boolell dated 15 December has been described both by you and by Ms. Nevill as an attempt to clear up the misunderstanding at CHOGM. But it doesn't refer to a misunderstanding at CHOGM. It doesn't refer to anything allegedly said by one Prime Minister to another at all. It says, at our meeting you mentioned your concerns that the UK should have consulted Mauritius further before launching the consultation exercise. I regret any difficulty this has caused you or your Prime Minister, and there is a reference later to misunderstandings. But it's not directly dealing with this question of whether there was an undertaking to put the MPA on hold. But Dr. Boolell's reply is dealing with that quite expressly. I have now managed, because I had so many tabs open, I've closed the one that has Dr. Boolell's reply. But he does say in terms in the final paragraph of that letter of the 30 December, you will recall that your Prime Minister undertook to put the MPA on hold.

Now, that's quite a serious suggestion, there was an agreement, it says, between the two Prime Ministers, but there doesn't appear to have been a reply to that.

PROFESSOR BOYLE: Well, it depends on how you understand the letter of 15 December, with all due respect.

[91] MM, Annex 162, UKAF, Tab 56, p. 72.

ARBITRATOR GREENWOOD: Explain it to me.

PROFESSOR BOYLE: Well, it might be the kind of letter that any of us would write in the circumstances. It seems to me that you could read that letter as a very diplomatic and rather understated attempt to respond to the point. There is no doubt that Mr. Boolell – I agree entirely that Mr. Boolell does undoubtedly make reference to it but there is no doubt that he also envisages the matter being dealt with in a further meeting. And it's not unreasonable therefore for the recipient in the Foreign Office to say that someone should go and meet Mr. Boolell. That would be the obvious way to deal with a problem of this kind, I would suggest, respectfully.

ARBITRATOR GREENWOOD: Well, I can understand that, but I'm also a little bit surprised, given the very, very clear difference of views put by the two delegations here about what transpired at the Commonwealth Heads of Government Meeting, that the response to this paragraph in Dr. Boolell's letter wasn't a letter saying we do not accept that anything of the kind was agreed at the Commonwealth Heads of Government Meeting.

PROFESSOR BOYLE: I understand your concern, and clearly we would prefer if we could produce correspondence which answered your point directly, but we have looked through everything in our files, and we've scoured all we can. So far that's all we have been able to come up, but it does seems to me that there is a perfectly convincing story there. Maybe there was a misjudgement, but that depends how you understand the Foreign Secretary's letter of the 15th. And it doesn't seem to be unreasonable to deal with it that way. It does attempt to address the question, and indeed Dr. Boolell's letter was an attempt to deal with the problem. What's interesting is the Note Verbale from the Government of Mauritius at exactly the same date makes no reference to the CHOGM meeting at all.

I've got further instructions.

(Pause.)

PROFESSOR BOYLE: I think that's actually the point I already made, but Dr. Boolell's letter was quite clearly referring to the possibility of the meeting where the misunderstanding could be resolved, and it's very clear there were repeated attempts following that to deal with the problem. Unfortunately, that meeting never took place, but that was clearly not the United Kingdom's fault. Strenuous efforts were made to attempt to resolve that matter at a meeting once it was grasped and there obviously was a problem. But Dr. Boolell clearly envisaged a meeting being the right response, and as I say, the Note Verbale of the same date didn't make any reference to the issues. So, it may be that this has been somewhat overplayed. But, unfortunately, I can't help you at the moment to any greater extent than that.

ARBITRATOR GREENWOOD: Well, thank you for the help that you have given.

ARBITRATOR WOLFRUM: Professor Boyle, looking upon this exchange of letters from the receiver's side, I have once upon a time, it's long, long years ago, learned that one should looks into this exchange of letters from the receiving side. How was the letter to be understood which you qualify as very diplomatic and understated? Certainly not there is a reference to a misunderstanding and not clarifying a misunderstanding.

PROFESSOR BOYLE: Well, I regard it as a very diplomatic letter, but then I'm not here to give evidence. I have just read the letter. That's all I could essentially say on that point. It doesn't seem to me to be an unreasonable response, but I don't know what the facts were, indeed, that was part of the problem, we are in some doubt as to what are the facts, since no one else had any record of this meeting, and we obviously have a difference of view between two Prime Ministers about what occurred. That's unfortunate, but it is where we are.

Different governments do write to each other in rather different terms. Had this been an exchange in correspondence between the King of Saudi Arabia and the King of Kuwait, I've forgotten his precise title, but it would be on very different terms, and again, it would be

inexplicable to ask why two governments would write to each other in those terms, but it reflects the particular national characteristics of the governments concerned.

All I can say is that brings me to the obvious conclusion that, as regards consultation, the United Kingdom clearly did all it could to try to bring these consultations to an amicable and reasonable conclusion, but at the end of the day, it was Mauritius which unquestionably pulled out of the consultations as it said because it did not wish to see the public consultation proceed and that's why it terminated the bilateral consultations with the United Kingdom.

35. That brings us to Judge Greenwood's other question, I hope I can answer this one. It was the question about the Foreign Secretary and the decision he took on 1 April. You asked why did he take it quite so quickly. Two points. The Public Consultation was overwhelmingly positive, the scientists were in favour, so were the other UK stakeholders and the NGOs, and the United States was willing for the proposal to go ahead. So, there was no reason to delay a decision. Secondly, the deadline for submissions to the Public Consultation was extended from 12 February to 5 March, solely so that the facilitator could hold a video-conference with the Chagossian community in Mauritius on 4 March. She had been unable to travel to Mauritius as planned[92] to hold that Consultation because there had been difficulties with Mauritius over the public consultation[93]. Mauritius was advised of the extension of the deadline by a Note Verbale of 15 February[94]. So, it was a decision which could have been taken then. I don't think you would be making your point if the Public Consultation had ended on 15 February. But the only missing piece was that Consultation with the Chagossians in Mauritius. And the third point on this is clearly relevant, there was an election due at the beginning of May, which was a little over four weeks later. In the British system of government, when an election is

[92] UKCM, Annex 105, Facilitators Terms of Reference, para. 2.
[93] UKCM, para. 3.60.
[94] MM, Annex 161.

called, essentially government stops. No new policies can be introduced. So, either Mr. Miliband took his decision on 1 April – which is the last possible date he could do so before the election - or he could leave the decision for the incoming government four weeks later. He took the decision, he did lose office, a new government came in, and they confirmed his decision. It is not only Mauritian politicians who find themselves constrained by election timetables.

36. So, in summary, we would suggest that the evidence referred to by Ms. Nevill shows the following:

- That there were meaningful and initially constructive consultations between the parties with regard to the declaration of the MPA.
- Secondly, that those consultations were undertaken well before the MPA declaration was adopted and in circumstances designed to give Mauritius every opportunity to influence the design and implementation of the project.
- The consultations ensured that the Mauritian government at all levels was fully informed of what was proposed and given the opportunity to respond.
- Mauritius' response was focused largely on joint management of resources and activities which could advance its sovereignty claim.
- After October 2009 Mauritius chose not to engage in the public consultation or in further bilateral talks on the MPA proposal.
- It was only once that was clear and the Public Consultation was complete, did the United Kingdom proceed with the declaration of the MPA on 1 April 2010.

37. We would say that the evidence shows that the United Kingdom acted in good faith throughout these consultations in an attempt to engage Mauritius on the substance of the proposal, and that it did so before taking any decision to implement the MPA. It sought and it wished to continue discussions with Mauritius. The decision to end those consultations was taken not by the United Kingdom but by Mauritius.

(c) No requirement of consultation pursuant to Arts 2(3) & 56(2)

38. I can now turn very briefly to the specific articles of the Convention on which Mauritius relies for its alleged obligation to consult in advance of the MPA declaration.

39. We would say for reasons that are already explained, there is no customary obligation to be incorporated into article 2(3).[95] There is no customary obligation. And for reasons explained earlier this afternoon by Mr. Wordsworth, we would say that even if there is, it cannot be shoehorned into article 2(3) for the reasons he has already advanced.

40. Mauritius also relies on article 56(2). It rightly notes that this article requires the coastal state to have "due regard" to the rights and duties of other states in the exclusive economic zone. But, if having "due regard" for the rights of other states means consulting them, we would suggest the text would have said so. Other articles of the Convention do expressly require consultation when the rights of other states may be affected. They include articles 41 (on traffic separation schemes), 66 (on anadromous species); and Article 142 (on activities in the seabed area). And it is quite possible to have regard for the rights of other states without consulting them: states do so on a daily basis. So the omission of the appropriate language in this particular context, is not likely to be accidental.

41. As I said this morning, having due regard means what it says: take account of, give consideration to, do not ignore. We would suggest that both the internal United Kingdom documentary record on which Mauritius relies, and the bilateral negotiations to which the United Kingdom has referred, amply demonstrate that due regard has indeed been paid to the claimed rights of Mauritius. And that there is no breach of article 56(2) on this evidence.

42. An express obligation to consult and to cooperate with respect to straddling and highly migratory fish stocks is included in articles 63 and 64, and I will deal very briefly with these because I think I've actually dealt with most of the points earlier today.

[95] MR, paras. 6.68-6.72.

C. Consultation and cooperation with respect to fishing

(a) The facts establish consultation and cooperation

43. But once again, the United Kingdom's response is that the evidence simply doesn't show the lack of consultation alleged by Mauritius, either in regard to Article 63 or 64 or indeed Article 7 of the Fish Stocks Agreement. What we would say, is that as a full member of the Indian Ocean Tuna Commission, the United Kingdom has participated in and cooperated with that body in the conservation and management of fish stocks in the Indian Ocean. And in doing so, it has more than satisfied the requirements of Article 64 of UNCLOS and of Article 7 of the Fish Stocks Agreement. I would also point out that as regards bilateral cooperation, there is, once again, the British-Mauritian Fisheries Commission, Ms. Sander drew your attention to that on Wednesday. She explained how it was established in 1994 as a forum for cooperation on fisheries matters between the two countries, that it was Mauritius which brought that Commission to an end for sovereignty reasons in 1999. And it was Mauritius that declined in 2009 to resume cooperation on fisheries through that body.

44. Ms. Sander has also taken you through the discussions, the bilateral talks, in January and July 2009. You will recall that they covered fisheries issues, although the fisheries issues raised by Mauritius were essentially joint licensing of foreign exploitation of the fish stocks.[96]

45. So, it seems to us that the evidence really contradicts any argument about a failure of bilateral cooperation between the two parties with regard to fish stocks.

46. The same is true of Mauritius' participation in the IOTC. The Commission's published records show that at meetings of the Commission, Mauritius never raised the question of cooperation with the United Kingdom over fisheries, nor has it ever sought to have the MPA discussed. Its only relevant intervention in IOTC meetings has been to press its sovereignty claim over BIOT or to object to proposals made by the United Kingdom with respect to

[96] UKCM, Annexes 93 and 101; Day 5, Sander, pp. 610-613.

BIOT[97]. Mauritius has also objected to the United Kingdom's participation in meetings of like-minded coastal states[98]. Mauritius cannot really complain on the one hand about a failure by the United Kingdom to cooperate with the IOTC while at the same time obstructing the United Kingdom's participation in the work of the Commission.

47. Nor has the IOTC itself ever expressed any concern about the declaration of the MPA or the attitude of the UK. There are no resolutions of the IOTC on these subjects. You will search its annual reports in vain for any criticism of the UK or the MPA by any member state – and Mauritius has not drawn your attention to any. Given that one of Mauritius' claims is that the United Kingdom has not consulted or cooperated with the IOTC, this silence is beyond remarkable: it is of evidential significance. It would be extraordinary for this tribunal to find in favour of Mauritius on cooperation with the IOTC when that issue has never been raised in or by the IOTC.

48. And that contrasts, I would suggest, very strongly with the recent decision of the ICJ in the *Whaling Case*.[99] Japanese scientific whaling had been the subject of many critical resolutions in the IWC, it had been discussed on numerous occasions by the Scientific Committee, sometimes in very sceptical terms. No-one who reads IWC reports could be in any doubt that Japanese scientific whaling was controversial and that many member states were unhappy with it. Nothing remotely comparable can be said about the United Kingdom's exemplary record of participation in the IOTC.[100]

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[97] IOTC 14th Report of the Scientific Committee 2011, IOTC-2011-SC14-R[E], http://www.iotc.org/sites/default/files/documents/proceedings/2011/sc/IOTC-2011-SC14-R%5BE%5D.pdf, pp. 14-15, p. 14; IOTC 15th Report of the Scientific Committee 2012, IOTC-2012-SC15-R[E], http://www.iotc.org/sites/default/files/documents/proceedings/2012/sc/IOTC-2012-SC15-R%5BE%5D.pdf, p. 18, p. 18.

[98] IOTC Technical Committee on Allocation Criteria Meeting, Muscat, Oman 18-20 February 2013, day 2, UKCM, Annex 133.

[99] *Case Concerning Japanese Whaling in the Antarctic (Australia v Japan)*, Judgment, ICJ reports 2014.

[100] UKCM, para 9.24.

49. Mauritius claims "the UK's engagement with the IOTC was simply to inform it that the "MPA" was contemplated and that it "could have implications" for the organisation."[101]

50. But consultation is a two-way process. Having notified the IOTC it was open to the Commission or its members to come back with a request for more information or to seek further dialogue had they wanted to do so. And they did not do so, nor did Mauritius.

(b) Articles 63 and 64 are inapplicable

51. It follows, we would suggest, from all of this evidence that the United Kingdom has complied with whatever obligations of consultation and cooperation it may have had under articles 63 and 64 of UNCLOS, and article 7 of the Fish Stocks Agreement. But you will recall what I said this morning, that in any event these articles are entirely irrelevant to this case because they are inapplicable to Mauritius. Mauritius is not a state which fishes in waters adjacent to the BIOT MPA and it is not a state which fishes in the same region. It certainly hasn't provided any evidence to that effect. And the evidence which it has provided to the IOTC, and I showed you the map this morning, flatly contradicts the point.

52. So, regardless of whether there was consultation and cooperation here, we would say that these articles are entirely irrelevant. And I should also add that in regard to Article 64 and Article 7, Churchill and Lowe described the IOTC as "an organization of the kind envisaged by article 64."[102] Under article IV of the IOTC Agreement, membership is open to "coastal states ….situated wholly or partly within the [IOTC Area]." And the United Kingdom and Mauritius are both members and we would suggest that is the correct forum in which cooperation should occur.

(c) Article 7 UNFSA is inapplicable

53. That brings me very briefly to the Fish Stocks Agreement to which some reference has been made.

[101] MR, para. 6.106.
[102] Churchill and Lowe, *The Law of the Sea*, 3rd edn, p. 313.

54. It's not necessary to say very much. I think the point which needs emphasis is to explain Mauritius' references to Article 7(2) and 7(3), an argument that the United Kingdom has an obligation to agree conservation measures with Mauritius or with other member states of the IOTC. That argument misunderstands these articles. The key point here is that articles 7(2) and 7(3) require States whose nationals fish on the high seas "to ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness" of conservation and management measures adopted by "coastal States within areas under national jurisdiction". There is a much weaker obligation for coastal states to take account of the conservation measures applied to the adjacent high seas areas. That might be relevant if there were any, but Mauritius certainly has not drawn our attention to any.

55. So, we would suggest the only significance of these two articles is that if Mauritius does fish on the high seas in adjacent waters – and there is no evidence that it does – but if it did, it would have an obligation not to undermine the effectiveness of the conservation measures taken by the United Kingdom in the BIOT MPA. In other words, not to undermine the effectiveness of the no-take fisheries zone. But as I say, there doesn't seem to be any evidence that this article would in fact be applicable on the circumstances of this case.

56. Article 7 does involve, however, a complex attempt to balance the rights of coastal states and the legitimate interests of high seas fishing states in conservation and management of shared fish stocks. But again, the obvious forum for negotiating such measures is the IOTC. And here, bilateral negotiations with Mauritius would be of relatively limited value, because if the article were applicable, clearly one would want a much broader forum for cooperation. But as I explained yesterday Mauritian vessels do not on the evidence fish in these waters.

57. So, Mr. President, members of the tribunal, if we stand back and look at the totality of the evidence on fisheries cooperation between the parties, two things are fairly clear. First, there were ample opportunities for Mauritius to enter into a dialogue with the United Kingdom about

MPA fisheries and straddling or highly migratory fish stocks, either multilaterally through the IOTC, or bilaterally through the Joint Fisheries Commission, or directly. The onus is on Mauritius to show why it could not have availed itself of any of those opportunities, and why the discussions which took place in 2009, and which it brought to an end, do not constitute the 'consultation' it now demands. Let me point out that Mauritius too, has an obligation to cooperate.

58. Secondly, the IOTC is the appropriate body for discussions and cooperation between coastal states and distant water fishing states with regard to depleted tuna stocks and other highly migratory stocks in the Indian Ocean.

59. Here too, the onus is on Mauritius to show why the existing participation of both states in the IOTC does not constitute the cooperation required by article 64 of UNCLOS and article 7 of the Fish Stocks Agreement.

60. Finally, we do have to wonder what point Mauritius is trying to make when it alleges non-consultation and non-cooperation on fish stocks. Fairly obviously, it is not trying to save the tuna and it's not trying to prevent unsustainable fishing in the Indian Ocean. It has not suggested that the MPA fishing ban undermines the effectiveness of the IOTC or of the conservation measures adopted by the IOTC. Indeed, it could not do so.

61. Nor is Mauritius saying that the ban on commercial fishing in the MPA has harmed its own non-existent fishing in adjacent waters. In reality, Mauritius is not a distant water fishing state, it's not dependent on the BIOT fishery; its fishing is confined mainly to its own coastal waters, so nothing that happens between 500 and 900 miles away has any bearing on its fishing industry or economy.

62. And what Mauritius does seem to want is some measure of control over how the United Kingdom as a coastal state manages the conservation of fish stocks and other living resources

within the BIOT MPA. But as we pointed out in the Counter-Memorial, that makes Mauritius sound like an old-fashioned distant water fishing state from the 1960s.

63. The arguments that it now makes for greater access to coastal state fish stocks are the same arguments that brought about the failure of the 1958 Geneva Convention on Fisheries. They are fundamentally incompatible with the extension of exclusive fisheries jurisdiction that has occurred since the *Icelandic Fisheries Cases* were decided, and most obviously they contradict the UN Fish Stocks Agreement, of which both States are parties. Nostalgia for the 1960s might be understandable – up to a point – but reinventing preferential fishing rights is surely beyond the pale.

D. Continental shelf rights

64. That leads me very briefly to the continental shelf. Sir Michael Wood has dealt with this issue at some length and I need only recall that the understanding reached in 1965 as part the Lancaster House talks included a paragraph which stated that "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government."[103] Later the same year the Secretary of State for the Colonies indicated that "The islands are required for defence purposes. There is no intention of permitting prospecting for minerals or oils on or near them."[104]

65. We would say that the clear and unambiguous wording of the 1965 understanding and the negotiating record demonstrate that at present Mauritius has neither ownership nor sovereign rights over oil or gas or minerals on the BIOT continental shelf.[105]

66. Let me go back, if I may, to one of the documents on which Mr. Reichler relied. It is at tab 8.7 in Mauritius' folder. This is a Foreign Office memo from 1970 about oil and gas in the Chagos Archipelago. Page 2 sets out the United Kingdom position very clearly, and it notes that "This

[103] 1965 Understanding, para 22(viii), UKCM, para 2.112.
[104] UKCM, para 2.113 and MM, Annex 29.
[105] UKCM, paras 2.83-85; 2.112-2116.

was fully understood by [Mr. Wilson, the Prime Minister] and the Mauritian Government at the time. In fact, it was officially stated in the Legislative Assembly on 21 December." Thus, we would say that it was understood by Mauritius at the time of the independence negotiations that sovereign rights over the continental shelf would remain vested in the United Kingdom until the islands were no longer needed.

67. And the same applies equally to the harvesting of sedentary species. Mauritius claims that they were included in the traditional fisheries undertaking given by the United Kingdom, or the understanding given by the United Kingdom in 1965 and that a ban on harvesting them contravenes its rights under Article 78(2).

68. The Rejoinder sets out the position as it existed in 1965.[106] There was no harvesting of sedentary species at that time. Nor have any licences been issued since then. The wording of the understanding reached in 1965, as Mr. Wood had suggested, cannot have been intended to cover sedentary species.

69. So, the claim that Mauritius has "traditional fishing rights" with respect to those species simply has no merit unless Mauritius can show that such a fishery existed in or before 1965, and it hasn't made any attempt to do so.

E. Marine pollution: article 194

70. Let me turn to pollution. Mauritius makes two claims under article 194. First, it argues that the United Kingdom has a duty to coordinate its policy on marine pollution with Mauritius. Its second claim is that the United Kingdom must not legislate on marine pollution in a manner that interferes with Mauritius' right to fish in the MPA.

71. Neither claim has any merit. Article 194(1) is simply the chapeau to the more specific treatment of different sources of marine pollution set out in paragraph (3) of that article, and these sources are then dealt with in much more detail by articles 207 to 212, and I said quite a

[106] UKR, paras 8.43 – 8.46.

lot about those this morning. So, the obligation to endeavour to harmonize policies on marine pollution cannot be understood in isolation from the differing standards laid down by those articles. Mauritius has made no effort to elaborate this point.

72. But let me just give you one illustration. Article 211 requires states to establish international rules and standards for the prevention and control of marine pollution from ships. As we saw this morning, they have to do so through the IMO and the MARPOL Convention provides all the detailed rules and standards. So, there you've got international regulation of the problem.

73. Now, contrast that with article 207 on land-based pollution. It is noticeably and deliberately in much weaker terms. It simply says that states "shall endeavour" to harmonize their policies at the appropriate regional level. Now, in this part of the Indian Ocean the appropriate regional forum is probably the Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean adopted in 2010. You won't find anything about that in Mauritius' pleadings.

74. Mauritius could of course have placed coordination of policy on marine pollution on the agenda of the bilateral talks with the United Kingdom in 2009, or subsequently, but it did not do so. The first occasion on which the United Kingdom became aware that Mauritius regarded marine pollution as an important issue of shared concern was when it received Mauritius' Memorial in this case in August 2012.[107] What evidence is there of any cooperation by Mauritius, I might ask?

75. As for the argument that pollution legislation may unjustifiably interfere with Mauritius' claim to fish in the MPA and therefore violates article 194(4), this is frankly rather difficult to understand. Pollution has been for many years strictly regulated in the MPA under existing laws. These include:

1988 Environment Protection (Overseas Territories) Order[108]

[107] Arbitrators Folder, Tab 46.
[108] UKR, Annex 31.

1994 Prevention of Oil Pollution Ordinance[109], and the

1997 Regulation of Activities by Vessels Ordinance[110]

76. Mauritius has never in the past suggested that these laws have interfered with any of its fishing activities in BIOT waters, nor has it ever raised the matter in bilateral talks, nor has it made any reference in its pleadings to this legislation. The National Oceanographic Centre Report on the MPA notes that there have been no marine oil-spill incidents,[111] and there is no suggestion that bunkering of fishing vessels has been a problem. I think it's true that pollution caused by waste discharges from supply vessels moored in the lagoon and from the BIOT patrol vessel have been identified as a problem, and they're being dealt with. We've obviously discussed that earlier in the proceedings.[112] The lagoon is outside the MPA, and the problem there has no bearing on the claims made by Mauritius under article 194.

77. All I can say in conclusion on that point is the United Kingdom has no information on whether Mauritian fishing vessels are likely to have difficulty complying with BIOT pollution laws or with any future legislation. Perhaps Mauritius might like to provide us additional information on that.

F. There is no basis for an abuse of rights claim

78. That brings me happily to the last point, but it's a substantial one, so it will take 10 minutes, and that's the abuse of rights claim. This is now the fifth UNCLOS case in which one party has alleged a violation of article 300, and so far as I can tell, it's the only one to come to argument on the merits.[113] There is therefore little or no jurisprudence, so let me start with the questions of law that arise when article 300 is pleaded, and I have got four propositions.

[109] UKR, Annex 42.
[110] UKR, Annex 50.
[111] NOC Report, UKCM, Annex 102, UKAF, Folder 1, Tab 17, p. 11.
[112] Report by the BIOT Environment Adviser, March 2013.
[113] The others are: *Swordfish, Mox Plant, Southern Bluefin Tuna,* and *MV Louisa*.

79. First, abuse of rights is not an independent basis of claim, and Mauritius appears to have conceded this point, and I don't think I need to say any more about it.

80. Second, the burden of proving abuse of rights is on the party alleging it. In this respect the normal rules of international litigation apply, and Mauritius does not argue otherwise. However, unlike Professor Crawford, we would say that Mauritius has failed even to adduce prima facie evidence of improper purposes or bad faith.

81. Third, clear and convincing proof of injury is required. Professor Crawford did not mention that point in his oral argument, but Mauritius does rely in its written pleadings on the section on abuse of rights in the *Max Planck Encyclopaedia*, written by the late and much-lamented Alex Kiss, so let me quote what he says on the subject, and you can see it in front of you on the screen there. He says: "The fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle," and he goes on to refer to the *Trail Smelter Arbitration*. He says: "The abuse should be 'of serious consequence' and the injury established by clear and convincing evidence.'"[114] There is arguably good reason for a requirement of serious injury because rights may be abused without that amounting to a breach of treaty. I would suggest that without serious injury there would perhaps be no reason for a court to adjudicate on such a claim of abuse.

82. Mauritius has made much of its alleged fishing rights in BIOT waters, but it can scarcely say that their termination after many years of very limited use has caused it serious economic injury. Nor can it claim serious injury to its legal rights: at best, article 56(2) requires that due regard be paid to its claim to fish in BIOT waters. That limited obligation has to be read in conjunction with article 58(3) which requires other states to have due regard for the rights and duties of coastal states, and to comply with their laws and regulations. And that article and the obligation of foreign fishing vessels to comply with coastal state laws set out in article 62(4)

[114] UKCM, Authority 75, at para 31.

renders any claim to fish in the EEZ highly contingent and terminable when the coastal state has reasonable grounds for doing so. If proof of serious injury is required for an abuse of rights claim to succeed, then I would suggest that Mauritius fails at the first hurdle.

83. That brings me to my fourth point, that the rights in question must have been used in an abusive manner. Mauritius contends, first, that this means they must not be exercised for a purpose different from the one for which they were created. Second, it says that the use to which they are put must be capable of fulfilling the purpose for which they were created. And these are distinct issues and I am going to deal separately with them.

84. The first claim amounts to saying that the purpose of the MPA is not what it is said to be by the government. And to prove its case on improper purposes, Mauritius must somehow persuade you that the Foreign Secretary – and presumably his officials – were motivated by some inadmissible purpose that is extraneous to their powers under UNCLOS. If true, the Foreign Secretary and his officials would have been responsible for a quite enormous charade over a period of nearly two years.

85. What does Mauritius cite as evidence for that? Well, it cites a Wikileaks document, it refers to the High Court testimony of the Mr. Roberts, the BIOT Administrator, and to a briefing paper circulated over a year prior to the declaration of the MPA. It also draws attention to the advice given by officials. The United Kingdom has set out its views on Wikileaks documents at paragraph 8.64 of the Counter-Memorial. In cross-examination under oath Mr. Roberts flatly denied making the alleged 'Man Friday' remark or having any ulterior motive.[115] Ms. Yeadon denied that he made any such remark. The High Court dismissed the allegation. The briefing paper does not support the claim made by Mauritius about preventing resettlement. But even if it did, a briefing paper does not constitute proof of clear and convincing proof of ulterior political motive, nor does the advice given by officials. None of this, we would

[115] MM, Annex 174, day 2, pp. 34-36

suggest, adds up or comes near to the necessary evidential burden which Mauritius must discharge to prove this claim, which in our view is wholly unfounded.

86. Professor Crawford referred to the MPA as a "multi-purpose enterprise" with political aims. What is the implication here? If the implication is that there is some ulterior and inadmissible purpose behind the MPA, what is it? Professor Crawford mentioned only the government's desire to improve its image after the scandals of Iraq and extraordinary rendition. What is the implication of that? That politicians should not have additional public relations advantages in mind when they use powers conferred by treaties to achieve otherwise legitimate objectives that are wholly consistent with the object and purpose of the treaty in question? Australia made the same argument in the *Whaling Case*, when it drew attention to statements made by Japanese politicians and officials who appeared to have non-scientific motives in mind when they established the scientific whaling programme. The Court dismissed that argument in a short sentence.[116] "Accordingly, the Court considers that whether particular Government officials may have had motivations that go beyond scientific research does not preclude a conclusion that a program is for purposes of scientific research." I would suggest that you should dismiss that allegation in a similarly short sentence.

87. Nor, given the evidence on which the MPA decision was based, is it plausible to say that the government was acting for some extraneous purpose. You may have seen the Report on the MPA drawn up by the National Oceanographic Centre which sets out the scientific rationale; you have heard that the creation of the MPA conforms to policies for the Overseas Territories set out in white papers in 2009 and 2012; you are familiar with the negotiations and consultations between the two governments which took place in 2009 and 2010; and you have no doubt read or seen or probably will read the Public Consultation document in November

[116] *Whaling Case*, at para 97: "Accordingly, the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII."

2009. There is ample evidence here to demonstrate the real purpose for creating the MPA and for concluding that it was reasonable to proceed as proposed.

88. The decision to establish one of the world's largest MPAs is clearly a legally significant policy decision, and an example of state practice. That it was known to be controversial, or that some officials gave contrary advice, or that it was opposed by the multinational fishing industry, does not show that it is not fully consistent with the object and purpose of UNCLOS or with international policy on the marine environment. In our view that is more than sufficient to show that the United Kingdom's sovereign rights in respect of conservation and management of BIOT fish stocks and the protection and preservation of the marine environment were used for the purposes for which they were conferred.

89. If you bear with me, I can get to the end in five minutes. Mauritius' second argument is that the MPA is not reasonably capable of fulfilling its declared purpose, and I clearly need to deal seriously with that. In its Memorial and in its oral argument last week Mauritius refers to the failure to enact detailed regulations and to appropriate a budget; of effective enforcement; and the exclusion of Diego Garcia.[117] These allegations have all been dealt with by Ms. Nevill and in the written answers given to Judge Wolfrum, and we regard all of them as misconceived.

90. But while refraining from challenging the science on which the MPA is based, Mauritius has tried to suggest that that science does not justify interfering with the right to fish in the MPA. In effect, if I understand him correctly, Professor Crawford seemed to be inviting you to uphold the MPA but conclude there is no sufficient evidential basis for a no-take policy on fishing. There are two responses to this argument.

91. First, it's not an abuse of rights claim. As I have now said several times, what we are faced with here is a need to balance the competing rights of coastal states and of others fishing in their EEZ, and the relevant rules are articles 56, 58, 61 and 62. So the question, we would suggest, is

[117] MM, paras. 7.94-7.97.

whether in closing the MPA to foreign fishing to Mauritian fishing the United Kingdom has acted consistently with those articles, and that is not an appropriate question for an abuse of rights discussion.

92. Secondly, even if I am wrong, Mauritius has not shown that the decision to ban all commercial fishing in the MPA lacks scientific justification. All it can point to are the differing opinions of scientists about whether to ban fishing or continue the previous policy. It also points to concerns about effectiveness, but those I think we have responded to. It is hardly news that scientists disagree about the evidence, and Ms. Nevill has summarised the debate within the NOC Workshop and drawn your attention to the reasons for a no-take policy and the strong support they received there.

93. But I would suggest – this is a rather important point—that justifying measures of the kind taken by the United Kingdom, in order to conserve fish stocks, biodiversity and the marine ecosystems on which they depend does not require strong and cogent scientific evidence. It certainly doesn't require scientific consensus, even assuming there is such a thing. Mauritius is a party to the Fish Stocks Agreement. It has endorsed the application of a precautionary approach to the management of fish stocks in precisely the circumstances of this case. It is bound by the terms of that treaty and it is bound to respect measures adopted by coastal states implementing that treaty, even if those measures abrogate fishing licences formerly held in respect of the area now covered by the BIOT MPA.

94. And let me draw your attention to articles 6(1) and 6(2) on the screen.

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

95. Now, the implications of article 6(2) are obvious: the United Kingdom is entitled to be cautious about conservation of fish stocks and coral reefs and endangered species and biodiversity in the MPA. It does not have to postpone action until it has irrefutable proof that the conservation measures it proposes to take are necessary and will be effective. If need be, it can proceed while the scientists carry on with the necessary research.

96. I might in that connection cite the *Asbestos Decision* in the Appellate Body of the WTO, where it said that the Government may 'rely in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion'.[118] In other words the science does not have to be undisputed – and good science often is.

97. So, it follows, I would suggest, that if Mauritius wishes to cast doubt on the scientific justification for the no-take MPA next week, it will have to provide much stronger and far more cogent evidence that clearly and convincingly contradicts the existing scientific and environmental basis for the no-take policy on fishing. Notwithstanding anything said by Mauritius last week, it comes at the moment nowhere near doing so.

98. And it needs to be said that the science which underpins the BIOT MPA is the same science which underpins the creation of other MPAs worldwide – BIOT is only one of the big seven such zones established by coastal states.[119] Other MPAs have been adopted by the OSPAR Convention parties.[120] More are planned. The creation of large no-take MPAs does represent

[118] *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001), para. 178.

[119] UKR paras 3.38-44.

[120] Scott, "Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas", 27 IJMCL 849 (2012), UKR Authority 38.

an internationally endorsed response to growing pressure placed on the marine environment by unsustainable fishing. Destroy this one and you destroy all of them.

99. Mr. President, Judge Wolfrum asked a question about the scientific basis of MPAs, and this is perhaps the right moment to answer him. At tab 74 you will find information provided by the United Kingdom in response to that question. I should explain, this is a brief memo which has been drafted by Professor Sheppard, who was the former BIOT scientific adviser. I should stress that it is not submitted as expert evidence –

PRESIDENT SHEARER: I should allow Professor Sands to make his intervention. What was it?

PROFESSOR SANDS: Mr. President, this has been the subject of discussion between the Parties. The document that is tendered, we understand, is tendered by and on behalf of the United Kingdom. It is authored by the United Kingdom, not by any other person. It is on that basis that we have given our consent to that document being put forward, in response to a question put. The sponsorship is that of the United Kingdom and no other person.

Thank you, Mr. President.

PRESIDENT SHEARER: Thank you for the clarification.

PROFESSOR BOYLE: Yes, Mr. President. I'm grateful for that clarification. That is exactly the position.

100. But what it does is to summarize the findings in the scientific literature, and it provides a bibliography, and I hope that may be what Professor Wolfrum was asking for. And, of course, if we can assist the Tribunal further by providing additional scientific material, we will try our best to do so.

101. Mr. President, I think this is my last point. I have argued the abuse of rights case largely on the same basis as Mauritius. Even on Mauritius' view of the law it seems clear that it has no

case. It falls well short of showing anything that Professor Kiss would identify with his account of abuse of rights.

102. But for the sake of completeness, let me take you back to Article 297(3)(b) because we would suggest that in this context, this fisheries context, the appropriate way in which to deal with an abuse-of-rights claim is within the context of Article 297(3)(b), which does set out a variety of grounds under which it is possible to challenge measures taken with respect to the conservation and management of fish stocks in the exclusive economic zone.

103. So, our contention with respect to that article is that, in this context, it provides an exclusive remedy for allegations focused on abuse of rights by coastal States with regard to fisheries in the exclusive economic zone. And for that reason, we would suggest that it is entirely inappropriate to look at that particular claim under Article 300.

So, Mr. President, Members of the Tribunal, it has been a rather long day, that brings me to the end of my submissions for this afternoon. I will be happy to answer any questions. If there are none, that concludes the United Kingdom's first-round arguments, and on behalf of all my colleagues, may I wish you and our friends on the other side a pleasant weekend, and we look forward to reassembling on Monday.

Thank you.

PRESIDENT SHEARER: Thank you, Professor Boyle. You took the words out of my mouth about the forthcoming weekend, I think we all deserve a break.

And the latitude that I extended to the United Kingdom in relation to questions and some we had gone a bit over time, I'm very happy, the Tribunal is very happy to extend the same latitude to the Mauritius side, if they need it.

PROFESSOR BOYLE: Mr. President, we are very grateful to you for doing that.

PRESIDENT SHEARER: And so this brings the 50 round of arguments to an end, and we meet on Monday morning at 9:30 to begin the second round of arguments, and we will hear from Mauritius at that time.

So, thank you very much. Good evening.

(Whereupon, at 5:50 p.m., the hearing was adjourned until 9:30 a.m., Monday, May 5, 2014.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN

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