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

MAURITIUS

v.

UNITED KINGDOM

COUNTER-MEMORIAL

SUBMITTTED BY

THE UNITED KINGDOM

15 JULY 2013

CONTENTS

CHAPTER I

INTRODUCTION

1.1 This Counter-Memorial requests the Arbitral Tribunal to find that it is without jurisdiction in respect of the dispute submitted by Mauritius in its Notification and Statement of Claim. It also, and without prejudice to this principal submission, addresses the merits of the Application.

A. Summary of proceedings

1.2 On 20 December 2010, the Republic of Mauritius ('Mauritius') instituted proceedings against the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') under Part XV of, and Annex VII to, the United Nations Convention on the Law of the Sea ('UNCLOS', 'Convention'), by addressing to the United Kingdom a *Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of the Claim and grounds on which it is based.*[1]

1.3 The Members of the Tribunal were appointed in accordance with article 3 of Annex VII of UNCLOS, and the Tribunal was fully constituted as of 25 March 2011.

1.4 On 23 May 2011 Mauritius stated its intention to challenge the appointment of one of the arbitrators. Following exchanges of written pleadings, as well as an oral hearing, on 30 November 2011 the other four arbitrators dismissed the challenge and deferred any decision regarding costs[2].

[1] On 27 January 2012 the Agent of Mauritius wrote to the Agent of the United Kingdom, copied to the Deputy Secretary-General of the Permanent Court of Arbitration, informing him that it had "come to the attention of the Government of Mauritius that a number of minor factual matters required correction in Mauritius' Notification and Statement of Claim of 20 December 2010". The Agent attached to his letter "a revised version of that document, highlighting the changes which have been made", adding that the changes were "not intended to have any substantive consequences for the claims".

[2] *Reasoned Decision on Challenge* dated 30 November 2011.

1.5 On 29 March 2012 the Tribunal adopted its Rules of Procedure, and fixed 1 August 2012 as the time-limit for the communication by Mauritius of a Memorial, which was duly communicated on that date.

1.6 On 31 October 2012 the United Kingdom submitted Preliminary Objections, in which it requested the Tribunal to find that it was without jurisdiction in respect of the dispute submitted to the Tribunal by Mauritius in its Notification and Statement of Claim[3]. Following an exchange of written pleadings[4], and an oral hearing on 11 January 2013[5], devoted to the question of 'bifurcation', in *Procedural Order No. 2* of 15 January 2013 the Arbitral Tribunal decided and ordered as follows:

> *"1. The United Kingdom's request that its Preliminary Objections be dealt with in a separate jurisdictional phase as a preliminary matter is rejected.*
>
> *2. The United Kingdom's Preliminary Objections to the jurisdiction of this Tribunal will be considered with the proceedings on the merits."*[6]

1.7 The hearing on 11 January 2013, and *Procedural Order No. 2*, were devoted exclusively to the question of 'bifurcation'. The Arbitral Tribunal did not decide the issues of jurisdiction raised by the United Kingdom in its Preliminary Objections, which, as stated in the *Procedural Order*, are to be "considered with the proceedings on the merits".

1.8 Following consultations with and between the Parties, the Tribunal took note of the revised schedule for further submissions agreed by the Parties. In accordance with that revised schedule, the present Counter-Memorial is due on 15 July 2013[7].

[3] United Kingdom Preliminary Objections to Jurisdiction, 31 October 2012.
[4] Mauritius Written Observations on the Question of Bifurcation, 21 November 2012; United Kingdom Written Reply to the Written Observations of Mauritius, 21 December 2012.
[5] Transcript prepared by Worldwide Reporting, LLP.
[6] *Procedural Order No. 2 (Application to bifurcate proceedings)* dated 15 January 2013. No reasons were given.
[7] Letter from the PCA dated 5 February 2013.

B. General observations

1.9 The question of jurisdiction is central to the present proceedings. In the United Kingdom's view, the Arbitral Tribunal is without jurisdiction over any of Mauritius' claims.

1.10 The attempt by Mauritius to construct a case under UNCLOS in order to bring the sovereignty dispute between itself and the United Kingdom within the compulsory jurisdiction of the present Arbitral Tribunal is artificial and baseless. In the United Kingdom's respectful submission, a court or tribunal acting under the compulsory jurisdiction provided for in Part XV of UNCLOS has no jurisdiction over questions of sovereignty over land territory such as Mauritius has sought to introduce. To assume such jurisdiction would be contrary to the principle of consent, which remains fundamental to the jurisdiction of international courts and tribunals, and would be to exceed a court or tribunal's powers under Part XV. It almost goes without saying that a finding of jurisdiction could have far-reaching implications for the universality of UNCLOS.

1.11 The artificial nature of Mauritius' claims under UNCLOS is reflected in the fact that none of them were raised with the United Kingdom prior to the Notification and Statement of Claim. This of course raises the discrete issue of whether Mauritius has met the requirements of article 283 of UNCLOS. It is the United Kingdom's firm position that it has not.

1.12 In light of the Tribunal's decision on bifurcation, questions of jurisdiction will assume great importance at the oral hearing, which will need to be organised with this in mind.

1.13 As to the merits, Mauritius' claims raise both sovereignty and non-sovereignty issues. On both aspects the claims are notably weak. The United Kingdom's sovereignty over the British Indian Ocean Territory ('BIOT') is clear. The Chagos Archipelago was not within the territory of Mauritius to which independence was granted on 12 March 1968, and has remained United Kingdom sovereign territory up to the present[8].

[8] The territory with which this case is concerned is known in United Kingdom constitutional law as the British Indian Ocean Territory (abbreviation, 'BIOT'). When it was established in 1965 the BIOT was composed of certain islands that had originally been part of the Lesser Dependencies of Mauritius and of the Colony of Seychelles. The islands that had formerly been part of the Seychelles were detached from the BIOT and became part of the Republic of Seychelles upon its independence in 1976. Thereafter the BIOT comprised only the islands of the Chagos Archipelago (as they are referred to in the current Constitution of Mauritius). It is not, therefore, factually inaccurate to refer, as regards any time after 1965, to the islands of the BIOT as the Chagos

1.14 There is likewise no merit in the non-sovereignty claims. The claims, that in establishing the Marine Protected Area ('MPA') there have been failures to comply with individual provisions of UNCLOS, were never raised with the United Kingdom, and are evidently an afterthought. Had there been any merit in these claims, they would have been flagged up in correspondence, particularly in that they concern alleged fishing rights and alleged failures to consult that could readily have been, and should have been, raised in the context of bilateral consultations with respect to the MPA.

1.15 It should not be overlooked that, by bringing these proceedings under UNCLOS, Mauritius is ultimately seeking to block a conservation measure – a marine protected area. This is, or should be, entirely distinct from the question of Mauritius' claim to sovereignty. What Mauritius fails to acknowledge, indeed appears to contest, is that the BIOT MPA is an important conservation and biodiversity measure, implemented after two years of work by officials and a wide ranging consultation process, which included Mauritius. The MPA may be changed or even terminated at any time. Implementation of the MPA cannot in any way compromise Mauritius' position should the Chagos Archipelago be ceded to it when it is no longer needed for defence purposes.

1.16 It is regrettable, and a matter of real surprise in the relations between two friendly States, that Mauritius has also seen fit to introduce a wholly unfounded allegation that the establishment of the MPA constituted an abuse of rights.

1.17 The United Kingdom does not intend to respond, in the course of the present proceedings, to the various allegations concerning the treatment of the Chagossians. The present proceedings are not about the rights of the Chagossians, which have been canvassed at length before the courts of England and Wales, and before the European Court of Human Rights, most recently in the 2012 decision of the Strasbourg Court and in the June 2013 judgment of the Administrative Court in London. The latter judgment is, however, relevant in that the Administrative Court examined facts that are at issue in the present case.

Archipelago, and the United Kingdom will not object to this usage in these arbitral proceedings on the understanding that such usage carries no substantive judgment. The United Kingdom wishes nevertheless to place on record that the correct constitutional name for the territory is the 'British Indian Ocean Territory'.

C. Organisation of the Counter-Memorial

1.18 The present Counter-Memorial is divided into three parts. **Part One** (Chapters II and III) sets out the relevant facts; **Part Two** (Chapters IV to VI) deals with jurisdiction; and **Part Three** (Chapters VII to IX) with the merits.

1.19 **Chapter II** describes the constitutional and diplomatic background. This chapter first describes the geographical situation of the BIOT, some 2,856 kilometres from the Island of Mauritius. It then describes the constitutional position of the Chagos Islands, which were governed as 'Lesser Dependencies' of Mauritius until 1965, when - together with certain Seychelles islands - they became a separate British overseas territory, the BIOT. It then turns to the constitutional history of Mauritius, before and after Independence in 1968. The Chapter describes the background to the establishment of the BIOT, including the agreement of the Mauritius Council of Ministers to the establishment of the BIOT. The Chapter also describes developments at the United Nations, as well as subsequent relations between Mauritius and the United Kingdom concerning the BIOT. An Appendix sets out the law and practice of States relating to dependencies.

1.20 **Chapter III** describes the BIOT MPA, which was established in 2010 following extensive consultations, including with Mauritius.

1.21 **Part Two** explains the United Kingdom's principal submission in the present proceedings, that the Arbitral Tribunal does not have jurisdiction under UNCLOS to decide the issues submitted to it by Mauritius. The three chapters of this Part set out the three objections to jurisdiction that were previously contained in the United Kingdom's Preliminary Objections to Jurisdiction dated 31 October 2012. The present Counter-Memorial is self-contained in the sense that, so far as concerns the objections to jurisdiction, it incorporates and restates the arguments earlier presented in the Preliminary Objections. It does so in three chapters, as follows:

- **Chapter IV** explains that the Tribunal can have no jurisdiction under UNCLOS over Mauritius' sovereignty claim, since UNCLOS does not provide for compulsory jurisdiction over questions of territorial sovereignty;

- **Chapter V** explains that the Tribunal has no jurisdiction because Mauritius has not met the requirements of article 283 of UNCLOS (Obligation to exchange views);
- **Chapter VI** shows that Mauritius' claim that the MPA is incompatible with UNCLOS is likewise not within the jurisdiction of the Tribunal.

1.22 **Part Three**, which is without prejudice to the United Kingdom's principal submission that the Tribunal is without jurisdiction, considers the merits of Mauritius' Application as follows:

- **Chapter VII** describes how the United Kingdom acquired sovereignty over the BIOT in 1814, and that subsequent events have not led to any relinquishment of sovereignty;
- **Chapter VIII** shows that the establishment of the MPA did not violate any rights of Mauritius under UNCLOS;
- Finally, C**hapter IX** will show that the MPA did not violate any other treaty applicable in the relations between Mauritius and the United Kingdom.

1.23 The Counter-Memorial concludes with the United Kingdom's **Submissions.**

PART ONE

THE FACTS

Part One deals with the factual background to the case.

Chapter II describes the geographical setting of the British Indian Ocean Territory ('BIOT') and the Republic of Mauritius, as well as constitutional developments relating to the Chagos Islands, which were administered from Mauritius as a dependency until the BIOT was constituted as a separate overseas territory in 1965. Chapter II also describes the agreement of the Mauritius Council of Ministers to the establishment of the BIOT in 1965, as well as subsequent exchanges at the United Nations General Assembly and between Mauritius and the United Kingdom about fisheries and other matters.

Chapter III describes the BIOT Marine Protected Area, which was established in 2010 following extensive consultations, including with Mauritius.

CHAPTER II

GEOGRAPHICAL, CONSITUTIONAL AND DIPLOMATIC BACKGROUND

2.1 The present Chapter describes the geography of the British Indian Ocean Territory and the Republic of Mauritius (**Section A**). It sets out the constitutional history of the Chagos Islands/BIOT (**Section B**), and the constitutional history of Mauritius so far as relevant (**Section C**). **Section D** describes the agreement of the Mauritius Council of Ministers to the establishment of the BIOT, and related developments. Events in the UN General Assembly are covered in **Section E**. **Section F** then outlines the background facts relevant to the existence of the alleged fishing and mineral rights that Mauritius invokes in these proceedings. An **Appendix** describes the law and practice relating to dependencies.

A. Geography of the British Indian Ocean Territory and of the Republic of Mauritius

2.2 The British Indian Ocean Territory and the Republic of Mauritius are each located in the Indian Ocean. They are separated, at the nearest point, by nearly 1,700 kilometres of ocean. The BIOT is located at approximately 2,200 kilometres from the main island of Mauritius.

(i) The British Indian Ocean Territory

2.3 The BIOT is a British overseas territory[9]. It comprises a group of islands, also referred to as the Chagos Islands or Chagos Archipelago, located in the middle of the Indian Ocean, almost equidistant from the coast of the African mainland to the west and south-east Asia to the east (see **Figure 2.1**, on p. 48). The nearest points to the west and to the east are the coasts

[9] Since 2002 the United Kingdom's overseas territories have been known as 'British overseas territories' (section 1(1) of the British Overseas Territories Act 2002 (c. 8)), described in I. D. Hendry, S. Dickson, *British Overseas Territories Law* (2011), pp. 2-4 (**Authority 68**). The terms 'colonies' and 'dependent territories' are no longer in common use. For convenience, the term 'overseas territories' is used throughout this Counter-Memorial, regardless of the period in question.

of Somalia and Sumatra, both about 1,500 nautical miles distant. The BIOT lies about 1,000 nautical miles south of the Indian sub-continent.

2.4 The BIOT sits on a major volcanic ridge, the Chagos-Laccadive Ridge, which extends from Diego Garcia in the south and continues northwards for nearly 2500 nautical miles through the Maldives and the Lakadshweep Islands off India. The volcanic features have formed shallow banks on which carbonate reefs and atolls have developed which form the various islands, reefs and banks that comprise the Chagos Archipelago (and also the Maldives to the north).

2.5 The shallow banks of the BIOT descend steeply to oceanic depths of about 3000 metres (in places less than 15 nautical miles from the coast) and are surrounded by deep ocean floor. The Chagos trench runs about 60 nautical miles to the east of the islands and descends to over 5,000 metres.

2.6 The BIOT is one of the most isolated island groups in the world. The distance from Diego Garcia to major neighbouring population centres/capitals are as follows:

Malé, Maldives: 690 nautical miles (1,280 kilometres)

Colombo, Sri Lanka: 970 nautical miles (1,790 kilometres)

Thiruvanathapuram, India: 990 nautical miles (1,830 kilometres)

Victoria, Seychelles: 1030 nautical miles (1,910 kilometres)

Port Louis, Mauritius: 1140 nautical miles (2,110 kilometres)

2.7 The distance between the nearest point of the Republic of Mauritius, the island of Agalega, and Diego Garcia is some 962 nautical miles (1782 kilometres). Agalega itself is an isolated island, some 580 nautical miles (1074 kilometres) from the Island of Mauritius.

2.8 These distances are such that (as is illustrated on **Figure 2.2**, on p. 49) the 200 nautical mile zones of the BIOT and of the Republic of Mauritius do not overlap. Indeed they are separated, at their nearest point, by approximately 500 nautical miles (930 kilometres) of high seas. The continental shelves of the BIOT and of Mauritius are likewise separated by the International Seabed Area.

2.9 The BIOT consists of a number of coral atolls, some of which are above sea level and form islands (**Figure 2.3** on p. 50). The Great Chagos Bank is the world's largest drying coral atoll, being a ring of shallow coral banks enclosing a large lagoon about 100 nautical miles by 60 nautical miles. It has small islands on the western rim: Danger, Cow, Eagle and the Three Brothers (South, Middle and North); and on the north: Nelson's Island. The eastern and southern margins of the Great Chagos Bank do not rise above sea level, reaching about 20 metres water depth.

2.10 Other smaller atolls are distributed north and south of the Great Chagos Bank. To the north, these include the Peros Banhos atoll, a group of over twenty-five small islands surrounding a central lagoon of about 12 square nautical miles; the Salomon Islands, an atoll about 4 nautical miles by 3 nautical miles, with eleven islands around its rim; Blenheim Reef, an atoll about 6 nautical miles by 2 nautical miles, which is only exposed at low water; and two permanently submerged banks, Speakers' Bank and Colvocoresses Reef. To the south, the Egmont Island group has four islands on the rim of a coral atoll about 6 nautical miles by 2 nautical miles, with several submerged banks: Cauvin, Pitt, Ganges, Centurion and Wight.

2.11 In the southeast is the largest island of the BIOT, Diego Garcia. This has an area of about 30 square kilometres, which accounts for more than half of the BIOT's total land area of approximately 60 square kilometres. Diego Garcia consists of a long ribbon-like structure around the edge of an atoll, about 13 nautical miles by 6 nautical miles, enclosing a lagoon.

2.12 The BIOT has a rich diversity of marine and terrestrial habitats, which have been well documented by numerous scientific expeditions over the last 30 years. The BIOT area includes around half the total area of 'good quality' coral reefs in the Indian Ocean. Its location makes it a place of critical value regionally, providing a connection or stepping stone between the east and west parts of the Indian Ocean, whose surrounding shores and reef fisheries are over-exploited and degraded. The BIOT is host to 440 red-listed species on the International Union for Conservation of Nature (IUCN) list, of which 76 have elevated risk of extinction (including the world's largest arthropod, the coconut crab); 10 Important Bird Areas recognised by Birdlife International; at least 784 species of fish, 280 land plants, 220 corals, 105 macroalgae, 96 insects and 90 birds (24 breeding); and undisturbed and

recovering populations of Hawksbill and Green Turtle. Bird breeding populations are amongst the densest in the Indian Ocean (for example, 22,000 nests on Nelson's Island).

(ii) The Republic of Mauritius

2.13 The Republic of Mauritius lies in the south-western part of the Indian Ocean about 400 nautical miles east of Madagascar and over 2500 nautical miles from south-east Asia. It comprises one main island, the Island of Mauritius, and other islands, mostly widely scattered, including Rodrigues Island 315 nautical miles (584 kilometres) to the east; Cargados Carojos Shoals and Agalega to the north (at a distance from Mauritius of 227 and 580 nautical miles (420 and 1074 kilometres); and Tromelin Island some 309 nautical miles (573 kilometres) to the north-west[10]. The total land area is 2,040 square kilometres.

2.14 The Island of Mauritius lies some 1,126 nautical miles (2,085 kilometres) southwest of the BIOT (measured from Egmont Island), and some 94 nautical miles (175 kilometres) from the French territory of Réunion (see **Figure 2.1** at p. 48). It is of volcanic origin, and is almost entirely surrounded by coral reefs.

2.15 Mauritius has a population of approximately 1,320,000 persons. Important economic activities include tourism, textiles, sugar and financial services. Recently, other sectors have become important, such as information and communication technology, property development and renewable energy.

B. The constitutional history of the Chagos Archipelago/British Indian Ocean Territory

2.16 Until 8 November 1965, when they became part of the BIOT, the islands now forming the BIOT were administered as a Dependency of Mauritius. In the French period they had been *Dépendences* of the *Île de France* (as the island of Mauritius was then known). They were covered by that expression in the Treaty of Paris of 1814, by which they were ceded by

[10] Tromelin is also claimed by France.

France. They were never an integral part of Mauritius, but were among its Dependencies. As Mauritius itself notes in its Memorial:

> "[l]ike the French, the British governed the Chagos Archipelago as a dependency of Mauritius. Special Commissioners and Magistrates made visits to the islands of the Chagos Archipelago, tasked by the British Governor to ensure that no one was brought to or held in the Archipelago against their will."[11]

(i) Cession to the United Kingdom

2.17 The United Kingdom occupied the Island of Mauritius (*Île de France*) in 1810, during the Napoleonic Wars. The 'treaty of capitulation' signed on 3 December 1810 marked the surrender of the *Île de France* and all its dependencies (including the Chagos Islands)[12]. The Island of Mauritius remained under British military occupation until 1814, when France ceded the *Île de France* and its Dependencies (the latter including the islands now constituting the BIOT), to United Kingdom by the Treaty of Paris of 30 May 1814[13].

2.18 Article VIII of the Treaty of Paris provided, in relevant part:

> "His Britannic Majesty … engages to restore to His Most Christian Majesty … the Colonies, Fisheries, Factories, and Establishments of every kind which were possessed by France on the 1st of January, 1792, in the Seas and on the Continents of America, Africa and Asia; with the exception, however, of the Islands of Tobago and St. Lucie, and of the Isle of France and its Dependencies, especially Rodrigue and les Séchelles, which several Colonies and Possessions His Most Christian Majesty cedes in full right and Sovereignty to His Britannic Majesty, …."

(ii) British administration as a Lesser Dependency (1814-1965)

[11] MM, para. 2.22. See also MM, para. 6.8: "Before 1965, the Chagos Archipelago had been a dependency of, *and thus part of,* the non-self-governing territory of Mauritius." (The words we have placed in italics are a *non-sequitur*.)

[12] Article 8 of the capitulation provided that "The inhabitants shall preserve their Religion, Laws and Customs".

[13] Definitive Treaty of Peace and Amity between his Britannic majesty and his most Christian majesty (of France), concluded at Paris on 30 May 1814, 1 *British and Foreign State Papers* 151: **Annex 1**. The Treaty was concluded in French. Treaties in the same terms were concluded on the same day between France and Austria, Prussia and Russia respectively.

2.19 The Chagos islands were administered - purely as a matter of convenience - as a Dependency of Mauritius, following the French practice before 1810. From time to time there were administrative re-arrangements, the most important of which was the detachment of Seychelles from Mauritius to form a separate colony in 1903. As a Dependency, the Chagos Archipelago was very loosely administered from Mauritius. Contact between the two territories was minimal largely due to the great distance separating them, some 2,150 kilometres. The islands were privately owned with the land given over to the production of copra. There was no other commercial activity to attract settlers from Mauritius. The islands had no economic relevance to Mauritius, other than as a supplier of coconut oil and an employer of a limited number of contract labourers.

2.20 The sole sustainable economic activity of any significance on the Chagos was the operation of the coconut plantations. The plantation managers were also appointed by the Government in Mauritius both as 'Peace Officers', with limited criminal jurisdiction and police powers, and as 'Civil Status Officers', with responsibility for recording births, marriages and deaths.

2.21 During the nineteenth century and the first half of the twentieth century, the Chagos Archipelago and the Mauritian island of Agalega were collectively known as the 'Oil Islands' (because of the coconut oil that they produced). Together with St. Brandon, the islands constituted the Lesser Dependencies of Mauritius (as distinguished from the larger Dependency of Rodrigues Island).

2.22 In 1852, by Ordinance the Governor of Mauritius was empowered:

> "to extend to the Seychelles Islands and other Dependencies of Mauritius any laws and regulations published in this Colony [that is, published in Mauritius], under such restrictions and modifications as in the aforesaid laws and regulations as the Governor may deem fit, according to the local circumstances of the said Dependencies."[14]

2.23 The 1852 Ordinance was replaced by an Ordinance of 1853, which empowered the Governor in his Executive Council, rather than the Governor, to extend the laws and regulations, but which was otherwise identical[15].

[14] Mauritius and Dependencies, Ordinance No. 20, 2 June 1852: **Annex 2**.
[15] Mauritius and Dependencies, Ordinance No. 14, 23 March 1853: **Annex 3**.

2.24 Notwithstanding the legislative authority of the Governor in Council, *jouissance*-holders continued to hold wide administrative powers in the Oil Islands and were little troubled by the Government in Mauritius until 1859-60, when two Special Commissioners toured the Chagos Archipelago and other islands. However, by 1865 *jouissance*-holding was virtually at an end. The *jouissance*-holders were given an option to buy their freeholds at a price determined by the amount of coconut oil produced in the previous year, and nearly all did so. A District Magistrate from Mauritius was appointed to the Lesser Dependencies in 1872 and regular visits began in 1875.

2.25 In 1875, the Governor of Mauritius, and its Dependencies, with the advice and consent of the Council of Government thereof, enacted a new Ordinance, the long title of which was:

> "To appoint a Police and Stipendiary Magistrate for the smaller Dependencies commonly called "Oil Islands" and those other Islands, Dependencies of Mauritius, in which there are or may be Fishing Stations, and to appoint permanent Officers of the Civil Status for those Islands."

2.26 The Ordinance provided that the Magistrate "should have summary jurisdiction, and should from time to time visit the aforesaid Dependencies to administer justice"[16]. The Magistrate was to "make a return of all Judgments and Convictions by him given or awarded in each Dependency separately"[17]. Schedule A to the 1875 Ordinance enumerated the "Dependencies to which this Ordinance applies" as the following Islands or groups of Islands:

> Diego Garcia
> Six Islands
> Danger Island
> Eagle Island
> Peros Banhos
> Coevity
> Solomon Islands
> Agalega
> St.-Brandon Islands, also and otherwise called Cargados Carayos
> Juan de Nova
> Trois Frères
> Providence.

[16] *Ibid.*, preamble.
[17] *Ibid*., section 2.

2.27 It is clear from the terms of this Ordinance that the Stipendiary Magistrate of the listed Islands was separate from the Stipendiary Magistrate of Port Louis, with his own jurisdiction and applicable law[18]. Express provision was made for cases where his decisions could be executed in Mauritius[19]. And the Ordinance clearly distinguished throughout between Mauritius and the Dependencies[20].

2.28 By Letters Patent dated 27 December 1888, "separate provision" was made "for the Government of the Seychelles Islands" (a Dependency of the Island of Mauritius). An Administrator was appointed to administer the Government of the Seychelles whenever the Governor of Mauritius was absent from the Seychelles.

2.29 In 1903, Seychelles (which until then had also been a Dependency of Mauritius[21]) was established by Letters Patent as a separate colony, comprising the island of Mahé and certain other islands that had formerly been within the Lesser Dependencies of Mauritius[22].

2.30 The Government in Mauritius reviewed administrative arrangements in the Lesser Dependencies in the light of the visiting magistrates' reports. As a result, the Lesser Dependencies Ordinance was enacted in 1904 "To provide for the Government of and the Administration of Justice in the Lesser Dependencies"[23]. The 1904 Ordinance provided for the appointment of District and Stipendiary Magistrates for the Lesser Dependencies[24], with the rights, duties, powers and jurisdiction defined by the Ordinance[25]. Like the 1875 Ordinance, the 1904 Ordinance distinguished between Mauritius and the Islands, and also between the Islands and Seychelles (with which, however, there remained special connections even after the formation of the separate colony of the Seychelles in 1903).

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[18] See, for example, Ordinance No. 41, 31 December 1875, Articles 8, 9, 10 and 14 ("concurrent jurisdiction with the District Magistrate of Port Louis"): **Annex 4**.
[19] *Ibid.*, Articles 12 and 15.
[20] For example, *ibid.*, Article 20.
[21] As Roberts-Wray, writing in 1966, explained, "[u]nder French administration, the Seychelles were a dependency of Mauritius, and they retained that status under British sovereignty until they became a separate Colony in 1903. [….] Laws passed by Mauritius before 1903 did not automatically extend to the Seychelles, but some were made applicable either expressly or "by necessary implication."" (Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 732) (**Authority 90)**.
[22] In 1908 Coetivy was also detached from Mauritius and annexed to Seychelles. And in December 1921 Farquhar was annexed to the Seychelles. From that date until 1965, the Lesser Dependencies of Mauritius consisted of the Chagos Islands, Agalega and St. Brandon.
[23] The Lesser Dependencies Ordinance, Ordinance No. 4, 18 April 1904: **Annex 5**.
[24] *Ibid.*, Article 3(1).
[25] *Ibid.*, Article 3(2).

2.31 The administration of the Lesser Dependencies of Mauritius underwent few changes in the twentieth century. Day-to-day administration was in the hands of the plantation managers, who continued to hold wide powers.

2.32 In summary, the Chagos Archipelago was administered from Mauritius as a Dependency right up to the date of the establishment of the BIOT on 8 November 1965[26]. While included for some purposes within the definition of the 'Colony of Mauritius'[27], they were in law and in fact quite distinct from the Island of Mauritius. The islands were commonly referred to as the 'Lesser Dependencies' or 'Smaller Dependencies'. For further background on the constitutional concept of 'dependency', see the **Appendix** to the present Chapter.

(iii) The British Indian Ocean Territory: establishment and constitutional evolution

2.33 On 8 November 1965, an Order in Council was made under which the Chagos Archipelago ("being islands which immediately before the date of this Order were included in the Dependencies of Mauritius"), together with the Farquhar Islands, the Aldabra Group and the Island of Desrosches ("being islands which immediately before the date of this Order were part of the Colony of Seychelles"), formed a separate British overseas territory under the name 'British Indian Ocean Territory'[28].

2.34 This was effected under the Colonial Boundaries Act 1890; the Constitution of the British Indian Ocean Territory, set out in the same Order in Council, was made under the Royal Prerogative. Under the Constitution there was a Commissioner, whose powers effectively made him head of the Government of the Territory on behalf of the Crown, and also its legislature. He had power to make laws "for the peace, order and good government" of the territory, which had been created for the purpose of establishing defence facilities for

[26] See the reference in the British Indian Ocean Territory Order in Council 1965 to 'islands which immediately before the date of this Order were included in the Dependencies of Mauritius".
[27] For example, section 52 of the Letters Patent of 16 September 1885.
[28] British Indian Ocean Territory Order 1965 (S.I. 1965 No.1920) (**Annex 10**), amended by the British Indian Ocean Territory (Amendment) Order 1968 (S.I. 1968 No. 111): **Annex 21**.

an "indefinitely long period" according to the UK/US Agreement[29]. There were Royal Instructions which prohibited the enactment of certain laws and regulated aspects of the manner in which enactments were framed.

2.35 On 10 November 1965, the Colonial Secretary, Mr. Anthony Greenwood, informed the House of Commons of the establishment of the BIOT in a Written Answer:

> "With the agreement of the Governments of Mauritius and Seychelles new arrangements for the administration of certain islands in the Indian Ocean were introduced by Order in Council made on 8th November. The islands are the Chagos Archipelago, some 1,200 miles north-east of Mauritius, and Aldabra, Farquhar and Desroches in the Western Indian Ocean. Their populations are approximately 1,000, 100, 172 and 112 respectively. The Chagos Archipelago was formerly administered by the Government of Mauritius and the other three islands by that of Seychelles. The islands will be called the British Indian Ocean Territory and will be administered by a Commissioner. It is intended that the islands will be available for the construction of defence facilities by the British and United States Governments, but no firm plans have yet been made by either Government. Appropriate compensation will be paid."[30]

2.36 As a British overseas territory, the BIOT had (and has) a constitution and government distinct from that of the United Kingdom. The Governor of the Seychelles was appointed as the first BIOT Commissioner.

2.37 The 1965 Order was revoked and replaced in 1976, by the British Indian Ocean Territory Order 1976, which made new provision for the administration of the BIOT and for the return from the BIOT to Seychelles of the Aldabra Group of islands, Desroches and Farquhar[31]. The 1976 Order was amended in 1981, to make new provision for the appointment of the Commissioner of the territory and enabling the Supreme Court of the Territory to act in certain circumstances outside the territory[32]. It was further amended in 1984 and 1994 chiefly in connection with court procedure[33].

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[29] Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of United States of America Concerning the Availability for Defence Purposes of the "British Indian Ocean Territory", in force 30 December 1966, 603 *U.N.T.S.* 273 (No. 8737): MM, annex 46.

[30] House of Commons Debate 10 November 1965, vol. 730 col.-2W: **Annex 12.**

[31] British Indian Ocean Territory Order 1976 (S.I. 1976/893): **Annex 32**.

[32] The British Indian Ocean Territory (Amendment) Order 1981: **Annex 42**.

[33] The British Indian Ocean Territory (Amendment) Order 1984 and the British Indian Ocean Territory (Amendment) Order 1994.

2.38 The British Indian Ocean Territory (Constitution) Order 2004 made new provision for the constitution and administration of the BIOT[34]. It revoked the earlier Orders, the British Indian Ocean Territory Orders 1976 to 1994. Under the new Constitution, which remains in force, there is a Commissioner, appointed by Her Majesty the Queen, who exercises executive authority and who may make laws (Ordinances) for the peace, order and good government of the Territory. The Territory has a Supreme Court and a Magistrates' Court established by Ordinance. There is also a Court of Appeal established by Order in Council. Final appeal lies to the Judicial Committee of the Privy Council.

2.39 The BIOT Administration consists of the Commissioner, who reports to Her Majesty the Queen through the Secretary of State for Foreign and Commonwealth Affairs, the Deputy Commissioner, an Administrator (who is also the Director of Fisheries), Deputy and Assistant Administrators, a BIOT Government Legal Adviser and the Environmental Adviser to the BIOT Commissioner. There is a British Representative of the BIOT Administration resident on Diego Garcia, who also acts as Magistrate, and who reports to the BIOT Commissioner and Administrator. The British Representative has a staff of about 40 on Diego Garcia covering policing, customs and immigration functions.

C. The constitutional history of Mauritius

2.40 This section describes the constitutional history of Mauritius in so far as may be relevant to the present proceedings.

2.41 Mauritius became independent on 12 March 1968. However, the process towards independence began long before, with electoral and constitutional reforms in 1947.

2.42 The move towards independence started in earnest in 1953 when the Legislative Council, by a small majority, passed a resolution calling for a greater measure of self-government. The Secretary of State for the Colonies asked the Governor to hold local

[34] British Indian Ocean Territory (Constitution) Order 2004: **Annex 77**. For a description of the current BIOT Constitution, see I. Hendry, S. Dickson, *British Overseas Territory Law* (2011), pp. 301-310 (**Authority 68**).

consultations[35]. When agreement could not be reached among the various political parties, a further series of meetings was held in London which resulted in the 1957 London Agreement. Under the Agreement a ministerial system of government was introduced[36], 40 single-member constituencies were created[37] and universal suffrage was introduced. The Governor continued to nominate up to 12 other members, after consultation with the Legislative Council, to ensure representation of special interests which had no chance of obtaining representation through election. In the General Election of 1959 the Labour Party won a large majority of seats, and formed a coalition government with the Muslim Committee of Action[38].

2.43 The only significant change that was made at a Constitutional Review Conference held in 1961 was the creation of the post of Chief Minister[39]. Further constitutional change was deferred until after the next General Election, in which the Mauritius Labour Party lost its absolute majority[40]. By July-August 1964 an all-party coalition had been formed, led by the Chief Minister, renamed Premier, Sir Seewoosagur Ramgoolam[41]. The appointed Constitutional Commissioner, Professor S. A. de Smith, visited in July-August 1964 to explore the foundations of an appropriate constitutional scheme.

2.44 The decisive Constitutional Conference took place in London in September 1965. There was no consensus between the four main parties as to whether independence was even desirable. As recorded by Professor de Smith in November 1968[42]:

> "the central issues facing the conference were the determination of ultimate status and the constitutional framework to be adopted for self-government and the next and final step forward. The Mauritius Labour Party and the Independent Forward Bloc advocated independence. The Muslim Committee of Action was not opposed in principle to independence but strongly urged the introduction of better constitutional safeguards for Muslim interests. The Parti Mauricien Social Démocrate… opposed the principle of independence and supported the principle of free association with the

[35] S.A. de Smith, *Mauritius: Constitutionalism in a Plural Society*, 31 Modern Law Review (November 1968) pp. 601-622 ('De Smith'), p. 605: **Annex 22.**
[36] Nine members of the elected Legislative Council were represented in the Executive Council in proportion to party representation.
[37] De Smith, p. 605.
[38] De Smith, p. 606.
[39] The 1961 constitutional conference is summarised in the Command Paper, *Mauritius Constitutional Conference 1965, Presented to Parliament by the Secretary of State for the Colonies by Command of her Majesty October 1965*, Cmnd. Paper 2797, paras. 1-2: **Annex 11**.
[40] De Smith, p. 607.
[41] De Smith, p. 607.
[42] De Smith, pp. 607-608. See also *Mauritius Constitutional Conference 1965* paras. 6, 12-17: **Annex 11**.

> United Kingdom; it demanded a referendum on the question of independence or association. In the event, Mr Anthony Greenwood, the Secretary of State announced on the last day of the conference his view that it was right that Mauritius should be independent… [A] General Election would be held under a new electoral system which would be introduced after an Independent Electoral Commission had reported. If the newly elected Legislative Assembly then so resolved, Her Majesty's Government would, in consultation with the Government of Mauritius, fix a date for independence after six months of internal self-government. By the time the Secretary of State's announcement was made, the members of the Parti Mauricien delegation had walked out of the conference. After the announcement, they were joined by the two Independents."[43]

2.45 Mauritius became an independent State on 12 March 1968[44], pursuant to the UK Mauritius Independence Act 1968[45]. Section 5(1) of the 1968 Act provided:

> "In this Act, and any amendment made to this Act in any other enactment, "Mauritius" means the territories which immediately before the appointed day constitute the Colony of Mauritius."

These territories did not include the Chagos Archipelago, which had been detached to form part of the BIOT on 8 November 1965.

2.46 The Constitution of Mauritius of 1968 (the Constitution that came into force upon Independence on 12 March 1968) was set out in the Schedule to the Mauritius Independence Order 1968[46]. Section 1 of the Independence Constitution provided that "Mauritius shall be a sovereign democratic State". Section 2 provided that the Constitution "is the supreme law of Mauritius". Section 111, paragraph 1 of the Constitution, mirroring the language of section 3(1) of the Independence Act, provided that:

> ""Mauritius" means the territories which immediately before 12th March 1968 constituted the colony of Mauritius".

2.47 This remained the position under the Constitution of Mauritius for over 14 years following independence. It was only in July 1982 that, following the defeat of the Labour Party Government in the general election of June 1982, the Legislative Assembly of

[43] The events between the Secretary of State's announcement and Mauritius' independence are summarised by de Smith in his 1968 *Modern Law Review* article: **Annex 22**

[44] Mauritius became an independent State within the Commonwealth. Her Majesty Queen Elizabeth II (in right of Mauritius) was Head of State until 12 March 1992, when Mauritius became a republic, with a President as Head of State.

[45] Mauritius Independence Act 1968 (1968 c. 8), s 1(1): **Annex 19**.

[46] The Mauritius Independence Order 1968: **Annex 20.**

Mauritius enacted the Interpretation and General Clauses (Amendment) Act, which purported to include the Chagos Archipelago (and Tromelin Island) within the territory of Mauritius, and to do so with retrospective effect. As a result of this Act the 1992 Constitution included in section 111 the following definition of 'Mauritius':

> "(1) In this Constitution …
> 'Mauritius' includes –
>
> (a) the Islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including Diego Garcia and any other island comprised in the State of Mauritius;
>
> (b) the territorial sea and the air space above the territorial sea and the islands specified in paragraph (a);
>
> (c) the continental shelf; and
>
> (d) such places or areas as may be designated by regulations made by the Prime Minister, rights over which are or may become exercisable by Mauritius."

2.48 The Interpretation and General Clauses (Amendment) Bill was adopted on 6 July 1982. The Bill appears to have gone through all its stages on that day[47]. The debate in the Assembly suggests that the aim was largely political and symbolic ("Le geste légal"[48]), to show that the new Government (by contrast to their predecessors in 1980) would fight for the return of Chagos Archipelago and to reinforce Mauritius' claim. The Bill also reversed the deliberate decision of the Assembly in 1980 not to add the Chagos Archipelago to the Interpretation and General Clauses Act at the time when Tromelin was so added[49]. It was made retrospective to 1974 (the date on which the Interpretation and General Clauses Act had first been adopted).

2.49 Thus, the Prime Minister said that "The Government … to facilitate the process of independence, had foregone that part of the territory and it seemed that they had accepted that the British Indian Ocean Territory be created". He went on to say that "those who were in power in this country after independence… never asserted our sovereignty. They went so far as ... almost saying that that part of the world did not form part of Mauritian territory and that

[47] Debate in Mauritius' Legislative Assembly of 6 July 1982: **Annex 43**.
[48] *Ibid*., col. 338 (Minster of Finance).
[49] See Debate in Mauritius' Legislative Assembly of 28 June 1980: **Annex 35.**

the legitimate country that had the right of sovereignty on Diego Garcia and the Chagos Islands - that had been excised from the Mauritian territory - was the United Kingdom"[50].

D. The 5 November 1965 agreement by the Mauritius Council of Ministers to the establishment of the BIOT

2.50 The agreement of the Council of Ministers of 5 November 1965 to the detachment of the Chagos Archipelago is best understood against the domestic political background and the politics of independence. By the early 1960s, the political process leading to Mauritius' independence was well underway, and involved an active and vigorous domestic party political system which included, in progressively greater numbers following successive constitutional changes, elected members on the basis of universal suffrage and a ministerial system of government in the Council of Ministers.

2.51 The plans of the United States for a military facility in the Chagos Archipelago were raised with Mauritius and Seychelles in July 1965. On 19 July 1965 the Governors of Mauritius and the Seychelles were instructed to communicate the proposals for the US defence facility and the detachment of the Chagos Archipelago to their respective Ministers. The Governor of Mauritius, Sir John Rennie, reported back on the first reaction of Ministers of the Council on 23 July 1965. According to his report, "while not ill–disposed, they asked for time to consider further". The Premier (Sir Seewoosagur Ramgoolam) and Mr Duval (leader of the *Parti Mauricien Socialiste Démocrate*) expressed dislike of detachment[51], and the Premier raised the question of "mineral or other valuable rights that might arise in future". A week later they advised the Governor that they were "sympathetically disposed to the request" but that, in view of the likely public opinion, they would prefer a long-term lease, e.g., for 99 years. Ministers also asked for safeguards for mineral rights and preference for Mauritius if fishing or agricultural rights were ever granted. Likewise, they sought meteorological, air and navigational facilities, provision for defence, and British help in obtaining sugar and other trade concessions from the United States[52].

[50] Debate in Mauritius' Legislative Assembly of 6 July 1982, col. 336: **Annex 43**.
[51] Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965, FO 371/184526: MM, annex 12.
[52] Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965, FO 371/184526: MM, annex 13.

2.52 On 13 August 1965 the Governor reported to Mauritian Ministers that the United States had objected to the proposal for a lease. The Ministers renewed the suggestion that the matter be discussed in London[53] at the forthcoming constitutional conference.

2.53 Discussions over the proposal for a defence facility and detachment of the Chagos Archipelago continued the following month in the margins of the constitutional conference held in London between 7 and 24 September 1965. The Mauritian Premier restated his preference for a long-term lease in conversation with the Colonial Secretary on 13 September 1965. An initial meeting with the four main Mauritius party leaders and a leading independent Minister (all members of the Council Ministers) on 20 September 1965 at the Colonial Office failed to produce any agreement[54]. The Premier, Sir Seewoosagur Ramgoolam, met separately with the British Prime Minister, Harold Wilson, on 23 September 1965 to discuss a variety of matters, including the proposal for detachment.

2.54 Mauritius claims in the Memorial that independence "was granted on condition that Mauritian Ministers agreed to the excision of the Chagos Archipelago from the territory of Mauritius"[55]. That was not the case, as is clear from the Colonial Secretary's minute to the Prime Minister of 22 September 1965[56]. The briefing note prepared for the Prime Minister by the Colonial Secretary also makes it clear that the Colonial Secretary was in fact in favour of moving directly to independence rather than having a referendum on a choice between independence and free association (which was what the *Parti Mauricien Social Démocrate* were seeking). A key reason for not conveying certainty as to Her Majesty's Government's position as regards independence was not detachment but the terms of the constitution: it might have been necessary to press the Premier "to the limit to accept maximum safeguards for minorities"[57].

[53] As recorded in a telegram from the Governor of Mauritius to the Secretary of State for the Colonies, 13 August 1965: MM, annex 15.
[54] Record of a Meeting in the Colonial Office at 9.00 a.m. on Monday, 20th September, 1965, Mauritius – Defence Issues, FO 371/184528: MM, annex 16.
[55] MM, paras. 2.40, 3.68.
[56] Colonial Office, Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, 22 September 1965, PREM 13/3320: MM, annex 17.
[57] "The Premier should not leave the interview with certainty as to H.M.G.'s decision as regards independence, as during the remaining sessions of the Conference it may be necessary to press him to the limit to accept maximum safeguards for minorities": MM, annex 17.

2.55 It is also clear from the record of the meeting between the Prime Minister and the Premier on 23 September 1965 that the latter sought support for independence from the British Government to strengthen his political position against the *Parti Mauricien*, which did not want independence, as well as to extract as much value as possible from the agreement on detachment (as had already been indicated to the Governor in July and at the meeting on 20 September 1965). The United Kingdom's Prime Minister wished to secure agreement from the Council of Ministers to detachment, even though, as a matter of law, detachment could be effected without agreement. The following extracts from the record of the meeting give the flavour[58]:

> "Sir Seewoosagur Ramgoolam said that the conference was going reasonably well. […] He himself felt that Independence was the right answer; the other ideas of association with Britain worked out on the lines of the French Community simply would not work. […]
>
> The Prime Minister said that he knew that the Colonial Secretary, like himself, would like to work towards Independence as soon as possible. […] He himself wished to discuss with Sir Seewoosagur a matter which was not strictly speaking within the Colonial Secretary's sphere: it was the Defence problem and in particular the question of detachment of Diego Garcia. This was of course a completely separate matter and not bound up with the question of Independence. It was, however, a very important matter for the British position east of Suez. Britain was at present undertaking a very comprehensive Defence Review, but we were very concerned to be able to play our proper role not only in Commonwealth defence but also to bear our share of peace-keeping under the United Nations: we had already made certain pledges to the United Nations for this purpose.
>
> Sir Seewoosagur Ramgoolam said that he and his colleagues wished to be helpful.
>
> The Prime Minister went onto say that he had heard that some of the Premier's colleagues, perhaps having heard that the United States was also interested in these defence arrangements, and seeing that the United States was a very rich country, were perhaps raising their bids rather high. […]
>
> Sir Seewoosagur Ramgoolam said that they were very concerned on Mauritius with their population explosion and their limited land resources. They very much hoped that the United States would agree to buy sugar at a guaranteed price and perhaps let them have wheat and rice in exchange. […]
>
> The Prime Minister said that Britain would of course continue with certain aid and development projects. […] While he could make no commitment at the moment, the Prime Minister thought that we might be able to talk to the Americans about providing some of their surplus wheat for Mauritius. As for Diego Garcia, it was a

[58] Record of a conversation between the Prime Minister and the Premier of Maurtius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 a.m. on Thursday, September 23, 1965: MM, annex 18.

purely historical accident that it was administered by Mauritius. Its links with Mauritius were very slight. In answer to a question, Sir Seewoosagur Ramgoolam affirmed that the inhabitants did not send elected representatives to the Mauritius Parliament. Sir Seewoosagur reaffirmed that he and his colleagues were very ready to play their part.

The Prime Minister went onto say that, in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be independence and detachment by agreement, though he could not of course commit the Colonial Secretary at this point.

Sir Seewoosagur Ramgoolam said that he was convinced that the question of Diego Garcia was a matter of detail; there was no difficulty in principle."

2.56 At a second meeting on defence matters on the afternoon of 23 September 1965 held at Lancaster House, the Mauritian delegation, comprising the Premier and Messrs Bissoondoyal, Paturau and Mohamed, provisionally agreed to detachment on the understanding that the Secretary of State would recommend the following:

(i) negotiations for a defence agreement between Britain and Mauritius;

(ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;

(iii) compensation totalling up to £3 million should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;

(iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;

(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;

(vi) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.

2.57 The Premier "said that this was acceptable to him and Messrs Bissondoyal and Mohamed in principle but he expressed the wish to discuss it with his other ministerial

colleagues"[59]. It was subject to the consent of the full Council of Ministers being secured on the return of the Premier to Mauritius, and a list of principal conditions, which were drawn up at the meeting.

2.58 Sir Seewoosagur Ramgoolam then took the list of conditions back to his hotel to mull them over with Mr Mohamed, the leader of the Muslim Committee of Action, the Labour Party's political ally. They added various conditions in a manuscript letter of 1 October 1965[60]: "(vii) navigational and meteorological facilities; (viii) fishing rights; (ix) use of air strip for emergency landing and if required for the development of the other islands; (x) any mineral or oil discovered in or near the islands should revert to the Mauritian Government." These conditions, in amended form, became paragraphs 22(vi) and 22(viii) in the final record of the 23 September meeting[61].

2.59 On 6 October 1965 the Colonial Office sent instructions to the Governor, together with the finalised record of paragraphs 22 and 23 of the meeting, to secure early confirmation that the Mauritius Government was willing to agree to the detachment of the Chagos Archipelago on the conditions set out in the final record of the discussion at Lancaster House[62].

2.60 The Council of Ministers confirmed their agreement to detachment on 5 November 1965, subject to certain further understandings recorded in the Minutes of Proceedings of the Meeting of the Council of Ministers held on 5 November 1965[63] and in a telegram from the Governor to the Secretary of State for the Colonies of the same date[64]. The Ministers of the *Parti Mauricien Social Démocrate* reserved their position, not because of any opposition in principle to the establishment of facilities and detachment, but because they considered the amount of compensation agreed - £3 million - inadequate[65].

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[59] Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: MM, annex 19.
[60] **Annex 9**.
[61] Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: MM, annex 19.
[62] See the telegram dated 6 October 1965: MM, annex 21.
[63] A copy of which is Appendix P to the 1983 Report of the Select Committee on the Excision of the Chagos Archipelago, 1 June 1983, p. 63: **Annex 46**.
[64] Mauritius Telegram No. 247 to the Colonial Office, 5 November 1965, FO 371/184529: MM, annex 25.
[65] See Mauritius Telegram No. 247 to the Colonial Office, 5 November 1965, FO 371/184529 MM, annex 25 and Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, entitled 'Defence Facilities in the Indian Ocean': MM, annex 26. The 1983 Report of the Select Committee on the

2.61 These events show:

- *First*, the Mauritius Council of Ministers agreed to the detachment of the BIOT. Their agreement was given some six weeks after the discussions in London on 23 September, and six weeks after the Secretary of State for the Colonies had already announced on the last day of the Constitutional Conference, 24 September 1965, that Her Majesty's Government's view was that Mauritius should become independent[66].

- *Second*, the Council of Ministers secured benefits - a 'deal' - in return for their consent, in full knowledge of the fact that detachment could have been effected without their consent and, *a fortiori* without any benefits to Mauritius.

- *Third*, this agreement was confirmed on 5 November 1965 by the Council of Ministers, the democratically elected representatives of the Mauritian population.

- *Fourth*, the Premier, Sir Seewoosagur, and his counterparts in the other Mauritius political parties who negotiated the deal on detachment were seasoned political actors, with an eye to their domestic political position and securing a victory over their political opponents on the question of independence, as much as securing a good deal from the United Kingdom[67]. It was they, not Her Majesty's Government, who suggested the discussions over the detachment proposal be held in London alongside the Constitutional Conference.

- *Fifth*, any concerns about moving forward to independence came from Mauritian politicians, not from the United Kingdom Government: the *Parti Mauricien Social Démocrate* did not want independence and its goal at the Constitutional Conference was to secure a referendum.

Excision of the Chagos Archipelago records Mr Jugnauth QC, then the Prime Minister of Mauritius and a member of the Independence Forward Bloc, recalling that "the withdrawal of the P.M.S.D. from the Constitutional talks had nothing to do with the excision of the Chagos Archipelago which, he repeated, was never on the Conference agenda. The P.M.S.D. delegates left when they learnt of the United Kingdom's intention to grant independence to Mauritius": **Annex 46**, p 15. See to similar effect the evidence to the Select Committee of Mr Paturau, at p. 17.

[66] As confirmed in the Command Paper, *Mauritius Constitutional Conference 1965*, para. 20: **Annex 11**.

[67] According to Professor de Smith's account, Mauritius had a genuine democratic political culture: pp. 621-22: **Annex 22.**

- *Sixth*, the policy of Mauritius' independence was announced on 23 September 1965, the last day of the Constitutional Conference, well before the agreement to detachment by the Council of Ministers on 5 November 1965[68]. That is, the momentum towards independence was well underway. If the full complement of Ministers had refused on 5 November 1965 to agree to detachment to the terms negotiated by the party leaders in September in London, the move towards independence would not have come to a halt.

2.62 That this account is accurate is confirmed in the course of debates in Mauritius' Legislative Assembly and in the June 1983 Report of the Select Committee [of the Mauritius Assembly] on the Excision of the Chagos Archipelago[69]. In particular:

a. On 21 December 1965 Mr Duval, leader of the *Parti Mauricien* asked the Premier and Minister of Finance "Whether, in exchange for the agreement of this Government to the excision of the Chagos Archipelago from Mauritius, the following obligations have been definitely undertaken by the British Government", to which Mr Forget, on behalf of the Premier and Minister of Finance, replied in terms which affirmed the existence of an agreement[70].

b. The Mauritian Prime Minister, on 26 June 1974 in a response given in a parliamentary debate over the Appropriation (1974-75) Bill said:

> "First of all, Sir, with regard to the ceding of Diego Garcia to this Government, I will actually say that it is not what my hon. friends opposite are saying. I will refer them to the Colonial Boundaries Act of 1895 which confers on Her Majesty the Queen… the power to alter the boundaries of colonies by order in Council, or letters patent, with the proviso that the consent of the self governing Colony, shall be required for the alteration of the boundaries thereof.
>
> It is by this that Seychelles and Mauritius were separated. It is by this that Diego was separated from Mauritius. By an Order in Council in 1965, dated 8th November, Her Majesty the Queen ordered that the British Indian Ocean Territory be constituted

[68] And even then, on 5 November, the Council of Ministers subjected their consent to the terms set out in paragraph 22 of the Lancaster House minutes to further understandings: see MM, annex 25.
[69] Excepts of which are annexed by Mauritius to its Memorial (annex 97). A full copy of the Report is attached to this Counter-Memorial as **Annex 46**.
[70] **Annex 15**.

consisting of certain islands included in the dependencies of Mauritius and of other territories.

The Government of Mauritius was nevertheless informed, after we had discussed in England, that this had taken place, and we gave our consent to it[[71]]. It was done like this, but the day it is not required it will revert to Mauritius… That is the position. Even if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper. This in principle was agreed even by the P.M.S.D. who was in Opposition at the time; and we had consultations, and this was done in the interest of the Commonwealth, not of Mauritius only"[72].

c. Sir Harold Walter, in a statement of 26 June 1980 on the reading of the Interpretation and General Clauses (Amendment) Bill (No XIX of 1980) at the Committee Stage said "Now, it was by consent that it was excised"[73]; in response to a question from the Chairman, Sir Harold also said that the BIOT "forms part of Great Britain and its overseas territories, just as France has *les Dom Tom*; it is part of British territory and there is no getting away from it […]"[74].

d. In a debate of 25 November 1980 the following exchange with the Prime Minister was recorded:

"Mr Boodhoo: Was the excision of these islands a precondition for the independence of this country?

Prime Minister: Not exactly.

Mr Bérenger: Since the Prime Minister says to-day that his agreement was not necessary for the "excision" to take place, can I ask the Prime Minister why then did he give his agreement which was reported both in Great Britain and in this then – Legislative Council in Mauritius?

Prime Minister: It was a matter that was negotiated, we got some advantage out of this and we agreed"[75].

2.63 The June 1983 Report of the Select Committee on the Excision of the Chagos Archipelago[76], which records the expressions of politicians long after the event in the context

[71] In fact, the Order in Council creating the BIOT was passed on 8 November 1965 after advice was received from the Governor of Mauritius that the Council of Ministers had assented to it on 5 November 1965.
[72] Mauritius Legislative Assembly, 26 June 1974, Committee of Supply, cols 1946-1947: MM, annex 71.
[73] At col. 3414: MM, annex 92.
[74] *Ibid*., col. 3415.
[75] Mauritius Legislative Assembly, 25 November 1980: MM, annex 96.

of a highly political investigation, nevertheless contains several telling observations by politicians either directly involved in the discussions over detachment of the Chagos, or indirectly involved as contemporaries of party political colleagues who attended the discussions. Sir Seewoosagur Ramgoolam is recorded by the Select Committee as refusing to describe the deal as blackmail[77]. Instead he told the Committee that one of the reasons "he accepted the excision" was "he could not then assess the strategic importance of the archipelago which consisted of islands very remote from Mauritius and virtually unknown to most Mauritians"[78]. Other comments to the Select Committee emphasised the domestic political context: "Sir Seewoosgar maintained that the choice he made between the independence of Mauritius and the excision of the archipelago was a most judicious one. He thought however, had all the political parties present at Lancaster House been united in the claim for independence, better conditions might have been obtained. But, the Parti Mauricien Social Démocrate (P.M.S.D.) walked out of the Conference, as soon as it became evident that independence could not be avoided"[79].

2.64 Sir Veerasamy Ringadoo, also of the Mauritius Labour Party,

> "confirmed that, at no time, was the question of the excision of the Chagos Archipelago brought on the table of the Mauritius Constitutional Conference of September 1965…. He did not object to the principle of excision as he felt that, being given the defence agreement entered into with Great Britain[[80]]… - a decision which had the unanimous support of all political parties present at Lancaster House, most particularly in view of the social situation which had deteriorated in Mauritius – the United Kingdom should be given the means to honour such an agreement. It was in this context that he viewed the excision of the islands which were to be used as a communications station"[81].

Sir Harold Walter, also of the Mauritius Labour Party, "further stressed that no Mauritian delegate present at Lancaster House had expressed any dissent on the principle of excision"[82].

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[76] Excepts of which are annexed by Mauritius to its Memorial (annex 97). A full copy of the Report is attached to this Counter-Memorial as **Annex 46**. See further **Chapter VII,** paras. 7.35-7.41.
[77] MM, annex 97, p. 36.
[78] MM, annex 97, p. 10.
[79] MM, annex 97, p. 10.
[80] Command Paper, *Mauritius Constitutional Conference 1965*, para. 23: **Annex 11**.
[81] **Annex 46**, p. 11.
[82] **Annex 46**, p. 12.

2.65 Mr Paturau, an independent who also attended the discussion at Lancaster House on 23 September said he "expressed dissent as he thought the compensation was inadequate, but the other delegates agreed"[83].

2.66 The Select Committee itself said that "[i]t would be wrong, however, to pretend that the excision of the Chagos Archipelago was a unilateral exercise on the part of Great Britain"[84] and concluded that "the Select Committee is not prepared to put on the sole shoulders of the latter [Sir Seewoosagur Ramgoolam] the blame for acceding unreservedly to the United Kingdom's request. Evidence is not lacking to show that, indeed, the Premier shared with, at least, some independent participants, including Mr Paturau, D.F.C., the United Kingdom's offer of excision and the interests of the United States of America"[85]. The Select Committee recorded that the agreement of the Council of Ministers to the detachment of the Chagos Archipelago was obtained at the sitting of the Council of Ministers on 5 November 1965[86] and, later in its conclusions to the Report, "denounce[d] the then Council of Ministers which did not hesitate to agree to detachment of the islands"[87].

E. Debate in the UN General Assembly in 1965/1967 and subsequently

2.67 Between 8 November 1965, the date of the establishment of the BIOT, and 12 March 1968, the date of the independence of Mauritius, the United Nations General Assembly adopted three resolutions touching on the question of the BIOT. No further such resolutions were adopted after the independence of Mauritius, and the subject was not brought up in the General Assembly for another 12 years, until Mauritian representatives began to refer to it in speeches in the annual general debate.

(i) UNGA resolutions 2066 (XX), 2232 (XXI) and 2357 (XXII)

[83] **Annex 46**, p. 16.
[84] **Annex 46**, p. 4, para. 12.
[85] **Annex 46**, p. 23, para 37.
[86] **Annex 46**, p. 26, para. 44.
[87] **Annex 46**, p. 35.

2.68 On 16 December 1965, the UN General Assembly adopted resolution 2066 (XX)[88], by 89 in favour, none against and 18 abstentions (including the United Kingdom). The resolution was adopted upon the recommendation of the Fourth Committee, where the voting (on 24 November 1965) had been similar: 77-0-17(UK)[89].

2.69 The detachment of the Chagos Archipelago was discussed in the Fourth Committee of the United Nations General Assembly on 16 November 1965, after the establishment of the BIOT[90]. The real concern of the few speakers who addressed the topic (Tanzania[91], Cuba[92], India[93] and Yugoslavia[94]) seemed to be the establishment of a military base in the Indian Ocean, rather than any breach of the principle of self-determination. The United Kingdom representative responded in the following terms:

> "Questions had been raised about the United Kingdom's plans for certain islands in the Indian Ocean. The facts were as follows. The islands in question were small in area, were widely scattered in the Indian Ocean and had a population of under 1,500 who, apart from a few officials and estate managers, consisted of labourers from Mauritius and Seychelles employed in copra estates, guano extraction and the turtle industry, together with their dependents. The islands had been uninhabited when the United Kingdom had first acquired them. They had been attached to the Mauritius and Seychelles Administrations purely as a matter of administrative convenience. After discussions with the Mauritius and Seychelles Governments – including their elected members – and with their agreement, new arrangements for the administration of the islands had been introduced on 8 November. The islands would no longer be administered by these Governments but by a Commissioner. Appropriate compensation would be paid not only to the Governments of Mauritius and Seychelles but also to any commercial or private interests affected. Great care would be taken to look after the welfare of the few local inhabitants, and suitable arrangements for them would be discussed with the Mauritius and Seychelles Governments. There was thus no question of splitting up natural territorial units. All that was involved was an administrative re-adjustment freely worked out with the governments and elected representatives of the people concerned." [95]

2.70 In explaining the United Kingdom's abstention on 24 November 1965, its representative in the Fourth Committee said that his delegation could not support *inter alia* the paragraph of the resolution in which the detachment of certain islands from Territory was

[88] MM, annex 38.
[89] A/C.4/SR.1558.
[90] UNGA Fourth Committee, 1558th meeting, 16 November 1965, am and pm: **Annex 13**.
[91] *Ibid*., am, para. 44.
[92] *Ibid*., pm, para. 4.
[93] *Ibid*., pm, para. 25, *in fine*.
[94] *Ibid*., pm, para.61.
[95] *Ibid*., pm, para.80 (Mr. Brown, UK).

described as a contravention of the 1960 Declaration. The UK was still less able to regard such action as constituting a dismembering of the Territory or a violation of its territorial integrity. As had already been stated, the question of the territorial integrity of Mauritius did not arise in that context[96].

2.71 General Assembly resolution 2066 (XX) contained a final preambular paragraph, in which the Assembly noted with deep concern:

> "that any step taken by the Administering Power to detach certain islands from the territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration [on the Granting of Independence to Colonial Countries and Peoples], in particular of paragraph 6 thereof."

2.72 In its operative paragraph 4, the General Assembly proceeded to *invite* "the Administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

2.73 Both in the Fourth Committee and in plenary, the adoption of resolution 2066 (XX) took place after the establishment of the BIOT on 8 November 1965. The detachment of the islands, referred to in the resolution, had already taken place, and - as described in **Section D** above - had taken place with the agreement of the Mauritian Council of Ministers.

2.74 As a resolution of the General Assembly, resolution 2066 (XX) was not legally binding but recommendatory. The United Kingdom did not accept the invitation contained in its operative paragraph 4. It did not accept that the Chagos Islands were an integral part of the territory of Mauritius, nor were they considered to be of any economic relevance to Mauritius.

2.75 One year later, on 20 December 1966 the UN General Assembly adopted resolution 2232 (XXI). This was an omnibus resolution dealing with some 25 Territories administered by various States. In the preamble the General Assembly expressed itself to be *deeply concerned*:

[96] As recorded in the *Yearbook of the United Nations 1965*, p. 586.

"at the information contained in the report of the Special Committee on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories and the creation by the administering Powers of military bases and installations in contravention of the relevant resolutions of the General Assembly".

2.76 In operative paragraph 4 the General Assembly *reiterated*:

"its declaration that any attempt aimed at the partial or total disruption of the national unity or the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the united nations and of General Assembly resolution 1514(XV)".

2.77 Resolution 2232 (XXI) was adopted by a vote of 93-0-24(UK). This followed a separate vote on the paragraph referring to military bases, which was adopted by 78-18(UK)-27. Voting in the Fourth Committee followed a similar pattern[97].

2.78 A year later, General Assembly resolution 2357(XXII) of 19 December 1967 contained identical preambular and operative language. The voting in 1967 followed the same pattern as in 1966.

2.79 Questions concerning the Chagos Archipelago were not dealt with in the Fourth Committee or in the plenary after 1967, though the BIOT (particularly as regards the question of military bases) was mentioned in connection together with Seychelles until the independence of the latter on 29 June 1976.

(ii) Mauritian statements in the UNGA after Independence and UK replies

2.80 Mauritius achieved independence on 12 March 1968. It was admitted to membership in the United Nations by the General Assembly on 24 April 1968 [98], upon the recommendation of the Security Council[99].

[97] 62-0-21(UK) on the resolution as a whole; 48-11(UK)-23 on the military bases paragraph.
[98] General Assembly resolution 2371 (XXII).
[99] Security Council resolution 249(1968) of 18 April 1968.

2.81 In its Memorial, Mauritius claims that "[o]n numerous occasions since gaining its independence in 1968, Mauritius has asserted its sovereignty over the Chagos Archipelago"[100]. It annexes extracts from 28 statements in the UN General Assembly[101], and lists a number of bilateral assertions[102]. Mauritius fails to mention that, whenever appropriate, the United Kingdom replied firmly to such claims, rejecting them and restating its own sovereignty. Mauritius does not explain or even indicate that it did not begin to put forward these claims until many years after independence. For some 12 years after independence Mauritius did not even raise the Chagos Islands in the United Nations. The earlier bilateral protest to which Mauritius refers dates from January 1998, almost 30 years after independence. In addition, for many years the statements by Mauritius were at best ambiguous as to whether it was claiming, as now it does, currently to be the sovereign as distinct from seeking to become sovereign.

2.82 It was only in 1980 that the Prime Minister of Mauritius, Sir Seewoosagur Ramgoolam, raised the question of the Chagos Archipelago in the United Nations General Assembly, and then did so in unspecific terms. Speaking in the general debate on 9 October 1980, Prime Minister Ramgoolam said:

> "Here it is necessary for me to emphasise that Mauritius, being in the middle of the Indian Ocean, has already ... reaffirmed its claim to Diego Garcia, and the PM of Great Britain in a parliamentary statement has made it known that the island will revert to Mauritius when it is no longer required for the global defence of the West. Our sovereignty having thus been accepted, we should go further than that and disband the BIOT and allow Mauritius to come into its natural heritage as before independence."

2.83 This statement by the Prime Minister of Mauritius was no more than a claim to Diego Garcia and an acknowledgment that the United Kingdom had agreed that it would revert to Mauritius at a future date. It was not to be construed as an assertion by Mauritius that, as of 1980, it already enjoyed current sovereignty. That the Prime Minister was fully aware of the distinction is apparent from a Press Statement he had given in Mauritius just three months earlier, on 27 June 1980, which included the following:

> "We were consulted and we agreed to give away Diego Garcia and the British Government paid us £3 million as compensation. … As a result of the excision Diego

[100] MM, para. 3.73.
[101] MM, annex 95.
[102] MM, fn. 235 and corresponding annexes.

> Garcia became part of what is known as the British Indian Ocean Territory. And Great Britain has sovereignty over it. … Last night, a request was made in the Assembly that we should include Diego Garcia as a territory of the State of Mauritius. If we had done that, we should have looked ridiculous in the eyes of the world, because after excision, Diego Garcia doesn't belong to us, although we had already laid a claim for Diego Garcia to Great Britain. …. It is a complex problem. As you see, we could not say, last night, that Diego Garcia was Mauritius territory, …."[103].

2.84 The United Kingdom Permanent Representative, Sir Anthony Parsons, said the following in right of reply on 10 October 1980:

> "I wish to make clear that the UK has sovereignty over Diego Garcia and has not accepted that the island is under the sovereignty of Mauritius. When the Council of Ministers of Mauritius agreed in 1965 to the detachment of the Chagos Islands to form part of the BIOT it was announced that those islands would be available for the construction of defence facilities and that in the event of the islands no longer being required for defence purposes they should revert to Mauritius. What that means is that if the islands were no longer required the British Government would be willing to consider ceding sovereignty over them to Mauritius"[104].

2.85 On various subsequent occasions, between 1982 and 1998, Mauritius referred to the Chagos Archipelago (often together with Tromelin) in the UN General Assembly's annual general debate. During this period it continued to do so in terms of a claim to sovereignty and a desire to recover sovereignty, and with particular reference to the question of military bases and the UN General Assembly's Indian Ocean Zone of Peace resolutions, or the treatment of the Ilois. Such speeches were consistent with present United Kingdom sovereignty over the Chagos Archipelago.

2.86 On 30 September 1999 the language used by Mauritius in the general debate in the General Assembly elicited a further reply from the United Kingdom. On that occasion, the Mauritius Foreign Minister referred to:

> "the Chagos Archipelago, which was detached from Mauritius by the former Colonial power prior to our independence in 1968 …. This was done in total disregard of the UN declaration embodied in resolution 1514 (XV) of 14 December 1960 and resolution 2066 (XX) of 16 December 1965, which prohibit the dismemberment of colonial territories prior to independence. Mauritius has repeatedly asked for the return of the Chagos Archipelago, on which a US military base has been built, and thereby the restoration of its territorial integrity"[105].

[103] Port Louis, telno 104 of 28 June 1980: **Annex 36**.
[104] A/35/PV.33.
[105] A/54/PV.18.

The UK Representative replied, in language that has been repeated on subsequent occasions:

> "The British Government maintains that the BIOT is British and has been since 1814. It does not recognize the sovereignty claim of the Mauritian Government. However, the British Government has recognized Mauritius as the only State which has the right to assert a claim to sovereignty when the UK relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes"[106].

2.87 Since 1999, Mauritius has routinely referred to the BIOT in its general debate speeches, and the United Kingdom has continued to respond firmly along the lines of the above statement. Indeed, Mauritius has continued to raise the BIOT in the general debate even after commencing the present proceedings, the most recent occasion being on 1 October 2012, when Dr. Boolell, Foreign Minister of Mauritius, said:

> "There will be no meaningful Rule of law at international level until and unless all nations and specially the small ones can have avenues for resolving their disputes with other States.
>
> The United Kingdom excised part of Mauritian territory prior to independence and has refused to enter into talks in good faith over this dispute and has ensured that the dispute cannot be determined by the International Court of Justice.
>
> Thus, the decolonization of Africa has not been completed.
>
> At a time when the United Nations debates Rule of law at both national and international levels we urge the international community to work on machinery that enables States, whatever their size or economic power, to have judicial or other peaceful means of resolving disputes.
>
> Rule of law at international level cannot only be normative. There must also be adequate enforcement mechanisms without which there is no meaningful rule of law"[107].

2.88 The United Kingdom reply was contained in a statement annexed to a letter dated 2 October 2012 from its Permanent Representative to the President of the General Assembly, which read:

> "The British Government maintains that the British Indian Ocean Territory is British and has been since 1814. It does not recognize the sovereignty claim of the Mauritian Government.

[106] A/54/PV.19.
[107] **Annex 128**.

The British Government values its close and constructive cooperation with the Government of Mauritius on a wide range of issues and would like this to include a more constructive dialogue on British Indian Ocean Territory"[108].

F. Subsequent relations between Mauritius and the United Kingdom concerning the BIOT

2.92 **Section F** of this Chapter describes the subsequent relations between the United Kingdom and Mauritius relevant to the alleged 'fishing rights' now invoked by Mauritius, including details of fishing by Mauritian and other third country vessels in BIOT waters, and also the alleged 'mineral rights'.

(i) Fishing in the BIOT and the 'fishing rights' understanding

2.93 Following the agreement of the Mauritian Council of Ministers to detachment of the Chagos Archipelago on 5 November 1965, British officials took steps to meet the commitment recorded in paragraph 22(vi) of the record of the Lancaster House discussions to "use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritian Government as far as practicable:… (b) Fishing rights"[109]. Before approaching the American Government,[110] the Secretary of State for the Colonies sought a brief report from the Governors of Mauritius and the Seychelles indicating[111]:

"(a) nature of the fishing practiced by people in Chagos Archipelago;

(b) indication of use made of international waters in Archipelago and of any facilities in islands by vessels of any as to the fishing practices in BIOT waters of vessels from Mauritius and elsewhere by vessels of any other countries other than those of Seychelles;

[…]

[108] A/67/509: **Annex 129**.
[109] MM, annex 19.
[110] The Secretary of State for the Colonies informed the Governor of the Colony of Mauritius that the British Government would "make the appropriate representations to the American Government as soon as possible": paragraph 5 of the 6 October 1965 letter: MM, annex 21.
[111] Colonial Office Telegram No. 305 to Mauritius and Seychelles, 10 November 1965: MM, annex 34.

(d) value to Mauritius of waters in Archipelago as sources of fish".

2.94 The Governor of Mauritius replied on 17 November 1965, as follows[112]:

> "(a) nature of the fishing practised: mainly hand line with some basket and net fishing by local population for own consumption;
>
> (b) use made of international waters: nil, though vessels from Seychelles and occasionally Mauritius use anchorage facilities; …."
>
> […]
>
> (d) Value as source of fish:… Fishable area roughly 2,433 square miles. Available potential: fish 95,000 tons, shark 147,000 tons."

2.95 The understanding of the Mauritian Council of Ministers at the time as to the extent of Mauritian fishing in BIOT waters was consistent with the information provided in this report, as evidenced by the record of a debate in the Mauritian colonial parliament on 21 December 1965[113]. The Mauritian Premier was asked whether "the following obligations have definitively been undertaken by the British Government:- … (b) all fishing rights around Diego will be safeguarded". The Premier's answer to that point, delivered by Mr Forget, was:

> "I am not clear what the Hon Member means by the word "safeguarded". So far as I am aware the only fishing that now takes place in the territorial waters of Diego Garcia is casual fishing by those employed there and as the Hon Member is aware, they will be resettled elsewhere."

2.96 A further minute by Mr Fairclough of the Colonial Office of 15 March 1966, recorded that Mr Moulinie, the owner of Chagos Agalega Ltd (the company which then owned and operated the copra plantations in the BIOT) had said "that the only fishing in the Archipelago at present is for local consumption"[114]. This assessment was shared by the Governor, as confirmed in a letter of 25 April 1966[115], which also recorded that there were three fishing ventures operating from Mauritius, but that none fished in the waters of the Chagos

[112] MM, annex 37.
[113] **Annex 15**.
[114] **Annex 16**. Mr Fairclough also observed that the Colonial Office "had understood that Chagos was an important source of supply in Mauritius for turtles and that a Mauritius Company had spent money on two ships to fish in Chagos waters. Your savingsgram under reference does not, however, bear this out".
[115] **Annex 17**.

Archipelago. Similarly, paragraph 2 of a 1967 minute addressed to the BIOT Commissioner, Mr Todd affirms that:

> "The present position in Chagos is that fishing is regularly carried out by the Chagos Agalega Company [ie Mr Moulinie's company] but is limited to providing a fish ration for the company's employees"[116].

2.97 On 10 July 1969, after Mauritius' independence, the BIOT Commissioner, Sir Bruce Greatbatch, acting on the instructions of the Secretary of State, established a fisheries zone contiguous to the territorial sea of the Territory. This extended from the outer margin of the 3 nautical mile territorial sea to 12 nautical miles from shore ("the contiguous zone")[117], and was implemented by the Fisheries Limit Ordinance, No.2 of 1971[118]. Article 3 made it an offence to fish in the fisheries limits defined as the "territorial sea of the Territory together with the contiguous zone", without a research or sporting licence, but Article 4 enabled the Commissioner by order to designate any country "for the purpose of enabling fishing traditionally carried on in any area within the contiguous zone", thereby enabling vessels registered in that country to fish in the contiguous zone, but not the territorial sea. The limitation to fishing in the contiguous zone reflected the defence and security preferences of the United States and section 4 of the 1971 Immigration Ordinance prohibiting any person from entering or remaining in the Territory without a permit.

2.98 It appears that, although it was intended that the Commissioner should designate Mauritius under section 4 to enable fishing by Mauritian vessels in the 3nm-12nm contiguous zone[119], this was not in fact done. However, the understanding was that Mauritian-flagged vessels were designated to fish in the 3nm-12nm contiguous zone.

2.99 The record of fishing by vessels from Mauritius in the BIOT contiguous fisheries zone in the 1970s is slight. There is catch data for 1977 only, and none again until 1981[120]. The

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[116] **Annex 18**. At paragraph 216 of his judgment in *Chagos Islanders* v. *Attorney General* [2003] EWHC 2222 (QB) Lord Justice Ouseley concluded: "There was no evidence, nor even a suggestion, that people came to the islands other than to work for the plantation company or its staff, or on the Meteorological station. There were no independent traders or craftsmen, farmers or fishermen. Although people went fishing and built boats and houses, this was not an independent means of existence"; see also para. 344 of the Judgment (**Authority 22**).

[117] Proclamation No.1 of 1969: MM, annex 53.

[118] MM, annex 60.

[119] MM, annex 64; see also MM, annex 63.

[120] "A summary of historical information relating to the BIOT inshore fishery", attached to the joint communiqué, second meeting of the British/Mauritian Fisheries Commission, 17 March 1995: **Annex 64**.

Mauritian Minister of Fisheries in a parliamentary debate of 5 July 1978 referred to fishing in the Chagos by the *MV Nazareth*, but then went on to say that, as the fish from BIOT waters were not consumed by Mauritians "the proprietors of our companies are not interested in catching the fish which are found in abundance there"[121]. The parliamentary debate on the second reading of the Fisheries Bill (No IV of 1980) on 13 May 1980 suggested there was only one modern fully-equipped Mauritian vessel, the *Lady Sushil*[122], that could take advantage of tuna fishing opportunities in the area on a par with vessels from elsewhere[123].

2.100 A new fisheries Ordinance came into effect on 12 August 1984[124] establishing a licensing system which required all fishing boats to hold licences to fish within fishery limits, defined as the territorial waters and the contiguous zone thereto. "Foreign fishing boats", defined as boats other than a British fishing boat, i.e. including Mauritian-flagged vessels, would only be granted licences if they were from a country designated under section 4[125]. On 21 February 1985 the Commissioner, acting under section 4 of the 1984 Ordinance, designated Mauritius "for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius"[126].

2.101 Under the new licensing scheme, Mauritian-flagged vessels which planned to fish within BIOT territorial waters and the contiguous fisheries zone were required to apply to the High Commission in Port Louis for fishing licences to fish in specified areas, but no fee was charged[127]. Application forms for fishing and collecting coconuts were introduced in 1986[128]. In 1990 an express provision was added expressly prohibiting fishing in the lagoons.

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[121] col. 3116 : MM, annex 84.
[122] A tuna purse seining vessel.
[123] MM, annex 90: col. 942-943 (Mr Jugnauth, Leader of the Opposition); see also col. 95 (Mr Bérenger).
[124] Proclamation No. 8 of 1984, 15 November 1984, *Official Gazette* [1984] (**Annex 48**) and The British Indian Ocean Territory, Ordinance No. 11 of 1984, *Official Gazette* [1984]: **Annex 49**.
[125] Proclamation No.8 of 1984, replacing the 1969 Proclamation and establishing an exclusive fisheries zone in the contiguous zone. This was implemented by the BIOT Fishery Limits Ordinance No.11 of 1984.
[126] MM, annex 98.
[127] The information from the company operating the vessel included the radio frequencies on which the vessel could be contacted, the name of the master and the actual dates of departure and return of the vessel. Licences were issued for a specified period of days, on the proviso that no landings were made on the islands except in case of genuine necessity or with express permission. Any change of itinerary had to be notified to the High Commission. The use of nets other than cast nets (or 'throw nets', typically used for bait) was expressly prohibited.
[128] As required by the licence, vessels would establish radio contact with the Royal Navy Liaison Officer (RNLO) stationed on Diego Garcia on approaching BIOT, make daily call ups on their position and intended movements, notify the authorities in Diego Garcia before landing on any of the islands and report the return of the vessel to Mauritius promptly to the British High Commission in Port Louis. No fishing was undertaken around Diego Garcia.

2.102 Thus, from 1985, Mauritian-flagged vessels and their crew were granted strictly regulated permission to enter BIOT territorial waters and land on the outer islands. By the time the fishing licensing regime was introduced in 1984, Mauritius had already asserted its claim to sovereignty over the BIOT[129]. In a Legal Supplement to the Government of Mauritius Gazette 119 of 29 December 1984 it had announced an EEZ which included the BIOT under section 15 of the Maritime Zone Act 1977 (in respect of which the United Kingdom lodged a protest)[130]. Nonetheless, Mauritius did not protest the new fisheries legislation, nor the requirement that Mauritian vessels apply for fishing or coconut collecting licences.

2.103 BIOT records indicate that by early 1985 only two Mauritian vessels, the *MV Nazareth* and the *MV Piranha* had applied for and been granted licences to fish in BIOT waters. The type of fishing carried out was a mothership/dory operation, which targeted high-value bottom (demersal) fish varieties, like snapper and grouper, using lines and hooks in shallow water banks. The *Lady Sushil*, a tuna purse seiner vessel flagged to and operating out of Mauritius was also licensed to fish in BIOT waters[131].

2.104 In October 1991, in light of increasing interest shown by third country vessels in the waters of the BIOT during the 1980s[132] and growing concern about the depletion of Indian Ocean fish stocks (a decline in fish catches was recorded in the Indian ocean for the first time

[129] See paras. 2.81-2.85 above.

[130] Cf. MM, para. 4.2. The announcement of the designated EEZ in the Mauritius Gazette was the first public assertion of a claim to an EEZ around the BIOT by Mauritius. The 1977 Act did not itself specify the EEZ, but provided for the designation of continental shelf and EEZ by the Prime Minister by regulation. When Mauritius purported to claim an EEZ around BIOT by publishing coordinates and a chart under its 1977 Maritime Zones Act in late 1984 (formally advised to the UK in 1985), the United Kingdom protested: see Notes Verbale of 18 February 1985, 19 February 1985 and 16 August 1985: **Annexes 50, 51 and 52**.

When, a few years later in March, May and early June 1990, Mauritian authorities prosecuted three Taiwanese fishing boats for fishing within 200 nautical miles of the BIOT, the United Kingdom protested the action: the High Commissioner visited the appropriate official in the Mauritian Foreign Ministry to convey the United Kingdom's position and left a speaking note: **Annex 53**. Parallel action was taken with the High Commission of Mauritius in London.

[131] When the operators of the *Lady Sushil* approached the BIOT in late 1983 requesting permission to fish for tuna in BIOT waters, BIOT authorities at first considered it might fall outside the background of traditional Mauritian fishing activities in BIOT waters. However, on receiving advice that tuna stocks were unlikely to suffer overexploitation whether the *Lady Sushil* fished inside or outside BIOT fishery limits and it was unlikely to interfere with fish stocks of the inshore fishery, approval was given.

[132] In early 1987 the BIOT Administration noted that fishing in the Indian Ocean and Chagos Archipelago had increased dramatically from 2,000 to over 100,000 tonnes a year, largely by French-flagged vessels operating out of the Seychelles and Réunion.

in 1990), the BIOT proclaimed a 200 nautical mile (nm) Fisheries (Conservation and Management) Zone (FCMZ)[133]. Fishing was prohibited in the FCMZ without a licence[134].

2.105 A new commercial tuna fishing licence was developed for tuna fishing in the deeper waters away from the islands, which specified whether the licence authorised tuna fishing by long line or purse seine net[135]. Longline fishing targeted relatively few fish of higher value, mainly for the sushi market. Fishing by purse seine (a type of net) was lower value but higher volume than longline fishing, normally for the cannery market.

2.106 The existing fishing license for the mothership/dory fishing carried out on shallow water banks in the BIOT's 12nm waters was renamed an 'inshore fishing licence'. The number of annual inshore licences was set at six, following advice received from fisheries and conservation consultants, MRAG Ltd[136]. The new inshore fishing licence under the 1991 legislation included the same basic terms as had the licence issued under the 1984 legislation[137]. By this time in 1991 there were approximately ten vessels owned by four or five Mauritian companies which were carrying out fishing in BIOT waters, the increase being attributed to catch rates falling in the Sudan, Nazareth and Saya de Malha banks of the Mauritian banks fishery where these vessels had mainly fished. Not all these Mauritian vessels remained flagged to Mauritius. Those that reflagged to other States were no longer able to take advantage of the free licences issued to Mauritius-flagged vessels under the licensing arrangement. (As explained below, the number of Mauritian-flagged vessels applying for inshore fishing licences fell sharply after 1996.)

2.107 The 1991 Ordinance made no provision for designation of countries, as had the earlier fisheries legislation, but in the Note Verbale of 23 July 1991 informing Mauritius of the intention to create a FCMZ, it was also told that:

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[133] MM, annex 101. The High Commission, Port Louis had advised Mauritius of its intentions to declare a 200nm exclusive fisheries and conservation management zone by Note Verbale of 23 July 1991: MM, annex 99. A declaration of intent to declare a 200nm exclusive fisheries and conservation management zone was issued by the BIOT on 7 August 1991: **Annex 54**. A Note Verbale in the same terms was sent by the Foreign and Commonwealth Office to the Mauritius High Commission, London, on 5 August 1991.

Before the introduction of the FCMZ in October, the number of fishing licences issued under the 1984 Ordinance to Mauritian-flagged vessels for the 1991 fishing season was halved to four in response to the decline in fish catches recorded for the 1990 fishing season.

[134] MM, annex 102.

[135] An example of the tuna fishing application forms is at **Annex 55**.

[136] The number was reduced from six to four in 1999 for conservation reasons: see para. 3.13 of **Chapter III.**

[137] An example of the new, post-1991 inshore fishing licence is at **Annex 56**.

> "In view of the traditional fishing interests of Mauritius in the waters surrounding British Indian Ocean Territory, a limited number of licences free of charge have been offered to artisanal fishing companies for inshore fishing. We shall continue to offer a limited number of licences free of charge on this basis."

2.108 Mauritius protested the creation of the FCMZ on the grounds of Mauritian sovereignty over the Chagos Archipelago, but did not refer to the 1965 fishing rights understanding or the practice of issuing licences free of charge to Mauritian vessels[138].

2.109 Initially there was some debate within the Foreign and Commonwealth Office as to whether Mauritian-flagged vessels applying for long-line or purse seine tuna fishing licences to fish in the FCMZ would also receive them free of charge. In the end it was decided in May 1992 that, for political reasons and because it was unlikely to be a particular burden (there were only three Mauritian-flagged tuna fishing vessels[139]), commercial tuna fishing licences would also be issued free of charge to Mauritian-flagged vessels that applied for them.

2.110 Originally three Mauritius-flagged vessels fished for tuna in BIOT waters under purse seine licences, although one of these vessels subsequently re-flagged to France. No purse seine fishing was undertaken by a Mauritian-flagged vessel after 1999. The vessels pursuing purse seine tuna fishing in the BIOT FCMZ were predominantly French and Spanish owned, but registered in a variety of countries. No Mauritius-flagged vessels ever fished using the longline method. Vessels taking up long line licences were flagged to Taiwan, Japan, China, Korea, and the Seychelles. The numbers of vessels applying for inshore fishing licences steadily dropped after 1996 and not all the licences that were issued were actually used. In 2005 and 2008 no inshore fishing licences were issued at all. Only one inshore fishing licence was issued in each of the years 2006 and 2007[140]. However, as the vessels to which the licences were issued in 2006 and 2007 were flagged to Madagascar and the Comoros, not Mauritius, licence fees were charged. The reason for the reduction in the numbers of Mauritian vessels taking up inshore fishing licences was economic: the boats were aged and inadequate for international export standards and, because of overexploitation of the

[138] See Note Verbale dated 7 August 1991 from Ministry of External Affairs, Mauritius to British High Commission, Port Louis, No. 35(91) 1311: MM, annex 100.
[139] *Lady Sushil I, Lady Sushil II* and *Cirne*, purse seiner vessels operated by Mauritius Tuna Fishing & Canning Enterprises Ltd.
[140] To vessels owned by the Talbot Fishing Company Ltd, a Mauritian company.

Mauritian banks, this type of shallow banks fishing no longer produced enough to make it economically viable. In 2009 only one Mauritian-flagged vessel, the *MV Etelis*, was granted two licences free of charge for inshore fishing (in respect of applications dated 20 April 2009 and 26 November 2009, for two separate licence periods). The *MV Etelis* had not fished the inshore fishery before 2009, and it was being used in that year to try out new hydraulic gear which would enable fishing on the deep reef slope[141].

2.111 Thus, by the time the MPA proposal was first being considered by the BIOT Administration in 2008, as described in Chapter III, the take-up of commercial fishing licences by Mauritian-flagged vessels was very low, in some years nil. The BIOT fishing licence figures for the period 1991 to 31 March 2010 are shown in **Figure 2.4** on p. 51.

(ii) The mineral rights understanding

2.112 The understanding on mineral rights in paragraph 22(viii) of the final record of the Lancaster House discussions - "that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government" - was confirmed by the Mauritian Council of Ministers on 5 November 1965 with the proviso that:

> "In (viii) "on or near" means within area within which Mauritius would be able to derive benefit but for the change of sovereignty…"[142]

The Secretary of State was asked to confirm this understanding.

2.113 The Secretary of State replied on 8 November 1965, stating the United Kingdom's position as follows:

> "The islands are required for defence facilities and there is no intention of permitting prospecting for minerals or oils on or near them. The points recorded in your paragraph 1 should not therefore arise but I shall nevertheless give them further consideration in light of your request."

[141] Inshore fishing licences were also issued to the *Talbot IV*, flagged to Madagascar, and the *Talbot V*, flagged to the Comoros, in respect of applications made on 14 October 2009 and 5 April 2009.
[142] As recorded in the first paragraph of the Governor's despatch to the Secretary of State to the Colonies of 5 November 1965: MM, annex 25.

2.114 This has remained the position ever since. It was fully understood at the time by the Mauritian Council of Ministers, as reflected in a reply to a parliamentary question delivered by Mr Forget on 21 December 1965 on behalf of the Premier and the Minister of Finance[143].

2.115 As has been made clear to Mauritius, Mauritius has no ownership of oil and minerals in the BIOT as a result of the 1965 understanding, nor any right to legislate with respect to them. This was spelt out by a Note Verbale from the British High Commission in Port Louis delivered on 17 December 1969 - in response to a letter from the Mauritian Prime Minister of 19 November 1969 in which he conveyed his Government's intention to vest its ownership in and issue licences for the exploration and prospecting of minerals and oil in the offshore areas of the Chagos Archipelago[144] - in the following terms:

> "The British Government feel bound to state that they consider that 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 and 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 or minerals or oil in the areas in question should be vested in the Government of Mauritius or that the Authorities of Mauritius should have any right to legislate with respect to or otherwise regulate matters relating to the ownership, exploration or exploitation of such minerals or oils. Nor is it believed that the correspondence and discussions which took place in 1965 contained anything to suggest such an intention on the part of the British Government. Indeed, it was made clear to Mauritius that there was no intention on the part of the British Government of permitting prospecting for minerals and oil on or near the islands of the Archipelago and that the question of any benefits arising therefrom was not therefore likely to arise unless and until the islands were no longer required for defence purposes and were returned to Mauritius. The British Government have no intention of departing from the undertaking that the Government of Mauritius should receive the benefit of any oils or minerals discovered in the Chagos Archipelago or the offshore areas in question in the event of the matter arising as a result of prospecting being permitted while the Archipelago remains under British sovereignty. At the same time, the British Government wish to state that they fully reserve their rights under international law with regard to the regulation of exploration for and exploitation of such oil. They consider that the Government of Mauritius are not entitled under international law to take the actions relating to such minerals and oil of

[143] Mr Forget's reply was as follows: "The Hon. Member's question is, again, a hypothetical one and I should make it clear that there has never been any indication of minerals in the Chagos Archipelago, which is a string of coral atolls. The British Government has no intention of allowing prospecting for minerals while the islands are being used for defence purposes": **Annex 15**.

[144] MM, annex 54. The genesis of Mauritius' interest in asserting such rights over BIOT minerals and oil, as recorded in a background note prepared in advance of the visit of the Mauritius Prime Minister to the United Kingdom on 4 February 1970, appears to have been because it was receiving enquiries from oil companies and oil exploration companies in respect of the Saya de Malha Bank and the Nazareth Bank, and also the Chagos Archipelago (the same companies had also approached BIOT): MM, annex 56.

which they informed the British Government in the Note of the 19th November, 1969, and they therefore trust that the Government of Mauritius will not proceed" [145].

2.116 This position was reaffirmed to Prime Minister Sir Seewoosagur Ramgoolam at a meeting in London on 4 February 1970[146]. It has been repeatedly affirmed by the United Kingdom Government to Mauritius on many occasions since then that it has no intention of permitting prospecting for minerals and oil while the BIOT remains British[147]. That remains the position.

[145] MM, annexes 55 and 56. MM, annex 55, is a copy of the Note Verbale of 17 November 1965, but it is missing a page. The missing content can be found the telegram sent from the Foreign and Commonwealth Office to the High Commission in Port Louis setting out the text of the Note Verbale to be issued (the telegram is annexed as part of the briefing for the Mauritius Prime Minister's visit to the United Kingdom on 4 February 1970, which is annex 56 of the Mauritius Memorial).

[146] See the speaking note prepared for the meeting: MM, annex 56.

[147] Letter from the United Kingdom's High Commissioner in Port Louis to the Mauritian Prime Minister, Rt Hon Sir Anerood Jugnauth KCMG QC of 1 July 1992 (MM, annex 103); letter from the Secretary of State for Foreign and Commonwealth Affairs to the Prime Minister of Mauritius of 10 November 1997: MM, annex 105.

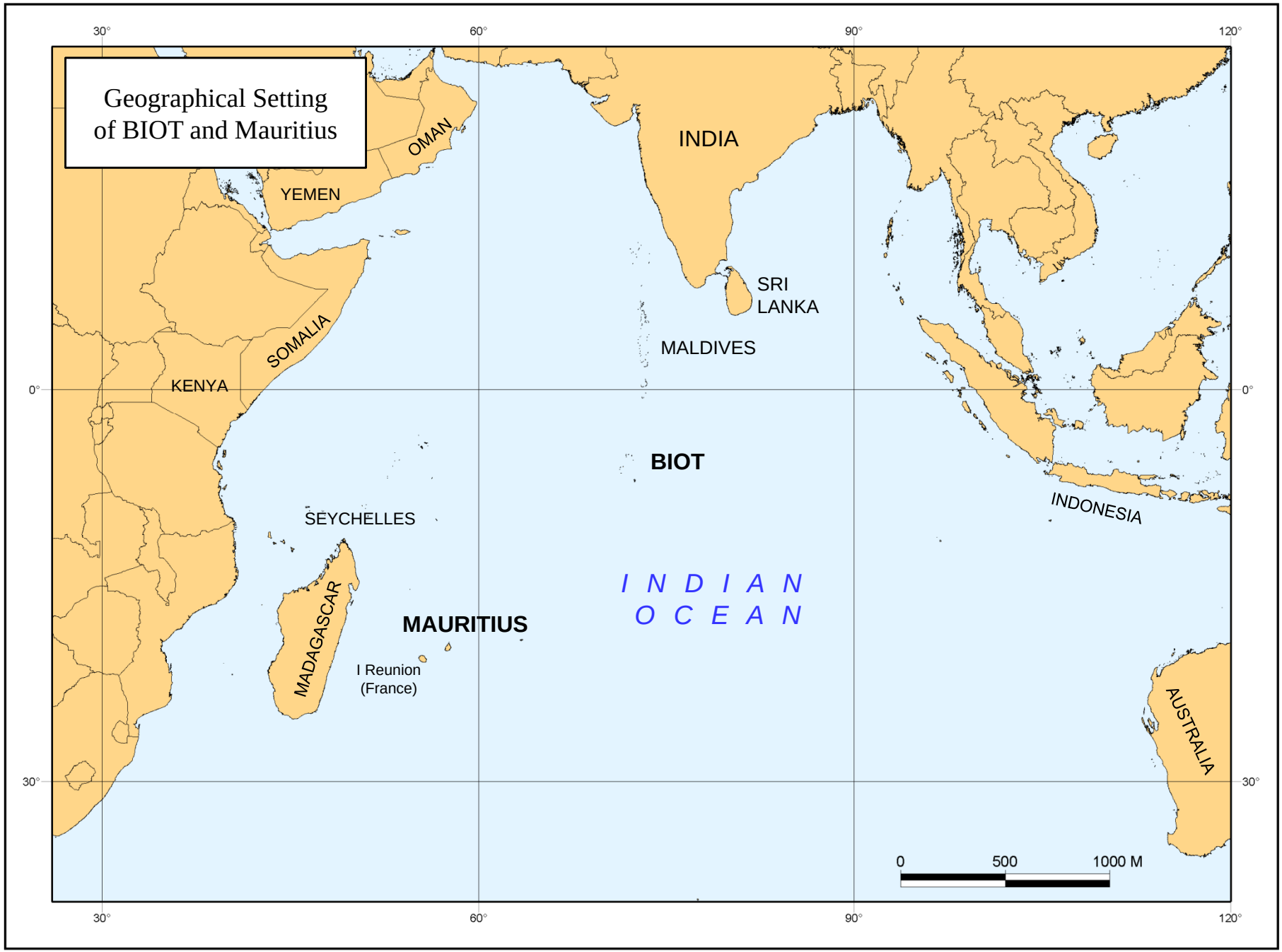
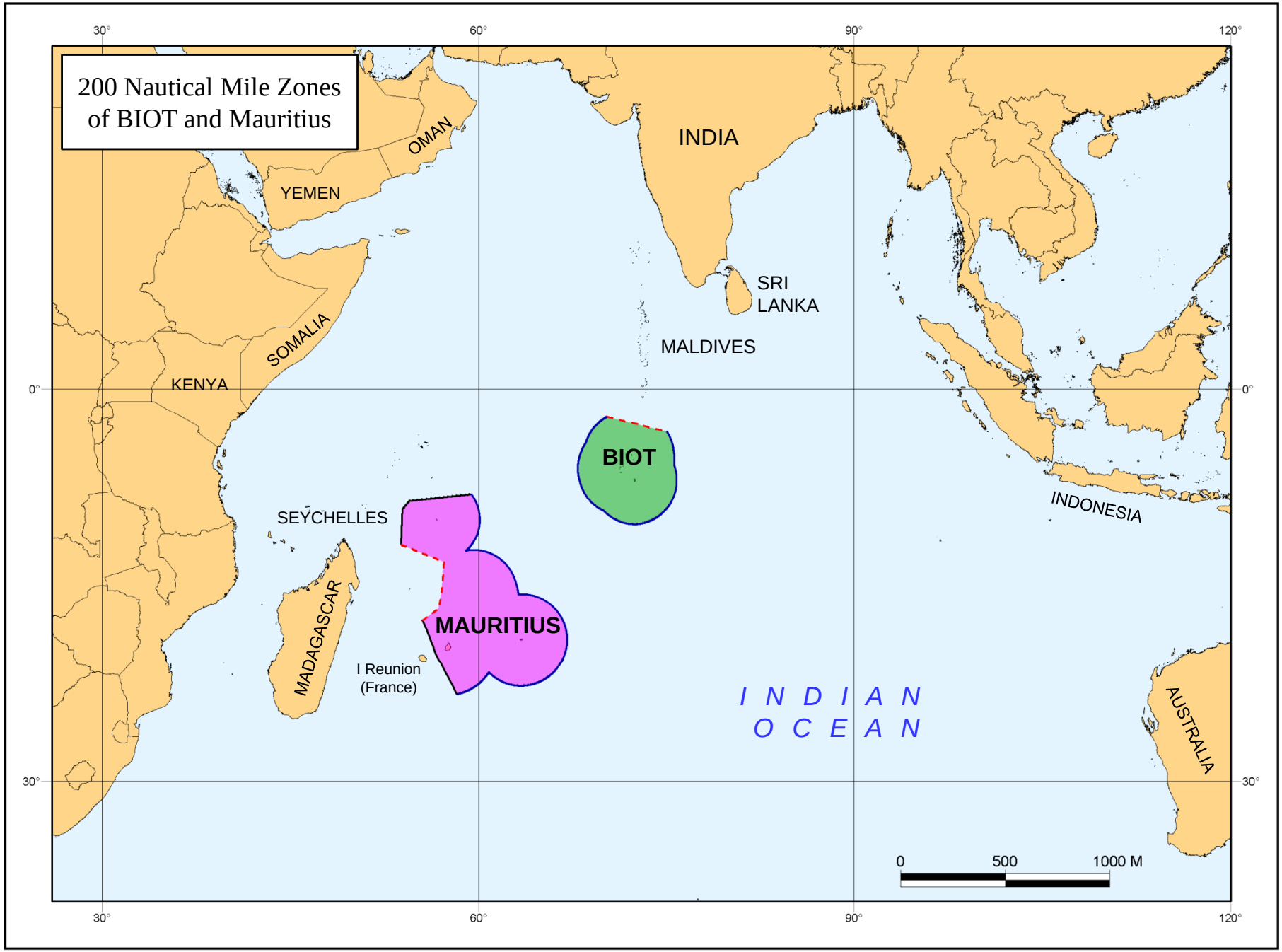

Geographical Setting
of BIOT and Mauritius
30°
60°
90°
120°
OMAN
YEMEN
INDIA
SRI
LANKA
MALDIVES
SOMALIA
KENYA
0°
BIOT
INDONESIA
SEYCHELLES
I N D I A N
O C E A N
MADAGASCAR
MAURITIUS
I Reunion
(France)
AUSTRALIA
30°
0
500
1000 M

Figure 2.1


200 Nautical Mile Zones
of BIOT and Mauritius
30°
60°
90°
120°
INDIA
OMAN
YEMEN
SRI
LANKA
MALDIVES
SOMALIA
KENYA
0°
BIOT
INDONESIA
SEYCHELLES
MADAGASCAR
MAURITIUS
I Reunion
(France)
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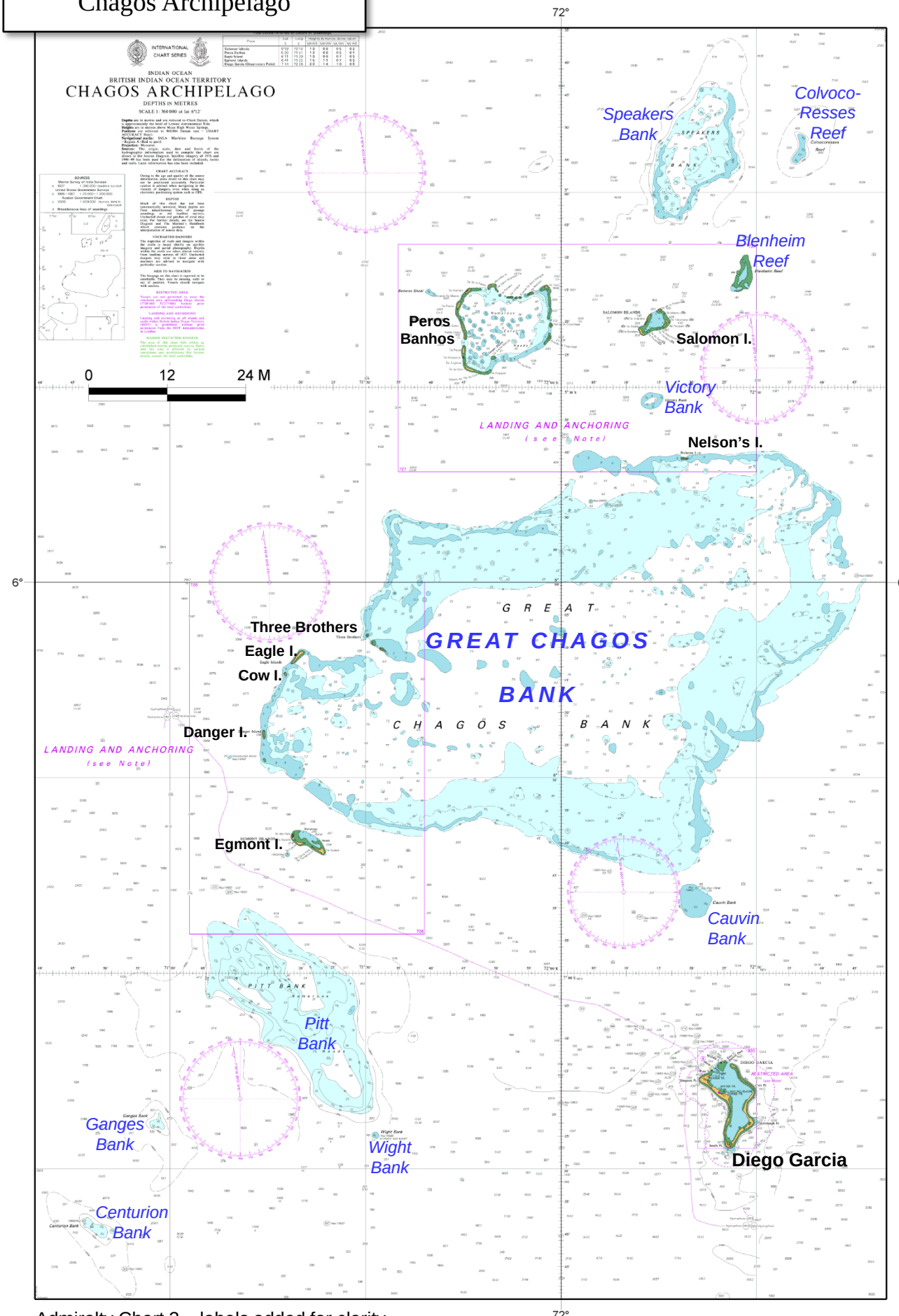
O C E A N
AUSTRALIA
0
500
1000 M

Figure 2.2

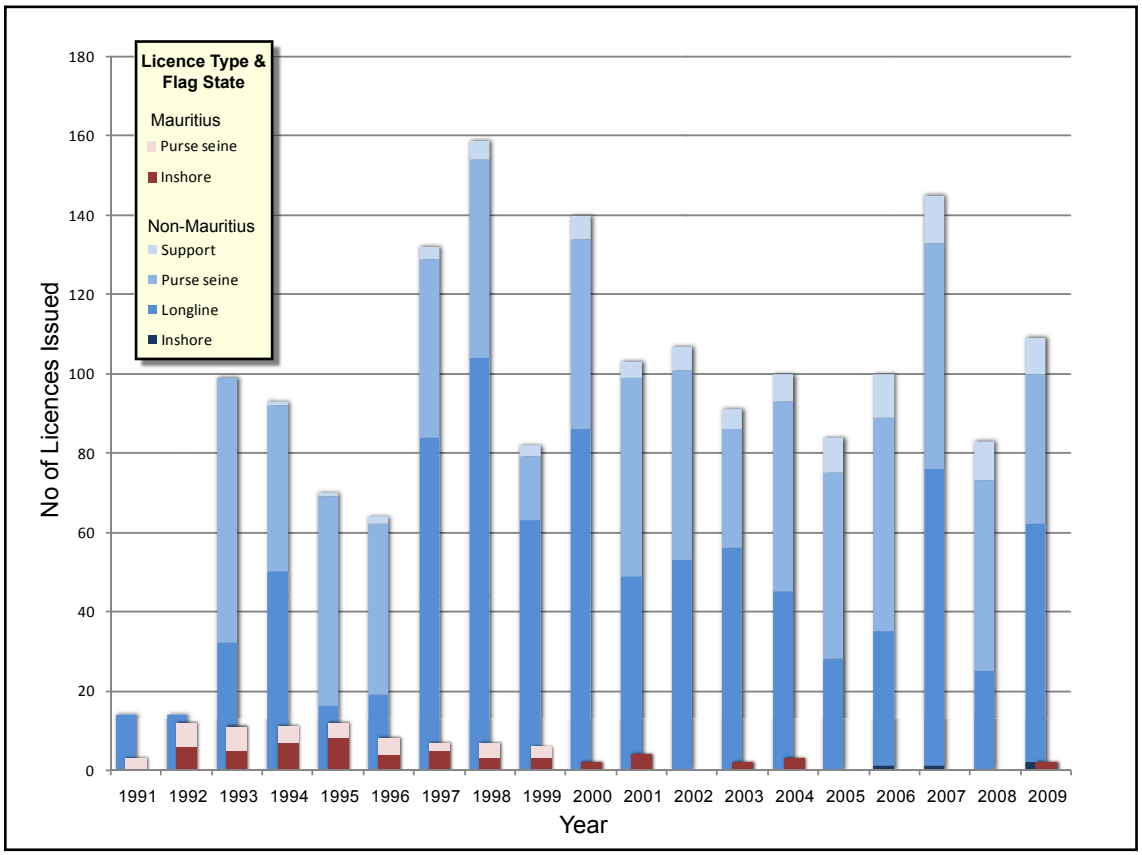
British Indian Ocean Territory: Chagos Archipelago



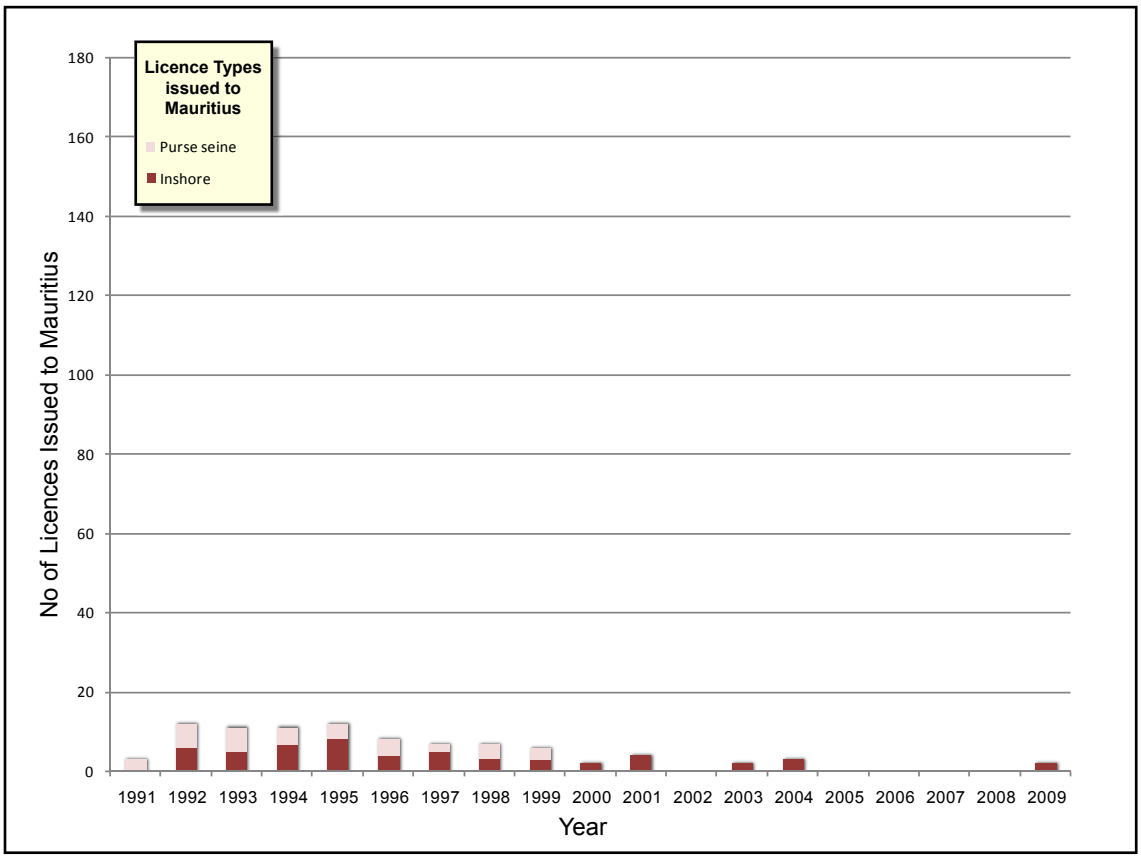
Admiralty Chart 3 – labels added for clarity

Figure 2.3

Fishing Licences Issued by BIOT from 1991 to 30 March 2010



A. All BIOT fishing licences issued between 1991 and 30 March 2010
(Mauritian-flagged vessels and vessels flagged to third States)



B. BIOT fishing licences issued to Mauritian-flagged vessels between 1991 and 30 March 2010

Figure 2-4

APPENDIX TO CHAPTER II

DEPENDENCIES

A2.1 The present Appendix describes an aspect of the law and practice of overseas territories that is relevant to the present proceedings, that of 'dependencies'. The focus is on British practice, but reference is also made to the practice of other countries, particularly France.

A2.2 Sir Kenneth Roberts-Wray discusses the terms 'dependency' and 'dependent territory' in his book from 1966:

> "To avoid possible confusion it should perhaps be mentioned that one dependent territory may be placed under the authority of another of which it does not form part, and that the former is then usually called a Dependency of the latter. For example, Ascension Island, Tristan da Cunha and other Islands are Dependencies of St. Helena. In drafting, all such cases can be dealt with in general terms. Thus, at the foot of the First schedule to the Visiting Forces (British Commonwealth) (Application to Colonies, etc.) Order in Council, 1940, which contained a list of dependent territories to which the order applied, was the following sentence: "Reference in this Schedule to any territory of which there are dependencies shall be construed as including a reference to such dependencies"[148].

A2.3 The definition of 'Dependency' given in the Oxford English Dictionary is: "a country or province subject to the control of another of which it does not form an integral part". As the status of Dependency was an administrative convenience the nature of the relationship with its administering Colony was, by definition, variable. In the British context, Dependencies could be, and often were, detached or attached as between one colony and another by exercise of the Royal Prerogative.

A2.4 In both French and British colonial practice, the attachment of a remote and less developed island or territory to a nearby colony was an established constitutional administrative arrangement. The Dependency was usually placed under the authority of a larger colony that had full administrative and judicial capacity to exercise effective authority

[148] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), p. 61 (**Authority 90**).

over it: for example, the establishment of Rotuma as a Dependency of Fiji in 1880. At other times attachment might be a device for formally asserting sovereignty against other powers over territories which did not have settled populations or clear political attachments: for instance, the placing of the South Orkney Islands under the authority of the Falkland Islands administration in 1910.

A2.5 There was, in fact, an extensive practice whereby colonial powers from time to time altered the boundaries of their overseas territories, in the interests of administrative convenience and effective governance. For example, the changes in the territorial boundaries within French West Africa are described at some length by the International Court of Justice in its Judgment of 16 April 2013 in the *Frontier Dispute (Burkina Faso/Niger)* case:

> "The frontier dispute between the Parties is set within an historical context marked by the accession to independence of the countries that were formerly part of French West Africa. From the beginning of the century up to the entry into force of the French Constitution of 27 October 1946, the territorial administration of French West Africa was centralized. It was headed by a governor-general and divided into colonies, whose creation or abolition fell within the executive power of the French Republic. Each of these colonies was headed by a "colonial governor" with the title of "lieutenant-governor". The colonies were themselves made up of basic units called *cercles* which were administered by *commandants de cercle*; the creation and abolition of the *cercles* were the sole prerogative of the governor-general, who decided their overall extent. Each *cercle* in turn was composed of subdivisions, administered by *chefs de subdivision*. Finally, the subdivisions comprised *cantons*, which grouped together a number of villages. The creation and abolition of subdivisions and cantons within any particular *cercle* came within the jurisdiction of the lieutenant-governor of the colony of which the *cercle* formed part (see *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, para. 31)"[149].

A2.6 The British mechanisms for establishing such Dependencies of larger colonies have included combinations of formal cession, proclamations, Letters Patent and Orders in Council according to individual circumstances. This was not always a neat and tidy process: for example in 1855 there was uncertainty over the precise status of Tristan da Cunha as a Dependency of Cape Colony; and the Dependencies of St. Helena were only formalised by Letters Patent in 1938. Furthermore, Dependencies of larger colonies could be, and frequently were, made and unmade at will. This practice used to be common, and continued

[149] ICJ, *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, paras. 12-22, at para. 12 (**Authority 42**). The ICJ had already described these French colonial arrangements in *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 569, paras. 31-32 (**Authority 10**).

into recent times. Thus, the Caymans Islands became a Dependency of Jamaica in 1863 but were separated from it in 1958; and South Georgia and the South Sandwich Islands – formerly Dependencies of the Falklands – were constituted as a separate territory in 1985.

A2.7 Sometimes broader political, strategic and military considerations were at play. At other times, the motivation was simply economic and administrative pragmatism. The **Cocos (or Keeling) Islands**, with a very small population and plantation economy, were attached to various Colonies after their annexation in 1857: to Ceylon, to the Straits Settlements, and in 1946 to Singapore. In 1955 – that is, before the independence of Singapore – they were transferred to the Australian Commonwealth (as a Commonwealth 'Territory'). This was done in order to meet both Australian and British concerns about strategic/defence issues at a time when independence was coming to the British territories in South-East Asia (Malaya 1957; full internal self-government in Singapore 1959) and when those territories were still under pressure from internal communist insurgency.

A2.8 The uninhabited island of **Ascension** was occupied by the Royal Navy in 1815 on Admiralty instructions and was thereafter the naval establishment 'HMS Ascension'. From 1821 until 1922 it was a garrison for the marines. In 1899-1901 two commercial companies landed cables on the island. One of them, the Eastern Telegraph Co., subsequently absorbed into Cable & Wireless, established a small station on Ascension. In 1922, the Admiralty having transferred control to the Colonial Office, the island was made a Dependency of St. Helena by Letters Patent of 12 September. The Governor of St. Helena became the Governor of Ascension with the power to legislate. Very few of the laws of St. Helena were in fact applied, but the Executive Council of St. Helena also became the Executive Council for Ascension. The actual administration of the islands, however, was left in the hands of the Manager of Cable & Wireless as ex-officio Resident Magistrate (and also, for some years, member of the Executive Council) assisted by two police constables.

A2.9 In 1964 the Manager of Cable & Wireless relinquished the post of Resident Magistrate. Control passed to a full time Administrator appointed by the Colonial Office and responsible to the Governor of St. Helena. Under the terms of the St. Helena (Constitution) Order in Council of 1966 Ascension was wholly removed from control of the Executive Council: but the Governor remained as the sole legislative authority and the sole link between the two islands.

A2.10 During the nineteenth century the **Gold Coast Settlements** were several times made – and unmade - Dependencies of the Colony of Sierra Leone. This simply meant that the Council of Government of these largely trading forts was abolished and they were placed under the administrative and, in particular, judicial authority (because of the slaving cases) of Sierra Leone.

A2.11 The **Turks and Caicos Islands** and the **Cayman Islands** are cases where an integral part on the one hand and a dependency on the other were separated from a colony shortly before independence. In 1958 the Turks and Caicos Islands ceased to be part of the Colony of Jamaica, by virtue of an Act of the United Kingdom Parliament[150].

A2.12 As Hendry and Dickson explain "[u]nlike the Turks and Caicos Islands, [the Cayman Islands] were never annexed to, and made part of, Jamaica, but were instead a dependency of it"[151]. Nevertheless, the Governor, legislature and courts of Jamaica had extensive powers in relation to the Cayman Islands**;** in effect the Governor of Jamaica had the same powers as in relation to the Cayman Islands as if they had been part of Jamaica. These arrangements were terminated by the same 1958 Act of the United Kingdom Parliament[152], though there were close links to Jamaica until the latter's independence in 1962[153].

A2.13 Since 1958 and 1962 respectively, the Turks and Caicos Islands and the Cayman Islands have been British overseas territories entirely separate from Jamaica, which itself became independent on 6 August 1962.

A2.14 The **Esparses Islands**[154] **(Iles Glorieuses, Juan de Nova, Bassas de India, and Europa),** uninhabited 'scattered' islands in the Mozambique Channel, were administered as Dependencies of Madagascar before the latter's independence from France in June 1960. The Iles Glorieuses had also been a dependency of another colony - Mayotte - and were attached

[150] Cayman Islands and Turks and Caicos Islands Act 1958 (c. 13), section 1: **Annex 6**.
[151] I. Hendry, S. Dickson, *British Overseas Territory Law* (2011), p. 311 (**Authority 68**). The difference between the Turks and Caicos Islands, which were part of the Colony of Jamaica, and the Cayman Islands, which were not part of the Colony but a dependency thereof, is apparent from the language of section 1 of the Act.
[152] Cayman Islands and Turks and Caicos Islands Act 1958 (c. 13), section 1.
[153] I. Hendry, S. Dickson, British Overseas Territory Law (2011), p. 312 (**Authority 68**).
[154] See A. von Ungarn-Sternbeg, 'Eparses Islands', in R. Wolfrum ed., *Max Planck Enyclopedia of Public International Law* (2102), vol. III, pp. 597-600 (**Authority 106**).

to Madagascar along with the Comoros Archipelago as a Dependency of them. The Glorieuses were attached to Madagascar directly by a decree of 1928.

A2.15 On 1 April 1960 during Madagascar's independence negotiations France issued a decree confirming France's rights over the islands in question. They were subsequently administered by the Prefect of Réunion (an Overseas Department of France), who was given direct responsibility for them on behalf of the French Government.

CHAPTER III

THE BIOT MARINE PROTECTED AREA

A. Introduction

3.1 This chapter describes the BIOT Marine Protected Area ('MPA'), which was proclaimed on 1 April 2010, following extensive consultations bilaterally with interested States and with the general public.

3.2 The BIOT MPA is a marine reserve extending throughout the BIOT's 200 nautical miles Fisheries (Conservation and Management) Zone ('FCMZ'), its territorial sea and internal waters, and its coextensive 200 nautical miles Environment (Preservation and Protection) Zone ('EPPZ'), excluding only the island of Diego Garcia and its waters out to 3 nautical miles. Within the MPA commercial fishing is banned. Regulated non-commercial fishing by yachtsmen for personal consumption and regulated recreational fishing off Diego Garcia continues to be allowed.

3.3 The intention is that the MPA will encompass the land territory of the islands, as well as their internal waters and maritime zones. A comprehensive MPA Ordinance is in the course of being prepared, which will replace the existing BIOT legislation protecting the environment, flora and fauna of the islands and their waters. To date the MPA has been implemented by not issuing commercial licences to fish in BIOT fishing waters[155] under the 2007 Fisheries Ordinance and Regulations (fishing being prohibited without a licence under the fisheries legislation). Additional funding for patrolling BIOT waters (the internal waters, territorial sea and FCMZ/EPPZ), which had previously been supported by revenue from commercial fishing licences, has been provided.

3.4 It should be said at the outset that the MPA and its related legislation does not affect the claims by Chagossians of a right of return, which have been pursued in domestic courts

[155] Defined in section 3 of the 2007 Fisheries Ordinance as comprising '(a) the internal waters of the Territory; (b) the territorial sea of the Territory; and (c) the Fisheries Conservation and Management Zone: **Annex 79**.

and the European Court of Human Rights. Part of the United Kingdom's policy regarding the MPA is that, should circumstances change in relation to the claimed right to return, the MPA would be reconsidered. In addition, nothing will be done that would prejudice the undertaking that the islands will be ceded to Mauritius should they no longer be required for defence purposes[156].

3.5 The BIOT MPA followed from a 2007 initiative of two non-governmental organisations who joined forces to create the Chagos Environment Network to lobby for the introduction of a large marine park or protected area in the BIOT. How this led to the comprehensive consultation process subsequently undertaken by the United Kingdom and the BIOT MPA in its current 'no take' form will be explained in **Section D** below. The decision to implement the MPA in 2010 can only be fully understood against the background of the United Kingdom's long-standing policy on the environment of its Overseas Territories in general and the existing BIOT environmental policy and legislative framework, described in **Section B**, and the emerging international consensus on the role and necessity of marine protected areas, summarised in **Section C**.

B. Policy on the environment of the overseas territories, BIOT conservation and management policy and legislation prior to the MPA

(i) Policy on the environment in respect of the Overseas Territories

3.6 Many of the United Kingdom's Overseas Territories have long been recognised as having exceptional environmental and biodiversity importance. There is a long history of engagement on environmental issues between the United Kingdom Government, the Governments of the Territories and international environmental and scientific experts within the United Kingdom and internationally. On 17 March 1999, the Foreign Secretary published a White Paper, "Partnership for Progress and Prosperity: Britain and the Overseas Territories", chapter 8 of which focussed on sustainable development and the environment in

[156] The MPA policy and the related legislation could be amended at any time by the BIOT legislature, if necessary, to respond to changed circumstances.

the Overseas Territories [157] . The White Paper at paragraphs 8.4-8.5 expressed the Government's policy as follows:

> "8.4 The environment of the Overseas Territories is of global significance… The common objective must be to use the environment of the Overseas Territories to provide benefits to the people in them, and to conserve our global managing sustainably all the Overseas Territories natural resources.
>
> 8.5 We support specific aims as part of this overall objective:
>
> - to promote sustainable use and management of the Overseas Territories' natural and physical environment, for the benefit of local people;
> - to protect fragile ecosystems such as coral reefs from further degradation and to conserve biodiversity in the Overseas Territories…"

3.7 The development of these environmental protection policies followed different paths in different Territories, reflecting the enormous political, economic and geographical variation between them. [158] Environmental protection remained a key driver of policy throughout the period of 1999-2010. The context for this included the United Kingdom's international commitments, such as the Convention on Biological Diversity 1992 ('CBD') (although it has not been extended to the BIOT), the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 ('CITES', extended to the BIOT on ratification in 1976), the Convention on Wetlands of International Importance 1971 ('Ramsar Convention', extended to the BIOT in 1999), the Convention on the Conservation of Migratory Species of Wild Animals 1979 (the 'CMS' or 'Bonn Convention', extended to the BIOT in July 1985), the 2001 Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia (to which the United Kingdom, in right of the BIOT, is a party), as well as the 1995 Straddling Stocks Agreement under UNCLOS (extended to the BIOT on ratification in 2001) and the non-binding Plan of Implementation of the 2002 World Summit on Sustainable Development.

3.8 Mounting concerns about threats to biodiversity led to increased pressure on the Government from the United Kingdom Parliament to implement the United Kingdom's

[157] Command Paper Cm 4246, **Annex 71**.
[158] The BIOT Commissioner and Minister signed an Environment Charter for BIOT on 26 September 2001, affirming the United Kingdom's commitment to facilitating the extension of the United Kingdom's ratification of Multilateral Environment Agreements to the BIOT and their implementation: **Annex 73**.

commitments under international conventions. The designation by the United Nations of 2010 as the International Year of Biodiversity placed a renewed focus on the environment of the Overseas Territories. Work across Government led in 2009 to the completion of a biodiversity strategy for the Overseas Territories by the Government's specialist advisory body, the Joint Nature Conservation Committee[159]. This led to a tripartite interdepartmental agreement between the FCO, the Department for International Development ('DFiD') and the Department for Environment, Fisheries and Rural Affairs ('Defra') in 2009, renewing the departmental partnership towards environmental protection. The development of new conservation approaches to the BIOT was part of this context. The new partnership was launched by Ministers from the three departments concerned at a public event in the FCO on 30 June 2009. The Chagos Environment Network presented its proposal for a large scale marine protected area in BIOT at the event.

3.9 Throughout 2008-2010 the Overseas Territories Directorate, together with DFiD and Defra, the Governments of Overseas Territories and environmental and scientific organisations and experts pursued a range of environmental protection initiatives in most of the Territories. There has been an increasing focus on bringing ambition and cohesion to the protection of the marine environment as, with the exception of territory within the Antarctic Treaty System, ocean is by far the greater part (in area) of the areas over which the United Kingdom exercises sovereign rights and jurisdiction. Confirmation of the wider United Kingdom Government policy on environmental protection and biodiversity in the overseas territories, including the BIOT, and a brief description of the initiatives which have already been put in place was set out in a White Paper of 16 January 2012, "The Overseas Territories: Security, Success and Sustainability"[160].

3.10 The environment of the BIOT has long been recognised as special even in the context of the Overseas Territories. The seas and coral systems of other States in the Indian Ocean have become substantially degraded in recent decades[161]. The special circumstances which prevail in the BIOT have contributed to the BIOT's pristine environment and helped mitigate these effects.

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[159] **Annex 112**.
[160] Command Paper Cm. 8374: **Annex 127**.
[161] Including those of Mauritius: see, for example, T Goreau et al, 'Conservation of Coral Reefs after the 1998 Global Bleaching Event' (2000) 14 *Conservation Biology* 5, 10 (**Authority 65**).

(ii) BIOT conservation and fisheries legislation since 1965

3.11 Since the BIOT's establishment in 1965, a wide range of measures have been enacted to protect and conserve its fisheries, terrestrial and marine environments and wildlife so that a substantial legislative and policy framework was already in place when the MPA was established in April 2010.

3.12 As already noted in **Chapter II** above, a fisheries zone was proclaimed around the BIOT in 1969, extending from the outer limit of the 3nm territorial sea to 12nm[162]. It was followed in 1971 by the Fisheries Limits Ordinance which prohibited all fishing and taking of marine products within the fisheries limits (which included the fisheries zone and the territorial sea) by foreign fishing boats other than - within the fisheries zone - by vessels flagged to a foreign country designated by the Commissioner[163]. The 1969 Proclamation and 1971 Ordinance were repealed and replaced by new fisheries legislation in 1984 establishing a licensing system[164].

3.13 In 1991 the outer limit of the BIOT fisheries zone was extended from 12nm to 200nm, named the Fisheries Conservation and Management Zone ('FCMZ')[165]. The reasons for declaring the FCMZ, as explained in Notes Verbales to various interested governments, included protecting tuna stocks migrating through the 200 nautical mile zone around the BIOT and "conserving the stock position to protect the future fishing interests of the Chagos group"[166]. Additional special fisheries measures have been taken as necessary, e.g. the reduction of inshore fishing licences from six to four in response to the 1998 coral bleaching

[162] Proclamation No. 1 of 1969: MM, annex 53. See further para. 2.97 above.
[163] MM, annex 60.
[164] Proclamation No. 8 of 1984, 15 November 1984, *Official Gazette* [1984] (**Annex 48**), and The British Indian Ocean Territory, Ordinance No. 11 of 1984, *Official Gazette* [1984] (**Annex 49**). Referred to at paras. 2.100-2.101 above.
[165] See Proclamation No. 1 of 1991, 1 October 1991 (MM, annex 101) and Fisheries (Conservation and Management) Ordinance 1991, No. 1 of 1991, (MM, annex 102), as amended by BIOT Ordinance No 1 of 1993 (**Annex 59**), Ordinance No. 5 of 1993 (**Annex 60**), Ordinance No. 2 of 1995 (**Annex 65**), Ordinance No. 4 of 1995 (**Annex 66**), Ordinance No. 2 of 1997 (**Annex 68**), and Ordinance No. 5 of 2007: **Annex 79**. The 1991 Ordinance and its amendments were consolidated in Ordinance No. 4 of 1998, *Official Gazette* [1998 issues 2 & 3]: **Annex 69**. Fisheries Regulations under s. 21 of the Ordinance were passed in 1993 (SI No. 3 of 1993) (**Annex 58**), and later replaced by the Fishing Regulations 2007 (SI No. 4 of 2007), *Official Gazette* [2008 issues 1 & 2] (**Annex 80**).
[166] See, e.g., Note Verbale dated 23 July 1991 from the British High Commission, Port Louis to the Government of Mauritius, No 043/91: MM, annex 99. See further paras. 2.104-2.109 above.

event[167] which caused the mortality of most reefs in the Indian Ocean, including 80-100% of BIOT's reefs (fortunately now recovered)[168]. The current fisheries legislation is the Fisheries Ordinance 2007, which consolidates the 1991 legislation and subsequent amendments, and the Fisheries Regulations 2007. Fishing is prohibited unless it is in accordance with a licence issued by the BIOT authorities[169].

3.14 Multilateral and bilateral arrangements concerning fisheries have been concluded with other Indian Ocean States. Bilateral fisheries commissions and joint observer programmes were established in the early 1990s with Mauritius (the British-Mauritian Fisheries Commission) and Seychelles (the British-Seychelles Fisheries Commission), with the objective of long-term conservation and management of fisheries stock[170]. The United

[167] Coral bleaching occurs when corals are physiologically stressed, which upsets the critical balance that maintains the corals' critical symbiotic relationship with algae that inhabit its cells. The algae is a major source of the corals' nutrition and colour. Tissue growth, skeletal accretion and reproduction are suspended and the corals, now devoid of colour, are referred to as bleached. Coral bleaching is most often associated with a significant rise in sea surface temperatures. In 1998 there were coral bleaching events around the world (in the Indian Ocean between March and June) thought to be the result of a combination of El Niño and La Niña, local climate variations and the exceptionally high global temperatures that year.

[168] See Note Verbale, 13 April 1999, from the British High Commission, Port Louis, to the Ministry of Foreign Affairs and International Trade, Mauritius, No. 15/99 and Speaking Notes, "Chagos - Inshore Fishing Licences": MM, annex 107.

As explained in **Chapter II,** paras. 2.105-2.106, prior to the creation of the BIOT MPA in April 2010, and the expiry of the licences granted in 2009 on 31 October 2010, three types of fishing licences were issued by the BIOT authorities, inshore licences for fishing in the shallower waters by hooks and lines and licences for deep water fishing for tuna by long line and purse seine.

[169] As already noted (para.3.3), the Ordinance and Regulations will be repealed and replaced when specific legislation is enacted for the MPA. Until then, the ban on commercial fishing in the MPA is implemented by not issuing commercial fishing licences.

[170] The United Kingdom and Mauritius concluded a Joint Statement on the Conservation of Fisheries under a 'sovereignty umbrella' on 27 January 1994: **Annex 62**. The object of the agreement was set out in paragraph 2 of the Statement as follows:

> "In order to contribute to the conservation of fish stocks, the two Governments agree to open the way for cooperation in this field on an ad hoc basis by means of the establishment of the British-Mauritian Fisheries Commission, composed of delegations from both States, to promote, facilitate and co-ordinate conservation and scientific research in the maritime area covered by this Statement."

The Commission would meet at least once annually, would receive available information from the parties on the operation of fishing fleets, appropriate catch and effort statistics and analysis of the stocks of the most significant off-shore species, would assess the information provided by both Governments and submit recommendations for the conservation of the most significant off-shore species including co-ordinated measures where applicable, propose joint scientific work and recommend possible actions for the conservation of straddling and migrating stocks in international waters. Following the recommendation of the BMFC at its first meeting in London between 26 and 28 April 1994, a Scientific Subcommittee was established to meet in conjunction with the meetings of the BMFC and make recommendations to the BMFC on appropriate measures to enhance the conservation of stocks (joint communiqué, 28 April 1994 (**Annex 63**) and an observer programme on Mauritian-flagged vessels operating in the inshore fishery in BIOT waters run by MRAG Ltd, the BIOT's fisheries and conservation consultants. The "area of waters of concern" to the BMFC was defined in the second meeting held on 16-17 March 1995 as the EEZ of Mauritius and FCMZ of BIOT and the intervening international waters, but excluding the EEZs of third countries (joint communiqué, British/Mauritian Fishing Commission, 17 March 1995 and confidential minute: **Annex 64**.

Kingdom, in right of the BIOT as an Indian Ocean 'coastal State', is a Member of the Indian Ocean Tuna Commission ('IOTC').

3.15 BIOT's wildlife and terrestrial and marine environments are conserved and protected under the Protection and Preservation of Wild Life Ordinance 1970, which empowers the BIOT Commissioner to designate Strict Nature Reserves and Special Reserves, together with the Strict Nature Reserve Regulations 1998 and the Diego Garcia Conservation (Protected Area) Ordinance 1994. Strict Nature Reserves were established on Peros Banhos, Nelson Island, The Three Brothers and Resurgent Islands, Cow Island[171] and Danger Island in 1998. Diego Garcia has a Nature Reserve Area in the eastern arm from Barton point, and four Strict Nature Reserves at Barton Point, East Island, Middle Island and West Island. There is a Lagoon Restricted Area. A large part of Diego Garcia was designated in 2001 as a Wetland of International Importance under RAMSAR[172]. The BIOT Administration has, since 1997, treated BIOT in accordance with the requirements of the World Heritage Convention 1972, subject only to defence requirements[173].

3.16 The Environment (Protection and Preservation) Zone ('EPPZ'), covering an area coextensive with the FCMZ, was established on 17 September 2003 as a zone within which "Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the zone"[174]. A copy of the EPPZ coordinates was deposited with the United Nations on 12 March 2004 in accordance with article 75 of the Convention. The main purpose for the creation of the EPPZ was to manifest the BIOT's environmental interest in the Great Chagos Bank, which had been identified by

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The BMFC operated with some success for five years. Within the BMFC, Mauritius sought on occasion to establish a joint system for the issue of commercial fishing licences for the BIOT FCMZ, as a potential source of revenue and support for its sovereignty claim, but this was rejected by the United Kingdom. The BMFC's last meeting was in 1999. Mauritius subsequently refused to participate any further in the BMFC because it considered that continued participation was inconsistent with its position on sovereignty. The United Kingdom later, in 2003 (see MM, annex 119) and again in the context of the bilateral talks held in 2009 (as to which, see fn. 223 below), sought to re-establish the BMFC or a similar framework for cooperation on conservation and fisheries matters.

[171] Which now includes Eagle Island in one special nature reserve.

[172] See the RAMSAR Information Sheet for the wetland "Diego Garcia" dated February 2001: **Annex 72**.

[173] *Ibid*.

[174] Proclamation No. 1 of 2003: MM, annex 121. See also the letter from the Minister for Overseas Territories, Foreign and Commonwealth Office of the UK, to the Minister of Foreign Affairs and Regional Cooperation of Mauritius, dated 12 December 2003 (MM, annex 124), in which the Minister explains that purpose of the zone is "to help protect and preserve the environment in the Great Chagos Bank… [which] is an exceptional example of a submerged coral atoll which provides a valuable contribution to the marine ecology of the Indian Ocean".

environmental groups as meriting further protection. The Chagos Bank is an exceptional example of a submerged coral atoll[175] and is the largest atoll in the world. Together with the Maldives and Lakshadweep Atolls, it forms the most extensive coral reef system in the Indian Ocean and provides a valuable contribution to the marine ecology of the Indian Ocean. The creation of an EPPZ also complemented the Chagos Conservation Management Plan, then being developed in close consultation with the Joint Nature and Conservation Committee ('JNCC') and interested environmentalists[176].

3.17 The United Kingdom in right of the BIOT has not established a full EEZ under the Convention[177] because it has no intention to regulate economic activities in the 200 nautical mile zone, other than fisheries, or to allow geological exploration[178]. Instead it has claimed 200 nautical miles zone in which it exercises sovereign rights and jurisdiction under the Convention and international law concerning fisheries and living resources (the FCMZ) and protection and preservation of the marine environment (the EPPZ): the FCMZ/EPPZ is not a full exclusive economic zone for all purposes[179].

3.18 The creation of marine protected areas in BIOT waters had been considered by the BIOT authorities well before the initiative that led to the 2010 MPA. A closed marine protected area was established in July 2003 to protect spawning grouper[180]. Closed area management marine protected areas were one of the regular agenda items of the British-Mauritian Fisheries Commission[181], and the British-Seychelles Fisheries Commission. And the 2003 Chagos Conservation Management Plan recommended the establishment of fully protected areas covering at least one third of BIOT waters[182]. The BIOT's protected areas are illustrated in **Figures 3.1** starting on p. 91.

[175] It is largely submerged, except for 8 islands on its western and northern rim.
[176] Mauritius was informed of the intended EPPZ as a courtesy by letter dated 13 August 2003 from the FCO Overseas Territories Department to the Mauritius High Commission in London (MM, annex 120) and a note dated 20 August 2003 from the British High Commission in Port Louis: **Annex 75**.
[177] Cf. Memorial of Mauritius, paras. 4.7-4.13. Mauritius makes repeated reference to UK 'assurances' that a EEZ would not be claimed: see paras 4.8, 4.16, 4.17, 4.23, 6.6, 6.31(ii).
[178] For the background, see **Chapter II**, paras. 2.112-2.116.
[179] As explained to Mauritius in a letter of 12 December 2003 from the Minister responsible for Overseas Territories, Bill Rammell, to the Minister of Foreign Affairs and Regional Co-operation, AK Gayan: MM, annex 124.
[180] As explained in the letter from Charles Hamilton, FCO Overseas Territory Department to the Mauritian High Commissioner, London, dated 8 July 2003: MM, annex 119.
[181] MM, annex 119.
[182] Chagos Conservation Management Plan, for BIOT Administration, FCO, by Dr Charles Sheppard & Dr Mark Spalding, October 2003: **Annex 76**.

C. The emergence of an international consensus on marine reserves and protected areas

3.19 The development of the marine environment policy in relation to the Overseas Territories outlined above reflects the international consensus on the urgent need to do something to halt the degradation of the world's marine environments and protect and maintain marine biodiversity.

(i) Marine protected areas in international law and practice

3.20 Protection of the marine environment has traditionally lagged some way behind the protection of terrestrial environments. Marine protected areas have been advocated by the World Parks Congress on National Parks since 1982 and the International Union on the Conservation of Nature ('IUCN') since 1988, but the first concerted action by States towards protecting marine environments was only made in 1992, in Chapter 17 on "Protection of the Oceans, all Kinds of Seas, Including Enclosed and Semi-enclosed Seas, & Coastal Areas & the Protection, Rational Use & Development of the Living Resources" of Agenda 21, adopted by the United Nations Conference on Environment and Development at Rio de Janeiro[183]. In particular, paragraph 17.7 of Chapter 17 recommended that:

> "[c]oastal States, with the support of international organizations, upon request, should undertake measures to maintain biological diversity and productivity of marine species and habitats under national jurisdiction. Inter alia, *these measures might include*: surveys of marine biodiversity, inventories of endangered species and critical coastal and marine habitats; *establishment and management of protected areas*; and support of scientific research and dissemination of its results" [184] (emphasis added).

3.21 Article 8(a) of the Convention on Biological Diversity ('CBD') adopted at the Rio Summit in 1992 provides for the establishment of a system of protected areas (without

[183] Rio Declaration on Environment and Development, UN Conference on Environment and Development, A/CONF.151/26 (vol 1), June 1992.

[184] Further, para. 17.85 stated "States should identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and should provide necessary limitations on use in these areas, through, inter alia, designation of protected areas. Priority should be accorded, as appropriate, to: (a) Coral reef ecosystems; (b) Estuaries; (c) Temperate and tropical wetlands, including mangroves; (d) Seagrass beds; (e) Other spawning and nursery areas".

distinction as to land or sea)[185]. The Second CBD Conference of the Parties ('COP') in 1995 adopted a decision entitled "Conservation and sustainable use of marine and biological diversity"[186]. The decision "supported" the recommendation of the CBD's Subsidiary Body on Scientific, Technical and Technological Advice ('SBSTTA') that, *inter alia*, representative marine and coastal protected areas be established or consolidated, and researched or monitored to assess their value for conservation and sustainable management of biodiversity, that means be explored to incorporate marine and coastal protected areas into a broader framework for multiple use planning as exemplified by UNESCO's Man and the Biosphere ('MAB') programme on biosphere reserves, that the participation of local communities and of resources users in the planning, management of conservation of coastal and marine areas be encouraged[187]. Subsequent COPs issued further decisions containing provisions on marine protected areas[188].

3.22 In 1998, as part of the United Nations' International Year of the Ocean under UNESCO auspices, 1605 marine scientists and conservation biologists from 65 countries issued the widely publicised *Troubled Waters: a call for action*. It summarised the urgent threats to marine species and ecosystems and called for immediate action to prevent further damage, including the creation of an effective system of marine protected areas from the shore to the open ocean[189].

[185] "Each Contracting State shall, as far as possible and as appropriate: establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity".
[186] COP 2, Decision II/10, also known as "The Jakarta Mandate".
[187] Recommendation I/8, paragraph 11.
[188] See:

- COP 4 Decision IV/5, 1998, on the Jakarta Mandate on Marine and Coastal Biological Diversity, including a programme of work;
- COP 5 Decision V/3, 2000, Progress report on the implementation of the programme of work on marine and coastal biological diversity (implementation of decision IV/5);
- COP 6 Decision VI/3, 2002;
- COP 7 Decision VII/5, 2004, Marine and coastal biological diversity;
- COP 8 Decision VIII/21, 2006, Marine and biological diversity: conservation and sustainable use of deep seabed genetic resources beyond the limits of national jurisdiction;
- COP 8 Decision VIII/22: Marine and coastal biological diversity: enhancing the implementation of integrated marine and coastal management;
- COP 8 Decision VIII/24, Protected Areas;
- COP 9 Decision IX/20, 2008, Marine and coastal biodiversity;
- COP 10 Decision X/29, 2010, Marine and coastal biodiversity;
- COP 11 Decision XI/17, Marine and coastal biodiversity: ecologically or biologically significant marine areas, Decision XI/18, 2012, Marine and coastal biodiversity: sustainable fisheries and addressing adverse impacts of human activities, voluntary guidelines for environmental assessment, and marine spatial planning and Decision XI/24, Protected areas.

[189] *Troubled Waters: a call for action*: **Annex 70**.

3.23 The 2002 World Summit on Sustainable Development in Johannesburg developed a programme of implementation for Agenda 21 (the "Johannesburg POI"). Drawing on the targets adopted by the COP under the CBD that same year, it called on States:

> "[i]n accordance with chapter 17 of Agenda 21, [to] promote the conservation and management of the oceans through actions at all levels, giving due regard to the relevant international instruments to: … Develop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods, proper coastal land use and watershed planning and the integration of marine and coastal areas management into key sectors"[190].

The Johannesburg Plan of Implementation was endorsed by the UN General Assembly in resolution 57/253 (2002), which called for:

> "the implementation of the commitments, programmes and time-bound targets adopted at the Summit and, to this end, for the fulfilment of the provisions of the means of implementation"[191].

3.24 The UN General Assembly in its 2002 "Oceans and the Law of the Sea" resolution called again on States "to promote the conservation and management of the oceans in accordance with chapter 17 of Agenda 21… to develop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, the establishment of marine protected areas… including representative networks by 2012"[192]. The use of marine protected areas is endorsed in the UN General Assembly's successive annual oceans and law of the sea resolutions[193].

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[190] Para 32(c). See also paragraph 32(b), which called on States to "[i]mplement the work programme arising from the Jakarta Mandate on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity of the Convention on Biological Diversity" and, (e), "Implement the Ramsar Convention, including its joint work programme with the Convention on Biological Diversity, and the programme of action called for by the International Coral Reef Initiative to strengthen joint management plans and international networking for wetland ecosystems in coastal zones, including coral reefs, mangroves, seaweed beds and tidal mud flats". See also Robin Kundis Craig, "Protecting International Marine Biodiversity: International Treaties and National Systems of Marine Protected Areas" (2004-5) 20 J Land Use & Envtl Law 333, 366.

[191] A/RES/57/253, 20 December 2002 (21 February 2003).

[192] A/RES/57/141, 12 December 2002 (21 February 2003), para 53.

[193] A/RES/58/240, 23 December 2003 (5 March 2004), para 54; A/RES/59/24, 17 November 2004 (4 February 2005), para 72; A/RES/60/30, 29 November 2005 (8 March 2006), para 74; A/RES/61/222, 20 December 2006 (16 March 2007), paras 97-98; A/RES/62/215, 22 December 2007 (14 March 2008), para 109, 111-114; A/RES/63/111, 5 December 2008 (12 February 2009), para 134; A/RES/64/71, 4 December 2009 (12 March 2010), paras 153-156; A.RES/65/37 A, 7 December 2010 (17 March 2011), paras 177-180; A/RES/66/231, 24

3.25 The 7th CBD Conference of the Parties in 2004 adopted Decision VII/5 urging parties to make efforts, as a matter of high priority, to adopt a national framework of marine and coastal protected areas[194]. The 10th CBD Conference of the Parties in 2010 held in Nagoya, Japan adopted a revised and updated Strategic Plan for Biodiversity containing 20 strategic targets - the 'Aichi Biodiversity Targets'. Target 11 is that:

> "By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes."

The United Nations Fisheries and Agriculture Organisation (FAO) Committee of Fisheries at its 26th session in 2005 recommended specific actions for the FAO to assist States in meeting their commitments under the Johannesburg Plan of Implementation, in particular the establishment of representative networks of MPAs by 2012, and to increase knowledge on MPAs in a fisheries management context[195]. The importance of MPAs was affirmed once more at the 2012 UN Conference on Sustainable Development (Rio 20+) in its conference outcome document, "The future we want", endorsed by the UN General Assembly in resolution 66/288[196].

3.26 Thus there is a wide degree of consensus amongst the relevant treaty bodies and UN organs and agencies on the scientific case for and need of marine protected areas. The need to take urgent action is perceived by the scientific community to be acute. A study published in 2011 recorded that "Large-scale evaluations of marine biodiversity loss have shown that intensification of human activities at sea has depleted more than 90% of formerly important

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December 2011 (5 April 2012), paras 176-179; A/RES/67/78 11 December 2012 (18 April 2013), paras 192-198.

[194] Paragraphs 16 and 20; see generally paras. 16-28.

[195] FAO website page, "Marine Protected Areas as a Tool for Fisheries Management (MPAs)", http://www.fao.org/fishery/mpas/en

[196] In para. 177, as follows: "We reaffirm the importance of area-based conservation measures, including marine protected areas, consistent with international law and based on best available scientific information, as a tool for conservation of biological diversity and sustainable use of its components. We note decision X/2 of the tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, that by 2020 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are to be conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures.", annexed to A/RES/66/288, 11 September 2012.

species, destroyed more than 65% of seagrass and wetland habitat, degraded water quality and accelerated species invasions"[197]. FAO statistics make equally sobering reading[198]. The Big Oceans Group, a network of the world's largest half dozen MPAs of which the BIOT is a member, while it takes the view that 'size matters', also recognises that the difference between isolated MPAs and those close to large population calls for a diversity of approaches.

3.27 This international context and mounting global concerns have directly influenced the United Kingdom's Overseas Territories environmental policy making described above. The FCO Overseas Territories Department worked extensively for four years on the negotiations under the Convention on the Conservation of Antarctic Marine Living Resources ('CCAMLR') within the Antarctic Treaty System for the establishment of the South Orkney Islands southern shelf MPA. Much of the work was led by the FCO's Overseas Territories' Polar Regions Unit, with specialist secondees from Defra. The Polar Regions Unit accumulated a high level of expertise in marine conservation policy[199]. As a result of the work carried under the auspices of the Polar Regions Unit, a number of marine protected areas have been established in the Overseas Territories, including a large marine protected area covering over 1 million square kilometres of the waters of the South Georgia and South Sandwich Islands on 27 February 2012.

(ii) The establishment of an MPA is an exercise of sovereign rights and jurisdiction within the 200 nautical mile zone

3.28 Mauritius claims in its Memorial that the MPA is the culmination of a "creeping assertion of maritime zones"[200]. In the Written Observations on the Question of Bifurcation dated 21 November 2012, Mauritius put the same point this way: "In the first part of its claim, Mauritius asks the Tribunal to rule that the *UK is not entitled to declare maritime zones* around the Chagos Archipelago because the UK is not 'the coastal State' for the

[197] Claudet ed, ed, *Marine Protected Areas* (CUP, 2011), p. 15 (**Authority 56**).
[198] *The State of World Fisheries and Aquaculture 2012*, pp. 11-13, available at http://www.fao.org/docrep/016/i2727e/i2727e.pdf
[199] In 2009-10 responsibility for environmental policy in the Overseas Territories was transferred to the Polar Regions Unit because of its professionalism in this area.
[200] MM, para 3.73; see also para. 4.5.

purposes of the 1982 United Nations Convention on the Law of the Sea"[201]. At paragraph 52 of its Written Observations, Mauritius makes reference to the United Kingdom's "creeping extension of maritime zones over the Chagos Archipelago, *culminating in the "MPA"*"[202].

3.29 This characterisation obscures what a marine park or protected area actually is - or, more precisely, is not. When established by a coastal State within its EEZ, a marine protected area is not, unlike the claim to the EEZ itself, a 'new' maritime zone under or as a matter of international law. Rather, it is the exercise of the coastal State's sovereign rights and jurisdiction *within* the 200 nautical mile EEZ - in the case of the BIOT, the FCMZ/EPPZ. The establishment of the MPA did not add any new or further 'zone' and cannot therefore be characterised as the "culmination" of a "creeping extension of maritime zones".

D. Establishment and implementation of the BIOT MPA

(i) The approach by Pew Environment Group and the Chagos Conservation Trust

3.30 The idea for a large scale marine park in BIOT waters originated with the US-based environment charity Pew Environment Group ('Pew'). Together with the Chagos Conservation Trust ('CCT'), Pew first approached the BIOT Administration and the FCO's Overseas Territories Directorate with their idea in April 2008. Pew's ideas were in line with existing environmental policy as regards the Overseas Territories in general and the BIOT in particular, as well as the emerging international consensus on the need for more and better marine protected areas described above[203]. Work was already being done on marine protected areas within the Overseas Territories Directorate and other United Kingdom Government departments. However, although the BIOT Administration and the Overseas Territories Directorate were receptive to the idea, it was recognised by officials that it raised potential political and legal issues, including the claims by Mauritius and Chagossian interests, that would have to be worked through.

[201] Written Observations, para. 28.
[202] See also Written Observations, para. 53 (referring to the declaration of a 'maritime zone') and para. 56.
[203] Sections B and C of this Chapter.

3.31 Pew had identified the BIOT as a candidate for its Global Ocean Legacy project in around 2007. The Global Legacy Project initially aimed to establish at least three to five large, world-class, "no-take" marine reserves to provide "ocean-scale ecosystem benefits and help conserve our global marine heritage"[204]. The project grew out of work undertaken by Pew in 2005-2006 to support the creation of a fully protected, no take, area in the north western Hawaiian islands, the Papahānaumokuākea Marine National Monument. (The US Administration decided to implement the Monument in June 2006[205].)

3.32 Pew approached Professor Charles Sheppard, the Environmental Adviser to the BIOT Commissioner, in July 2007 to indicate its interest in BIOT. Professor Sheppard in turn referred the proposal to the Chagos Conservation Trust[206]. Thereafter Pew and the Chagos Conservation Trust joined forces to promote a large scale BIOT marine park and lobby the BIOT Administration. The Chagos Conservation Trust held a conference on "The Future Conservation of the Chagos" in October 2007, which the BIOT Administration attended[207]. Following the conference the Chagos Conservation Trust prepared a discussion paper on creating a framework for a 'world class Chagos national park', which it sent to the BIOT Administration on 11 April 2008[208]. In April 2008 Pew and the Chagos Conservation Trust formed the Chagos Environment Network with the aim of promoting a robust long-term conservation framework for the BIOT[209].

3.33 At Pew's request, its representatives met with BIOT officials on 22 April 2008 to explain their proposal. Pew in particular was aiming to create a complete 'no-take' marine protected area. The BIOT Administration's initial response to the efforts of Chagos Conservation Trust and Pew was cautious. As recorded in the note of the meeting[210], it was

[204] As described on Pew's website, at http://www.pewtrusts.org/our_work_detail.aspx?id=136. Its target is now 15 'massive marine sanctuaries by 2020' (see http://www.pewenvironment.org/news-room/media-coverage/group-embarks-on-politically-impossible-push-for-marine-reserves-85899432688).

[205] The last fishing was phased out in 2011.

[206] The Chagos Conservation Trust is a charity registered in the United Kingdom set up in 1992 to promote the protection and conservation of the pristine natural environment of the BIOT and to raise awareness of environmental issues affecting it. Email of 17 July 2007 from Charles Sheppard to Tony Humphries, Head of BIOT and Pitcairn Section, FCO, forwarding an email from Heather Bradner of the Pew Charitable Trusts (**Annex 82**) and email exchange of 16-20 August 2007 between Heather Bradner and Tony Humphries: **Annex 83**.

[207] Letter of 20 June 2007 from Chagos Conservation Trust to Tony Humphries and letter of 19 October 2007 from Chagos Conservation Trust to Tony Humphries: **Annex 84**.

[208] **Annex 86**.

[209] See letter from Chagos Environment Network to Andrew Allen, BIOT, 4 June 2008, enclosing record of Chagos Environment Network foundation meeting of 22 April 2008: **Annex 88**.

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

explained that while the proposal was attractive, there were big obstacles and it could be difficult politically. There was a commitment to cede the territory to Mauritius when it was no longer required for defence purposes so any agreement between Pew and the Government might be affected when the United Kingdom ceded the islands. The view then taken, as explained at the meeting, was that Mauritius had "some rights re inshore fishing" and, while it had not exercised them recently, this was a "loophole that would need looking into"[211]. No commitment could be made before the House of Lords had given its decision in *R (on the application of Louis Olivier Bancoult)* v. *the Secretary of State for Foreign and Commonwealth Affairs* ('*Bancoult II*')[212], expected in the Autumn of 2008.

3.34 When Mr Roberts, the BIOT Commissioner, addressed the annual Chagos Conservation Trust meeting on 18 November 2008, he told them that while he personally found attractive the concept of a complete no-take BIOT area, this would not be easy to achieve as there were constraints, including security (the United Kingdom as well as the US needed facilities at Diego Garcia) and the resources needed for fisheries protection[213].

3.35 From July 2008 the BIOT Administration engaged in discussions with interested stakeholders to scope out the options for strengthening the environmental protection regime in BIOT, in line with Government policy on environmental protection in the Overseas Territories. This included looking at the options for the kind of large-scale marine protected area advocated by Chagos Conservation Trust and Chagos Environment Network, and drew on the work being carried out at the same time by the Polar Research Unit on the establishment of the world's first high seas marine protected area under the Antarctic Treaty system in the South Orkney islands.

3.36 Press articles about the Chagos Conservation Trust and Pew proposal began appearing

[211] The Court in *R(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) concluded that 'The contemporaneous documents show that over the years some British officials believed that there was or might be a legal obligation to allow fishing by Mauritian vessels in BIOT waters, whereas others evidently looked at the question in essentially political terms' (para. 157); see also para. 159 (**Authority 43**).

[212] The House of Lords' decision in *Bancoult II* was handed down on 22 October 2008. Overturning the Court of Appeal decision, it upheld the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 (**Authority 31**).

[213] Minutes of the Annual General Meeting of the Chagos Conservation Trust, held on 18 November 2008: **Annex 91**.

in early 2009[214]. The Chagos Environment Network and Chagos Conservation Trust formally launched their proposal for the creation of one of the world's largest conservation zones in the BIOT on 9 March 2009[215]. *The Independent*, amongst other newspapers, reported on 9 February 2009 that a giant marine park was planned for the Chagos Islands[216]. As Mauritius has said in its Memorial, *The Independent* article caused it to send a Note Verbale to the United Kingdom on 5 March 2009, reiterating its sovereignty claim and asserting that the creation of any marine park would require its consent[217]. However, as explained by the Foreign and Commonwealth Office (FCO) in its response to Mauritius dated 13 March 2009:

> "the proposal for a marine park in the Chagos Archipelago (BIOT) is the initiative of the Chagos Environment Network and not of the Government of the United Kingdom of Great Britain and Northern Ireland. However, the Government of the United Kingdom of Great Britain and Northern Ireland welcomes and encourages recognition of the global importance of the British Indian Ocean Territory… [and]… has already signalled its desire to work with the international environmental and scientific community to develop further the preservation of the unique environment of the British Indian Ocean Territory"[218].

Contrary to Mauritius' assertion at paragraph 7.55 of its Memorial, this is entirely consistent with the facts.

3.37 A further meeting was held between Chagos Environment Network representatives and BIOT officials on 23 April 2009 to discuss the proposal[219].

(ii) Decision to consider the possibility of a large scale MPA and informal consultations

3.38 It was not until 6 May 2009 that the Secretary of State for Foreign and Commonwealth Affairs adopted a policy of giving consideration to the possibility of creating

[214] The formal press briefing launching Chagos Environment Network was on 9 March 2009.
[215] See the letter from the Chagos Conservation Trust to Gillian Merron, MP, Minister of State, 12 February 2009 and her response dated 5 March 2009: **Annex 95**.
[216] MM, annex 138.
[217] MM, annex 139.
[218] MM, annex 140.
[219] See the minutes of the 'Chagos Environment Network Meeting with Government' on 23 April 2009, prepared by Chagos Environment Network: **Annex 96**.

a large-scale BIOT MPA[220]. The type of marine protected area - full no-take marine reserve or a zonal approach combining no-take and limited take areas - was one of the issues for consideration.

3.39 The next step was to carry out bilateral discussions with key interested parties - or stakeholders - on the proposal, in particular with the Governments of the United States and Mauritius. The BIOT Administration also sought independent advice on the scientific justification for a large scale BIOT marine protected area from the National Oceanography Centre based at the University of Southampton[221]. The National Oceanography Centre offered to facilitate a workshop to bring together key marine research scientists from a range of disciplines to assess key scientific issues[222]. Depending on the outcome of these initial consultations, a decision would then be taken as to whether to carry out a formal public consultation later in the year.

3.40 It was decided that the MPA proposal would be formally tabled with Mauritius at the second round of bilateral talks over the Chagos Archipelago/BIOT[223] scheduled for July 2009. As part of the preparation for these talks, the understanding reached in 1965 on 'fishing rights' was identified as something that needed to be looked into in advance and received detailed consideration. As a result of the BIOT officials' subsequent enquiries, by the time the United Kingdom delegation arrived in Mauritius for the second round of bilateral talks their understanding was that Mauritius did not have legal rights to fish in BIOT waters, whether as a result of the 1965 understanding or otherwise, that prevented the United Kingdom from establishing a MPA, including a no-take MPA. The question of whether the

[220] Drawing on the scoping work carried out by BIOT and OTD officials since July the previous year and following a full, one hour, visual presentation by Professor Sheppard.
[221] An article by Professor Sheppard published in *Science in Parliament* in Autumn 2009 set out the scientific case for further protection of the Chagos Archipelago (**Authority 95**).
[222] See letter from Professor Hill, National Oceanography Centre, to Colin Roberts, BIOT Commissioner, 19 June 2009: **Annex 97**.
[223] The United Kingdom agreed in 2007 to establish a bilateral talks framework with Mauritius on matters relating to the BIOT/Chagos Archipelago under a 'sovereignty umbrella'. The first of these took place on 14 January 2009 and the second on 21 July 2009. The agenda of the first meeting, at the United Kingdom's suggestion, included matters on which the United Kingdom considered there might be fruitful cooperation between the two countries: cooperation over fishing rights in the form of a revived British-Mauritian Fisheries Commission or something similar (although the United Kingdom was aware Mauritius was seeking an arrangement for the joint issue of commercial tuna fishing licences to third countries to fish in BIOT waters and sharing of licence fees under this agenda item, which the United Kingdom would not accept) and a joint submission on the continental shelf to the Commission (as to which, see **Chapter VII**, paras. 7.51-7.58 below). As described later, in paras. 5.29 c., d., e., f., and 5.43, Mauritius refused to continue with the bilateral talks because of the stance it adopted towards the public consultation on the proposed MPA.

United Kingdom has some international legal obligation to Mauritius relating to 'fishing rights' stemming from the 1965 understanding is, of course, a question before this Tribunal, if it finds that it has jurisdiction to determine it[224]. The relevance of the understanding of the BIOT officials involved in the MPA proposal process is simply that they were conscious of the issue and would have picked up on any remarks from Mauritian officials related to it.

3.41 An analysis of fishing in BIOT waters was also sought by the BIOT Administrator, Joanne Yeadon, from MRAG Ltd, the consultancy firm which has contracted with the BIOT Administration since 1991 to run the BIOT fisheries. MRAG provided a full history of fishing by Mauritian-flagged vessels in the BIOT in early July 2009[225]. This showed that the take up of fishing licences by Mauritian-flagged vessels had been very low for several years, and had been dropping since 1996[226]. Of the three types of commercial fishing licences issued (tuna long line licences, tuna purse seine licences and inshore licences), no Mauritian-flagged vessel had ever applied for a long line licence, no Mauritian-flagged vessel had had (or applied for) a purse seine licence since 1999, and, at that time, only one Mauritian-flagged vessel had applied for an inshore licence for the 2009 season. In 2005 and 2008 no inshore licences had been issued at all. Only one inshore fishing licence had been issued in each of the 2006 and 2007 seasons, to one of the vessels owned by a Mauritian company, The Talbot Fishing Company, but as its vessels were flagged to Madagascar and the Comoros, licence fees were charged. In all, in the years between 2005 and July 2009 only one commercial fishing licence had been issued free to a Mauritian-flagged vessel ('*The MV Etilis*'), in 20 April 2009[227]. The fishing licence statistics for the period 1991 to 31 March 2010 are

[224] The basis of the judicial review proceedings in *R(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) was the Claimant's contention that there was a sufficient argument concerning the existence of Mauritian fishing rights in respect of BIOT waters as to require mention to be made of it in the consultation document if the consultation was to be lawful: the Court concluded there was not (paras. 153-156). This did not require the Court to determine whether as a matter of international law, Mauritius had such rights which it indicated it would have declined to do on the basis of non-justiciability and other principled grounds (see para. 153) (**Authority 43**).

[225] Email from MRAG to Joanne Yeadon, BIOT Administrator, 6 July 2009 and attachments, 'Summary of the activities of Mauritian (flagged and owned) vessels in the BIOT FCMZ by year 1991 to date' and 'Purse Seine Fishery' and spreadsheet listing all commercial fishing licences issued since 1991: **Annex 98**.

[226] A summary of commercial fishing activities in BIOT waters is set out in Chapter II, paras. 2.105-2.106 and 2.110.

[227] It was stated on behalf of Mauritius in its oral pleadings in the bifurcation hearing that 'we will give you the impact on Mauritian fishery vessels, and we will make it very clear that the impact has been very significant. It has stopped Mauritian fishermen from carrying out their livelihood' (Transcript, 84/4-7). Mauritius has failed to produce any such evidence and its statement simply does not accord with the available data on fishing carried out in BIOT waters. Furthermore, the owners of the Mauritian-flagged vessels who benefitted from the arrangement whereby they could apply for commercial fishing licenses free of charge raised no objection at any stage of the consultation process or subsequently.

illustrated in **Figure 2.4** on p. 51.

(iii) Consultations with Mauritius

3.42 The MPA proposal was outlined in some detail by the head of the United Kingdom delegation, the BIOT Commissioner and Head of the Overseas Territories Directorate, Colin Roberts, to the Mauritian delegation at the second round of bilateral talks in Port Louis on 21 July 2009, including the possibility of a complete ban on fishing in BIOT waters.

3.43 Before the start of the formal talks Mr Roberts, and the British High Commissioner, John Murton, met the Mauritian Foreign Minister, Arvin Boolell, and explained in detail the Government's thinking on a possible BIOT MPA. The Foreign Minister was positive about the proposal[228] and indicated Mauritius would be interested if it could be presented as something with which it could be involved. Mr Roberts raised the possibility that a formal public consultation might be conducted and invited Mauritius to join in it, e.g. by launching an international consultation with a joint press statement by the two Governments. The offer of Mauritian involvement in the public consultation was judged something that the BIOT Administration could offer to assist the Mauritian Government with its domestic presentation of public support for the MPA proposal, which might well receive a cool reception if it was perceived to compromise the position on sovereignty. It was not considered that there was any legal obligation to carry out a public consultation or to include Mauritius in it.

3.44 Mr Roberts also met the Prime Minister's Chief Cabinet Secretary, Mr Suresh Seeballuck, the head of the Mauritian delegation, at the latter's invitation for a tête-à-tête directly before the formal bilateral discussions. The BIOT MPA proposal was discussed at this meeting too. Neither the Foreign Minister nor the Chief Cabinet Secretary mentioned fishing rights under the 1965 understanding, the practice of issuing licences free to Mauritian-flagged vessels or UNCLOS.

3.45 The bulk of the formal discussions was taken up with the MPA proposal. It was explained by Mr Roberts that one of the ideas being mooted was a complete no-take MPA in

[228] 'UK/Mauritius talks on the British Indian Ocean Territory (BIOT), Tuesday 21 July 2009: Record of meeting', 24 July 2009: **Annex 101** (redactions are on the ground of relevance).

the entire 200nm extent of BIOT waters. The Mauritian response, as recorded in the Overseas Territories Directorate's record of the discussions in Port Louis on 21 July 2009, dated 24 July 2009, was as follows:

> "The Mauritian delegation explained that they had taken exception to the proposal from the Chagos Environment Network but on the basis that it implied the Mauritians had no interest in the environment. They had also found it necessary to protest on sovereignty grounds. There was a general agreement that scientific experts should be brought together. However, the Mauritians welcomed the project but would need to have more details and understand the involvement of the Mauritian government. The UK delegation explained that not many details were available as the UK wanted to talk to Mauritius before the proposals were developed. If helpful the UK could, for the purposes of discussion, produce a proposal with variations on paper for the Mauritians to look at"[229].

On the part of the United Kingdom it was explained that:

> "the Foreign Secretary was minded to go towards a consultative process and that would be a standard public consultation. However, the UK had wanted to speak to Mauritius about the ideas beforehand. Also, we needed to bear in mind the case before the ECrtHR. Any ideas proposed would be without prejudice to any judgment by the Court"[230].

3.46 There was a short discussion about access to fishing rights, which had been tabled on the agenda by Mauritius ahead of the discussions. 'Fishing rights' had also been listed as one of the agenda items tabled for the first round of bilateral talks on issues relating to the Chagos Archipelago/BIOT, held on 14 January 2009[231]. Mauritius wanted the BIOT to consider jointly issuing fishing licences to third countries, but this was not understood by the BIOT delegation as relating to any Mauritius 'fishing rights' under the 1965 understanding and the free licensing arrangements (the discussion was not about fishing but the licensing process) but to Mauritius' wish to establish a sovereignty "win". This was considered "all a bit surreal" by the BIOT delegation, as commented in the formal record of the discussion, because "the last half hour [of] discuss[ion] had been spent on the possible ban on any fishing in the territory but the Mauritians warned us this would remain an agenda item. We agreed to

[229] **Annex 101**. A record of the meetings is also contained in an eGram from the British High Commissioner, Port Louis, dated 21 July 2009: **Annex 99**.
[230] 'UK/Mauritius talks on the British Indian Ocean Territory (BIOT), Tuesday 21 July 2009: Record of meeting', 24 July 2009: **Annex 101**.
[231] MM, annex 137. As explained above in fn. 223, what the BIOT Administration had in mind was fisheries cooperation, but Mauritius made it clear it was only interested in fisheries concessions to advance its sovereignty claim, a 'red line' issue for the United Kingdom.

consider the idea but would need to take into consideration the implications of a proposed marine protected area". The BIOT officials understood, from the discussions with Mauritian officials before the formal discussion, that this particular item remained on the agenda because of its importance, in view of connection to maintenance of Mauritius sovereignty, to one member of the Mauritian delegation[232].

3.47 At the talks a number of follow-up points were agreed: that there should be a third round of bilateral talks in London in about October to pursue the MPA proposal and prepare for the consultation process, and that experts should meet to follow up the discussion about the possibility of a joint submission for an extended continental shelf. Mauritius was advised of the meeting of marine scientists at the National Oceanography Centre planned for August.

3.48 A joint communiqué was issued in which the Government of Mauritius confirmed its welcome in principle for the United Kingdom's proposal for environmental protection[233]. This was subsequently included as annex C to the public consultation document. The Overseas Territory Department's formal meeting record concludes it was "[a] surprisingly positive meeting"[234].

3.49 At no point did any Mauritian official raise the subject of 'fishing rights' under the 1965 understanding, the practice of issuing free licences for Mauritian-flagged vessels, or UNCLOS or any provisions of UNCLOS. The discussion of the 'fishing rights' agenda item related only to Mauritius' proposal that the BIOT and Mauritius jointly issue commercial fishing licences to third country flagged vessels, a sovereignty-related point. If any one of the Mauritian representatives met with on 21 July 2009 thought Mauritius had fishing rights or other rights under UNCLOS that would be interfered with by a possible MPA, including a complete no-take marine reserve, it is strange that they did not raise these points in the bilateral talks or during either of the meetings held earlier that day, which were an obvious opportunity for them to do so.

3.50 After July 2009 the United Kingdom put in repeated offers to Mauritius to finalise a date for the third round of bilateral talks and to participate in any public consultation process.

[232] Mr Roberts had been told by Mr Seeballuck that this did not affect Mauritius' general interest in working with the BIOT on the MPA proposal.
[233] MM, annex 148.
[234] **Annex 101.**

The United Kingdom's High Commissioner in Port Louis, John Murton, called on the Mauritian Foreign Minister Arvin Boolell on 15 September to ask him to let the United Kingdom know when Mauritius would like the third round of bilateral talks to take place: he received no response. The High Commissioner called again on the Mauritian Foreign Minister on 1 October 2009 to propose 4-5 November for the third round of bilateral talks[235]. He called again on 12 October 2009 and flagged up the likelihood that the public consultation would be underway by the time the third round of bilateral talks was held, now probably at the end of November. As recorded in the High Commissioner's record of the meeting, the Foreign Minister was uncomfortable with the prospect of the public consultation because the opposition would use it against the Government in what was now election season in Mauritius. The High Commissioner explained that a period of intense political activity was also coming up in the United Kingdom (the general election being set for May the following year), and the consultation was most unlikely to be halted. The High Commissioner extended the offer to manage messaging on the BIOT to the mutual benefit of both Governments and suggested that the MPA consultation could be portrayed as a fruit of the BIOT/Chagos Archipelago bilateral dialogue. The Foreign Minister agreed to this.[236]

3.51 The next day, on 13 October 2009, another meeting took place between the Mauritian High Commissioner in London and the Director of the FCO's Overseas Territories Directorate. The Director stressed how keen the United Kingdom Government were for Mauritian involvement in the MPA proposal, and explained that the reasoning behind the public consultation was that there were a wide range of people whose interests might be affected by an MPA, and therefore it was logical to have a public consultation alongside the discussions with Mauritius. On 22 October 2009 the United Kingdom's High Commissioner in Port Louis called on Prime Minister Ramgoolam to further discuss the MPA proposal. The High Commissioner outlined the nature of the draft consultation documents that had been prepared for review by the Foreign Secretary, and explained they contained assurances on Mauritian sovereignty should the islands no longer be needed for defence purposes, as well as a proposal for consultation to take place in Mauritius for non-governmental stakeholders there. The Prime Minister said could see the advantages of coming out in support of the

[235] The Mauritian High Commissioner said on 13 October 2009 that 4-5 November for the third round of bilateral talks would not work for Mauritius, confirmed by a Note Verbale of 5 November 2009: MM, annex 150.
[236] Email from British High Commissioner on 13 October 2009: **Annex 103**.

consultation, though it would take political footwork locally[237]. On 23 October 2009, the High Commissioner called on the Mauritian Prime Minister's Chief of Staff, Kailesh Ruhee, to explain the likely shape of the public consultation document. He also explained that due to tight timelines in the United Kingdom, the public consultation could not be delayed. The possibility of parallel MPAs in Mauritius was discussed.[238]

3.52 In summary, Mauritian officials knew about the possibility of a public consultation on the MPA proposal (from July 2009) and were offered a role and involvement in the public consultation in the period leading up to its launch. Although they never took up this offer, nor did any of the officials involved ever say they did not want any involvement in the public consultation or the MPA. The concerns voiced by Mauritian officials regarding the public consultation before 10 November 2009 centred on the anticipated domestic political difficulties caused by the proposed timing of the public consultation, but otherwise they did not reject the idea of a public consultation or, indeed, the idea of the proposed MPA. Mauritian officials did not at any point raise UNCLOS, the subject of 'fishing rights' under the 1965 understanding or the practice of issuing free licences for Mauritian-flagged vessels[239]. Mauritius' subsequent responses to the public consultation are described below[240].

(iv) Independent scientific advice on the proposal

3.53 The National Oceanography Centre held its workshop on the topic on 5-6 August 2009[241]. In addition to scientists from the National Oceanography Centre, the participants included scientists from the British Antarctic Survey, the Institute of Zoology, the Zoological Society of London, the International Union for the Conservation of Nature ('IUCN'), the National Museum of Wales, the Joint Nature Scientific Committee, the University of Warwick, the University of Bangor, the University of East Anglia and the UK Natural

[237] Email from British High Commissioner on 13 October 2009: **Annex 103**.
[238] Email from British High Commissioner on 23 October 2009: **Annex 104**.
[239] The Court in *R(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) concluded that '[s]ave in the context of the separate dispute over sovereignty, Mauritius did not suggest that it had any special rights to fish in BIOT; nor was that suggestion made by the operators of the Mauritian-flagged vessels themselves. The earlier history, through which we were taken at such length, does not serve to give the issue a significance that it lacked in current practice' (para. 155) (**Authority 43**).
[240] At paras. 3.62-3.65, and in further detail in Chapter V, paras. 5.29-5.32, 5.39-5.42.
[241] The final report is online at *Marine conservation in the British Indian Ocean Territory: science issues and opportunities*, Report of workshop held 5-6 August 2009, Southampton, UK: **Annex 102**.

Environment Research Council.

3.54 The workshop participants reached the following conclusions, summarised in the executive summary of the National Oceanography Centre report[242]:

"i) There is sufficient scientific information to make a very convincing case for designating all the potential Exclusive Economic Zone of the British Indian Ocean Territory (BIOT, Chagos Archipelago) as a Marine Protected Area (MPA), to include strengthened conservation of its land area.

ii) The justification for MPA designation is primarily based on the size, location, biodiversity, near-pristine nature and health of the Chagos coral reefs, likely to make a significant contribution to the wider biological productivity of the Indian Ocean. The potential BIOT MPA would also include a wide diversity of unstudied deepwater habitats.

iii) There is very high value in having a minimally perturbed scientific reference site, both for Earth system science studies and for regional conservation management.

iv) Whilst recognising that there is already relatively strong *de facto* environmental protection, MPA designation would greatly increase the coherence and overall value of existing BIOT conservation policies, providing a very cost-effective demonstration of UK government's commitment to environmental stewardship and halting biodiversity loss.

v) MPA designation for the BIOT area would safeguard around half the high quality coral reefs in the Indian Ocean whilst substantially increasing the total global coverage of MPAs. If all the BIOT area were a no-take MPA it would be the world's largest site with that status, more than doubling the global coverage with full protection. If multi-use internal zoning were applied, a BIOT MPA could still be the world's second largest single site.

vi) Phasing-out of the current commercial tuna fisheries would be expected. Nevertheless, this issue would benefit from additional research attention to avoid unintended consequences.

vii) Climate change, ocean acidification and sea-level rise jeopardise the longterm sustainability of the proposed MPA. They also increase its value, since coral reef areas elsewhere (that are mostly reduced in diversity and productivity) seem likely to be more vulnerable to such impacts.

viii) To safeguard and improve the current condition of the coral reefs, human activities need to continue to be very carefully regulated. Novel approaches to wider sharing of the benefits and beauty of the MPA would need to be developed, primarily through 'virtual tourism'.

[242] *Ibid*., p. 3.

ix) Many important scientific knowledge gaps and opportunities have been identified, with implications both for the BIOT MPA management and for advancing our wider understanding of ecosystem functioning, connectivity, and the sustained delivery of environmental goods and services.

x) Further consideration of the practicalities of MPA designation would require increased attention to *inter alia* site boundary issues, possible zoning, and socio-economic considerations, with wider engagement and consultations expected to involve other UK government departments; neighbouring nations (e.g. Mauritius, Seychelles and Maldives); NGOs with interests; and other stakeholder groups (including Chagossian representatives)".

In short, the scientific arguments were strongly in favour of a large scale marine protected area covering the BIOT's entire 200nm FCMZ/EPPZ.

(v) The public consultation

3.55 Based on the outcome of the National Oceanography Centre workshop and consultations with stakeholders, including Mauritius, the decision was taken by the Foreign Secretary at the end of October 2009 to launch a public consultation process[243]. An independent facilitator, Rosemary Stevenson[244], was engaged to carry out the public consultation in accordance with terms of reference drawn up by the FCO's Overseas Territories Directorate[245]. The Terms of Reference stressed the importance of reaching Chagossian communities living in Mauritius, Seychelles and Crawley[246]. It was planned that the facilitator would arrange and attend meetings with Chagossians and other stakeholders in Port Louis, Victoria and Crawley.

3.56 The United Kingdom's understanding, based on the outcome of the 21 July 2009 bilateral talks and subsequent bilateral discussions with Mauritius up to that point, was that Mauritius supported the public consultation (but that it would be helpful for the optics in

[243] The public consultation was based on the Government's Code of Practice on Consultation (July 2008): **Annex 90**. The BIOT Administration is not bound by the Code, but due to anticipated international and public interest in the MPA proposal it was concluded that a formal consultation was appropriate to help "assess whether a marine protected area is the right option for the future environmental protection of the British Indian Ocean Territory": "FCO consultation document: Consultation on whether to establish a marine protected area in the British Indian Ocean Territory", p. 2 (MM, annex 152).
[244] A former senior civil servant at the Department for International Development.
[245] Terms of Reference: Facilitator for British Indian Ocean Territory (BIOT) MPA Consultation: **Annex 105**.
[246] *Ibid.*, para 8. Since 2002 when the nationality rules were changed hundreds of Chagossian families have settled in the UK.

Mauritius if the Foreign Secretary telephoned the Prime Minister to discuss the matter ahead of the launch), that the engagement with Mauritius had been smoother than expected and that the Mauritian "Foreign Minister was supportive in principle[247].

3.57 The consultation opened online on the FCO website on 10 November 2009[248]. Mauritius was advised shortly beforehand of the launch, as explained below[249]. The consultation was advertised by the FCO and reported widely in the press in the United Kingdom, Mauritius and the Seychelles. Copies of the Consultation Document were posted on the FCO website, and the websites of the High Commissions in Port Louis and Victoria, and disseminated to interested groups. It was explained by Press Releases of 10 and 12 November 2009 that the purpose of the consultation was to understand views on the MPA proposal "as well as possible" as only then could a decision be taken about whether or not to establish a marine park and that responses to the consultation would form the basis of a report for the Foreign Secretary who would then decide next steps[250].

3.58 The Consultation Document asked for a response to four questions:

> "1. Do you believe we should create a marine protected area in the British Indian Ocean Territory?
>
> If yes, from consultations with scientific/environmental and fishery experts, there appear to us to be 3 broad options for a possible framework:
>
> (i) Declare a full no-take marine reserve for the whole of the territorial waters and Environmental Preservation and Protection Zone (EPPZ)/Fisheries Conservation and Management Zone (FCMZ); or
>
> (ii) Declare a no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain forms of pelagic fishery (e.g., tuna) in certain zones at certain times of the year.
>
> (iii) Declare a no-take marine reserve for the vulnerable reef systems only.
>
> 2. Which do you consider the best way ahead? Can you identify other options?
>
> 3. Do you have any views on the benefits listed at page 11? What importance do you attach to them?

[247] Detailed above at paras. 3.42-3.52.
[248] See also the Written Ministerial Statement, 10 November 2009: **Annex 107**.
[249] Para. 3.62 and **Annex 114**.
[250] FCO Press Release, posted at 17:27 10 November 2009, 'UK enhancing protection for world's oceans and Antarctica' (**Annex 108**) and Press Release of the UK High Commissioner to Port Louis, John Murton, 'British Indian Ocean Territory/Chagos Archipelago: Consultation on possible establishment of marine protected area', 12 November 2009: **Annex 109**.

4. Finally, beyond marine protection, should other measures be taken to protect the environment in BIOT?[251]"

3.59 It was made clear in the Consultation Document that any decision to establish a marine protected area would be taken in the context of the current position under the law of BIOT; that there is no right of abode in BIOT and that all visitors need a permit; that it would not affect the commitment to cede BIOT to Mauritius when no longer needed for defence purposes; and would be without prejudice to the outcome of the proceedings pending before the European Court of Human Rights in *Chagos Islanders* v. *United Kingdom*[252]. The joint communiqué from the 21 July 2009 talks was attached to the Consultation Document (Annex C) because it outlined Mauritius' claim to sovereignty, set out the respective views of the United Kingdom and Mauritius on sovereignty and showed that the United Kingdom had been talking to Mauritius about the MPA.

3.60 The consultation ran until 5 March 2010. Meetings in the Seychelles were held by the independent facilitator between 24 and 27 January 2010 and in the United Kingdom on 6 February. The consultation meeting in Mauritius was eventually held by videoconference on 4 March 2010, because of the difficulties which had arisen with the Government of Mauritius and its objections to the continuation of the public consultation process[253].

3.61 Over a quarter of a million people responded to the public consultation. The results are summarised in the facilitator's report[254]. Most of those numbers came through petitions, but included 450 written responses, 225 statements of support, over 250 responses to an alternative questionnaire submitted by the Diego Garcian Society (representing Chagossians resident in the United Kingdom), the outcomes of oral discussions held with people representing the Chagossian community in Mauritius[255], Seychelles[256] and the United

[251] MM, annex 152, pp. 5 and 8.
[252] **Authority 40**, pp. 12-13.
[253] Described in **Chapter V** at para. 5.29 c., d., e., f., and 5.43. Initially the public consultation was due to close on 12 February 2010, but it was decided to extend it for a further period because of the difficulty arranging the facilitator's visit to consult with the Chagossian community in Mauritius: see the FCO Press Release, 'Consultation on Marine Protected Area extended', 11 February 2010: **Annex 113**.
[254] "Whether to establish a marine protected area in the British Indian Ocean Territory: Consultation Report", Rosemary Stevenson, Consultation Facilitator: **Annex 121**. A collation of the responses prepared by the facilitator is at **Annex 122**.
[255] By video conference, on 4 March 2010.
[256] At meetings on 24-27 January 2010.

Kingdom[257], as well as Seychelles-based environmental and fishing bodies. The responses included those of a large number of representatives from the scientific and academic community, 50 environmental organisations and networks, a number of fishing bodies from Europe and Japan and the Seychelles Fishing Authority and Indian Ocean Tuna Commission. Of those who supported one of the listed options (all but 30 of the responses) for a marine protected area, most supported option (i), i.e., a full no-take marine reserve[258]. There was limited support for options (ii) and (iii), i.e. a zoned approach allowing limited tuna fishing or protection of the vulnerable reef systems, which mostly came from the Indian Ocean and international tuna fishing communities and officials and representative bodies in the Seychelles[259]. The overall picture was one of broad support for a no-take marine reserve.

(vi) Mauritius' response to the public consultation

3.62 On the day of the scheduled launch of the public consultation, 10 November 2009, the British High Commissioner, John Murton called on the Mauritian Foreign Minister, Arvin Boolell, and took him through the MPA consultation document approved by the Foreign Secretary. The High Commissioner then called on the Cabinet Secretary, Mr Seelballuck, to do the same and gave him a copy of the consultation document. The same day the Foreign Secretary, David Miliband telephoned Prime Minister Ramgoolam to brief him on the public consultation[260]. The Prime Minister requested that the wording of the Consultation Document be changed to reflect the exact wording of the joint communiqué from the second round of bilateral talks of 21 July 2009, to which the Foreign Secretary agreed. The text of the Consultation Document was immediately amended and reposted online[261]. Mauritius repeated the substance of the Prime Minister's complaint in a Note Verbale protesting that the Consultation Document did not reflect what was stated in the joint communiqué[262]. No was mention made of UNCLOS, the 1965 understanding or free licensing of Mauritian-flagged fishing vessels. The understanding of the United Kingdom as at 12 November 2009 is

[257] At a meeting on 6 February 2010.
[258] MM, annex 165.
[259] Summarised at pp. 14-15 of the Facilitator's Report: **Annex 121**.
[260] Record of telephone call between Foreign Secretary and Mauritian Prime Minister, 10 November 2009: **Annex 106**.
[261] See also *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), para. 135 (**Authority 43**).
[262] Note Verbale dated 10 November 2009: MM, annex 153.

recorded in the British High Commissioner press statement in Port Louis regarding the public consultation on the MPA proposal: further talks with the Mauritius Government were planned and there was "plenty of scope for working together"[263].

3.63 The details of Mauritius' subsequent responses and communications with the United Kingdom after the launch of the international public consultation are set out in **Chapter V**, and will not be repeated here, except in one respect. Mauritius alleged in its oral pleadings in the bifurcation hearings that Mauritius received an assurance "that the MPA would not be implemented"[264], which the United Kingdom understands to refer to the content of a discussion between the parties respective Prime Ministers in the margins of the Commonwealth Heads of Government Meeting ('CHOGM') held between 27-29 November 2009. The United Kingdom rejects that contention. The first point is that, as confirmed by Mauritius' contemporaneous correspondence, what was sought by the Mauritian Prime Minister in the margins of CHOGM appears to have been that the project be put on hold and be addressed in the next round of bilateral talks, not withdrawal of the MPA. The position set out in subsequent correspondence was not that there should be no MPA, but that it could only be considered and implemented through the bilateral process[265] and that the public consultation should be withdrawn[266]. Such a position is entirely consistent with Mauritius' stance on sovereignty and the 'alternative legal framework' laid out as part of its presentation in the first round of bilateral talks on 14 January 2009[267]. Second, when the allegation first arose in late December 2009 that the United Kingdom Prime Minister had given any such undertaking to withdraw the public consultation, the Prime Minister was asked whether he had: he said he had not.

3.64 Moreover, in all its dealings with the United Kingdom in the lead up to and during the public consultation period, Mauritius never raised the 1965 understanding on fishing rights or the issue of free licensing of Mauritian-flagged vessels or UNCLOS or any provisions of UNCLOS.

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[263] **Annex 109**.
[264] Transcript 74/19. See also p 101/19.
[265] Letter from the Mauritius Minister of Foreign Affairs, Regional Integration and Trade to the Foreign Secretary, 30 December 2009, MM annex 157. See also the letter of the same date from the Ministry of Foreign Affairs, Regional Integration and Trade to the British High Commission, Port Louis, MM, annex 158. This reflects Mauritius' earlier protest, before CHOGM, in its Note Verbale of 23 November 2009, MM, annex 155.
[266] Letter from the Prime Minister's Office, Mauritius, to the British High Commission, Port Louis, 19 February 2010, MM, annex 162.
[267] 'The Legal Position of Mauritius', Ian Brownlie CBE QC, undated: **Annex 92**.

3.65 Mauritius' initial objections turned on their insistence that any MPA should take account of its sovereignty claim - a point which was not raised again between its Note Verbale of 10 April 2009 and the Prime Minister's conversation with the Foreign Secretary on 10 November 2009 - and include resettlement of the Chagossian community, a point first articulated by the Mauritian Prime Minister on 10 November 2009[268]. However, repeated assurances had been given to Mauritius that any BIOT MPA would have no impact on the United Kingdom's commitment to cede the BIOT when it was no longer needed for defence purposes. Further, while there was no right of abode in the BIOT under current BIOT law, an MPA would have no direct immediate impact on settlement by Chagossians (albeit it was recognised that circumstances might change following any ruling by the European Court of Human Rights in the *Chagos Islanders* case).

(vii) Mauritius' response to the establishment of the MPA

3.66 The Foreign Secretary telephoned Mauritius' Prime Minister on Friday 1 April, at 3 p.m. London time, in advance of the public announcement of the establishment of the BIOT MPA, to inform the Prime Minister that he intended to instruct the BIOT Commissioner to establish a MPA that day. According to the record of the telephone conversation, contained in an email of 1 April 2010 from the Global Response Centre[269], the Mauritian Prime Minister did not claim at any point in the telephone conversation with the Foreign Secretary that the MPA would infringe any Mauritian fishing rights under the 1965 understanding or rights to free licences for Mauritian-flagged vessels, or mention UNCLOS or allege the United Kingdom was not the 'coastal State' for the purposes of UNCLOS. Nor did he make any mention of the alleged undertaking by the United Kingdom's Prime Minister in the margins of CHOGM in November 2009 to halt the MPA project and withdraw the public consultation process.

3.67 The FCO's press release of the same date reiterated that the creation of the MPA

[268] This latter aspect was articulated for the first time by the Mauritian Prime Minister in the telephone conversation with the Foreign Secretary on 10 November 2009 (Annex 115) and in writing for the first time in the Note Verbale of 23 November 2009: MM, annex 155. See also *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), paras. 132-137, 155-158 (**Authority 43**).
[269] A redacted copy of which is annexed as **Annex 114**.

would not change the United Kingdom's commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes and that it was without prejudice to the outcome of the proceedings before the European Court of Human Rights[270].

3.68 The United Kingdom received a formal note of protest against the MPA from the Mauritian Foreign Ministry dated 2 April 2010[271]. The focus of the Note Verbale, as described in **Chapter V**, was Mauritius' opposition to the MPA on the grounds that the project could not be undertaken without its consent, a reiteration of its sovereignty and the right of settlement of Mauritians of Chagossian origin. It did not mention UNCLOS, the 1965 understanding on fishing rights or the practice of issuing fishing licences free to Mauritius-flagged vessels, nor the alleged undertaking by the United Kingdom Prime Minister in November 2009 to withdraw the public consultation process.

(viii) The proclamation and implementation of the MPA

3.69 The MPA was formally established by the BIOT Commissioner in his Proclamation No. 1 of 2010 dated 1 April 2010[272]. The immediate step taken to implement the BIOT MPA, a 'no-take' marine reserve, was not to issue any more licences for fishing in BIOT waters. Commercial fishing in the BIOT thus ended in October 2010, when the last of the commercial fishing licences issued before the proclamation of the MPA for the 2010 expired. The legislation currently governing implementation and enforcement of the ban on commercial fishing in the MPA is the 2007 Fisheries Ordinance and Fisheries Regulations (together referred to as the '2007 fisheries legislation'). Fishing is prohibited unless in accordance with a licence issued by the BIOT authorities, and enforced by the BIOT patrol vessel and protection officers[273]. This legislation will be repealed and replaced when specific legislation is enacted for the MPA.

3.70 Under the current MPA framework regulated non-commercial fishing, by yachtsmen

[270] MM, annex 165
[271] MM, annex 167.
[272] MM, annex 166.
[273] MRAG, the consultancy firm which contracted with the BIOT Administration in 1991 to run the BIOT fisheries, continues to be contracted by the BIOT Administration, but the services it provides, including the provision of protection officers, have been adapted to the needs of the MPA.

for personal consumption and recreational fishing off Diego Garcia[274], continues to be allowed. Yacht permits are issued for passage through BIOT waters and for mooring at permitted sites off the outer islands of Peros Banhos and Salomon (Ile Boddam, Ile Fouquet/Takamaka, Ile Diamante, Ile de Coin and Fouquet). Under the terms of the permit, fishing for personal consumption is allowed provided the rules on what can be caught are observed and returns on the numbers and species of fish caught are provided. Prior to the establishment of the MPA, while commercial fishing was still going on, recreational fishing amounted to significantly less than 1% of the entire amount of fish caught in BIOT waters.

3.71 The other step that has been taken towards implementation has been to find additional funding for patrolling BIOT waters, which had previously been supported by revenue from fishing licences. The funding of the MPA is by a public-private partnership between the BIOT Administration and private sector NGOs, including Pew and the Bertarelli Foundation. It is an experimental model designed to help achieve the ambitious global environmental Aichi Biodiversity Targets agreed by the 2010 Conference of the Parties under the Convention on Biodiversity[275].

3.72 The BIOT Administration, with the support of the United Kingdom Government, has established a Scientific Advisory Group to advise the BIOT Administration on the scientific aspects of managing the MPA. The core of this work is to establish research baselines and to prioritise proposals for research. The United Kingdom Government, through its Department for the Environment, Food and Rural Affairs ('Defra'), has awarded a grant for further research in the BIOT which will fund three more scientific surveys of the BIOT marine environment over the next two and a half years in addition to the two which have already taken place since the MPA was established. Darwin Plus, the Overseas Territories Environment and Climate Fund administered by Defra, has awarded funding for a study of turtles and a rat eradication project. Another major scientific expedition by the University of

[274] Recreational fishing around Diego Garcia falls into two types, fishing from the shore, which is mostly by contract staff working on Diego Garcia for personal consumption, and sports fishing from boats by the military personnel stationed on Diego Garcia. Permits for recreational sports fishing off Diego Garcia are administered by Morale Wellness Recreation ('MWR'), a part of the United States military. MWR keeps records of applications and catches, and hands out information on prohibited areas and the rules on what types of fish may be caught. Catch data for recreational fishing off Diego Garcia is collated by MRAG, and data on sports fishing is submitted to the Indian Ocean Tuna Commission (IOTC). MRAG estimated in 2009 that approximately 45 tonnes of fish were caught by recreational boat fishing around Diego Garcia, but the figure is less now: the figure dropped in 2012 after restrictions were imposed following two drownings.

[275] See para. 3.25 above.

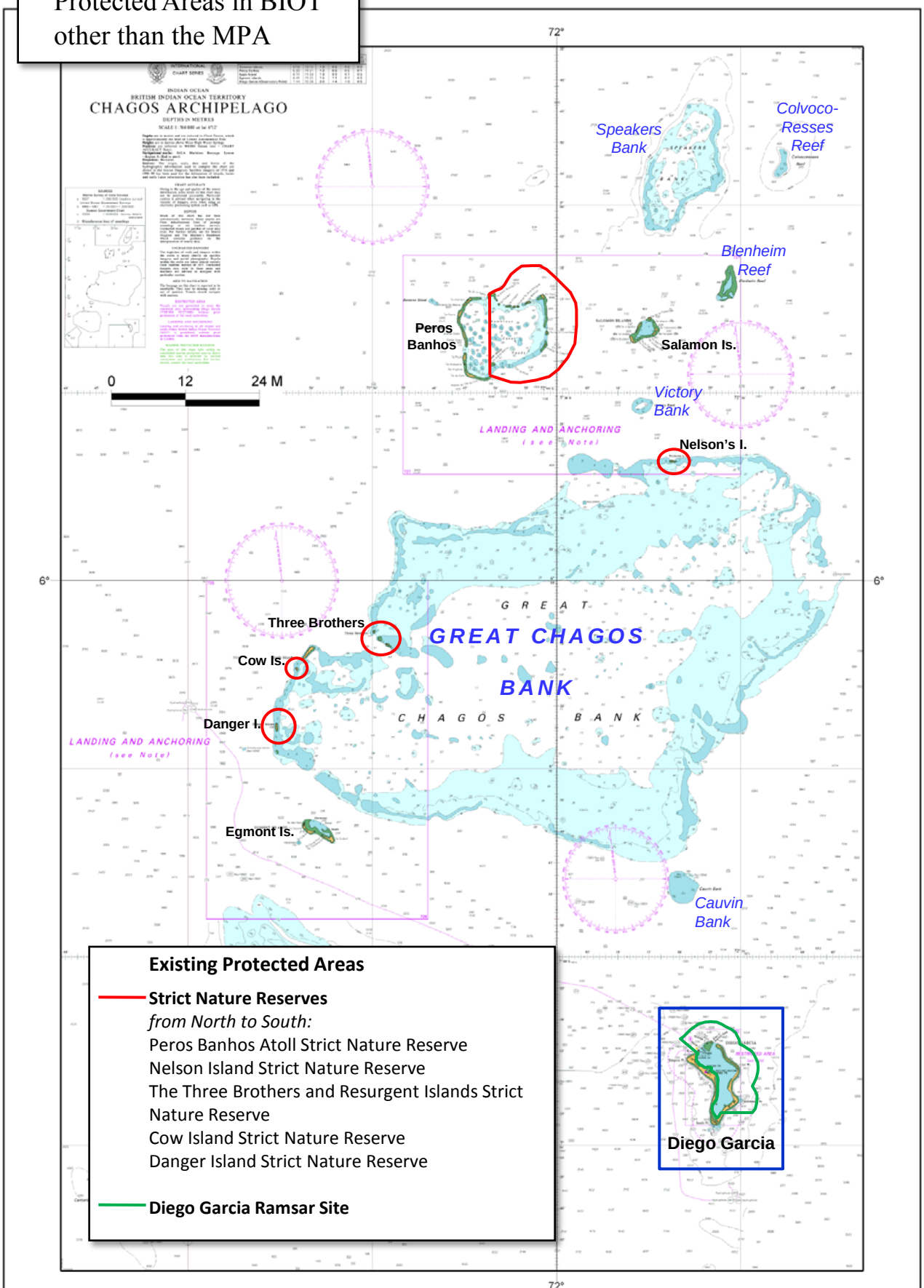
Western Australia has taken place, and scientific work has also been carried out by the Bertarelli Foundation. The BIOT Administration also funds the Chagossian Community Environment Project, a programme set up by the London Zoological Society and the Chagos Conservation Trust, which aims to work with Chagossian communities to raise awareness of environmental issues and provide opportunities in the field of conservation.

3.73 The BIOT MPA was the result of the two years' work by BIOT officials. A comprehensive consultation process was undertaken, which included formal bilateral consultations with Mauritius and the US and an international public consultation process which involved meetings with Chagossian communities in the United Kingdom, Mauritius and the Seychelles. Indeed, the very reason that recreational fishing off Diego Garcia was left open, alongside that by yachts passing through BIOT waters - which Mauritius cites to support its allegation of bad faith[276] - was a response to the United States' comments on the proposal and submissions by the yachting community[277], as stakeholders in the MPA proposal.

3.74 In light of all of the above, Mauritius' allegations that the "true purpose of the 'MPA' is not conservation"[278] and that "the UK acted in great haste, on the basis of a manifestly inadequate process of consultation and without prior information to Mauritius"[279] is misconceived and regrettable.[280]

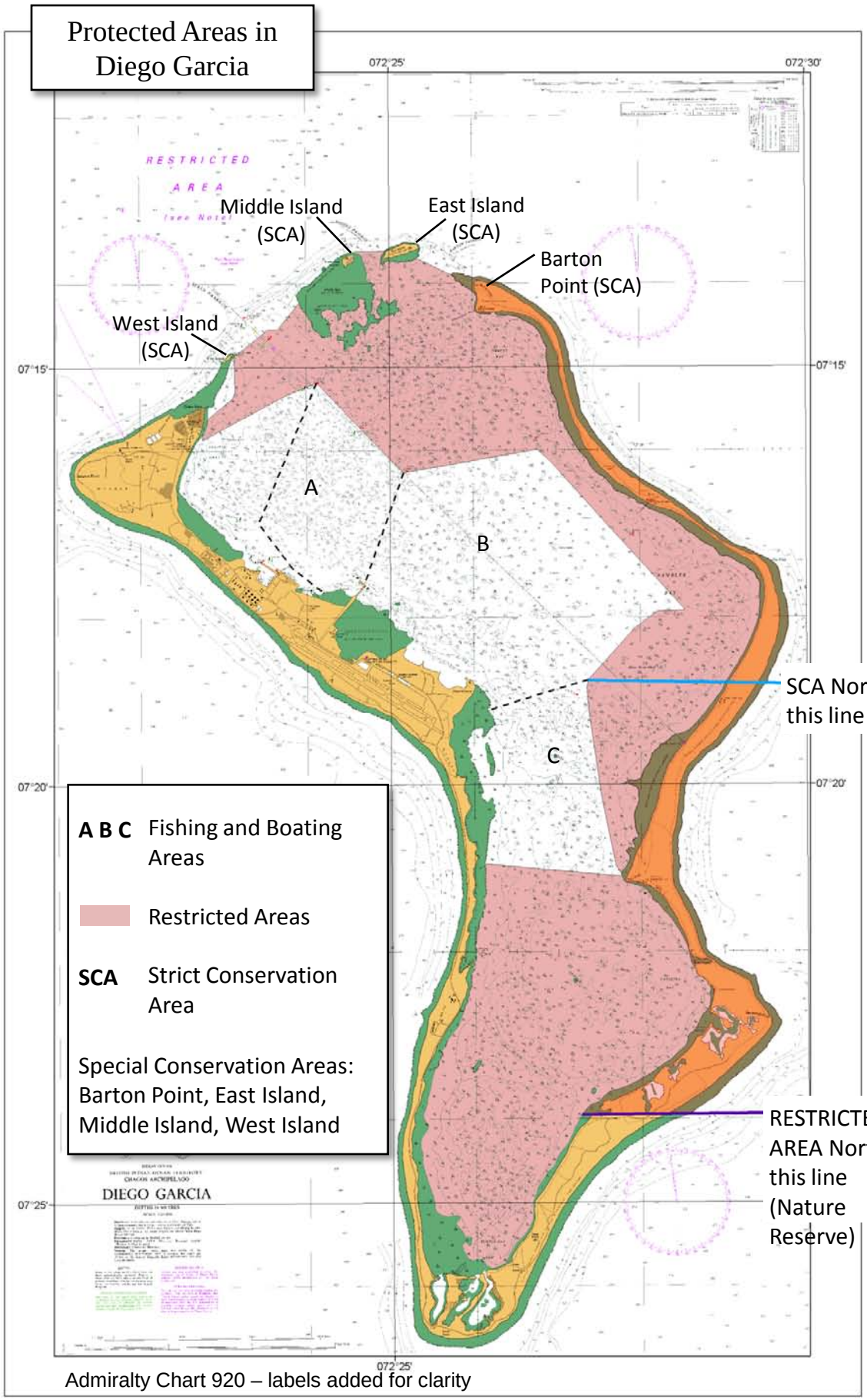
[276] MM, para 1.5.
[277] See paras. 73-74 of the Facilitators Report: **Annex 121.**
[278] Statement of Claim, para. 4; see also MM, para. 7.98; and the references in the Memorial to a "purported conservation measure" (para. 1.15) and "the rhetoric of environmental protection" (para. 1.18). The Administrative Court in the recent judicial review proceedings challenging the MPA, rejected a similar contention, concluding the decision of the Foreign Secretary to pursue the BIOT MPA policy and eventually establish the MPA was obviously a response to a proposal for an MPA for scientific and conservation purposes only: *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, Judgment of 11 June 2013, para 74 (**Authority 43)**.
[279] MM, para 1.5. The integrity of the public consultation was also challenged in the recent judicial review proceedings, but that challenge was rejected (**Authority 43).**
[280] See further **Chapter VIII**, paras 8.51-8.54 and 8.61-8.64.

Protected Areas in BIOT other than the MPA



Admiralty Chart 3 – labels added for clarity. For Diego Garcia (blue box) see Figure 3.1.2 for detail.

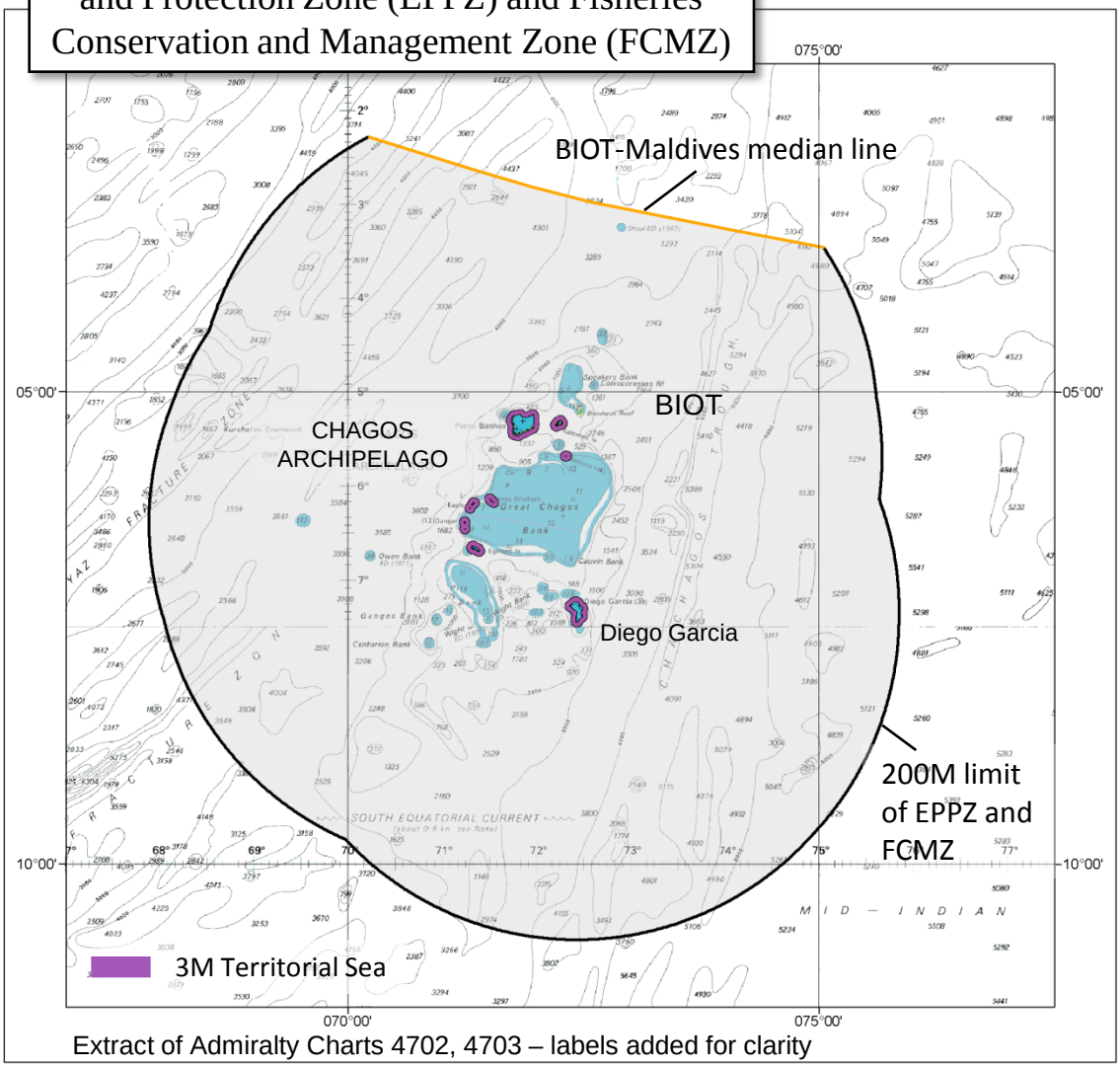
Figure 3.1.1



Admiralty Chart 920 – labels added for clarity

Figure 3.1.2

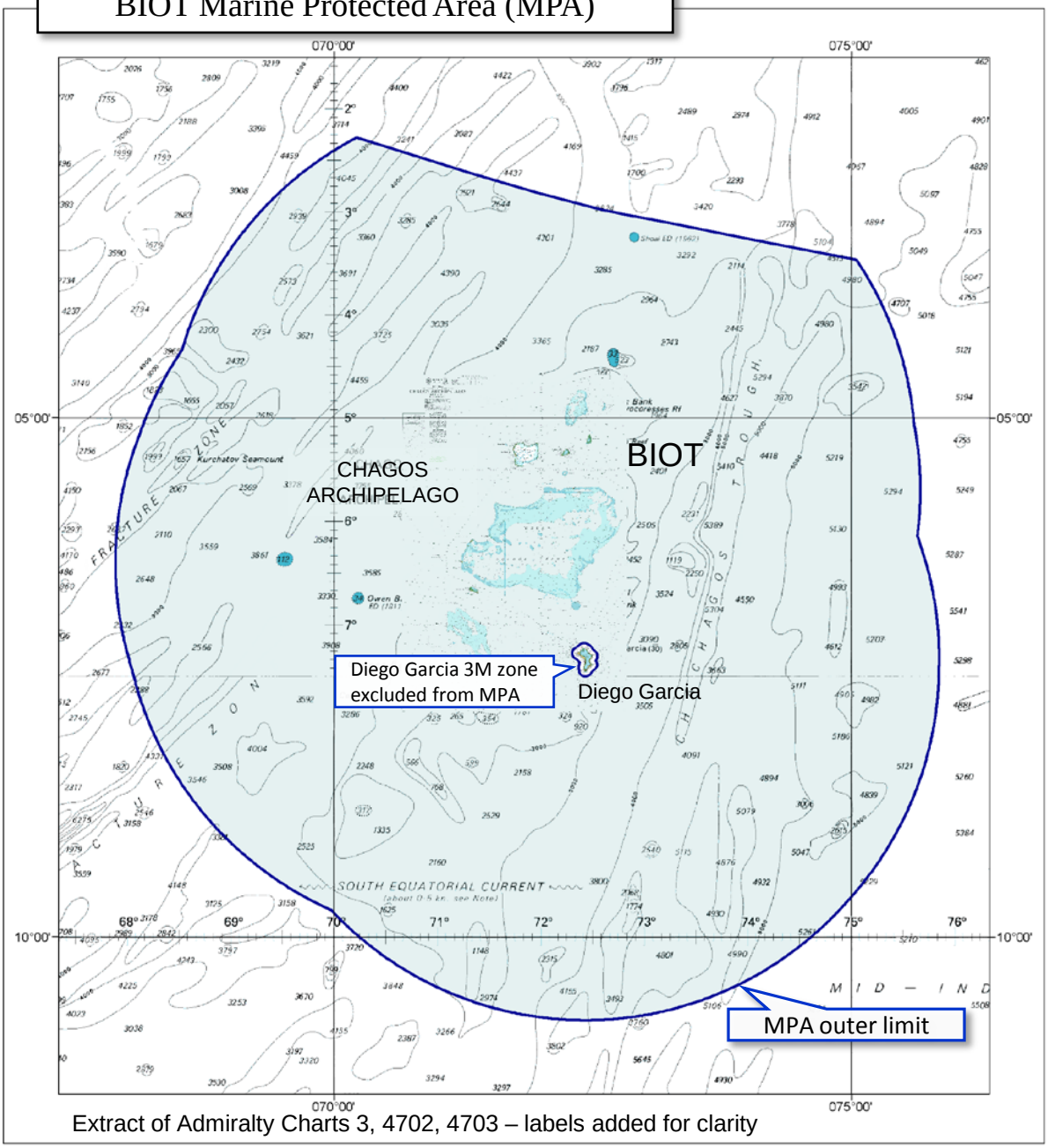
Limits of the BIOT Environment Preservation and Protection Zone (EPPZ) and Fisheries Conservation and Management Zone (FCMZ)



Extract of Admiralty Charts 4702, 4703 – labels added for clarity

Figure 3.1.3

BIOT Marine Protected Area (MPA)



Extract of Admiralty Charts 3, 4702, 4703 – labels added for clarity

Figure 3.1.4

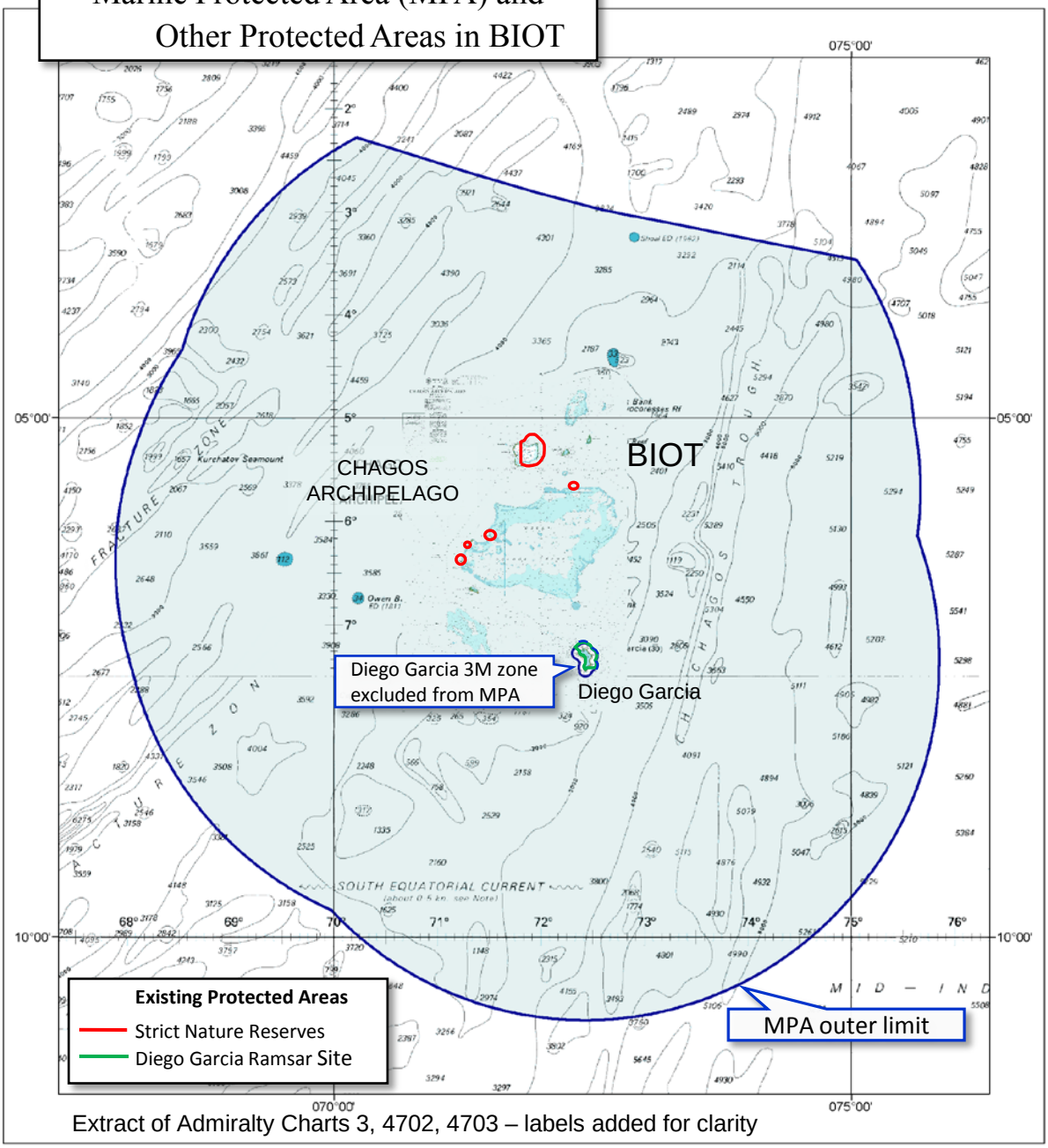

Marine Protected Area (MPA) and
Other Protected Areas in BIOT
075°00'
05°00'
10°00'
070°00'
075°00'
CHAGOS
ARCHIPELAGO
BIOT
Diego Garcia 3M zone
excluded from MPA
Diego Garcia
MPA outer limit
Existing Protected Areas
Strict Nature Reserves
Diego Garcia Ramsar Site
Extract of Admiralty Charts 3, 4702, 4703 – labels added for clarity

Figure 3.1.5

PART TWO

JURISDICTION

Part Two deals with the jurisdiction of the Arbitral Tribunal.

Chapter IV explains that the Tribunal cannot have jurisdiction over the sovereignty claim brought by Mauritius under UNCLOS because the claim is, in reality, a territorial sovereignty claim in relation to which there is no compulsory jurisdiction under UNCLOS. Chapter IV also refutes Mauritius' assertion that the territorial sovereignty claim concerns the interpretation or application of UNCLOS.

Chapter V explains that, since Mauritius has not met the requirements of article 279 (Obligation to settle disputes by peaceful means) or article 283 (Obligation to exchange views) of UNCLOS in relation to any of the claims, the Tribunal does not have jurisdiction to determine the claims.

Chapter VI explains that the Tribunal does not have jurisdiction over Mauritius' claim that the 2010 Marine Protected Area is incompatible with UNCLOS. Chapter VI deals with Mauritius' attempt to base jurisdiction on article 297(1)(c) of UNCLOS, explains that article 297(3)(a) excludes jurisdiction and shows how claims based on the Indian Ocean Tuna Commission Agreement are outside the Tribunal's jurisdiction.

CHAPTER IV

THE TRIBUNAL HAS NO JURISDICTION OVER MAURITIUS' SOVEREIGNTY CLAIM

A. Introduction: Characterisation of the Dispute

4.1 Both Parties accept that the Tribunal has the power to characterise the dispute before it[281]. Indeed, as the Court held in *Nuclear Tests*: "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim"[282]. To similar effect, the Court held in *Fisheries Jurisdiction (Spain* v. *Canada),* referring to its past jurisprudence:

> "The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262-263)"[283].

4.2 The identification of the real issues in dispute is of particular importance given that, as is considered further in **Sections B** and **C** below, it is for Mauritius to establish that there is a "dispute concerning the interpretation or application of this Convention", as is required by article 288(1) of UNCLOS.

4.3 Mauritius has sought to present its claims - in particular in its Memorial - as claims made within article 288(1) of UNCLOS although, as appeared more clearly from the hearing on bifurcation, it also characterises this as a "mixed dispute" involving determination of

[281] As to Mauritius' position, see Transcript of the hearing of 11 January 2013, e.g. p. 95, lines 15-21 (Mr Crawford): "The Tribunal has at all stages of its process the power to characterize a dispute. In the light of what I've said, the fact that you might characterize this dispute as in part concerned with the question of sovereignty over the coastline in the sense of arguing whether or not the United Kingdom was a coastal State is not a concern. It's a matter for you to decide as you decide the other issues in this case."

[282] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30 (**Authority 7**); see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55 (**Authority 13**); *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30 (**Authority 14**).

[283] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 31 (**Authority 14**).

disputed issues exterior to the Convention, i.e. disputed issues of sovereignty[284]. The United Kingdom does not accept either of these characterisations. It is the issue of sovereignty that is "the real issue in the case" (see *Nuclear Weapons* above), and that has been the subject of extended exchanges over many years (see further **Chapter V** below).

4.4 At paragraphs 2-5 of its Notification of 20 December 2010, Mauritius purported to introduce the so-called "MPA dispute". The central features of the dispute that Mauritius then portrayed are –

a. The so-called 'dismemberment' of Mauritius in 1965 by the UK's establishment of BIOT (Notification, paragraph 2);

b. Mauritius' claim to the Chagos Islands, reflected in Article 111 (Interpretation) of its Constitution (as amended in 1982), but also various related claims to an EEZ and continental shelf that include the Chagos Islands (Notification, paragraph 3);

c. Complaints as to the UK's assertions of sovereignty over the Chagos Archipelago, and the assertion that the "United Kingdom is not (in regard to the Chagos Archipelago) a 'coastal state' within the meaning of the 1982 Convention" (Notification, paragraph 4);

d. Finally, the alleged dispute, described as including, but not limited to "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention, under which the 'MPA' has purportedly been established, and the interpretation and application of the term 'coastal State' in Part V of the 1982 Convention" (Notification, paragraph 5).

4.5 This is ultimately a depiction of a dispute with respect to territorial sovereignty over the Chagos Archipelago. The question of "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention" turns on the question of which State has sovereignty over the BIOT. The question of "the interpretation and application of the

[284] Transcript of the hearing of 11 January 2013, p. 138, line 24 – p. 140, line 3 (Mr Crawford).

term 'coastal State' in Part V", i.e. of whether the UK is the coastal State[285], again turns on the question of which State has sovereignty over the BIOT.

4.6 To similar effect, the first and principal part to the argument outlined by Mauritius at paragraph 1.3 of its Memorial is that: "The UK does not have sovereignty over the Chagos Archipelago, is not 'the coastal State' for the purposes of the Convention, and cannot declare an 'MPA' or other maritime zones in the area". The determination that the Tribunal is invited to reach here and elsewhere in the Memorial is that Mauritius has "retained sovereignty over the Chagos Archipelago at all times"[286].

4.7 Likewise, it is remarkable that, in a case purportedly concerning the interpretation and application of UNCLOS, Mauritius does not in fact seek declarations of breach of UNCLOS (save to the extent of the declaration of incompatibility sought in the third of Mauritius' three heads of relief[287]). The relief sought aims at the issue of territorial sovereignty, in the guise of the United Kingdom allegedly not being the coastal State within the meaning of the Convention - in circumstances where, it might be added, the United Kingdom acceded to UNCLOS on 25 July 1997, with the Instrument of Accession extending to the BIOT, with no objection either then or since on the part of Mauritius so far as concerns that extension. An analogous territorial sovereignty claim could no doubt have been formulated by Mauritius under various other multilateral treaties pursuant to which the United Kingdom exercises sovereign rights in respect of the BIOT. The current formulation as an UNCLOS claim is artificial, and no doubt stems from the (misconceived) wish to rely on Part XV.

4.8 While Mauritius has made reference to the Annex VII Tribunal's Award in *Guyana* v. *Suriname*, and the application there of provisions of the UN Charter and principles of customary international law[288], the reasoning in that case serves only to highlight the unsustainable nature of the position that Mauritius is now taking. As the *Guyana* v. *Suriname* Tribunal explained with respect to the maritime delimitation case then before it:

> "This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties

[285] See Notification, para. 11(2).
[286] See, e.g., MM, para. 6.35.
[287] MM, p. 155.
[288] MM, para. 5.33.

> have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties"[289].

4.9 By contrast, the dispute that Mauritius seeks to put before this Tribunal has as its principal concern the long-standing question of territorial sovereignty over the BIOT. There is a reversal of the position in *Guyana* v. *Suriname* above. It is the (artificial) claims which Mauritius seeks to bring before this Tribunal as to the "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention" and "the interpretation and application of the term 'coastal state' in Part V"[290] that are incidental to the real dispute between the Parties, i.e. the dispute concerning sovereignty over the BIOT[291].

4.10 The question for the Tribunal is whether it has jurisdiction under article 288(1) UNCLOS to determine that real dispute (sovereignty). As detailed further in **Sections B-C** below, the United Kingdom's position is that it does not, and that such jurisdiction cannot somehow be established by Mauritius' characterisation of this as a "mixed dispute". In arguing otherwise, Mauritius seeks an expansion of jurisdiction that is inconsistent with the plain wording of article 288(1) UNCLOS, unsupported by jurisprudence and unsupported even by the formulations of those that have suggested that there may be Part XV jurisdiction over "mixed disputes" (in the materially different context of maritime delimitation cases that involve ancillary issues of sovereignty over land).

4.11 An expansive reading of Part XV such as is urged by Mauritius in these proceedings could have serious ramifications so far as concerns the aspiration of UNCLOS to universality, both in terms of future accessions to UNCLOS under article 307 and indeed potential denunciations thereof under article 317. The negotiating States did not intend the extensive "ancillary" jurisdiction which Mauritius asserts, nor did the States Parties to the Convention agree thereto. The fact that a series of politically highly sensitive territorial disputes would, on Mauritius' analysis, inevitably also be susceptible to compulsory dispute resolution under Part XV, serves as a powerful illustration of the radical, and misconceived, nature of its

[289] *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits,* Award of 17 September 2007 (2008) 47 ILM 166, at para. 401 (**Authority 27**).
[290] See Notification, para. 5.
[291] As to the issues that have in fact been raised by Mauritius since the 1980s, see Chapter V below. These issues do not establish the existence of a dispute under UNCLOS, and there has evidently been no exchange of views.

contentions.

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

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

4.12 Mauritius contends by reference to article 286 of UNCLOS that "the scope of jurisdiction under Part XV is intended to be broad"[292]. The contention is incorrect. The scope of jurisdiction under Part XV is neither broad nor narrow; it is what it is, and the question is whether a given claim falls within the scope of a jurisdiction that is established in straightforward language[293]. In this respect, article 286 establishes three important conditions for the jurisdiction of a court or tribunal under Part XV.

4.13 First, the compulsory dispute settlement established by article 286 applies "[s]ubject to section 3", i.e. subject to the "Limitations and Exceptions to Applicability of Section 2" that are set out in section 3 of Part XV. Mauritius asserts that these limitations and exceptions "should not be expansively interpreted and, and in particular should not be interpreted in such a way as to deny practical effect to Part XV"[294]. That assertion is not supported in any way. The provisions of section 3 of Part XV fall to be interpreted in accordance with the rules on interpretation set forth in the Vienna Convention on the Law of Treaties[295]. As is well-known, the existence of limitations and exceptions as are now to be found in section 3 was of central importance to the agreement of many of the negotiating States to compulsory dispute settlement mechanism under UNCLOS[296].

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[292] MM, para. 5.10.

[293] Insofar as reference to the language of presumption is appropriate (cf. ibid), any presumption would operate against Mauritius' expansive interpretation of article 286. See, e.g., Crawford, *Brownlie's Principles of International Law*, p. 379, referring to the principle of restrictive interpretation as follows: "In a number of cases the Permanent Court committed itself to the principle that provisions implying a limitation of state sovereignty should receive a restrictive interpretation. As a general principle of interpretation this is question-begging, and later decisions have given less scope to it. However, the principle may operate in cases concerning regulation of core territorial privileges. In these cases, it is not an 'aid to interpretation' but an independent principle"(**Authority 59**).

[294] MM, para. 5.14.

[295] Albeit that, as noted above, insofar as reference to the language of presumption is appropriate (cf. MM, para. 5.10), any presumption would operate against Mauritius' expansive interpretation of article 286.

[296] See, e.g., M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, Commentary to art. 297, at 297.1 (quoted in para. 4.45 below) (**Authority 85**).

4.14 Secondly, article 286 only applies where no settlement has been reached by recourse to section 1 of Part XV (as considered in **Chapter V** below)[297].

4.15 Finally, article 286 establishes a right to submit disputes "concerning the interpretation or application of this Convention" and no other dispute. To similar effect, article 287 provides that States shall be free to choose any of the means of settlement prescribed in that article for "disputes concerning the interpretation or application of this Convention". Article 288(1) of UNCLOS in turn provides:

> "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

4.16 By using, on each occasion, the expression "dispute(s) concerning the interpretation or application of this Convention" the States Parties established a fundamental limitation on the scope of jurisdiction under Part XV[298].

4.17 This is in stark contrast to Article 288(2). That paragraph provides for a court or tribunal to have jurisdiction over a dispute concerning the interpretation or application of any other international agreement related to the purposes of UNCLOS, but only where the dispute is submitted in accordance with that separate agreement:

> "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement"[299].

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

4.19 The rules of international law that Mauritius asserts in Chapter 6 of its Memorial are

[297] Mauritius makes no mention of this obvious condition at MM, para. 5.10.
[298] See also, e.g., arts. 279, 280, 281, 282, 283, 284; also art. 187(a).
[299] See also Annex VI, arts. 21-22, and article 57 of the Rules of the International Tribunal for the Law of the Sea.

said to be derived from the Charter of the United Nations and United Nations General Assembly resolutions, including resolutions 1514(XV), 2066(XX), 2232 (XXI) and 2357(XXII). They comprise:

a. The principle of self-determination[300], to be exercised in accordance with the free will of the people concerned as opposed to under duress[301];

b. The reference to territorial integrity in paragraph 6 of General Assembly resolution 1514(XV)[302], supported by the principle of *uti possidetis*[303];

c. The competence of the General Assembly to pronounce on rights to self-determination, and specific pronouncements in respect of Mauritius[304].

4.20 Disputes as to the interpretation or application of these principles and rules (including as to whether they establish binding obligations on States, and specifically on the United Kingdom in 1965) are not disputes concerning the interpretation or application of UNCLOS within article 288(1). As none of them falls within the terms of article 288(2) (see above), they are beyond the jurisdiction of the present Tribunal[305]. The same applies with respect to the alleged undertakings on which Mauritius relies[306]. Mauritius' contentions to the contrary are addressed in **Section C** of this Chapter.

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

4.21 This outcome cannot be avoided, and the jurisdiction of the Tribunal enlarged,

[300] MM, paras. 6.10-6.14.
[301] MM, paras. 6.25-6.28.
[302] MM, paras. 6.15-6.18.
[303] MM, paras. 6.23-6.24.
[304] MM, paras. 6.19-6.22.
[305] See also the Joint Separate Opinion of Judge Wolfrum and Judge Cot, para. 7, in *The "ARA" Libertad Case (Argentina* v. *Ghana)*, Order of 15 December 2012: "We would like to emphasize a central point concerning the interpretation of article 288 of the Convention. According to that provision the Tribunal is mandated only to decide on disputes concerning the interpretation and application of the Convention. In that respect the mandate of the Tribunal is limited compared to the one of the International Court of Justice. Article 293 of the Convention provides that the Tribunal may have recourse to general international law not incompatible with the Convention. These two issues have to be separated clearly, which the Order does not do (compare paragraphs 62 et seq. with paragraph 100). A dispute concerning the interpretation and application of a rule of customary law therefore does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention" (**Authority 41**).
[306] MM, paras. 6.37-6.52.

through reliance on article 293(1) UNCLOS, which in no sense expands the scope of the Tribunal's jurisdiction under article 288(1)[307]. Arguments to that effect were put forward by Ireland in cases against the UK concerning the MOX Plant facility at Sellafield, and were correctly rejected.

4.22 In the Order of 24 June 2003 in the *MOX Plant* case[308], the Annex VII tribunal stated as follows:

> "The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible"[309].

4.23 The above passage was cited with approval in the Partial Award in the *Eurotunnel* case, the Tribunal noting that "this distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is a familiar one"[310]. The Tribunal in *Eurotunnel* decided that its function was limited to deciding claims falling within the instruments establishing its jurisdiction (the Concession Agreement of 14 March 1986 and the UK/France Treaty to which it referred)[311]. Thus, it rejected the claimants' case to the effect that it could apply, and determine breach of,

[307] Cf. Notification, para. 9, and MM, paras. 5.29, 5.33 and 6.4.
[308] The Tribunal may recall that, pursuant to this Order of 24 June 2003, the proceedings in the *MOX Plant* case were suspended pending further possible (and then actual) proceedings before the European Court of Justice, which subsequently found that Ireland had breached obligations under the EC Treaty by commencing the UNCLOS claim. In its judgment of 30 May 2006, the European Court of Justice found that, by instituting the proceedings before the Annex VII Tribunal, Ireland had failed to fulfil its obligations under Articles 10EC and 292EC and under Articles 192EA and 193EA. The UNCLOS claim was subsequently withdrawn by Ireland (on 15 February 2007) (**Authority 18**).
[309] Ibid., at para. 19, emphasis added.
[310] *Eurotunnel (Channel Tunnel Group and France-Manche* v. *UK and France)*, Partial Award of 30 January 2007, ILR 132, 1, at para. 152 (**Authority 26**).
[311] Clause 40.1 of the Concession Agreement of 14 March 1986 provided: "Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party": *ibid*., at para. 97.

exterior agreements by reference to the applicable law clause[312].

4.24 To similar effect to both the *MOX Plant* and *Eurotunnel* cases, the Tribunal constituted in respect of the second of Ireland's two claims with respect to the MOX Plant facility at Sellafield found that the broad applicable law provision in the OSPAR Convention did not "transform it [the OSPAR Convention] into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention"[313]. This determination was made against the backdrop of Article 32(1) of the OSPAR Convention, which is substantially similar to article 288(1) UNCLOS in terms of conferring jurisdiction on an arbitral tribunal in respect of "Any disputes between Contracting Parties relating to the interpretation or application of the Convention …"[314].

4.25 A similar approach may also be discerned in the *Bosnian Genocide* case (merits phase), where the International Court of Justice held:

> "The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. ... It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*"[315].

4.26 It was not then open to Bosnia and Herzogovina to seek to expand jurisdiction by reference to Article 38(1) of the Court's Statute.

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[312] Clause 40.4 of the Concession Agreement of 14 March 1986 provided: "In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general [En outre], recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity": *ibid*., at para. 99.

[313] *Case concerning the OSPAR Convention*, Award of 2 July 2003, XXIII *RIAA* 59, paras. 84-85 (**Authority 20**).

[314] As to the applicable law provision, a tribunal constituted under the OSPAR Convention is mandated to decide disputes "according to the rules of international law and, in particular, those of the Convention" (Article 32(6)(a)).

[315] *Application of the Genocide Convention, Judgment (Merits), ICJ Reports (2007)*, para. 147 (**Authority 28**).

4.27 In respect of jurisdiction founded on Article 36(1) of the Statute, i.e. jurisdiction based on a compromissory clause in a treaty (as in the *Bosnian Genocide* case and as in the present case), the scope of jurisdiction will be controlling of the law applicable to the dispute. The matter was addressed by Rosenne, in respect of Article 36 of the Court's Statute, in the following terms:

> "There is another major difference between jurisdiction under paragraph 1 and jurisdiction under paragraph 2. That relates to the 'sources' of the law to be applied by the Court. Where the jurisdiction is based on paragraph 1, the Court is empowered only to apply that treaty. Where it is based on paragraph 2, the Court's jurisdiction may allow it and even require it to have recourse to rules of customary international law which resemble the rules of a treaty but which exist independently of the treaty, if for any reason that treaty is excluded from the scope of the jurisdiction of the Court in that particular case[316]."

4.28 Thus, Article 38(1) of the Court's Statute, setting out the sources of international law, cannot be used to extend the jurisdiction of the Court under Article 36(1) of the Statute[317].

4.29 As all this makes plain, the jurisdiction of a court or tribunal seised of a dispute on the basis of a compromissory clause akin to that relied upon in the present case extends only to matters that come within the scope of that clause, and does not include the interpretation or application of other international agreements or of customary international law[318].

4.30 That does not, of course, mean that Article 38 of the ICJ Statute, or any applicable law provision in a given treaty such as article 293(1) UNCLOS, becomes redundant. As the Court further explained in the *Bosnian Genocide* case:

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[316] S. Rosenne, *The Law and Procedure of the International Court, 1920-1996*, Volume II, at p. 668 (**Authority 91**).

[317] See also *Mavrommatis Palestine Concessions* case, where jurisdiction was founded on a provision conferring jurisdiction in respect of disputes relating to "the interpretation or application of the provisions of the Mandate". The PCIJ concluded: "The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible ...; but in every case it must relate to the interpretation or application of the provisions of the Mandate." *PCIJ Reports*, Series A No.2 (1924), pp.15-16. See also Louis Sohn in his Hague lectures on *The Settlement of Disputes Relating to the Interpretation and Application of Treaties*: 1976 II Hague Recueil, at pp. 237-272 (**Authority 2**).

[318] The same point is also made – focusing on art. 293 UNCLOS – in M Forteau, "The Diversity of Applicable Law before International Tribunals as a Source of Forum Shopping and Fragmentation of International Law: An Assessment", in R Wolfrum and I Gätzschmann, *International Dispute Settlement: Room for Innovations?* Springer, 2013, 417, at 437 (**Authority 64**). To equivalent effect, see also the Joint Separate Opinion of Judge Wolfrum and Judge Cot, para. 7, in *The "ARA" Libertad Case (Argentina* v. *Ghana)*, Order of 15 December 2012 (**Authority 41**).

> "The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts"[319].

4.31 The Tribunal in the *Eurotunnel* case explained the purpose of the applicable law provision before it (clause 40.4 of the 1986 Concession Agreement) in similar terms:

> "The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement (and the Treaty as given effect by the Concession Agreement) does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. But it is the relationship between the Principals and the Concessionaires as defined in Clause 41.1 on which the Tribunal is called to pronounce"[320].

4.32 It is submitted that this approach applies equally with respect to the intended interplay between articles 288(1) and 293(1) UNCLOS, it being recalled that article 293(1) established that the question of applicable law is predicated on the prior existence of jurisdiction: "A court or tribunal *having jurisdiction under this section* shall apply this Convention and other rules of international law not incompatible with this Convention" (emphasis added).

4.33 So far as concerns the role of article 293(1) UNCLOS, other rules of international law may be relevant to the court or tribunal's decision as regards a dispute concerning the interpretation or application of UNCLOS where the specific provisions of UNCLOS that form the basis of the complaint themselves expressly require that other non-UNCLOS rules of international law be taken into account or applied.

4.34 Examples of such an approach are articles 74 and 83 UNCLOS, which respectively address delimitation of the exclusive economic zone and the continental shelf between States

[319] *Application of the Genocide Convention*, Judgment (Merits), ICJ Reports (2007), para. 149 (**Authority 28**).
[320] *Ibid*., para. 151.

with opposite or adjacent coasts[321]. Paragraph 1 of these articles provides that delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice"[322]. As noted by the Annex VII tribunal in *Barbados* v. *Trinidad and Tobago*:

> "This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules"[323].

4.35 In the absence of any such *renvoi*, and assuming that article 288(2) does not apply in the given case, the "other rules of international law" to which article 293(1) refers will only be relevant to a dispute within the jurisdiction of a Part XV court or tribunal:

a. Where such rules arises incidentally in the course of a dispute, principally in the form of secondary rules of international law, such as those relating to State responsibility or the law of treaties;

b. Where they are to be taken into account, together with the context, in interpreting a treaty in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. This permits, in article 31(3), account to be taken for purposes of interpretation of a treaty *inter alia* of (a) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", (b) "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and (c) "any relevant rules of international law applicable in the relations between the parties".

4.36 This interpretation is consistent with the object and purpose of the Convention as recorded in the very first paragraph of its preamble. There, the States Parties in agreeing to

[321] See e.g. *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, para. 183 (**Authority 36**).
[322] In each of these articles, paragraph 4 also provides: "Where there is an agreement in force between the States concerned, questions relating to the delimitation of the [exclusive economic zone] [continental shelf] shall be determined in accordance with the provisions of that agreement".
[323] *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, XXVII RIAA, p. 147, at p. 210, para. 222. (**Authority 24**).

the Convention were: "*Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea ..." (emphasis added).

4.37 It is likewise consistent with the *travaux* relating to article 293(1), where there is nothing to suggest an intention in respect of any broader application of laws external to the Convention in the context of dispute settlement[324].

C. The Absence of Jurisdiction over Mauritius' Sovereignty Claim

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

4.38 When it comes to the application of article 288(1) in the instant case, it is useful to set out first the list of issues that the Tribunal would have to determine before it could (on Mauritius' case) find breaches of the specific provisions of UNCLOS on which Mauritius relies in relation to its sovereignty claim. These are:

a. That the detachment of the Chagos Archipelago was contrary to a right of self-determination that Mauritius is entitled to assert vis-à-vis the United kingdom in respect of events dating from 1965[325], which in turn comprises a series of findings as to (i) any applicable rules of international law concerning self-determination in 1965; (ii) the relevant unit of self-determination (by reference to resolutions of the General Assembly and the principle of *uti possidetis juris*); and (iii) the competence of the General Assembly to interpret the right of self-determination;

b. That there was no valid agreement to the detachment of the Chagos Archipelago[326];

c. That Mauritius has continuously asserted its sovereignty over the Chagos

[324] While the *travaux* provide little guidance as to the rationale for the words "and other rules of international law not incompatible with the Convention", the *Virginia Commentary* at Vol. V, p. 73 states that "with respect to international law there was insistence that some of its rules might become obsolete after the adoption of the Convention, and that the Convention must take precedence over them. Consequently, … it was made clear that other rules of international law would not be applied in case of their incompatibility with the Convention". This does not suggest that article 293(1) was intended to establish some form of unlimited jurisdiction, subject only to absence of incompatibility with the Convention.
[325] MM, paras. 6.10-6.24.
[326] MM, paras. 6.25-6.30.

Archipelago and that the United Kingdom has recognised that sovereignty in certain respects[327];

d. That Mauritius thus has retained sovereignty over the Chagos Archipelago and is the (or possibly a) coastal State in respect of the Chagos Archipelago[328];

e. dThat the United Kingdom has in any event given a series of binding undertakings that deny to the United Kingdom the entitlement to act as the coastal State within the meaning of the Convention, and that Mauritius is on this separate ground entitled to avail itself of the rights of a coastal State[329].

4.39 It is recalled that this is not a case where jurisdiction can be established over any of these matters by reference to article 288(2).

(ii) Application of article 288(1)

4.40 The question is whether disputes in relation to the above matters constitute disputes concerning the interpretation or application of UNCLOS. The answer is clear: they do not.

4.41 Mauritius seeks to avoid this straightforward conclusion by asserting in its Memorial that (i) the dispute placed before the Tribunal turns on the interpretation or application of the term 'coastal State' in articles 2(1), 55, 76 and/or 77 and/or 81 of UNCLOS, and is not excluded by article 297(1)[330]; (ii) with particular reference to article 298(1), issues of sovereignty or other rights over continental or insular land territory which are "closely linked or ancillary to maritime delimitation and to other issues raised under the Convention" self-evidently concern the interpretation or application of the Convention[331]; and (iii) in the light of article 293(1), an Annex VII tribunal can exercise jurisdiction over alleged violations of the UN Charter and obligations derived from General Assembly resolution 1514(XV)[332]. These three lines of argument are dealt with in turn below.

[327] MM, paras. 6.31-6.34.
[328] MM, paras. 6.34-6.36.
[329] MM, paras. 6.37-6.52.
[330] MM, para. 5.25.
[331] MM, paras. 5.26-5.31.
[332] MM, paras. 5.32-5.33.

(a) Reference to the term "coastal state"

4.42 The ***first line of argument*** amounts to no more than the assertion that - because numerous (in fact, some sixty four) articles of UNCLOS use the term "coastal State"[333], one or more of which provisions is relied on in the context of a given claim, a court or tribunal has jurisdiction under Part XV to resolve all or any disputes over sovereignty to determine whether State A or State B (or indeed State C) is indeed the "coastal State". On this argument, UNCLOS has indeed created a broad compulsory jurisdiction, one that is unparalleled in international law, to determine an issue of the most central importance to States, i.e. territorial sovereignty[334].

4.43 However, there is nothing in the text of UNCLOS, or in the *travaux,* or in subsequent practice of the States Parties to UNCLOS, to suggest that this is an intention reflected in Part XV.

4.44 As to the text of UNCLOS:

a. The States Parties expressly and materially restricted the types of disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction under the Convention: see article 297(1). It would have been bizarre to agree to such a restriction on settlement of disputes concerning the *exercise* of rights or jurisdiction, and yet to agree at the same time to jurisdiction over the anterior and more fundamental question as to whether there was any *basis* for the exercise of such sovereign rights or jurisdiction in the first place, i.e. whether the given State asserting sovereign rights or jurisdiction was the coastal State.

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

[334] Of course, wherever a State exercises its jurisdiction as a coastal State, this ultimately derives from its sovereignty over the relevant stretch of land. See e.g. *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain),* Judgment of 16 March 2001 (**Authority 17**), *I.C.J. Rep 2001*, p. 40, at 97, para. 185: "In previous cases the Court has made clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea" *(North Sea Continental Shelf, I.C.J. Reports 1969,* p. 51, para. 96; *Aegean Sea Continental Shelf, I. C. J. Reports 1978,* p. 36, para. 86)." This basic principle provides a further illustration of just how broad the jurisdiction is for which Mauritius contends.

b. Neither the wording of article 297(1), nor any other provision of Part XV, nor indeed any of the substantive provisions of the Convention, suggest that such an agreement was reached (Mauritius' position on article 298(1) is considered further in the context of its second argument, below). Indeed, the dispute settlement provisions of the Convention are inextricably linked to its substantive provisions[335]. They were not intended to establish jurisdiction over long-standing disputes over territorial sovereignty that are in no sense regulated by the Convention's substantive provisions.

4.45 As to the negotiating history of the Convention, the *Virginia Commentary* explains that:

> "The acceptance of many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned upon the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision. There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision. When Ambassador Reynaldo Galindo Pohl (El Salvador) introduced the first general draft on the settlement of disputes at the second session of the Law of the Sea Conference (1974), he immediately highlighted the need for exceptions from obligatory jurisdiction with respect to 'questions directly related to the territorial integrity of States.' Otherwise, a number of States might have been dissuaded from ratifying the Convention or even signing it"[336].

4.46 Those concerns did not disappear in the course of negotiations. For example, the representative of Democratic Kampuchea stated at the plenary meeting of 3 April 1980 that:

> "He strongly supported those delegations which felt that the provisions on delimitation in the future convention must not be allowed to prejudice the legal status quo by engendering claims against sovereignty or other rights in respect of continental or island territory"[337].

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[335] See, e.g., the comments of the representative of Chile, Plenary, 164th session, 1 April 1982, para. 127, at **Annex 44**. See also the comments of the representative of Romania, Plenary, 182nd meeting, 30 April 1982, para. 72, at **Annex 45**.

[336] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, pp.87-88, para. 297.1 (**Authority 85**).

[337] Democratic Kampuchea, Plenary, 128th session, 3 April 1980, para. 35 at **Annex 34**. See also Plenary, 136th session, 26 August 1980, para. 39 at **Annex 39**: "His delegation firmly supported the position of the many delegations which were opposed to the possible use by the parties of the opportunity to make claims on the sovereignty or other rights of a continental or island territory as a cover for political annexation".

4.47 Further, the concerns (*inter alia*) came to be reflected in article 298(1)(a), as to which (by way of example) the Venezuelan delegate stated:

> "It should be clearly understood that the procedure established in article 298, paragraph 1 (a), was not applicable to ... disputes that necessarily involved the consideration of another unsettled dispute concerning sovereignty or other rights over continental or insular land territory"[338].

4.48 Even assuming in Mauritius' favour that article 298(1)(a) was correctly interpreted as implying that, where there is no article 298(1)(a) declaration, a court or tribunal may rule on matters of territorial sovereignty that arise incidentally where there is a maritime delimitation dispute under articles 15, 74 or 83 (see further below), it is inconceivable that States Parties to the Convention would have agreed to the determination of matters of territorial sovereignty that arose in other contexts without an equivalent opt out provision. The absence of any such provision is a very obvious indicator that no "broad" jurisdiction over such matters was intended or established.

4.49 As to the practice of the States Parties to UNCLOS, it is to be noted that there is nothing in the declarations or statements made by States under article 310 to suggest that they understood that Part XV has the jurisdictional scope that Mauritius now contends for.

4.50 Further, it is noted that in the recent Part XV proceedings brought against China, the Philippines asserts that it "does not in this arbitration seek a determination of which party enjoys sovereignty over the islands claimed by both of them"[339]. Thus the Philippines seeks to avoid asking the tribunal in that case to make determinations equivalent to those sought by Mauritius before this Tribunal. However, notwithstanding the formulation of the Philippines' claim, the spokesperson of China's Ministry of Foreign Affairs stated on 26 April 2013:

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[338] See Venezuela, Plenary, 135th session, 25 August 1980, para. 17 at **Annex 38**. See also, e.g., the comments of the representative of (i) the Philippines, Plenary, 31st session, 8 July 1974, para. 54 at Annex 28; (ii) Colombia, Plenary, 60th session, 6 April 1976, para. 18 at **Annex 29;** (iii) Israel, 62nd session, 7th April 1976, para. 51 at **Annex 30**; (iv) Turkey, Plenary, 105th session, 19 May 1978, paras. 97 and 98 at **Annex 31**; (v) Albania, Plenary, 139th session, 27 August 1980, para. 128 at **Annex 40**. See also the statement of Romania dated 2 April 1980, para. 3 at **Annex 33**.

[339] Notification and Statement of Claim, 22 January 2013, para. 7. The arbitral tribunal has now been constituted. It is noted that, like Mauritius, the Philippines is represented in its arbitration by Foley and Hoag LLP, and has nominated Judge Wolfrum as party-appointed arbitrator.

> "The claims for arbitration as raised by the Philippines are essentially concerned with maritime delimitation between the two countries in parts of the South China Sea, and thus inevitably involve the territorial sovereignty over certain relevant islands and reefs. However, such issues of territorial sovereignty are not the ones concerning the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS). Therefore, given the fact that the Sino-Philippine territorial disputes still remain unresolved, the compulsory dispute settlement procedures as contained in UNCLOS should not apply to the claims for arbitration as raised by the Philippines"[340].

4.51 Thus the practice of the States Parties to UNCLOS offers no support to Mauritius, but also shows how the extent of Part XV jurisdiction has always been a matter of great importance and great sensitivity to States. The same applies to issues of territorial sovereignty more generally, which flared up on occasion in the course of the diplomatic conference. For example, on 28 June 1974, Vietnam asserted its sovereign rights over certain islands that it considered to have been "unjustly claimed or illegally occupied by neighbouring countries", to which the Chinese representative responded that:

> "He could not accept what the representative of the Saigon authorities had said in his statement concerning the Hsisha and Nansha islands which, as the Government of the People's Republic of China had on more than one occasion solemnly declared, had always been an inalienable part of Chinese territory. The Chinese Government would not tolerate any infringement on China's territorial integrity and sovereignty by the Saigon authorities"[341].

4.52 Yet, according to Mauritius' case on jurisdiction[342], China and indeed all other States were accepting precisely that such issues of territorial integrity and sovereignty could be decided by a court or tribunal under Part XV wherever a claim could be formulated so as to bring into play one of the numerous substantive provisions of UNCLOS that use the term "coastal State"[343]. Such a result would have been plainly unacceptable, and there was no agreement to the establishment of such jurisdiction.

4.53 Finally, it may be noted that, it is implicit in Mauritius' sovereignty argument that the United Kingdom would not qualify as the coastal State for the purposes of the Convention even by virtue of what Mauritius would presumably view as the *de facto* jurisdiction and control that the United Kingdom has exercised in respect of the BIOT for many decades

[340] See **Annex 134**.
[341] Plenary, 22nd meeting, 28 June 1974, para. 25, emphasis added, at **Annex 25**.
[342] MM, paras. 5.25-5.34.
[343] See arts. 2, 5, 6, 7, 14, 16, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 35, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 69, 70, 71, 73, 75, 76, 77, 78, 79, 81, 82, 84, 85, 98, 111, 116, 122, 142, 161, 208, 210, 211, 218, 220, 228, 231, 234, 245, 246, 247, 252, 253, 254, 275.

(while still contesting sovereignty *de iure*)[344]. It may be that this is a matter that Mauritius will develop in its Reply.

(b) Alleged jurisdiction over "closely linked or ancillary" matters

4.54 The ***second line of argument*** of Mauritius is that a court or tribunal has an unlimited jurisdiction to decide matters "closely linked or ancillary to maritime delimitation and to other issues raised under the Convention"[345]. At the hearing on bifurcation, Mauritius stated its position that:

> "First, this is a mixed dispute. It's a dispute about a Marine Protected Area and its consistency with the Convention. That means that on the ordinary accepted legal meaning of 'dispute arising' or involving interpretation or application of the Convention, this dispute does involve the interpretation or application of UNCLOS. It no doubt involves other things as well, but that's usual with disputes"[346].

4.55 The Tribunal will be well aware of the debate with respect to jurisdiction over mixed disputes, i.e. the debate as to whether a court or tribunal under Part XV of the Convention can decide both maritime boundaries and incidental territorial issues. However, and notwithstanding Mauritius' more forthright reliance on mixed disputes at the hearing on bifurcation, the Tribunal need not enter into the detail of the debate. This is because Mauritius is seeking an unwarranted and unsupported extension of the underlying (if controversial) concept from the discrete area of maritime delimitation so as to apply in respect of any "other issues raised under the Convention"[347].

4.56 In this respect, it is useful to set out in full the statement of Judge Hoffmann, the first sentence of which is cited in isolation at paragraph 5.26 of the Memorial. Judge Hoffman said (referring to the statement of President Wolfrum before the sixty-first session of the General Assembly):

> "The Tribunal, at its Twenty-Second and Twenty-third Sessions, dealt with a number of legal matters that have a bearing on its judicial work. One of the issues considered

[344] Cf., e.g., MM, para. 6.2.
[345] MM, para. 5.26.
[346] Transcript of the hearing of 11 January 2013, p. 138, line 24 – p. 140, line 3 (Crawford).
[347] MM, para. 5.26.

by the Tribunal concerned the competence of the Tribunal on disputes on maritime delimitation. Article 288 of the Convention confers jurisdiction on the Tribunal, as well as the ICJ or an arbitral tribunal, to deal with any dispute concerning the interpretation or application of the Convention. Therefore disputes relating to maritime boundaries are considered disputes concerning the interpretation or application of the Convention.

The Tribunal has noted that its jurisdiction over maritime delimitation disputes also include those which involve issues of land or islands. In his Statement before the 61st Session of the General Assembly, President Wolfrum stated that (and I quote)

> 'This approach is in line with the principle of effectiveness and enables the adjudicative body in question to truly fulfil its function. Maritime boundaries cannot be determined in isolation without reference to territory. Moreover, several provisions of the Convention deal with issues of sovereignty and the inter-relation between land and sea. Accordingly, issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope.' (end of quote)"[348].

4.57 The subject-matter of these comments is maritime delimitation. There is nothing to suggest that a court or tribunal under Part XV enjoys jurisdiction over any issues of sovereignty or other rights over continental or insular land territory, i.e. other than where these are closely linked or ancillary to maritime delimitation.

4.58 Precisely the same applies to the statement of Judge Wolfrum at the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, in New York, on 23 October 2006. He said:

> "It is apparent that maritime boundaries cannot be determined in isolation without reference to territory. Moreover, sea boundaries are associated with issues of sovereignty, such as the determination of entitlements over maritime areas, the treatment of islands, the identification of the relevant basepoints - whether they are located at sea, in river mouths or on terra firma - or the fixing of baselines including archipelagic baselines. Such issues of sovereignty and the inter-relation between land and sea are addressed in several provisions of the Convention, for instance, those concerning internal waters, the territorial sea, baselines, archipelagic States and the continental shelf. The presence of islands is a frequent factor in maritime delimitation and the regime of islands is provided in article 121 of the Convention.
>
> Issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope. This may be

[348] Statement by Judge Hoffman, 46th Session of the A-ALCO, Cape Town, 2-6 July 2007: **Annex 81**.

evidenced by a reading *a contrario* of article 298, paragraph 1(a), namely, in the absence of a declaration under article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal"[349].

4.59 It appears self-evident that this view is predicated on an inter-relationship between land territory and maritime boundaries. That inter-relationship is reinforced through the reference to article 298(1)(a), which establishes an opt out with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles". There is considerable debate as to the strength of that inter-relationship[350], and whether it could extend the scope of matters falling within UNCLOS as Judge Wolfrum suggests (see further below); but there appears to be no underlying suggestion in the above statement to the effect that UNCLOS is intended to establish a roving jurisdiction over issues of territorial sovereignty wherever a State is characterised as a coastal State or otherwise as sovereign over land areas.

4.60 If it were otherwise:

a. Participation in UNCLOS would lead to the potential jurisdiction of a court or tribunal under Part XV in any of the myriad of cases where a coastal State exercises rights under UNCLOS wherever another State Party contested the territorial sovereignty of that State, and without that State being able to make any declaration excluding jurisdiction such as that provided for by article 298(1)(a) with respect to articles 15, 74 and 83.

b. Thus, *wherever* a coastal State purported to exercise rights under e.g. articles 2-3, 19, 21-22, 24-26, 27-28, 30, 33 (and so on, to include not just rights under Part II, but also rights under Parts IV, V or VI of the Convention), a claimant contesting the underlying territorial sovereignty could bring a claim of breach of the relevant article, and (subject always to article 297) require the court or tribunal under Part XV to

[349] R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006: **Annex 78**. See also T. Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?" in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77 (**Authority 104**).
[350] See, e.g., P. Weil, *Perspectives du droit de la délimitation maritime* (Pedone 1988) 99-102 (**Authority 110**).

decide the issue of territorial sovereignty in order to establish whether rights under the Convention had or had not been validly exercised.

c. And, as emphasised above, there would be no opt out available to State Parties such as that provided for in the specific circumstances envisaged by article 298(1)(a).

4.61 Part XV does not establish any such extended - and compulsory - jurisdiction over disputes concerning territorial sovereignty, and Mauritius' case to the contrary is misconceived, contrived and dangerous. Mauritius seeks to portray this case as *sui generis*[351], as it is evidently aware of the potential ramifications of the precedent it seeks to set. However, the reality is that the question of compulsory jurisdiction to arbitrate or adjudicate disputes that raise issues of sovereignty over land territory implicates the interests of all coastal States that are party to the Law of the Sea Convention, including those that have made declarations under article 298(1)(a). No doubt potential claimants in any attempt to bring within Part XV territorial disputes - in relation to, e.g., the Diaoyu/Senkaku islands, the Falkland Islands, South Georgia and the South Sandwich Islands, parts of Antarctica, Dok-do/Takeshima, the Spratlys, Paracels or other features in the South China Sea, Belize, Sabah, Tromelin, the Hala'ib Triangle, Abu Musa, Western Sahara, Mbanie Island, Mayotte, Perejil Island, and so on - would likewise argue that their claims were *sui generis*.

4.62 The simple point is that Mauritius seeks to push the dispute settlement provisions of the Convention beyond the limits intended by the States Parties and, indeed, beyond the limits suggested by commentators in the context of the debate over "mixed disputes". This finds no support in the text of UNCLOS, whether in Part XV or elsewhere.

4.63 Moreover, a correct as opposed to an imaginative application of the provisions of Part XV could be crucial for universal participation in UNCLOS. As noted by Professor Oxman (writing in 2007, in the context of the debate on mixed disputes):

> "In short, there is nothing in the Convention text as such to support the ambitious interpretations that have emerged in some quarters regarding the reach of the Convention's compulsory jurisdiction provisions in general, and those concerning the ITLOS in particular. If anything, there is much to suggest that such ambitions could set off a counter-productive reaction among parties and would-be parties alike - a

[351] See e.g. MM, para. 1.7.

reaction that might prejudice the Convention's dispute settlement system and that might not be limited to the law of the sea. In this respect, there are clear warning signals on the horizon. An increasing number of parties to the Convention that did not originally exercise their right to file declarations under Article 298 of the Convention (excluding certain categories of disputes from compulsory jurisdiction) are now, years later, filing such declarations. China did so just a few months ago. Explanations for such action may vary, but it should not surprise us to learn that one of the explanations may be rooted in improvident speculation regarding the scope of the compulsory dispute settlement obligations under the Convention"[352].

4.64 Insofar as it is appropriate to look further into the general debate over mixed disputes, there are three points to make.

4.65 First, the debate over mixed disputes should be left to be decided as and when (or if) it arises in the maritime delimitation context in which the debate has taken place. As matters stand, the proposition that issues of territorial sovereignty can be decided under Part XV in the context of maritime delimitation is controversial, and it is noted that in *Guyana* v. *Suriname* the Annex VII tribunal expressly did not address this controversy[353].

4.66 Secondly, and if this Tribunal were to consider that it must enter into the controversy, the United Kingdom's position is as follows:

a. The proviso to article 298(1)(a)(i) clarifies that the general exclusion of unsettled territorial sovereignty disputes from compulsory dispute settlement also applies in the context where such a dispute would fall for consideration (not determination) in the context of mandatory conciliation.

b. As a practical matter, Negotiating Group 7 was focussed on the area of delimitation and maritime boundaries and the settlement of disputes thereon, which most obviously brought to the fore issues of territorial sovereignty, and this explains why the point was made explicit in article 298(1)(a). There is no *a contrario* implication to

[352] Bernard H. Oxman, *A Tribute to Louis Sohn – Is the Dispute Settlement System under the Law of the Sea Convention Working?* 39 Geo. Wash. Int'l L. Rev. 655, 657 (2007) (**Authority 88**).
[353] *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits,* Award of 17 September 2007 (2008) 47 ILM 166, at para. 308, where it was stated: "The Tribunal recalls that Suriname argued that it does not have jurisdiction to determine any question relating to the land boundary between the Parties. The Tribunal's findings have no consequence for any land boundary that might exist between the Parties, and therefore, in light of Suriname's statement at the hearing discussed in Chapter IV, this jurisdictional objection does not arise" (**Authority 27**).

be drawn from the fact that there is no equivalent wording in article 297, which was negotiated separately[354].

c. There is also nothing in the (hard fought over) wording of articles 15, 74 and 83 that suggests any intention of States Parties to extend the scope of disputes concerning the interpretation or application of UNCLOS to matters of territorial sovereignty, and there was no such intention[355].

d. Support for the above position is to be found in the works of many commentators, writing contemporaneously with conclusion of the Convention [356] and more recently[357].

4.67 Thirdly, even where it is suggested that there may be jurisdiction over mixed disputes,

[354] In this respect, it is to be borne in mind that there was a great reluctance to make any additional changes to the dispute settlement text apart from those arising from the specific work of the negotiating groups dealing with outstanding issues such as delimitation of maritime boundaries, and that that this reluctance extended to the work of the Drafting Committee, which did not address any matter that any delegation considered to have possible substantive implications. See the Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, 23 August 1980, para. 6, at **Annex 37**.

[355] It is also to be noted that the principles with respect to establishing sovereignty over land in no sense translate directly to sovereignty over maritime areas. See in this respect *Case concerning the Land and Maritime Boundary (Cameroon* v. *Nigeria: Equatorial Guinea intervening),* Judgment, *I.C.J. Reports 2002*, p. 303, at p. 421, para. 238: "Nor does the Court accept Cameroon's contention that the reasoning in the *Frontier Dispute (Burkina Faso/Republic of Mali) (I.C.J. Reports 1986,* p. 554) and the *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (I. C. J. Reports 1994,* p. *6)* in regard to land boundaries is necessarily transposable to those concerning maritime boundaries. These are two distinct areas of the law, to which different factors and considerations apply" (**Authority 19**).

[356] See, e.g., B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session" (1981) 75 AJIL 211, 233 fn. 109 (**Authority 86**); P.C. Irwin, "Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations" (1980) 8 ODIL 105, 114-15, 138-39 (**Authority 73**); K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP 1987) 140 **Authority 76**; L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (1984) 244 (**Authority 100**); L.B. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" (1983) 46 LCP 195 **(Authority 99)**; R.W. Smith, "The Effect of Extended Maritime Jurisdictions", in A.W. Koers and B.H. Oxman, *The 1982 Convention on the Law of the Sea: Proceedings, Law of the Sea Institute* (1984), at 343 (**Authority 96**): "A short answer to the question of what effect the new Law of the Sea Convention has on the resolution of sovereignty disputes would be, 'none'".

[357] See, e.g., R.W. Smith and B.L. Thomas, *Maritime Briefing*, vol. 2(4), "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes" (1998), stating: "With regard to *sovereignty disputes over islands*, it must be made quite clear that the LOS Convention ***does not*** contain any provisions in any of its articles for resolution of disputes over any territory, including islands", (**Authority 97**) (emphasis in original); G.G. Guillaume, *La Cour internationale de Justice à l'aube du XXIème siècle. Le Regard d'un juge* (2003), pp. 300-301 (**Authority 67**); R.R. Churchill, "The Role of the International Court of Justice in Maritime Boundary Delimitation", in A.G.O. Elferink and D.R. Rothwell, *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) p. 136 (**Authority 53**); S. Torres Bernárdez, "Provisional measures and Interventions in Maritime Delimitation Disputes", in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006) (**Authority 103**); Weckel, report on the *Juno Trader* case, 2005 *R.G.D.I.P.* 230: "le Tribunal peut être pénalisé par sa spécialité qui interdit notamment sa saisine au sujet de la possession d'îles" (**Authority 108**).

it is recognised that there must be a limit to that jurisdiction. In this respect, the following potential criteria put forward by Judge Treves are of obvious importance:

> "It may be discussed whether this argument [on the *a contrario sensu* interpretation of article 298(1)(a)] is sufficient to support the view that all "mixed" boundary disputes, involving land sovereignty issues as well as maritime boundaries fall - in lack of a declaration under Article 298, paragraph 1(a) - within compulsory jurisdiction. Whether such jurisdiction can be considered as existing in this case may well depend on the way the case is presented by the plaintiff party, on which aspects are the prevailing ones, and on whether certain aspects can be separated from others, on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention"[358].

4.68 Thus a distinction would be drawn between cases where (i) an issue of territorial sovereignty arises incidentally to, and out of, the central issue of maritime delimitation and (ii) the "prevailing" issue is a dispute over territorial sovereignty, but there is also an issue of maritime delimitation. Jurisdiction might, on a mixed disputes approach, be established in respect of all aspects of (i), but evidently not in respect of the territorial sovereignty issues of (ii). If the mixed disputes analogy were somehow applicable in the current case (and it is not), the obvious answer would be that, as outlined in **Section A** above, the current dispute falls clearly into the second of these two categories: it has as its principal object the question of territorial sovereignty over the BIOT. It is that issue which has for over three decades been highlighted by Mauritius in its relations with the United Kingdom, and which Mauritius has repeatedly sought to bring by way of a claim before other fora; it is that issue alone that Mauritius raised in exchanges prior to the commencement of the present proceedings that it now relies on for the purposes of article 283. That territorial sovereignty issue cannot somehow now become "ancillary" to a series of UNCLOS-framed claims in respect of alleged fishing rights and a failure to consult.

(c) Reliance on article 293(1) UNCLOS

4.69 With respect to Mauritius' ***third line of argument***, which is dependent on a mis-application of article 293(1) UNCLOS, the United Kingdom refers to **Section B** above.

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

Article 293(1) cannot be used to expand jurisdiction established by articles 286 and 288(1). As follows from **Section B**, whether non-UNCLOS rules of international law are to be taken into account and applied within the framework of UNCLOS will hinge on the terms of the provisions of UNCLOS which form the basis of the case in issue. None of the provisions on which Mauritius relies (articles 2(1), 55, 76 and/or 77 and/or 81) contains a *renvoi* to the principles on which Mauritius' case on the territorial sovereignty issue depends, and likewise there is no basis for asserting jurisdiction over the alleged undertakings on which it relies. There is no other permitted basis for asserting jurisdiction over and applying such principles/the alleged binding undertakings.

4.70 The term "coastal State" is used in specific articles of UNCLOS to address the jurisdiction, rights and duties of certain States in particular contexts. However, nowhere in the Convention is there any suggestion that the mere reference to the term "coastal State" in a disputed context would establish jurisdiction on the part of a court or tribunal under article 288(1) to rule on whether the State has the underlying territorial sovereignty or other territorial rights with respect to the relevant coast.

D. Conclusion

4.71 As indicated above, it is for the Tribunal to identify the real issues in dispute. The real issue in dispute in this case is Mauritius' long-standing claim to sovereignty over the British Indian Ocean Territory. That is not a dispute "concerning the interpretation or application of this Convention", as is required by article 288(1) of UNCLOS.

4.72 Mauritius' attempts to transform the real issue in dispute into a dispute under the provisions of UNCLOS are unsustainable. Further, article 293(1), on applicable law, cannot be invoked to expand the jurisdiction under article 288(1) of a Part XV court or tribunal.

4.73 To borrow the words of Judge Koroma in the *Georgia* v. *Russia* case before the International Court of Justice: "a link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before

the Court"[359]. In the instant case, Mauritius is indeed seeking to use Part XV of UNCLOS as a vehicle for forcing the sovereignty dispute over the BIOT before this Tribunal.

4.74 The Tribunal should not countenance that inappropriate attempt. The compulsory dispute settlement provisions in Part XV of UNCLOS were never intended to extend to issues of sovereignty over land territory, as is asserted by Mauritius in this case. Any purported expansion of their scope to cover such issues would have serious consequences for the future of UNCLOS.

4.75 In the United Kingdom's submission, all of the claims in Mauritius' Notification and Statement of Claim concern or stem from Mauritius' claim to sovereignty over BIOT, which is the real issue in dispute. For the reasons given in the present Chapter, the Tribunal therefore has no jurisdiction over the dispute submitted by Mauritius (i.e., all the claims as formulated in the Statement of Claim and Memorial). In the alternative, the Tribunal has no jurisdiction over Mauritius's claims to sovereignty made by reference to articles 2(1), 55, 76 and/or 77 and/or 81 of UNCLOS, and also lacks jurisdiction for the reasons (and to the extent) as set out in **Chapters V and VI** below.

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

CHAPTER V

THE TRIBUNAL HAS NO JURISDICTION BECAUSE THE REQUIREMENTS OF ARTICLE 283 HAVE NOT BEEN MET

A. Introduction

5.1 Mauritius' sovereignty claims fall outside the scope of UNCLOS and the Tribunal's jurisdiction, as explained in **Chapter IV**[360]. But even if the Tribunal were to surmount this hurdle, it would be without jurisdiction because the requirements of article 283 have not been met, either in respect of these claims or in respect of Mauritius' 'non-sovereignty claims'.[361] The same underlying point applies with respect to article 279, which requires the parties to a dispute under UNCLOS to seek a solution by the means indicated in Article 33 of the UN Charter. It is clear that, prior to commencing the present proceedings, Mauritius made no effort whatsoever to seek a solution to the UNCLOS disputes that are the subject of its Notification by any of these means. It follows that the Tribunal lacks jurisdiction: the application of compulsory procedures entailing binding decisions under section 2 of Part XV is predicated on prior recourse to settlement under section 1 (see article 286).

5.2 The Tribunal has no jurisdiction under UNCLOS unless, first, there is a "dispute" between the parties concerning the interpretation or application of UNCLOS (articles 283 and 286) and, second, the parties have proceeded "expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" (article 283(1)).

5.3 The United Kingdom's case under article 283 is that Mauritius cannot demonstrate

[360] Mauritius Written Observations dated 21 November 2012 contended that the United Kingdom "implicitly concedes that there has been the necessary exchange of views" in respect of the "claim that the United Kingdom is not entitled to establish the 'MPA' because it is not 'the coastal State'": Mauritius' Written Observations, para 61, Skeleton Argument, para 15. This contention is unfounded. As explained by the United Kingdom in its Reply dated 21 December 2012 and oral submissions in the hearing on bifurcation (Transcript, p. 54), its reasoning is that article 283 does not come into play unless the dispute in question concerns the interpretation or application of the Convention and Mauritius' sovereignty claims do not. At the risk of stating the obvious, article 283 is irrelevant to claims which fall outside UNCLOS and, *a fortiori*, the Tribunal's jurisdiction under Part XV.

[361] Mauritius has characterised its case as falling into two parts in its Memorial, at para. 1.3 and again at para. 5.2, which can conveniently be referred to as its 'sovereignty claims' and 'non-sovereignty claims' respectively.

that either the 'sovereignty' or the 'non-sovereignty' claims that concern the interpretation or application of UNCLOS on which its case now turns existed at the date of its Notification and Statement of Claim on 20 December 2010, for the simple reason that Mauritius never raised these disputes with the United Kingdom before that date. It follows that Mauritius cannot demonstrate that it has met the requirement under article 283(1) to exchange views regarding the settlement of a dispute prior to commencing the present proceedings.

5.4 The structure of this Chapter is as follows: **Section B** covers the requirements of article 283(1) and relevant case law. **Section C** applies article 283(1) to the facts of this case, considering first the communications between 5 March 2009 and 2 April 2010 on which Mauritius relies in its Memorial, and then the communications relied on by Mauritius in its post-Memorial submissions[362]. The United Kingdom then turns to Mauritius' argument that communications would have been futile.

B. Article 283(1)

5.5 Article 283 is entitled 'Obligation to exchange views'. Article 283, paragraph 1 reads as follows:

> "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means"[363].

5.6 Article 283(1) means what it says: it applies where "a dispute arises between States Parties concerning the interpretation or application of this Convention"[364], and requires that the parties to the dispute have proceeded expeditiously "to an exchange of views regarding its settlement by negotiation or other peaceful means".

[362] In its Written Observations and Skeleton Argument for, and oral pleadings in, the bifurcation hearing on 11 January 2013.

[363] Paragraph (2) of article 283, which applies where a settlement procedure has been terminated, is not relevant to the present proceedings.

[364] As confirmed in the jurisprudence under UNCLOS, e.g., *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 36 (**Authority 21**); *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, Separate Opinion of Judge Nelson, para. 5 (speaking generally of the steps that must be taken before the mandatory procedures in Part XV, section 2, can be utilised) (**Authority 18**).

5.7 Although the jurisprudence directly on article 283 is to some degree limited[365], there has recently been very full consideration of equivalent provisions in the jurisprudence of the International Court of Justice, which has emphasised the importance of requirements as to the existence of a dispute and prior negotiations. In *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal)*[366], the Court concluded that it had no jurisdiction over Belgium's claim of a breach of customary international law because, in light of the diplomatic exchanges between the parties, no such dispute existed on the date of the application:

> "54…The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention Against Torture. It is noteworthy that even in a Note Verbale handed over to Senegal on 16 November 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to 'the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the Convention Against Torture', without mentioning the prosecution or extradition in respect of other crimes… Under these circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr Habré under customary international law…"[367]

The Court concluded that, at the time of filing of the Application, the dispute between the Parties did not relate to breaches of the obligation under customary international law, and that it thus had no jurisdiction to decide on Belgium's claims related thereto".

5.8 It is not necessary that a State refer to a specific treaty in its exchanges with the other State in order to enable it later to invoke that instrument before the given court or tribunal, but

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[365] The requirement of compliance with art 283 where there has been no prior exhaustion of negotiations appears from *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)("SBT")*, Decision of Annex VII Arbitral Tribunal, 4 August 2000, RIAA, Vol. XXIII, p. 1, paras. 55-58 (**Authority 16**), *Mox Plant Case (Ireland* v. *United Kingdom) (Provisional Measures)("Mox Plant")* 3 December 2001, 126 ILR 259, p. 279, para. 5 (**Authority 18**), and *Case Concerning Land Reclamation By Singapore in and around the Straits of Johor (Malaysia* v. *Singapore) (Request for Provisional Measures)("Land Reclamation")*, 8 October 2003, 126 ILR 48, paras. 36-38 (**Authority 21**). There was some consideration of article 283 in *Barbados* v. *Trinidad & Tobago* 11 April 2006, XXVII RIAA 149, and *Guyana v Suriname*, Award of 17 September 2007, although both these cases concerned disputes over maritime delimitation and, in relation to both, there had been extensive negotiations relating to maritime delimitation. In such circumstances, the tribunals found that there was no need for a further exchange of views. The cases are thus obviously distinguishable from the current case.

[366] Judgment, 20 July 2012.

[367] See also para. 46, summarising the ICJ's jurisprudence on the existence of a dispute.

> "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice"[368].

5.9 In considering the condition under article 30(1) of the Convention Against Torture that "the dispute cannot be settled through negotiation"[369] in *Belgium* v. *Senegal*, the Court said:

> "57. … the Court must begin by ascertaining whether there was, "at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" *(Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections,* Judgment of 1 April 2011, para. 157). According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (*ibid.,* para. 159). The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)".

5.10 As the following passage illustrates, the Court concluded that the obligation had been met because there had been "several exchanges and various meetings" and Belgium expressly stated that it was acting under the Convention Against Torture:

> "58. Several exchanges of correspondence and various meetings were held between the Parties concerning the case of Mr. Habré, when Belgium insisted on Senegal's compliance with the obligation to judge or extradite him. Belgium expressly stated that it was acting within the framework of the negotiating process under article 30 of the Convention against Torture in Notes Verbales addressed to Senegal on 11 January

[368] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011, para. 30 (**Authority 37**). See also *Arbitration between Barbados and the Republic of Trinidad & Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them* 11 April 2006, XXVII *RIAA* 149, para. 198 (**Authority 24**).

[369] Article 30(1) of the Convention against Torture reads: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

> 2006, 9 March 2006, 4 May 2006 and 20 June 2006 (see paragraphs 25-26 above). The same approach results from a report sent by the Belgian Ambassador in Dakar on 21 June 2006 concerning a meeting with the Secretary-General of the Ministry of Foreign Affairs of Senegal (see paragraph 26 above). Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations".

5.11 Article 283(1) is an important precondition for the Tribunal's jurisdiction. As explained by Judge Nelson in his Separate Opinion in *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*:

> "2. The whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention. That was the intent of the drafters of the Convention…
>
> 3. It is in this context that article 282… should be read…
>
> 4. This provision, in my view, constitutes a hurdle which ought to be crossed before the procedures in section 2 of Part XV can be invoked"[370].

Although the *MOX Plant (Provisional Measures)* decision concerned article 282, Judge Nelson's comments apply equally to article 283(1).

5.12 The importance of provisions such as article 283 in compromissory clauses was affirmed by the International Court of Justice in *Georgia* v. *Russia* in the following terms:

> "131. … it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that 'before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 15).
>
> In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.
>
> In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by

[370] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95 (**Authority 18**).

States. The Court referred to this aspect reflecting the fundamental principle of consent in the Armed Activities case in the following terms:

> '[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*.' (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 39, para. 88; emphasis added.)'"[371].

Each of these three factors applies with equal force so far as concerns article 283(1) UNCLOS.

C. The application of Article 283(1) in this case

(i) Mauritius' claims in its Memorial

5.13 Mauritius' case is summarised in paragraph 1.3 and repeated in paragraph 5.2 of its Memorial. It has characterised its claims as falling into two parts, referred to in this Counter-Memorial as Mauritius 'sovereignty claims' and 'non-sovereignty' claims respectively:

> "(i) The UK does not have sovereignty over the Chagos Archipelago, is not "the coastal State" for the purposes of the Convention, and cannot declare an "MPA" or other maritime zones in this area. Further, the UK has acknowledged the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago, such that the UK may not impose the purported "MPA", or establish any maritime zones over the objections of Mauritius; and
>
> (ii) Independently of the question of sovereignty, the "MPA" is fundamentally incompatible with the rights and obligations provided for by the Convention. This means that, even if the UK were entitled in principle to exercise the rights of a coastal State, *quod non*, the purported establishment of the "MPA" is unlawful under the Convention".

5.14 Mauritius' 'sovereignty claims' are particularised in paragraphs 5.23(i), (iii) and (xi) of the Memorial. As appears from paragraph 5.25 of the Memorial, the claims each turn on whether the United Kingdom is 'the' or 'a' 'coastal State' in respect of the BIOT for the

[371] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) (Preliminary Objections)*, Judgment, 1 April 2011 (**Authority 37**).

purposes of Convention articles 2(1) (territorial sea), 55 (exclusive economic zone) and 76, 77 and 81 (continental shelf), and this corresponds to paragraph (1) of the relief sought by Mauritius[372].

5.15 The particulars of Mauritius' 'non-sovereignty claims' are to be found at paragraph 5.35 of the Memorial[373]. It is necessary to summarise these particulars in some detail, to show that not one of these points was raised by Mauritius with the United Kingdom prior to the submission of its Notification and Statement of Claim to the Tribunal on 20 December 2010.

5.16 Mauritius claims that the United Kingdom has failed to comply with the following provisions of UNCLOS:

(i) the provision in article 2(3) that "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law", by failing to have due regard to Mauritius' fishing and related rights and mineral rights in the territorial sea[374] (which are such "other rules of international law")[375];

(ii) the provision in article 55 that the "rights and jurisdiction of the coastal State … are governed by the specific legal regime in this Part" and the requirement in article 56(2) that, in "exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have regard to the rights and duties of other States and shall act in a manner compatible with this Convention", because the United Kingdom "has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are

[372] Which submits that "(1) The United Kingdom is not entitled to declare an 'MPA' or other maritime zones because it is not the 'coastal State'", covered in Chapter 6, section I of the Memorial.
[373] MM, para. 5.23 lists 13 "elements of the dispute" in the order in which they are to be found in UNCLOS, i.e., all the provisions of UNCLOS that relate to the 'sovereignty claims' (MM, para. 5.2(i), set out in detail in Chapter 6) and the 'non-sovereignty claims' (para. 5.2(ii), set out in detail in Chapter 7). MM, para. 5.35 particularises the 10 "elements of the dispute" that fall within the 'non-sovereignty claim' and Chapter 7, and largely repeats the list in para. 5.23, except for the references to article 2(1) (para. 5.23(i)), the article 55 dispute over "whether the UK is "the coastal State" having rights and jurisdiction in "an area beyond and adjacent to the territorial sea" (para. 5.23(iii)) and articles 76, 77 and 81 (para. 5.23(xi)).
[374] Mauritius uses the catch-all phrase "certain specific rights" in para. 5.3 to describe the alleged "fisheries rights, rights in mineral resources, and rights in relation to the continental shelf", which expands on para 5.2(ii). See also MM, Chapter 6, section II.
[375] MM, para. 5.35(i). Thus there is some overlap between the two parts of Mauritius' claims, insofar as the 1965 understandings give rise to the aspect of Mauritius' 'sovereignty claim' set out in the third sentence of paragraph 5.2(i) and are also the basis of the 'non-sovereignty claim' in 5.2(ii) in respect of the alleged "certain specific rights" in fisheries, minerals and in relation to the continental shelf.

applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention" (although Mauritius does not specify what these "specified rules and standards" are)[376];

(iii) the requirement in article 56(2) that, in "exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have regard to the rights and duties of other States", by failing to have "due regard to the rights" of Mauritius in respect of non-living resources in the part of the MPA that is beyond the territorial sea of the BIOT[377];

(iv) the requirement in article 62(5) to "give due notice of conservation and management laws and regulations"[378];

(v) the obligation in article 63(1) to "seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development" of straddling stocks of tuna, by failing to deal directly with Mauritius or the Indian Ocean Tuna Commission ('IOTC')[379];

(vi) the obligation in article 63(2) to "seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of [straddling] stocks in the adjacent area" to the MPA, by failing to deal directly with Mauritius or the IOTC[380];

(vii) the obligation in article 64(1) to "cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of [highly migratory] species throughout the region,

[376] MM, para. 5.35(ii).
[377] MM, para. 5.35(iii).
[378] MM, para. 5.35(iv).
[379] MM, para. 5.35(v).
[380] MM, para. 5.35(vi).

both within and beyond the exclusive economic zones", by failing to cooperate with Mauritius or with other States or appropriate international organisations[381];

(viii) the obligation in article 7 of the 1995 United Nations Fish Stocks Agreement to "make every effort to agree on compatible conservation and management measures within a reasonable time"[382] by promulgating the MPA without consulting directly with Mauritius beforehand;

(ix) the obligation in article 194(1) to "endeavour to harmonize" its policies in connection with measures "necessary to prevent, reduce or control pollution of the marine environment from any source", by not harmonising its policy with Mauritius or other States in the region[383];

(x) article 300, by exercising its rights in a manner which constitutes an abuse of rights[384].

5.17 What is immediately apparent from this list is that, for the most part, it concerns alleged breaches of obligations of communication and cooperation that appear particularly apt for early identification and attempt at settlement. In its Memorial, Mauritius raises issues under the Convention that might well have been addressed had Mauritius actually sought, as required by article 283(1), to explain its views as to how articles 55, 56(2), 62(5), 63(1), 63(2), 64(1) and 194(1) of the Convention would be or were being breached by either the consideration of the proposal for an MPA or the MPA itself.

5.18 Conscious that it had to meet the jurisdictional requirements of article 283(1)[385], Mauritius relied in its Memorial on diplomatic correspondence and exchanges in 2009 and 2010 as evidence of "a full exchange of views between Mauritius and the United Kingdom

[381] MM, para. 5.35(vii).
[382] MM, para. 5.35(viii), referring to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995 ('UNFS Agreement'): MM, para. 5.2(ii), as elaborated in para. 5.35, and Chapter 7 of its Memorial. It should be noted that the Tribunal is not a court or tribunal to which a dispute has been submitted under Part VIII of the UNFS Agreement.
[383] MM, para. 5.35(ix).
[384] MM, para. 5.35(x).
[385] See MM, paras. 5.38-5.40.

concerning the dispute in regard to the "MPA" and related matters"[386]. This focus on 2009-2010 is entirely as would be expected, given that - as explained in **Chapter III** above - the MPA proposal had not even been conceived of by the United Kingdom prior to the approach by Pew and the Chagos Conservation Network in 2008, the policy decision to pursue an MPA proposal was not made until 5 May 2009, and the MPA itself was not established until 1 April 2010. Indeed, the opening words of Mauritius' Memorial state that "This claim arises out of the United Kingdom's decision, in April 2010, to declare a 'Marine Protected Area'… around the Chagos Archipelago"[387]. The United Kingdom responded accordingly in Chapter IV of its Preliminary Objections.

(ii) Mauritius' post-Memorial assertions concerning the requirements of article 283

5.19 Mauritius subsequently contended in its Written Observations of 21 November 2012 that "As Mauritius' Memorial makes clear, the subject matter of the dispute - including historic fishing rights; right to an EEZ and extended continental shelf; and the right to be consulted - has been raised regularly by Mauritius over several decades, in bilateral and multilateral contexts, intertwined with the continuous assertion of its sovereignty over the Chagos Archipelago"[388]. It also adduced additional evidence of communications between 2 April 2010 and 20 December 2010, as will be described below[389]. Then, in its oral pleadings at the bifurcation hearing, Mauritius relied on "45 years" of complaints as meeting its obligations under article 283[390]. It also claimed that

> "Mauritius protested the establishment of each of these various zones [by which it referred to the Fisheries (Conservation and Management) Zone (FCMZ), Environment (Protection and Preservation) Zone (EPPZ) and MPA], not least because of its historic fishing rights as recognized in the 1965 undertakings. And these protests expressly raised historic fishing rights and the absence of consultation".

Mauritius' arguments with respect to article 283 thus present something of a moving target.

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[386] MM, para. 5.38.
[387] MM, para. 1.1
[388] Mauritius' Written Observations, para 66. The point is repeated in Mauritius' Skeleton Argument at para. 17.
[389] Paras. 5.40-5.42.
[390] Transcript, pp. 98-99, and again at p. 102.

(iii) Overview of the United Kingdom's position

5.20 The United Kingdom's response is one of fact and law. Starting with fact: Mauritius' contentions are, quite simply, not borne out by the evidence, as will be shown below[391]. It is not denied that Mauritius has made claims to sovereignty over the BIOT since the early 1980s[392] and protested, *inter alia*, the establishment of the Fisheries (Conservation and Management) Zone ('FCMZ') in 1991 and the Environment (Preservation and Protection) Zone ('EPPZ') in 2003, but Mauritius' argument misrepresents the content and evidentiary value of its protests. The simple point is that Mauritius never raised its sovereignty claim as a breach of UNCLOS: that is, its dispute over sovereignty was never formulated (albeit it would have been artificially) as being that it was Mauritius and not the United Kingdom that was the "coastal State" for the purposes of UNCLOS. The non-sovereignty claims were never raised at all.

5.21 There are in addition two short points of law: first, at least as regards protests against BIOT's establishment of the Fisheries (Conservation and Management) Zone, UNCLOS was not in force between Mauritius and the United Kingdom and so any such protest could not constitute the raising of a dispute for the purpose of article 283 with a view to an exchange of views thereunder[393]. Any claim by Mauritius could not have given rise to a dispute with respect to the interpretation or application of UNCLOS, the only kind of dispute over which the Tribunal has jurisdiction[394].

5.22 Second, the scope of a tribunal's jurisdiction under UNCLOS, Part XV is confined or limited to the actual dispute raised by a party under article 283 in an exchange of views. Even if the Tribunal had jurisdiction over Mauritius' sovereignty dispute (which the United

[391] See paras. 5.25-5.42.
[392] See paras. 2.81-2.88 above.
[393] As pointed out by the United Kingdom at the bifurcation hearing: Transcript, pp. 125-126.
[394] See the finding of the International Court of Justice in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) (Preliminary Objections)*, Judgment, 1 April 2011, para. 64, where the Court dismissed a similar claim by Georgia that documents predating the entry into force of the International Convention on the Elimination of All Forms of Racial Discrimination (1966) (CERD) between the parties could meet the requirements of Article 22. Article 22 of CERD provides that "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement" (**Authority 37**).

Kingdom denies), the existence of that dispute and an exchange of views thereon could not suffice to give the Tribunal jurisdiction over other, distinct disputes that were not raised and subjected to an exchange of views as required under article 283(1).

(iv) The communications relied upon by Mauritius do not come close to meeting the requirements of article 283(1)

5.23 The evidence on which Mauritius relies in its Memorial shows that Mauritius did not assert at any point in its communications with the United Kingdom that the MPA was unlawful because it was incompatible with the terms of UNCLOS ('the non-sovereignty claims') or because Mauritius and not the United Kingdom was the "coastal State" within the meaning of the relevant provisions of UNCLOS or that it had rights as the "coastal State" because of its special position in relation to BIOT ('the sovereignty claims'). Rather, Mauritius' communications focused exclusively on its general claim to territorial sovereignty over the BIOT.

5.24 So far as concerns the documents in the period 2009-2010, UNCLOS is not once referred to; nor is the term "coastal State"; nor, indeed, is the law of the sea. Mauritius has not established that it raised a dispute under UNCLOS, let alone that there was any exchange of views.

(a) Communications between 5 March 2009 and the establishment of the MPA on 1 April 2010

5.25 It is (regrettably) necessary that each of the documents relied on by Mauritius in its Memorial as establishing the existence of a dispute be dealt with in turn[395].

[395] The approach of the International Court of Justice in *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections*, 1 April 2011, is instructive. The Court said it needed "to determine (1) whether the record shows a disagreement on a point of law or fact between the two States; (2) whether that disagreement is with respect to "the interpretation or application" of CERD, as required by Article 22 of CERD; and (3) whether that disagreement existed as of the date of the Application. To that effect, it needs to determine whether Georgia made such a claim and whether the Russian Federation positively opposed it with the result that there is a dispute between them in terms of Article 22 of CERD" (para. 31). The larger part of the Court's judgment then consists of its methodical analysis of each of the official statements and documents submitted by Georgia as evidence that it raised a dispute under CERD and engaged in negotiations (**Authority 37**).

5.26 The Note Verbale of 5 March 2009 sent by the Mauritian Ministry of Foreign Affairs, Regional Integration and International Trade to the United Kingdom, in response to the press article on the proposed MPA published in *The Independent* on 2 February 2009, was phrased as follows:

> "… both under Mauritian law and international law, the Chagos Archipelago is under the sovereignty of Mauritius and the denial of enjoyment of sovereignty to Mauritius is a clear breach of United Nations General Assembly Resolutions and international law. The creation of any Marine Park in the Chagos Archipelago will therefore require, on the part of all parties that have genuine respect for international law, the consent of Mauritius"[396].

5.27 Similarly, in its second Note Verbale concerning the MPA, dated 10 April 2009, Mauritius said that it:

> "wishes to reiterate that it has no doubt of its sovereignty over the Chagos Archipelago and does not recognize the existence of the so-called British Indian Ocean Territory…
>
> … whilst also supportive of domestic and international initiatives for environmental protection, would like to stress that any party initiating proposals for promoting the protection of the marine and ecological environment of the Chagos Archipelago, should solicit and obtain the consent of the Government of Mauritius prior to implementing such proposals.
>
> …the Government of United Kingdom has an obligation under international law to return the Chagos Archipelago in its pristine state to enable Mauritius to exercise and enjoy effectively its sovereignty…"[397]

5.28 A general reference to United Nations General Assembly resolutions and international law in complaints which turn on a claim of territorial sovereignty cannot be read as raising a dispute as to whether the MPA as such breaches the obligations of the United Kingdom or the rights of Mauritius as States Parties to UNCLOS.

5.29 Nor did Mauritius refer to UNCLOS, or invoke the term "coastal State" in subsequent discussions and communications with the United Kingdom. It did not raise any question of the compatibility of the MPA with UNCLOS or any one of the provisions of UNCLOS (as listed in paragraph 5.16 above) on which its claims now rest. Nor did Mauritius say that its

[396] See MM para. 4.40, MM, annex 139.
[397] MM, annex 142.

alleged "certain specific rights" in minerals, fisheries or the continental shelf were breached by the MPA[398], or constituted rights which UNCLOS required the United Kingdom to have regard to when declaring an MPA. More specifically:

a. The joint communiqué issued at the end of the second round of bilateral talks on 21 July 2009 on the Chagos Archipelago/BIOT records that, in response to the proposal of the British delegation that "consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region",

> "The Mauritian side welcomed, in principle, the proposal for environmental protection and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with a view to informing the next round of talks. The UK delegation made it clear that any proposal for the establishment of the marine protected area would be without prejudice to the outcome of the proceedings at the European Court of Human Rights.
>
> The Mauritian side reiterated the proposal it made in the first round of the talks for the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago/British Indian Ocean Territory. The UK delegation agreed to examine this proposal and stated that such examination would also include consideration of the implications of the proposed marine protected area" [399].

There is nothing in the joint communiqué that indicates that Mauritius questioned the lawfulness of the proposed MPA under UNCLOS. The fact that Mauritius welcomed the proposal in principle reinforces the conclusion that no such question was raised. Nor, as explained in **Chapter III** did any of the Mauritian officials involved in the three meetings which took place on 21 July 2009 raise the question of the compatibility of the proposed MPA with UNCLOS or Mauritius alleged "certain specific rights" or the practice of issuing fishing licences to Mauritian-flagged vessels free of charge. If Mauritius held the view that the MPA proposal, which included the possibility of a complete no-take marine reserve, interfered with rights under UNCLOS (or the 1965 understandings), its failure to raise these points on 21 July 2009 is extraordinary.

[398] A claim which would, in any event, be outside the jurisdiction of this Tribunal for the reasons set out in **Chapter VI** below.
[399] MM, annex 148.

b. Mauritius' Note Verbale dated 10 November 2009 asking the Foreign and Commonwealth Office to amend the Consultation Document raised no question about the legality of the MPA under UNCLOS or Mauritius' alleged "certain specific rights", and made no reference to the "coastal State"[400].

c. Mauritius' Note Verbale dated 23 November 2009, after the public consultation was launched, said:

> "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 manner 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, or progress in the talks on, the sovereignty issue.
>
> The stand of the Government of Mauritius is that the existing framework for talks on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the consultation launched by the British Government on the proposed MPA"[401].

The text speaks for itself. UNCLOS was not mentioned and no question was raised of the MPA's unlawfulness under the provisions of UNCLOS or the United Kingdom not being the "coastal State".

d. Nor did Mauritius make any complaint that the MPA breached the Convention in its statement of 4 December 2009 to the Scientific Committee of the Indian Ocean Tuna Commission. The focus was, once again, exclusively on sovereignty:

> "The establishment of a Marine Protected Area in the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago. A Marine Protected Area project in the Chagos Archipelago should address the issues of resettlement (Chagossians), access to the resources and the economic development of the islands in a manner which would not prejudice the effective exercise by Mauritius of its sovereignty over the Archipelago. A total ban on fisheries exploitation and omission of those

[400] MM, annex 151; see also MM, annex 153.
[401] MM, annex 155.

> issues from any Marine Protected Area project would not be compatible with the resolution of the sovereignty issue and progress in the ongoing talks."[402]

e. Nor did Mauritius raise the question of whether the proposed MPA would comply with UNCLOS in the letter of 30 December 2009 from its Minister of Foreign Affairs, Regional Integration and International Trade to the United Kingdom's Foreign and Commonwealth Office. Instead, Mauritius reiterated its claim to sovereignty, and refused to discuss the MPA at all unless its claim of sovereignty was included in any discussion:

> "On the substance of the proposal… the Government of Mauritius considers that the establishment of a Marine Protected Area around the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago…
>
> Moreover, the issues of resettlement in the Chagos Archipelago, access to the fisheries resources and the economic development of the islands in a manner that would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos Archipelago are matters of high priority to the Government of Mauritius. The exclusion of such important issues in any discussion relating to the proposed establishment of a Marine Protected Area would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago and progress in the ongoing talks between Mauritius and the United Kingdom"[403].

f. Nor were any of the current claims raised in the Note Verbale sent by Mauritius to the Foreign and Commonwealth Office on 30 December 2009[404]. The same applies to the letter from the Mauritian Secretary to Cabinet and Head of the Civil Service to the British High Commissioner, Port Louis, dated 19 February 2010. Instead, and consistently with the familiar pattern of Mauritian communications, this letter said that "any proposal for the protection of the marine environment … needs to be compatible with and meaningfully take on board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issue of resettlement and access by Mauritians to fisheries resources in that area"[405]. The Mauritian High Commissioner in London did not raise any allegation that the MPA was in breach of the Convention in his written evidence submitted to the House of Commons Select

[402] MM, para. 4.65 and fn. 350.
[403] MM, annex 157.
[404] MM, annex 158.
[405] MM, annex 162.

Committee on Foreign Affairs[406].

5.30 A number of bilateral meetings and telephone calls, not recorded or referred to in notes verbales or joint communiqués, took place between officials of Mauritius and the United Kingdom during the period 21 July 2009 to 23 November 2009 (on which latter date Mauritius asserted formally in writing for the first time, that it was inappropriate for consultation to take place outside the bilateral framework)[407]. In none of these meetings did Mauritius raise any dispute as regards the proposed MPA as such or concerning UNCLOS or the 1965 understandings. To the contrary, in the meeting between the British High Commissioner and the Mauritian Foreign Minister on 20 November 2009, the Minister agreed there was "plenty of scope to work together"[408].

5.31 Subsequent to its Memorial, Mauritius claimed in paragraph 52 of its Written Observations that "Mauritius *raised detailed and specific claims* that the "MPA" is incompatible with the Convention, including by reason of the fact that its 'no-take' regime *unilaterally terminates the fishing rights recognised as belonging to Mauritius by the UK in the 1965 undertakings* and repeatedly affirmed ever since" (emphasis added). It made the same claim again in paragraph 64 of its Written Observations[409]. The claim is, however, unfounded. Mauritius does not in paragraph 52 refer to any evidence to support its assertion; paragraph 64 refers to only two documents, Mauritius' Note Verbale of 23 November 2009 and the letter of 19 February 2010[410]. Notably, neither document refers to the 1965 understandings, 'historic fishing rights' or the BIOT practice of issuing commercial fishing

[406] MM, annex 160.
[407] These included: meetings between the United Kingdom's High Commissioner in Port Louis and the Mauritian Foreign Minister on 15 September 2009, 1 October 2009, and 12 October 2009; a meeting on 13 October 2009 between the Mauritian High Commissioner in London and the Director of the FCO's Overseas Territories Directorate.; a meeting on 22 October 2009 between the High Commissioner and Prime Minister Ramgoolam; a meeting on 23 October 2009 between the High Commissioner and the Prime Minister's Chief of Staff; a meeting on 10 November (the day of the scheduled launch of the public consultation) between the High Commissioner and the Mauritian Foreign Minister; a meeting on 10 November 2009 between the High Commissioner and the Cabinet Secretary; a telephone call between the Foreign Secretary, David Miliband and Prime Minister Ramgoolam on 10 November; and a meeting on 20 November 2009 between the High Commissioner and the Mauritian Foreign Minister, described in **Chapter II** above at paras. 3.50-3.51 and 3.62-3.63.
[408] **Annex 110**.
[409] In paragraph 64 of its Written Observations, Mauritius says that Chapter 4 of its Memorial and the annexed documentation "show how Mauritius repeatedly protested against the extension of such zones, including on the basis of Mauritius' historic fishing rights".
[410] MM, annexes 155 and 162.

licences to Mauritian-flagged vessels free of charge[411].

5.32 As regards Mauritius' alleged rights in respect of non-living resources, apart from one brief reference in the written submissions of the High Commissioner of Mauritius, London, to the United Kingdom's House of Commons Select Committee on Foreign Affairs[412], no reference was ever made to Mauritius' alleged rights to non-living resources. Even then, all that was said was that "the establishment of any MPA … should also address the benefits that Mauritius should derive from any mineral or oil that may be discovered … (as per the undertaking given in 1965)"[413]. Even if submitting written evidence to the House of Commons Foreign Affairs Committee was in principle sufficient to establish a dispute for the purposes of Part XV of the Convention (which it is not[414]), the High Commissioner's written evidence would not have done so: there is no reference to UNCLOS, nor any suggestion that that the MPA would breach UNCLOS.

(b) Correspondence pre-dating Mauritius' Note Verbale of 5 March 2009

5.33 To the extent that correspondence pre-dating any communication between the United Kingdom and Mauritius over the MPA proposal could somehow be relevant to establishing the article 283(1) requirements in the current case[415], they do not as a matter of fact advance Mauritius' contention that it has met the requirements of article 283.

5.34 Following Mauritius' Written Observations, Skeleton Argument, and oral pleadings at

[411] Both documents make reference to 'access to fisheries resources', but in the context of sovereignty and resettlement of 'Mauritians', not UNCLOS. These references were understood to be related to the sovereignty claim and Mauritius' alignment of its interests with those of the Chagossians seeking a right of resettlement through domestic judicial review proceedings in the UK domestic courts: see further para. 3.46 above and fn 223.
[412] MM, annex 160.
[413] *Ibid*., para. 8.
[414] See *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation)*, *Preliminary Objections*, 1 April 2011, para. 37; see also para. 63 which applies *mutatis mutandis* in this context (**Authority 37**).
[415] As would follow from Mauritius' Written Observations, paras. 63-64, 66, Skeleton Argument, para. 17, and Transcript of hearing on bifurcation, pp. 98-101. But cf. MM, para. 5.38, in the Chapter on "Jurisdiction", in the section headed "IV. Exchange of Views", where Mauritius relies on "a series of Notes Verbales and other communications and exchanges taking place in 2009 and 2010, and again following the purported establishment of the "MPA" in April 2010". The footnote references in para. 5.38 are to MM annexes 139 (the Note Verbale of 5 March 2009), 148, 150, 153, 151, 155, 157, 158, 160, 162 and 167, which are addressed in para. 5.29 above.

the bifurcation hearing, the United Kingdom understands Mauritius now to rely on the following documents:

a. The Note Verbale of 7 August 1991, protesting the FCMZ on ground of sovereignty and stating that, in light of that, Mauritius did "not ipso facto accept the validity of the offer of free licences for inshore fishing". There is no reference to Mauritius being the "coastal State" for the purposes of the law of the sea or UNCLOS (not then in force or signed by the United Kingdom), no references to the 1965 understandings, and no suggestion that United Kingdom was not entitled to declare a FCMZ because of the 1965 understandings[416];

b. The Note Verbale of 1 July 1999[417], in response to the Note Verbale from the British High Commission in Port Louis notifying Mauritius that the number of inshore fishing licences would be reduced from six to four because of the 1998 'El Nino' coral bleaching event[418]. This Note says only that "The Ministry wishes once again to reaffirm the position of the Government that sovereignty over the Chagos Archipelago rests with the Republic of Mauritius": there is no reference to UNCLOS, which was by then in force between the United Kingdom and Mauritius, nor any allegation that Mauritius has rights as the "coastal State"[419];

c. The letter of 16 August 1999[420] from the Mauritian High Commissioner in London to the Minister of State, Foreign and Commonwealth Office, concerning a report of the Minister asking "Should the Chagos Archipelago be made a World Heritage Site?". This letter objects to any suggestion the United Kingdom could propose the Chagos Archipelago as a World Heritage Site on the basis that it "is an integral part of the Mauritian territory" and asserts that any proposal "would necessitate the concurrence of the Government of Mauritius". The letter does not mention UNCLOS, nor claim that Mauritius is the "coastal State" nor that it has rights of a "coastal State" stemming from the 1965 understandings;

[416] MM, annex 100. This part of Mauritius' argument is developed in Chapter 6, section II of its Memorial and paragraph (2) of the relief sought.
[417] MM, annex 109
[418] MM, annex 107.
[419] At this point in time, Mauritius had been a party to UNCLOS since its entry into force on 16 November 1994.
[420] MM, annex 110.

d. The letter of 7 November 2003 from the Mauritian Minister of Foreign Affairs to his United Kingdom counterpart[421], in response to the BIOT's proclamation of the 200nm Environment (Protection and Preservation) Zone (EPPZ). This letter is not based on assertions that the United Kingdom is not entitled to do so because it is not the 'coastal State' under UNCLOS, or that Mauritius is the 'coastal State' or has rights as a 'coastal State' because of the 1965 understandings. Instead, it asks the United Kingdom not to go ahead and not to deposit coordinates under article 75 of UNCLOS because of an undertaking in a letter from the British High Commissioner, Port Louis of 1 July 1992 not to create an exclusive economic zone[422] and the undertaking to cede when no longer required for defence purposes[423];

e. The letter from Mauritian Prime Minister dated 1 December 2005 to his United Kingdom counterpart[424] following their discussion in the margins of Commonwealth Heads of Government Meeting (CHOGM) and concerning the EU proposal to cut the price of sugar says, in its final paragraph, "I look forward to discussing the important issue of fishing rights of Mauritius in Chagos waters". However, it says nothing more about the legal basis, if any, of any such rights and does not raise any dispute under UNCLOS or the subject-matter of UNCLOS. Nor was it perceived as doing so: the United Kingdom Prime Minister replied merely that "the question of fishing rights in the Archipelago and its implications needs to be talked through"[425]. The same is true of the Mauritian Prime Minister's letter following their meeting in the margins of CHOGM in 2007[426]. The letter notes the question of fishing rights was raised, but raises no dispute and does not mention UNCLOS or the 1965 understandings;

f. The joint communiqué from the first round of bilateral talks on the BIOT/Chagos Archipelago on 14 January 2009[427], which took place under a sovereignty umbrella[428], does not record that any dispute was raised under UNCLOS, and does not refer to

[421] MM, annex 122.
[422] See MM, annex 103.
[423] The United Kingdom's response to this letter, dated 12 December 2003, is at MM, annex 124.
[424] MM, annex 132.
[425] MM, annex 133.
[426] MM, annex 135.
[427] MM, annex 137.
[428] As recorded in the joint communiqué; see also MM, para. 4.38.

Mauritius' claims to be the "coastal State" under UNCLOS or have "coastal State" rights under UNCLOS by virtue of the 1965 understandings[429].

5.35 The only communication addressed to the United Kingdom that Mauritius has produced to the Tribunal which uses the term "coastal State" is a Note Verbale from the Mauritian High Commission to the Foreign and Commonwealth Office dated 20 April 2004, sent following the United Kingdom's deposit of the coordinates of the Environment (Protection and Preservation) Zone ('EPPZ') with the United Nations Secretariat under UNCLOS article 75(2). The second paragraph of the Note states that Mauritius has issued a protest statement with the United Nations against the deposit and that this "implicitly amounts to the exercise by the UK of sovereign rights and jurisdiction within an Exclusive Economic Zone, which only Mauritius as coastal state can exercise under Part V of UNCLOS"[430].

5.36 The Note is, however, written throughout in terms of Mauritius' sovereignty claim and in no sense initiates any claim or dispute under UNCLOS, as the last three paragraphs make clear:

> "The Government of Mauritius is very concerned at this unilateral decision of the UK pertaining to the Chagos Archipelago, which forms an integral part of Mauritius…
>
> The Government of Mauritius reiterates yet again in unequivocal terms that it does not recognise the so-called 'British Indian Ocean Territory'…
>
> The proclamation of the Environment (Protection and Preservation) Zone by the UK in no way alters the sovereignty of Mauritius over the Chagos Archipelago. The Government of the Republic of Mauritius has, over the years, consistently asserted, and hereby reasserts, its complete and full sovereignty over the Chagos Archipelago, including its maritime zones, which forms part of the national territory of Mauritius. The Government of the Republic of Mauritius reserves its right to resort to appropriate legal action for the full enjoyment of its sovereignty over the Chagos Archipelago, should the need be so felt".

Mauritius' protest statement to the UN Secretariat of 14 April 2004, to which it refers in this

[429] The lack of any such reference is affirmed by the record of the meeting prepared by the Overseas Territories Directorate dated 15 January 2009: **Annex 94**. The paper presented by Mauritius at the first round of bilateral talks prepared by Ian Brownlie, CBE, QC (who was also in attendance) which presents "the legal framework within which the position of Mauritius is to be assessed" does not make any reference to UNCLOS: **Annex 92.**
[430] MM, annex 127.

Note to the United Kingdom, is phrased in similar terms[431].

5.37 The context in which the statements were made is also important[432]. Mauritius' Note to the UN Secretariat and related Note to the United Kingdom constituted a routine public affirmation of its claim to sovereignty over the BIOT in response to a public sovereign act by the United Kingdom, namely the deposit of the Environment (Protection and Preservation) Zone ('EPPZ') coordinates with the UN Secretariat. There was no reason for the United Kingdom to understand the Note Verbale of 20 April 2004 in any other way, i.e. as indicating the existence of a dispute under UNCLOS. In fact, Mauritius' immediate communication with the United Kingdom in response to the proclamation of the EPPZ, i.e. the letter of 7 November 2003 from the Minister of Foreign Affairs and Regional Cooperation to the Foreign Secretary, does not claim that Mauritius is the "coastal State" under UNCLOS but instead claims that the EPPZ breaches an undertaking not to establish an EEZ[433].

5.38 Furthermore, although Mauritius makes a vague threat that it might "resort to legal action for the full enjoyment of its sovereignty", it specifies neither the treaty basis for bringing such a claim nor the court or tribunal before which it might bring it, nor any timeframe for doing so. There is no invitation by Mauritius, either within the Note Verbale of 20 April 2004 nor following it, to the United Kingdom to have an exchange of views about settlement of a dispute over the EPPZ arising under UNCLOS on the basis that Mauritius is the "coastal State"[434]. Indeed, Mauritius implicitly declined to extend any such invitation by saying it would only resort to such action "if the need be felt". Thus, Mauritius cannot establish that the second requirement and precondition to the Tribunal's jurisdiction under article 283 - an exchange of views with a view to resolution of the dispute - has been met either.

(c) Mauritius' stance did not alter after the proclamation of the MPA

5.39 The stance adopted by Mauritius in its communications with the United Kingdom regarding the MPA proposal described in paragraphs 5.26-5.29 above did not alter after the

[431] Note Verbale dated 14 April 2004 from the Permanent Mission of the Mauritius to the United Nations, New York, to the Secretary General: MM, annex 126.
[432] The importance of the context of statements is repeatedly emphasised in the International Court of Justice's reasoning in *Georgia* v. *Russia*: see, e.g., paras. 39, 40, 72, 73, 74, 77, 93, 95, 104 (**Authority 37**).
[433] MM, annex 122.
[434] Above, para. 157.

MPA was proclaimed on 1 April 2010. Mauritius' protest in its Note Verbale of 2 April 2010 was expressed wholly in terms of Mauritius' claim to sovereignty and the claimed right of return of Chagossians then still under consideration in the European Court of Human Rights[435]. There was no reference to UNCLOS, or Mauritian rights under UNCLOS based on the 1965 understandings, no use of the term "coastal State", and no reference challenging the legality of the MPA on the basis of the provisions of UNCLOS on which Mauritius now relies (i.e. article 2(3) (because of Mauritius' alleged "certain specific rights"), articles 55 and 56(2) read in conjunction with article 297(1)(c), article 56(2) (again because of the alleged "certain specific rights"), articles 62(5), 63(1), 63(2), 64(1), 194(1) and 300, and article 7 of the "1995 Agreement" (referring to the United Nations Fish Stocks Agreement)).

5.40 In fact, Mauritius' Memorial made no reference to any further communication from Mauritius to the United Kingdom regarding the MPA before the Notification and Statement of Claim dated 20 December 2010. Mauritius subsequently referred in paragraph 65 of its Written Observations to two 'examples' of communications between Mauritius and the United Kingdom between 2 April and 20 December 2010 concerning the MPA, namely (i) a meeting between the Prime Minister of Mauritius and the United Kingdom Foreign Secretary on 3 June 2010 referred to in a reply given by the Mauritian Prime Minister to a parliamentary question[436]; and (ii) a meeting between the Mauritius Minister of Foreign Affairs, Regional Integration and International Trade and the United Kingdom Minister for Africa and Overseas Territories of 22 July 2010, also referred to in a reply to a parliamentary question[437]. The United Kingdom annexed in full the relevant parts of its records of these meetings to its Reply[438].

5.41 Mauritius said its two references were examples only, which suggested others were in existence. Accordingly, the United Kingdom searched its records to ensure, as far as possible, a full list of all the contacts between the parties during this period. The United Kingdom identified a further four exchanges between the United Kingdom and Mauritius and provided

[435] MM, annex 167. On 11 December 2012 the Chagos Islanders' claims were held inadmissible by a decision of the Fourth Section of the European Court of Human Rights: *Chagos Islanders* v. *United Kingdom*, Application No. 35622/04 (**Authority 40**).
[436] Annex 1 to Mauritius' Written Observations.
[437] Annex 2 to Mauritius' Written Observations.
[438] **Annex 116 and Annex 118**. Initially the United Kingdom provided excerpted quotations from its internal records of these meetings in its letter to the Tribunal of 4 December 2012. At the Tribunal's request the United Kingdom provided full copies of the documents concerned.

redacted copies of its records of the meetings: (i) a meeting of 29 May 2010 between the Director of the FCO's Africa Directorate and the Mauritian High Commissioner in London[439]; (ii) a meeting of 15 June 2010 between Director of the FCO's Africa Directorate and the Mauritian High Commissioner in London[440]; (iii) two meetings on 9 September between the British High Commissioner in Port Louis and the Mauritian Minister of Foreign Affairs and the Prime Minister, respectively[441]; and (iv) a meeting of 10 September 2010 between the new Director of the FCO's Africa Directorate and the Mauritian High Commissioner[442].

5.42 The MPA was referred to in only four of these six meetings (3 June, 15 June, 22 July and 9 September). Mauritius did not, in any of these meetings, raise or refer to any dispute or claim under UNCLOS. Quite clearly, it had every opportunity to do so.

(d) Concluding remarks on Mauritius' communications

5.43 To sum up, in none of its dealings with the United Kingdom over the MPA in 2009-2010, whether before or after the MPA was established, did Mauritius refer to UNCLOS (or its subject-matter) or its alleged rights under UNCLOS based on the 1965 understandings, let alone do so with sufficient clarity to enable the United Kingdom to identify that there was, or even might be, a dispute with regard to that subject-matter. It did not invoke 'fishing rights' under the 1965 understandings or the practice of issuing fishing licences to Mauritian-flagged vessels free of charge, nor use the term 'Mauritius' 'historic fishing rights'. It did not use the term "coastal State". The reality is that Mauritius sought to use invitations to discuss or consult over the proposed MPA as a means by which to promote its claim to sovereignty and, furthermore, refused to participate further in the bilateral talks[443] when the United Kingdom did not meet its demand to stop the public consultation[444]. Having withdrawn from any dialogue with the United Kingdom over the BIOT and/or the MPA for whatever reason, Mauritius cannot now say that it raised the question of the unlawfulness of the MPA under UNCLOS.

[439] **Annex 115**.
[440] **Annex 117**.
[441] **Annex 119**.
[442] **Annex 120**.
[443] The bilateral talks are referred to in fn. 223 and paras. 3.42-3.50 above. The joint communiqué dated 21 July 2009 was the product of the second round of bilateral talks, the first of which was held on 14 January 2009.
[444] MM, annex 162; see also paras. 5.29 c., d., and e. above.

5.44 As regards Mauritius 'sovereignty claims' based on its "coastal State" argument, in all the communications with the United Kingdom on which Mauritius relies to evidence its claim that it has met the requirements of article 283, the closest Mauritius can come to demonstrating that it raised a dispute under UNCLOS over a maritime zone is the Note Verbale of 20 April 2004 concerning the EPPZ where Mauritius refers to itself as the "coastal State". However, the Note concerned Mauritius' sovereignty claim, not a dispute under UNCLOS (however artificially formulated). Nor did it invite any exchange of views with a view to settlement of any dispute under UNCLOS.

5.45 It follows that there was no dispute in existence for the purposes of article 283 between the parties at the time of Mauritius' Notification and Statement of Claim on 20 December 2010 regarding Mauritius sovereignty or non-sovereignty claims, still less any exchange of views regarding the settlement of that dispute.

(v) Mauritius cannot rely on the claim that communications would have been futile

5.46 Mauritius claims that "[b]y December 2010 it was plain that any further exchange of views would be futile, as the United Kingdom was fully committed to the establishment of the 'MPA'"[445]. This is pure assertion: there is nothing in the diplomatic record which supports or substantiates this. Mauritius, according to its own pleadings, had not even sought to communicate with the United Kingdom about the MPA for over eight months between 2 April 2010 and 20 December 2010 when it submitted its Notification and Statement of Claim, and had never raised the 'non-sovereignty claims' it raises now as to the legality of the MPA under UNCLOS; nor its alleged "certain specific rights"; nor the 'sovereignty claims' that it is the "coastal State" or has rights as a "coastal State" based on the 1965 understandings.

5.47 Mauritius subsequently alleged in its Skeleton Argument for the bifurcation hearing that "unilateral actions taken by the United Kingdom, in the face of commitments given at the highest levels of government, make it clear that any further exchanges in relation to the

[445] MM, para. 5.38.

subject-matter of this dispute would have been absolutely futile and without purpose"[446]. The United Kingdom understands this to refer to the assurance allegedly given by Prime Minister Gordon Brown to the Mauritian Prime Minister in the margins of the 2009 Commonwealth Heads of Government Meeting (CHOGM) to withdraw the public consultation. As explained in **Chapter III**, no such commitment was given[447].

5.48 In any event, the United Kingdom also fails to understand how, even if such an assurance had been given by the United Kingdom's Prime Minister, a failure to withdraw the public consultation could possibly make it 'clear' that any further exchanges in relation to the dispute notified in Mauritius' application would be 'futile and without purpose'. This is especially so against a background of communications by Mauritius which never actually raised a dispute under UNCLOS (or its subject matter). The continued existence of a public consultation on an MPA proposal neither prevented nor precluded Mauritius from raising a dispute under UNCLOS, nor seeking the communications and cooperation which Mauritius now contends the United Kingdom, in breach of UNCLOS, did not and should have undertaken. A decision to establish a full no-take MPA was not taken by the Secretary of State until 1 April 2010, over 3 months after the CHOGM meeting. At any point in time during this period Mauritius could have raised its complaints (or disputes) under UNCLOS regarding the MPA: it did not. Indeed, the United Kingdom invited Mauritius to maintain talks over the MPA[448], but it declined to do so.

5.49 The reality is that the United Kingdom had no idea what the subject-matter of the dispute was until it received Mauritius' Notification and Statement of Claim. There is no evidential basis on which Mauritius can establish its case that pursuing an exchange of views on that dispute would have been futile.

5.50 References to *Southern Bluefin Tuna*, *MOX Plant* and *Land Reclamation*[449] therefore cannot assist Mauritius. The United Kingdom does not dispute the well-established principle that a party is not obliged to continue with an exchange of views when the possibilities of settlement have been exhausted. Its contention is that Mauritius cannot even establish that it

[446] Skeleton Argument, para. 18.
[447] Para. 3.63.
[448] See the letter from the British High Commission, Port Louis, to the Secretary to the Cabinet and Head of Civil Service, 19 March 2010 (MM, annex 163), Note Verbale from the British High Commission, Port Louis to the Ministry of Foreign Affairs, Regional Integration and International Trade, 26 March 2010: MM, annex 164.
[449] MM, para. 5.39.

raised the UNCLOS claims which it now raises, let alone that an exchange of views had taken place and that the possibilities of a settlement had been exhausted:

a. The Arbitral Tribunal in *Southern Bluefin Tuna* found as a matter of fact that negotiations had been "prolonged, intense and serious" and that "in the course of those negotiations, the Applicants invoked UNCLOS and its provisions, while Japan denied the relevance of UNCLOS and its provisions". In the present case there have been no negotiations at all on the legality of the MPA under UNCLOS[450];

b. ITLOS in *MOX Plant* accepted (on a *prima facie* basis) that the threshold had been met where Ireland had referred to a dispute under UNCLOS in a letter of 30 July 1999 and a further exchange of correspondence had taken place on the matter before to the submission of the dispute to arbitration[451]. By contrast, in the present case Mauritius has not drawn attention to a dispute under UNCLOS at all.

c. ITLOS in *Land Reclamation* accepted that the threshold had been met where (i) Malaysia had on several occasions prior to the institution of Annex VII proceedings, informed Singapore of its concerns about Singapore's land reclamation and had requested a meeting between senior officials on an urgent basis but Singapore had rejected the request unless Malaysia undertook to supply reports and studies; and (ii) after the submission of the dispute by Malaysia, the parties had met to resolve the dispute amicably but Singapore had then refused to suspend reclamation works as a precondition for further talks. ITLOS concluded that, in these circumstances, the parties were not able to settle the dispute or agree on a means to settle it[452]. In the present case Mauritius has not raised its concerns about the MPA as such at all, nor a sovereignty argument under UNCLOS. In fact it is Mauritius, the applicant in the present proceedings, who acted like Singapore, the respondent in *Land Reclamation*,

[450] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)("SBT")*, 4 August 2000, XXIII *RIAA*, p. 1, para. 55 (**Authority 16**). Nor had there been nine rounds of negotiations, as in *Barbados* v. *Trinidad &* Tobago, Award, 11 April 2006, XXVII *RIAA*. p. 149, para 194 *ff* (**Authority 24**). Nor any requests to the respondent and a Note Verbale objecting to specific actions as contrary to the international law, as in *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, paras. 54-65 (**Authority 35**).

[451] .*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, paras. 58-60 (**Authority 18**).

[452] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, paras. 33-51 (**Authority 21**).

by refusing to discuss the proposed MPA unless the United Kingdom complied with its demands (to withdraw the public consultation process).

5.51 If the Tribunal were to accept jurisdiction over Mauritius' claims in the circumstances of this case, it would be tantamount to rendering the important precondition to jurisdiction in article 283(1) a nullity. This would evidently be contrary to the accepted principle of treaty interpretation that such a provision "must be given effect"[453].

5.52 Moreover, accepting jurisdiction over Mauritius' claims in the circumstances of this case would undermine the first two, eminently practical functions which provisions such as article 283(1) fulfil, as explained by the International Court of Justice in *Georgia* v. *Russia*[454]: delimiting the scope of the dispute and its subject-matter and encouraging the parties to settle their dispute and thus avoid resort to binding third-party adjudication. The United Kingdom, as respondent in proceedings submitted under article 286 of UNCLOS, is now being required to respond to claims about the legality of the MPA based on specific provisions of UNCLOS and alleged "certain specific rights" related to the 1965 understandings which could have and should have been raised earlier by Mauritius, and which could have resulted in settlement attempts during the period of consultation over the MPA proposal or after the MPA was proclaimed and before Mauritius submitted its Notification and Statement of Claim. The same point applies in respect of Mauritius' 'sovereignty claims': Mauritius could have and should have raised a dispute under UNCLOS that it was the or a "coastal State", and sought an exchange of views to settle that dispute before its Notification and Statement of Claim in these proceedings.

5.53 As explained by the International Court of Justice in *Georgia* v. *Russia*, the third function of compromissory clauses like article 283(1) is to indicate the limit of consent given by States: the simple point is that the United Kingdom did not consent to submit to compulsory third party adjudication under the Convention in circumstances such as these.

D. Conclusion

[453] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011, para. 133, and the cases referred to therein (**Authority 37**).
[454] Quoted in full in para. 5.12 above.

5.54 Mauritius has not and cannot establish that the requirements - requirements going to jurisdiction - of articles 279, 283(1) and 286 have been met:

a. First, although Mauritius had, since the early 1980s, made claims to sovereignty over BIOT, there was no dispute over Mauritius' present claims under UNCLOS, namely whether Mauritius was the "coastal State" under UNCLOS or had special rights entitling it to rights as the "coastal State" as a result of the 1965 understandings (Mauritius' 'sovereignty claims') or that the MPA as such breached UNCLOS, including by reason of certain specific rights (the 'non-sovereignty claims') at time of the Notification and Statement of Claim. The claims that Mauritius did raise with the United Kingdom regarding the MPA in 2009 and 2010, before it filed its Notification under UNCLOS, related entirely to its claim to territorial sovereignty over the BIOT, and were not made in terms of the MPA proposal or the MPA being a breach of UNCLOS because Mauritius was the "coastal State" or had "coastal State" rights. As explained in **Chapter IV**, that claim is (separately) outside the jurisdiction of the Tribunal.

b. Second, Mauritius' dispute that the MPA as such is unlawful because it is in breach of various provisions of UNCLOS[455] is being raised for the first time, was not in existence at the time of the Notification and Statement of Claim, and it inevitably follows that no exchange of views as required by article 283(1) took place.

c. Third, insofar as the dispute or disputes now asserted rest on alleged "certain specific rights", obligations owed under IOTC Convention or the United Nations Fish Stocks Agreement, these disputes were not in existence at the time of the Notification and Statement of Claim, and no exchange of views took place as required by Article 283(1). In addition, they are also outside the jurisdiction of this Tribunal for the reasons given in **Chapter VI**, which follows.

[455] That is, article 2(3) because of its alleged "certain specific rights", articles 55 and 56(2) read in conjunction with article 297(1)(c), article 56(2) because of its alleged "certain specific rights" to non-living resources, and articles 62(5), 63(1), 63(2), 64(1) and 194(1).

CHAPTER VI

MAURITIUS' CLAIM THAT THE MPA IS INCOMPATIBLE WITH UNCLOS IS NOT WITHIN THE JURISDICTION OF THE TRIBUNAL

A. Introduction

6.1 In Chapter 7 of its Memorial Mauritius makes two arguments: that the Marine Protected Area (MPA) is incompatible with the 1982 Convention on the Law of the Sea, and that its establishment is an abuse of rights by the United Kingdom. This part of the Memorial seeks to formulate an UNCLOS fisheries or environmental case out of what is at heart a territorial sovereignty dispute. In paragraph 5.35 of its Memorial, Mauritius sets out ten reasons why the Tribunal in its view has jurisdiction over this part of its case. In essence, its argument is that "There is nothing in Article 297 to exclude such jurisdiction"[456].

6.2 The present Chapter explains why, quite apart from the reasons given in Chapters IV and V above, the claims in Chapter 7 of the Memorial are excluded from the Tribunal's jurisdiction by section 3 of Part XV. The particulars of Mauritius' claim that the establishment of the MPA is unlawful under UNCLOS have been set out in paragraph 5.16 above.

6.3 Before turning to the detail, it is worth noting that the structure of article 297 UNCLOS, entitled "Limitations on applicability of section 2", insofar as jurisdiction over coastal state duties is concerned, parallels that of the Convention as a whole. Paragraph 2 of article 297 relates to duties of the coastal State with respect to marine scientific research set forth in Part XIII; paragraph 3 relates to duties of the coastal State with respect to marine living resources set forth in Part V; and paragraph 1(c) deals with the duties of the coastal State with respect to the protection and preservation of the marine environment set forth in Part XII. Each paragraph of article 297 contains very significant limitations on jurisdiction over coastal State duties in terms that refer back to the particular Part of the Convention to which that limitation relates.

[456] MM, para 5.35.

6.4 To assist the Tribunal, the United Kingdom first lists the individual claims made by Mauritius in Chapter 7 of its Memorial, together with the basis for jurisdiction asserted by Mauritius at paragraph 5.35 of its Memorial, and the United Kingdom's response in brief terms (as developed further in **Sections B** to **F** below).

(i) The dispute concerning the interpretation and application of article 2(3)

6.5 As regards article 2(3), Mauritius claims:

> "The dispute concerning the interpretation and application of Article 2(3) ([MM] para. 5.23(ii)) relates to the exercise of Mauritius' fishing and related rights in the territorial sea, and is therefore not excluded from the jurisdiction of the Tribunal by Article 297". [MM, para. 5.35 (i)]

The absence of jurisdiction over this claim is dealt with in **Section F** below.

(ii) The dispute concerning the interpretation and application of article 55

6.6 As regards article 55, Mauritius' specific claim is that:

> "The dispute concerning the interpretation and application of Article 55 ([MM] para. 5.23(iv) above) falls within the jurisdiction of the Tribunal because the United Kingdom "has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention", (in contravention of inter alia Article 56(2) of the Convention); jurisdiction is accordingly provided by Article 297)(1)(c)". [MM, para. 5.35(ii)]

6.7 Article 297(1)(c) cannot confer jurisdiction over a dispute concerning article 55. All that article 55 provides is that the EEZ is subject to the specific legal regime established in Part V and that the rights and obligations of the coastal State and other States in the EEZ are governed by the relevant provisions of the Convention. Article 55 does not contain any

"specified rules and standards for the protection and preservation of the marine environment". The fact that, according to article 297(1)(c), a tribunal established according to Part XV has jurisdiction over "specified international rules and standards for the protection and preservation of the marine environment" neither establishes the existence of such rules or standards, nor means that such rules and standards therefore exist under article 55. Mauritius still has to identify actual rules and standards which cover the substance of its claim and bring it within article 297(1)(c). As pointed out in paragraph 6.28 below it has failed to do so here.

(iii) The dispute concerning the interpretation and application of article 56(2)

6.8 As regards article 56(2), Mauritius claims that:

> "The dispute concerning the interpretation and application of Article 56(2) ([MM] para. 5.23(v)) is within the jurisdiction of the Tribunal because the United Kingdom has established the "MPA" without having "due regard to the rights" of Mauritius in respect of non-living resources in the part of the "MPA" that is beyond the territorial sea of the Chagos Archipelago; this is not excluded from jurisdiction by reason of Article 297(3)(a), since the dispute does not relate to sovereign rights with respect to the living resources in the exclusive economic zone or their exercise". [MM, para. 5.35(iii)]

6.9 Seabed minerals beyond the territorial sea but within 200 nautical miles fall within the exclusive jurisdiction and sovereign rights of the coastal state pursuant to article 56(1); notwithstanding this Mauritius claims rights over minerals within the MPA and says that the United Kingdom must have due regard to these alleged rights. The fact that article 297(3) does not exclude such a dispute is immaterial: the compulsory procedures provided for in section 2 of Part XV apply only to disputes "with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention" which fall within one of the categories listed in article 297. Nowhere does article 297 contain language capable of encompassing the dispute concerning article 56(2) formulated by Mauritius. Article 297(1) is explicit: "Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 *in the following cases*:..." (emphasis added). None of the "following cases" listed in sub-paragraphs (a) to (c)

covers a claim by a non-coastal State to mineral rights within the maritime zones of another State.

(iv) The dispute concerning the interpretation and application of article 62(5)

6.10 With respect to article 62(5), Mauritius claims:

> "The dispute concerning the interpretation and application of Article 62(5) ([MM] para. 5.23(vi)) is within the jurisdiction of the Tribunal because the United Kingdom has not given due notice of conservation and management laws and regulations and has thus "acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention"; jurisdiction is accordingly provided by Article 297(1)(c)". [MM, para. 5.35 (iv)]

6.11 There is no such dispute: the relevant laws and regulations are public documents, available to anyone. They are listed in **Chapter III** above. If there is a dispute concerning article 62(5), however, article 297(1)(c) cannot confer jurisdiction over it. Article 62(5) deals with giving "due notice of conservation and management laws and regulations". It relates to living resources in the EEZ, not to "the protection and preservation of the marine environment", a term which, as explained in paragraph 6.28 below, applies to marine pollution standards adopted under Part XII of UNCLOS, not to conservation laws adopted under Part V. Mauritius still has to identify actual rules and standards which cover the substance of its claim and bring it within article 297(1)(c). As pointed out in paragraph 6.28 below it has failed to do so here.

(v) The dispute concerning the interpretation and application of article 63(1)

6.12 With respect to article 63(1), Mauritius claims:

> "The dispute concerning the interpretation and application of Article 63(1) ([MM] para. 5.23(vii)) is within the jurisdiction of the Tribunal because the failure to seek agreement upon the measures necessary to co-ordinate and ensure the conservation and development of stocks of tuna, either directly with Mauritius or through the IOTC or other "appropriate subregional or regional organisations", is not excluded from jurisdiction by Article 297(1)(a) or (c), and/or is not covered by Article 297(3)(a) (the

dispute does not relate to sovereign rights with respect to the living resources in the EEZ, or their exercise)". [MM, para. 5.35 (v)]

6.13 This is a claim relating to the conservation and management of fish stocks. As explained in paragraphs 6.28-6.30 below, it is for that reason not a claim concerning "international rules and standards for the protection and preservation of the marine environment" and is therefore not within the Tribunal's jurisdiction under article 297(1). For reasons set out more fully in **Section B** below it is also excluded from compulsory jurisdiction by article 297(3) and by articles 281 and 282 in conjunction with article XXIII of the Indian Ocean Tuna Commission Agreement.

(vi) The dispute concerning the interpretation and application of article 63(2)

6.14 With respect to article 63(2) Mauritius argues:

> "The dispute concerning the interpretation and application of Article 63(2) ([MM] para. 5.23(viii)) is within the jurisdiction of the Tribunal because the failure to agree upon the measures necessary for the conservation of stocks of tuna in the area adjacent to the "MPA", directly with Mauritius or through the IOTC or other "appropriate subregional or regional organisations", is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention)". [MM, para. 5.35 (vi)]

6.15 This is a claim relating to the conservation and management of fish stocks. As explained in paragraphs 6.28-6.30, below it is for that reason not a claim concerning "international rules and standards for the protection and preservation of the marine environment" and is therefore not within the Tribunal's jurisdiction under article 297(1). For reasons set out more fully in **Section B** below it is also excluded from compulsory jurisdiction by article 297(3) and by articles 281 and 282 in conjunction with article XXIII of the Indian Ocean Tuna Commission Agreement.

(vii) The dispute concerning the interpretation and application of article 64(1)

6.16 With respect to article 64(1) Mauritius claims:

> "The dispute concerning the interpretation and application of Article 64(1) ([MM] para. 5.23(ix)) is within the jurisdiction of the Tribunal because the failure to cooperate directly with Mauritius and other States, or through appropriate international organisations, to ensure conservation and promote the objective of optimum utilisation of highly migratory species throughout the Indian Ocean region beyond the exclusive economic zone is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention)". [MM, para. 5.35 (vii)]

6.17 This is also a claim relating to the conservation and management of fish stocks. As explained in paragraphs 6.28-6.30 below, it is for that reason not a claim concerning "international rules and standards for the protection and preservation of the marine environment" and is therefore not within the Tribunal's jurisdiction under article 297(1). For reasons set out more fully in **Section B** below it is also excluded from compulsory jurisdiction by article 297(3) and by articles 281 and 282 in conjunction with article XXIII of the Indian Ocean Tuna Commission Agreement.

(viii) The dispute concerning the interpretation and application of Article 7 of the 1995 Agreement

6.18 With respect to article 7 of the UN Fish Stocks Agreement Mauritius argues:

> "The dispute concerning the interpretation and application of Article 7 of the 1995 Agreement ([MM] para. 5.23(x)) is within the jurisdiction of the Tribunal because Article 30 of the Agreement provides that the dispute settlement provisions of the 1982 Convention apply to disputes regarding the interpretation or application of the Agreement and because the failure of the United Kingdom to "make every effort to agree on compatible conservation and management measures within a reasonable period of time" is not excluded by Article 297 (the dispute is not with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention)". [MM, para. 5.35 (viii)]

6.19 This too is a claim relating to the conservation and management of fish stocks. As explained in paragraphs 6.28-6.30 below, it is for that reason not a claim concerning "international rules and standards for the protection of the marine environment" and is therefore not within the Tribunal's jurisdiction under article 297(1). For reasons set out more fully in **Section B** below it is also excluded from compulsory jurisdiction by article 297(3)

and by articles 281 and 282 in conjunction with article XXIII of the Indian Ocean Tuna Commission Agreement.

(ix) The dispute concerning the interpretation and application of article 194(1)

6.20 With respect to article 194(1), Mauritius claims that:

> "The dispute concerning the interpretation and application of Article 194(1) ([MM] para. 5.23(xii)) is within the jurisdiction of the Tribunal because the failure of the United Kingdom to comply with its obligation to "endeavour to harmonise" its policies with those of Mauritius and other States in the region falls within Article 297(1)c) of the Convention". [MM, para. 5.35 (ix)]

6.21 Article 194 applies only to the prevention of marine pollution. As noted earlier, that is the view of Judge Mensah: "The various sources of pollution of the marine environment are listed in Article 194 of the Convention"[457]. The same point is made in the *Virginia Commentary*: "Article 194 links the two statements of general principle contained in articles 192 and 193 to the formal rules of law appearing in the subsequent articles of Part XII. It addresses the three separate themes embodied in its title, namely the prevention, the reduction, and the control of pollution of the marine environment"[458].

6.22 Since there is no dispute between the parties about international rules and standards concerning pollution of the marine environment, the Tribunal cannot have jurisdiction under article 297(1)(c) by reference to article 194.

(x) The dispute concerning the interpretation and application of article 300

6.23 With respect to article 300 Mauritius argues:

> "The dispute concerning the interpretation and application of Article 300 ([MM] para. 5.23(xiii)) is within the jurisdiction of the Tribunal because the United Kingdom has failed to give effect to its obligation to exercise rights in a manner that does not "constitute an abuse of right"; this is a dispute concerning the application or

[457] In A. Kirchner (ed.), *International Marine Environmental Law* (2003), pp. 9-10 (**Authority 74**).
[458] M.H. Nordquist (ed.), *UNCLOS 1982: A Commentary* (1991), p. 53 (**Authority 85**).

interpretation of the Convention which is not excluded by Article 297". [MM, para. 5.35 (x)]

6.24 For reasons set out more fully in **Section F** below the Tribunal has no jurisdiction with respect to this claim.

6.25 The remainder of this Chapter is organized as follows. **Section B** shows that Mauritius' attempt to base jurisdiction on article 297(1)(c) is misconceived. Its case is not about "international rules and standards for the protection and preservation of the marine environment", and Mauritius has failed to identify any such relevant rules or standards. **Sections C** and **D** show that Mauritius' claims with respect to the MPA are excluded by article 297(3)(a) from binding compulsory jurisdiction under Part XV of UNCLOS because they relate to "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise"[459]. These sovereign rights include the regulation of access to, and conservation and management of, living resources[460]. At most, a dispute concerning the coastal State's exercise of these discretionary powers is subject to conciliation as provided for by article 297(3)(b).

6.26 **Section E** shows that Mauritius' claims with respect to the Indian Ocean Tuna Commission Agreement[461] are outside the Tribunal's jurisdiction because they are not justiciable in UNCLOS Part XV proceedings. The Indian Ocean Tuna Commission ('IOTC') is the appropriate regional fisheries organisation for the purposes of cooperation between States parties to that Agreement and disputes concerning cooperation must be settled in accordance with that Agreement.

6.27 Finally, **Section F** shows that alleged fishing rights in the territorial sea[462], and the claim that the United Kingdom has abused its rights in declaring an MPA, do not come within compulsory jurisdiction under Part XV of UNCLOS.

[459] Article 297(3)(a). The United Kingdom has not declared an EEZ around BIOT. As explained in Chapter III above (para. 3.17), the zones declared by BIOT are the Fisheries Conservation and Management Zone ('FCMZ') and the Environment (Preservation and Protection) Zone ('EPPZ'). Where reference is made in this Chapter to the EEZ, it is on the basis that Mauritius has used the term or in the context of a reference to the term within the provisions of UNCLOS.
[460] Articles 61-62.
[461] MM, paras. 5.35(v) and (vi).
[462] MM, para. 5.35(i).

B. Article 297(1)(c) does not confer jurisdiction over MPA Fisheries Disputes

6.28 Mauritius attempts to portray its case as a dispute falling within compulsory jurisdiction under article 297(1)(c), and therefore not excluded by article 297(3)[463]. Article 297(1)(c) refers to disputes concerning "specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention". Protection and preservation of the marine environment is dealt with in Part XII of UNCLOS. Within Part XII, the international rules and standards to which articles 194, 197, 207, 208, 209, 210, and 211 refer all relate exclusively to marine pollution - from land-based activities, seabed activities, dumping, and ships. There is an obligation pursuant to article 194(5) to protect ecosystems and marine life from pollution, but Part XII does not otherwise cover conservation and management of fisheries, other living resources, or biological diversity. These are all dealt with in Part V, not in Part XII. Mauritius also disregards the fact that article 297(3) was negotiated with the specific purpose of taking fisheries access, conservation and management disputes out of Part XV compulsory jurisdiction[464]. As such the exclusion forms part of the 'package deal' negotiation which enabled UNCLOS to be adopted in its final form[465]. It cannot have been the intention of the drafters to reincorporate those very same disputes within compulsory jurisdiction via article 297(1)(c).

6.29 The principal purpose of article 297(1)(c) is to ensure that the coastal State does not act in contravention of international rules and standards for the protection and preservation of the marine environment (which may include potential interference with freedom of navigation), not to provide an alternative jurisdictional basis for fisheries-related disputes[466]. It will, for example, cover disputes about EEZ areas "where the adoption of special

[463] MM, para. 5.35.
[464] See **section B** below.
[465] See 'Introduction' to the DOALOS/OLA Official Text of UNCLOS, p. 1 (**Annex 74)**; H. Caminos and M. Molitor, Progressive Development of International Law and the Package Deal (1985) 79 *AJIL* p. 871 (**Authority 52)**; B. Buzan, Negotiating by Consensus: Developments in Technique at the UN Conference on the Law of the Sea (1981) 75 *AJIL* p. 324 (**Authority 51**); P. Allott, Power Sharing in the Law of the Sea (1983) 77 *AJIL* p. 1 (**Authority 45**).
[466] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), p. 159, says that "Denials, or unauthorized restrictions, of the freedom of navigation are meant to be kept in check through Article 297(1)(c)" (**Authority 77**).

mandatory measures for the prevention of pollution from vessels is required..." (article 211(6)). These will usually be the measures prescribed for special areas designated pursuant to the 1973/78 MARPOL Convention, or by IMO resolution[467]. It would also cover coastal state regulation of foreign vessels that exceeds the "generally accepted internationally agreed rules and standards" prescribed by article 211(5)[468]. The reference to "generally accepted international rules and standards" in article 211 draws into the UNCLOS framework the current pollution control requirements agreed and adopted by a preponderance of maritime states under the 1973/78 MARPOL Convention, the 1974 SOLAS Convention, and in IMO and IAEA codes and guidelines[469].

6.30 Judge Mensah has written about the relationship between protection and preservation of the marine environment and the dispute settlement regime in UNCLOS[470]. After citing the text of article 297(1)(c) he notes that a court or tribunal "will be competent to deal with such a dispute if it concerns the interpretation or application of any of the provisions of the Convention relating to the marine environment, as provided in the Convention". At that point his footnote [5] says: "The various sources of pollution of the marine environment are listed in Article 194 of the Convention". He does not cite the fisheries or marine living resources articles of Part V of UNCLOS. The whole of Part XII on protection and preservation of the marine environment is about pollution, not conservation of living resources[471].

6.31 But even if Judge Mensah is wrong in saying that article 297(1)(c) covers only pollution, the mere fact that the MPA may serve broader environmental conservation objectives is not sufficient to turn a case based on alleged violation of UNCLOS Part V articles 55, 56, 62, 63, and 64 into a dispute about "specified international rules and standards for the protection and preservation of the marine environment". The MPA is not directed at a

[467] R. Lagoni, in A. Kirchner (ed.), *International Marine Environmental Law* (2003), pp. 156-67 (**Authority 79**).
[468] The phrase "generally accepted international rules and standards" originated in article 10(2) of the 1958 Convention on the High Seas.
[469] See B. Vukas, in A.H. Soons (ed.), *Implementation of the Law of the Sea Convention Through International Institutions* (LOSI, Honolulu, 1990) p. 405 (**Authority 107**); M. Valenzuela, in Soons (ed.) *op. cit.*, p. 187 (**Authority 105**); B. Oxman, The Duty to Respect Generally Accepted International Standards, 24 *NYUJ Int Law & Pol* (1991-2), p. 109 (**Authority 87**); E. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague, 1998) ch. 5 (**Authority 83**).
[470] In Kirchner (ed.), *op.cit*, pp. 9-10 (**Authority 74**).
[471] Other scholars who discuss Part XII of UNCLOS also make no mention of international rules and standards relating to fish stocks: see in particular A. Tan, *Vessel-Source Marine Pollution* (2006), pp. 195-201 (**Authority 102**); Molenaar, *op. cit;* D. Bodansky, Protecting the Marine Environment from Vessel-source Pollution: UNCLOS III and Beyond, 18 *Env.Law Quarterly* (1991) p. 719 (**Authority 47**).

threat of marine pollution - a largely hypothetical risk - but at conserving and protecting biodiversity and the marine ecosystem from the impact of harmful fishing practices. The "specified international rules and standards for the protection and preservation of the marine environment" which Mauritius says have been breached are simply articles 55[472], 62(5)[473] and 194(1) UNCLOS[474]. But none of these provisions creates "international rules and standards for the protection and preservation of the marine environment". They are simply UNCLOS provisions, only one of which is relevant to the marine environment (article 194). For reasons explained in the following paragraphs Mauritius cannot establish jurisdiction under article 297(1)(c) by reference to any of these provisions of UNCLOS.

C. Article 297(3)(a) excludes jurisdiction over MPA fisheries disputes

(i) Article 297(3)(a)

6.32 As pointed out in **Chapter III** above, the MPA implements a prohibition on commercial fishing within the 200nm Fisheries Conservation and Management Zone ('FCMZ'). As such it represents an exercise by the United Kingdom of the sovereign rights and jurisdiction with respect to conservation and management of marine living resources conferred on coastal States by Part V of UNCLOS. Disputes concerning living resources within 200 nautical miles are specifically excluded from binding compulsory dispute settlement by article 297(3)(a) of UNCLOS. Article 297(3)(a) provides that:

> "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations".

6.33 Disputes over fisheries management were deliberately excluded from binding compulsory dispute settlement in the interests of reaching agreement at the Third United

[472] MM, para. 5.35(ii).
[473] MM, para. 5.35(iv).
[474] MM, para. 5.35(ix).

Nations Conference on the Law of the Sea[475]. Klein concludes that: "Article 297 largely insulates the coastal State from review when it comes to fisheries"[476]. She points out that article 297(3)(a) emphasises that "'any dispute' relating to the costal State's sovereign rights over the living resources [*of the EEZ*] is excluded from the procedures in Section 2 of Part XV"[477]. Burke also summarises the position as follows:

> "Articles 61 and 62 are unequivocal in establishing the exclusivity of coastal State decision making authority, and article 297 both reinforces this exclusive authority and confirms the fact that decision making criteria are solely for the coastal State to determine in any specific instance"[478].

6.34 Disputes concerning fish stocks excluded from compulsory binding settlement by article 297(3)(a) will in some cases be subject to compulsory conciliation under article 297(3)(b). However, under that provision, conciliation is only required if the coastal state has "manifestly" failed to ensure through proper conservation and management that EEZ fish stocks are not seriously endangered, or if it has "arbitrarily" refused to determine the allowable catch or its own harvesting capacity, or to determine an EEZ surplus or allocate it to any state (article 297(3)(b)). A conciliation commission is prohibited by article 297(3)(c) from substituting its discretion on any of these matters for that of the coastal State. Conciliation thus affords the only remedy available in respect of fisheries disputes and only in cases of manifest or arbitrary failure by the coastal State to fulfil its obligations.

6.35 Moreover, if conciliators are prohibited from substituting their discretion for that of the coastal state, so *a fortiori* must an Annex VII tribunal respect the exercise of discretion by the coastal State. Even if it were accepted, *arguendo*, that Mauritius might succeed in making its case that the United Kingdom failed in its obligations by refusing to determine the allowable catch or allocate any licences to Mauritius, that conclusion would merely reinforce the point that, as pleaded by Mauritius, this case falls outwith the jurisdiction of an Annex VII tribunal under article 297(3)(a).

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[475] M.H. Nordquist (ed.), *UNCLOS 1982: A Commentary*, vol. V, pp. 87-94, 105 (**Authority 85**); N. Klein, *Dispute Settlement in the UN Conference on the law of the Sea* (2005), pp. 175-188 (**Authority 77**).
[476] Klein, *op.cit*, pp. 175-6. See also M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), pp.121-2 (**Authority 60**).
[477] Klein, *op.cit*, pp. 177-8.
[478] W.T. Burke, The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction, 63 *Oregon LR* 73 (1984), p. 117 (**Authority 49**).

(ii) Jurisprudence under article 297(3)(a)

6.36 The Annex VII tribunal in the *Southern Bluefin Tuna Arbitration* considered article 297 and came to the conclusion that it lacked jurisdiction. *Inter alia* it made the following assessment:

> "61. Article 297 of UNCLOS is of particular importance … for it provides significant limitations on the applicability of compulsory procedures insofar as coastal States are concerned. Paragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases only, i.e. (a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and (b) cases involving the protection and preservation of the marine environment. ….Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important "but", the coastal State is not obliged to submit to such procedures *where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations*" (emphasis added) [479].

6.37 It may be noted that because Mauritius seeks access to fish stocks within the Fisheries Conservation and Management Zone, and seeks to challenge the compatibility of the MPA with the 1982 Convention, it has initiated a dispute which "relates to [the coastal State's] sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations". As indicated by the Award of the Arbitral Tribunal in *Southern Bluefin Tuna* quoted in the previous paragraph, such a dispute is excluded from compulsory jurisdiction of an arbitral tribunal by article 297(3)(a).

6.38 In *Barbados* v. *Trinidad & Tobago,* the Annex VII tribunal noted, with respect to article 297(3)(a), that:

> "276. The pattern of Barbadian fishing activity is relevant to the task of delimitation as a relevant circumstance affecting the course of the boundary, and as such it is plainly a matter that must be considered by the Tribunal. Taking fishing activity into

[479] Decision of Annex VII Arbitral Tribunal, 4 August 2000, RIAA, Vol. XXIII, p. 1 (**Authority 16**).

> account in order to determine the course of the boundary is, however, not at all the same thing as considering fishing activity in order to rule upon the rights and duties of the Parties in relation to fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one or other Party. Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal "any dispute relating to [*the coastal State's*] sovereign rights with respect to the living resources in the exclusive economic zone", and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal".
>
> 283. The Tribunal accordingly considers that *it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a)* [*emphasis added*] and because, viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*. …"[480]

6.39 The *Barbados* v. *Trinidad & Tobago* case is of particular relevance to the present dispute because, like Mauritius, Barbados argued that it had traditional fishing rights within the EEZ of the other party to the dispute. It is therefore notable that, notwithstanding article 56, the arbitral tribunal concluded that this aspect of the dispute was "outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a)"[481].

D. Mauritius' claims are covered by article 297(3)(a)

6.40 Article 297(3)(a) is applicable for two reasons. First, it covers access to fisheries in the MPA. Second, it also covers conservation and management of fish stocks within the MPA. Both categories of dispute are expressly excluded from binding compulsory settlement under Part XV. By asserting a right to fish in the MPA[482], and by challenging the right of the United Kingdom to conserve and manage fish stocks within the MPA[483], Mauritius necessarily brings its case within the terms of Article 297(3)(a).

(i) Mauritius' access to MPA fisheries

[480] XXVII *RIAA* 149 (**Authority 24**).
[481] *Ibid.*, para. 283.
[482] MM, paras. 5.35(ii); 6.37-9; 6.42-45; 7.28-35.
[483] MM, paras. 5.35(ii); 7.28-35.

6.41 It is clear from the text and drafting history of article 297(3)(a) referred to in the previous section that disputes over access to EEZ fisheries are excluded from binding compulsory jurisdiction[484]. It is equally clear that in the present case Mauritius claims a right of access to fisheries within the MPA[485], i.e., to the FCMZ/EPPZ. That claim is based on undertakings given in 1965 and subsequently that the United Kingdom would use its "good offices" with the United States to ensure "as far as practicable" that fishing rights would remain available to Mauritius[486]. Alternatively Mauritius claims traditional fishing rights in the MPA[487].

6.42 The United Kingdom is entitled in conformity with UNCLOS to exclude all vessels from access to fish stocks in the FCMZ/EPPZ, and, in adopting the MPA for reasons relating to the conservation and management of living resources, it has done so. Access to EEZ fisheries is governed by article 62 of UNCLOS. Article 62 gives the coastal state a "broad discretion" in deciding which States' fishermen are to be given access to any surplus in the total allowable catch[488]. Moreover, "[t]his discretion is particularly broad, since … in determining the allowable catch, the coastal State can also determine the size of any surplus (if any)"[489].

6.43 In claiming to exercise fishing rights within the MPA Mauritius seeks to challenge the broad discretion conferred on the coastal State. Its fisheries claims "relate to [the coastal State's] sovereign rights with respect to living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations". These are among the rights referred to in article 297(3)(a). They are all matters in respect of which the coastal State "shall not be obliged to accept the submission to such settlement [i.e. binding compulsory settlement] of any dispute relating to its sovereign rights etc ...".

[484] See para. 5.15 above.
[485] MM, paras. 5.35(ii); 7.28-35.
[486] MM, paras. 3.87; 7.22-7.27.
[487] MM, paras. 7.9-7.21.
[488] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd ed., 1999), p. 290 (**Authority 55**).
[489] *Ibid*. See also N. Klein, *Dispute Settlement in the UNCLOS*, pp. 178-183 (**Authority 77**).

6.44 Moreover, even if the traditional fishing rights claimed by Mauritius were to survive entry into force of UNCLOS, a dispute with respect to those rights is necessarily excluded from Annex VII arbitration by article 297(3)(a) for the reasons set out above.

(ii) Mauritius' claims relate to conservation and management measures within the MPA

6.45 By challenging its right to designate an MPA within 200 nautical miles of the BIOT Mauritius also challenges the United Kingdom's right to conserve and manage living resources within the BIOT Fisheries Conservation and Management Zone ('FCMZ'). Article 61 of UNCLOS deals with conservation and management of living resources in the EEZ. Under this provision the coastal State must ensure "through proper conservation and management measures" that the living resources of the EEZ are maintained and not threatened by over-exploitation[490]. In formulating conservation and management measures the coastal State must "take into consideration" such ecological factors as "effects on species associated with or dependent upon harvested species" with a view to maintaining or restoring these populations "above levels at which their reproduction may become seriously threatened"[491]. It must, in other words, consider the ecosystem as a whole and ensure the sustainability of living resources. Once again, it is for the coastal State to decide what measures are necessary and appropriate in the circumstances.

6.46 The limitations on compulsory jurisdiction agreed by the States Parties to UNCLOS in article 297(3)(a) cannot be avoided by reformulating the same dispute as one concerning protection of the environment rather than conservation and management of living resources. The *Fisheries Jurisdiction Case* defined the phrase "conservation and management measure" broadly and held that "in its ordinary sense the word [i.e. measure] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby"[492]. The no-take policy applied by the United Kingdom to fish stocks in the MPA is covered by article 297(3)(a). For reasons explained earlier it does not fall within

[490] Article 61(2).
[491] Article 61(4).
[492] *I.C.J. Reports 1998*, p. 432, para. 66 (**Authority 14**).

article 297(1)(c)[493]. Accordingly, the United Kingdom "shall not be obliged to accept" the submission of any such dispute to binding compulsory settlement under Part XV of UNCLOS: it has not and does not do so.

(iii) Consultation with regard to establishment of the MPA

6.47 The establishment of the MPA was an exercise by the United Kingdom of its sovereign rights with respect to conservation and management of living resources in the territorial sea, FCMZ and EPPZ of the BIOT[494]. Even if Mauritius were right to say that articles 56(2), 61, 62, 63, and 64 (or any other article) require consultation with other States and/or with the Indian Ocean Tuna Commission about highly migratory fish stocks, article 297(3)(a) still applies. A dispute about consultation concerning conservation and management of living resources remains a dispute about "sovereign rights with respect to living resources in the exclusive economic zone or their exercise [etc] ...".

6.48 Article 197, to which Mauritius also refers[495], has no bearing on the present point. Article 197 deals with co-operation in adopting global or regional rules for the protection of the marine environment. As noted in paragraphs 6.28 to 6.30 above, it applies to pollution. It is not relevant to fisheries co-operation[496]. If it were relevant to fisheries co-operation, it too would be caught by article 297(3)(a).

6.49 The decision of the arbitral tribunal in the *Lac Lanoux Arbitration* does not assist Mauritius[497]. First, the Indian Ocean Tuna Commission Agreement, the 1995 UN Fish Stocks Agreement, and UNCLOS, are the relevant *lex specialis* with respect to consultation regarding shared fish stocks, not the *Lac Lanoux* decision. Second, the rights and obligations over which the present Tribunal has jurisdiction are to be determined by reference to UNCLOS, not the *Lac Lanoux* decision or customary international law. Even if the *Lac Lanoux* decision were relevant to the interpretation or application of the Convention, which it is not, article 297(3)(a) would still exclude compulsory jurisdiction with respect to fish

[493] See paras. 6.28-6.31 above.
[494] See **Chapter III** of this Counter-Memorial.
[495] MM, paras. 7.43-7.45.
[496] Nordquist (ed.), *UNCLOS 1982: A Commentary*, Vol. IV, pp. 77-81 (**Authority 85**).
[497] MM, para. 7.39.

stocks. Finally, with respect to seabed mineral resources the reasoning set out in paragraph 6.28 above would exclude such disputes: the compulsory procedures provided for in section 2 of Part XV apply only to disputes which fall within one of the categories listed in article 297. In any event, the requirements of the *Lac Lanoux* decision in regard to consultation do not differ from those addressed in **Chapter IX** of this Counter-Memorial.

E. Cooperation with respect to highly migratory fish stocks

6.50 Mauritius claims that when adopting the MPA the United Kingdom failed in its alleged duty to cooperate with Mauritius and the Indian Ocean Tuna Commission[498]. Both States are parties to the IOTC Agreement, but Mauritius bases its claim not on Article VIII of that Agreement but on articles 63 and 64 of UNCLOS, and article 7 of the UN Fish Stocks Agreement of 1995. The Tribunal has no jurisdiction over this claim for two reasons.

6.51 First, it is another attempt to challenge the discretionary exercise by the United Kingdom of its sovereign rights in relation to living resources, and "the terms and conditions established in its conservation and management laws and regulations"[499]. In seeking either to veto conservation and management measures adopted by the United Kingdom, or to subject them to consultation or cooperation with itself or the IOTC, Mauritius is thereby challenging the discretionary exercise by the coastal State of its sovereign rights over living resources, as well as "the allocation of surpluses to other states" and "the terms and conditions established in its conservation and management laws and regulations". For that reason this part of its case again falls within the terms of article 297(3)(a) and is excluded from the compulsory jurisdiction of an Annex VII tribunal.

6.52 Second, as explained in **Chapter IX** of this Counter-Memorial, the IOTC Agreement is the applicable law with respect to co-operation among IOTC member states (including Mauritius and the United Kingdom), not articles 63 and 64 of UNCLOS or article 7 of the UN Fish Stocks Agreement. The IOTC Agreement expressly preserves the sovereign rights of the coastal State with respect to conservation and management of fish stocks within the 200 nautical mile area. Article XVI provides that "This Agreement shall not prejudice the

[498] MM, paras. 7.63-7.64.
[499] Article 297(3)(a).

exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction".

6.53 The IOTC is the appropriate regional fisheries organisation for the purposes of cooperation between coastal States and other States in accordance with the United Nations Fish Stocks Agreement[500]. Article XXIII of the IOTC Agreement excludes the possibility of resort to Part XV of UNCLOS to resolve disputes arising between the parties concerning, *inter alia*, conservation and management of tuna stocks in the Indian Ocean. Article XXIII provides that:

> "Any dispute regarding the interpretation or application of this agreement, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as a result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement".

This provision does not confer jurisdiction on the present Annex VII Tribunal.

6.54 The dispute settlement provisions of a regional fisheries convention such as the IOTC Agreement will normally apply in lieu of the provisions of Part XV of UNCLOS unless the parties agree otherwise. This follows from article 282 of UNCLOS if the outcome of any proceedings pursuant to Article XXIII of the IOTC Agreement is a binding decision. Article 282 provides:

> "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed , through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails *a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part,* unless the parties to the dispute otherwise agree" (emphasis added).

[500] See **Chapter IX** below.

6.55 Moreover, the exclusion of Part XV compulsory procedures is also consistent with the Annex VII Tribunal's Award in *Southern Bluefin Tuna* if the outcome is not a binding decision[501]. That Award was based on article 281 of UNCLOS, which provides as follows:

> "1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit".

6.56 In the view of that Arbitral Tribunal, the parties to the 1993 Convention on Conservation of Southern Bluefin Tuna had agreed to exclude Part XV procedures under UNCLOS. They were bound to use the procedures provided by Article 16 of the 1993 Convention:

> "56. The Tribunal now turns to the second requirement of Article 281(1): that the agreement between the parties "does not exclude any further procedure". This is a requirement, it should be recalled, for applicability of "the procedures provided for in this Part," that is to say, the "compulsory procedures entailing binding decisions" dealt with in section 2 of UNCLOS Part XV. The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.
>
> 57. Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive …That express obligation [to keep the matter under review] equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute".

6.57 Thus, if Article XXIII of the IOTC 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 the Annex VII tribunal is equally applicable to the present case. It follows that if Mauritius' case rests on the interplay of UNCLOS and the IOTC Agreement, it must proceed under the terms of that agreement and not under UNCLOS Part XV.

[501] XXIII *RIAA* 1 (**Authority 16**).

6.58 For all these reasons, this part of Mauritius' claims is excluded from Annex VII arbitration by article 297(3)(a), and by the operation of articles 281 and 282 in conjunction with Article XXIII of the IOTC Agreement. A holding that an obligation to consult or cooperate gives the Tribunal jurisdiction would circumvent the provisions of article 297(3)(a), and allow claims by the "back door", contrary to the express wording of UNCLOS and the intention of the States Parties.

F. Other claims over which the Tribunal has no jurisdiction

(i) Access to territorial sea fish stocks

6.59 UNCLOS does not give other States any right to fish in the territorial sea. Mauritius' claim to do so depends entirely on whether there is, as it argues, an undertaking binding under international law by the United Kingdom vis-à-vis Mauritius to permit fishing by Mauritian vessels in the territorial sea[502], or on the basis of traditional inshore fishing rights allegedly exercised by Chagossian fishermen.

6.60 Whether Mauritius has these rights within the BIOT territorial sea (a) is not a question relating to the interpretation or application of UNCLOS as required by article 288(1); and (b) is not covered by any agreement to submit disputes concerning such non-UNCLOS rights to Part XV dispute settlement pursuant to article 288(2). The United Kingdom reiterates the position set out in **Chapter IV** above (at paragraphs 4.12- 4.18). By using, on each occasion, the expression "dispute(s) concerning the interpretation or application of this Convention" the States Parties established a fundamental limitation on the scope of jurisdiction under Part XV. Moreover, since the fishing rights that Mauritius asserts in Chapter 7 of its Memorial are not contained in an agreement that provides for UNCLOS dispute settlement, the Tribunal does not have the enlarged jurisdiction contemplated by article 288(2).

6.61 Mauritius also seeks to rely on article 293[503], but the United Kingdom reiterates the views it expressed on that article in **Chapter IV** above (at paragraphs 4.21-4.37).

[502] The BIOT Administration reserved the right to limit the number of licences issued relative to the surplus allowable catch. For the inshore fishery the limit was six eighty-day licences, reduced to four in 1999.
[503] MM, paras. 7.8 and 7.23.

6.62 References to article 2(3) of UNCLOS do not assist Mauritius. To say that sovereignty in the territorial sea "is exercised subject to ... other rules of international law" is to state an obvious fact[504], but article 2(3) does not incorporate other treaties, nor *a fortiori* unilateral undertakings, into the Convention[505], while Mauritius simply assumes that Article 297 confers jurisdiction over disputes concerning the territorial sea that do not concern innocent passage[506]. Correctly interpreted, there is no dispute concerning article 2(3) that falls within the jurisdiction of this Tribunal[507]. Moreover, that is also the view taken by the Administrative Court in its judgment of 11 June 2013, in which it held that at the time of the United Kingdom Government's 2010 "consultation" regarding establishment of the MPA "there was no dispute with Mauritius about fishing rights based on the September 1965 undertaking and there was nothing that needed to be mentioned on that score in the consultation document. The dispute with Mauritius concerned sovereignty, and that was expressly mentioned in the consultation document"[508].

(ii) Abuse of rights

6.63 Mauritius invokes article 300 UNCLOS and alleges abuse of rights. It asserts that the MPA was not adopted for reasons of conservation of living resources, but for other irrelevant political purposes[509]. The history and rationale for the MPA has been set out in **Chapter III** of this Counter-Memorial. As indicated there, its purpose is to protect the biodiversity and ecosystem of the MPA from damage caused by fishing. Its establishment is supported by a substantial body of expert scientific advice. But for present purposes what matters is that article 300 does not purport to give rise to an independent basis for compulsory settlement of

[504] Article 2(3) is based on Article 1(2) of the Territorial Sea Convention, which reflects the proposed draft considered by the 1930 Hague Conference on the Codification of International Law. See the ILC commentary in *Yearbook of the International Law Commission, 1956*, Vol. II, p. 254. The Special Rapporteur's Commentary is in *Yearbook of the International Law Commission, 1952*, Vol. II, p. 27.
[505] *Pulp Mills on the River Uruguay*, *I.C.J. Reports 2010*, para. 61: "Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay" (**Authority 33**).
[506] Cf. R.Wolfrum, *Handbuch des Seerechts* (2006), p. 473, para. 33 (**Authority 109**).
[507] The United Kingdom's interpretation of article 2(3) is set out in detail in **Chapter VIII,** paragraphs 8.4-8.7, of this Counter-Memorial.
[508] *The Queen (on the application of Louis Olivier Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (QBD Administrative Court), para.158 (**Authority 43**).
[509] MM, paras. 7.81ff.

the present dispute, while by contrast it would follow from article 297(3)(b) that any claim for abuse of rights in this context would be a matter for conciliation.

6.64 Thus, even if Mauritius were able to show that the United Kingdom has abused its rights under any other provision of UNCLOS, this Tribunal would have jurisdiction over such a claim only to the extent that it already has jurisdiction over a dispute concerning the relevant provision. *A fortiori*, if there is no abuse of other articles of the Convention then there can be no freestanding article 300 claim, and there can be no basis for jurisdiction over such a claim. Put simply, if the Tribunal lacks jurisdiction to decide the dispute, invoking article 300 will not rectify the problem.

6.65 That is the clear conclusion of ITLOS in its most recent judgment. In the *M/V "Louisa"* case[510], ITLOS rejected the argument that article 300 by itself provides a basis for alleged abuse of rights claims. At paragraph 137 "The Tribunal finds that it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when "the rights, jurisdiction and freedoms recognized" in the Convention are exercised in an abusive manner". It follows that any claim for abuse of rights must relate to abuse of other provisions of UNCLOS.

6.66 The same result follows from the Annex VII tribunal's reasoning in the *Southern Bluefin Tuna Arbitration*:

> "64. The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith".

6.67 This sets a high threshold for abuse of rights claims. The United Kingdom's conduct in declaring a no-take marine preserve cannot be considered to reach this threshold. The MPA:

[510] *The M/V "Louisa" Case* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment of 28 May 2013 (**Authority 44**).

a. protects the marine ecosystem and its biodiversity, unlike the Japanese fishing at issue in the *Southern Bluefin Tuna Cases*;

b. self-evidently is not irreversible;

c. has in fact had a very limited impact, if any, on Mauritian fishery vessels. As shown on Chapter IX of this memorial Mauritius is "*not presently classified as a fishing nation for tuna species*"[511]. Not since 1999 have licences to fish for tuna within the area now designated as the MPA been issued to Mauritian vessels[512].

6.68 Moreover, article 297(3)(b) already provides a remedy (conciliation) for abuse of rights in fisheries disputes. There is no need to invoke article 300 for this purpose. The article 300 claim is simply a re-packaging of Mauritius' other allegations of breaches of UNCLOS. If the tribunal has no jurisdiction over the alleged violations of the relevant fisheries articles of UNCLOS (articles 61-64), then it follows that it can have no jurisdiction over an alleged abuse of rights arising out of the same provisions. If this Tribunal were to interpret "abuse of rights" in article 300 as creating an independent basis of jurisdiction over EEZ fisheries disputes, it would not only contradict the considered jurisprudence of ITLOS referred to above, it would also render articles 297(3)(a) and (b) redundant and undermine the carefully constructed dispute resolution provisions of Part XV of UNCLOS.

6.69 Mauritius cannot and should not be allowed to achieve indirectly through allegations of improper purposes what it could not achieve directly - an adjudication on the exercise by the United Kingdom of "its discretionary powers for determining the … terms and conditions established in its conservation and management laws and regulations"[513]. Any other conclusion would subvert the package deal on which Part XV of the Convention is based.

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[511] IOTC 14th Report of the Scientific Committee, Mahé, Seychelles, 12–17 December 2011, p. 54: **Annex 126**.
[512] See paras. 2.110 and 3.40 above and *The Queen (on the application of Louis Olivier Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (QBD Administrative Court), para. 128: "In the period 1991 to 2009, when the licensing system was in operation, the vast majority of licences granted was for deep sea fishing by third country vessels (for example, those of France, Japan, Spain and Taiwan). According to statistics provided by MRAG, the position in relation to fishing by Mauritian-flagged vessels was as follows: for deep sea fishing, between two and six licences were granted annually in the period 1991 to 1999, and none thereafter; and for inshore fishing, between three and seven licences were granted annually in the period 1992 to 1999, between two and four licences annually in the period 2000 to 2004, none in the period 2005 to 2008, and two in 2009" (**Authority 43**).
[513] Article 297(3)(a).

G. Conclusions

6.70 However characterised, and whatever their merits may be, all of the claims made by Mauritius with respect to the legality of the MPA are excluded from the binding compulsory jurisdiction of an Annex VII tribunal.

6.71 To hold otherwise:

a. would subject the exercise of coastal State sovereign rights over living resources to challenge and interference by other States;

b. would upset the carefully balanced scheme for management of the EEZ by the coastal State;

c. would not be consistent with the ordinary meaning of the text of UNCLOS, interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties; and

d. would contradict existing jurisprudence.

PART THREE

MERITS

Part Three deals with the merits of Mauritius' application.

Chapter VII describes the UK's sovereignty over the BIOT, how this was acquired and how it has not been relinquished to the present day. Chapter VII also deals with Mauritius' arguments on self-determination, *uti possidetis*, and the United Kingdom's undertaking to cede the BIOT at a future stage when it is no longer required for defence purposes.

Chapter VIII refutes Mauritius' claims in respect of fishing, the alleged failure to consult, the alleged abuse of rights and explains that the establishment of the Marine Protected Area does not violate the rights of Mauritius under UNCLOS.

Chapter IX explains why the establishment of the Marine Protected Area does not violate the obligation of the United Kingdom to co-operate with respect to managing fish stocks in the 200 nautical mile FCMZ/EPPZ.

CHAPTER VII

THE UNITED KINGDOM HAS SOVEREIGNTY OVER THE BRITISH INDIAN OCEAN TERRITORY

7.1 At the outset of this Chapter, the United Kingdom reaffirms that an arbitral tribunal operating under the compulsory jurisdiction established by Part XV of UNCLOS is without jurisdiction over questions of sovereignty over land territory[514]. As already indicated, to hold otherwise would, in the United Kingdom's respectful submission, exceed a tribunal's powers under Part XV of UNCLOS[515]. The present Chapter is without prejudice to that position. It is included in the Counter-Memorial so as to ensure that the Tribunal is properly informed about the sovereignty issues raised in Mauritius' Memorial.

7.2 In its Memorial, Mauritius claims that the Marine Protected Area ('MPA') is unlawful under UNCLOS because it was "imposed by a State which has no authority to act as it has done"[516]. Mauritius bases this claim, first and foremost, on the assertion that "[t]he UK does not have sovereignty over the Chagos Archipelago"[517]. In support of this assertion, Mauritius argues that the detachment of the Chagos Islands from Mauritius on 8 November 1965, to form a separate British overseas territory, was "carried out in breach of fundamental principles of international law"[518], namely the principles of self-determination[519] and *uti possidetis*[520]. These arguments, together with others to be found throughout the Memorial[521], are unconvincing, as will be explained in the present Chapter.

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[514] See **Chapter IV** above.
[515] Para. 1.10 above.
[516] MM, para. 1.3(i).
[517] *Ibid.* See also MM, para. 6.8 ("The UK's claim to be "the coastal State" for the purpose of Part V of the Convention, and thus to be entitled to establish an EEZ and the "MPA", is founded upon its purported claim to sovereignty over the Chagos Archipelago, following the UK's unlawful detachment of the Archipelago from the territory of Mauritius"); MM, para. 6.36 ("the basis of its entitlement [to sovereignty over the Chagos Archipelago] is its status as a unit of self-determination … and its consequent status as an independent State").
[518] MM, para. 6.8.
[519] MM, paras. 6.10-6.22.
[520] MM, paras. 6.23-6.24.
[521] For example, at MM. para. 6.34, Mauritius appears to link its claim that the detachment was "void and without legal effect" to an alleged "denial of the human rights of the Chagossians". But in the same breath Mauritius indicates that this is "the subject of other proceedings", referring back to MM, para. 3.84. MM, paras. 3.75-3.84 give a tendentious account of the domestic and European proceedings brought by certain Chagossians,

7.3 The United Kingdom's acquisition of sovereignty over the islands that now form the British Indian Ocean Territory ('BIOT'), by cession from France under the Treaty of Paris of 1814, was described in **Chapter II** above, and is not in dispute. The United Kingdom has not subsequently relinquished sovereignty over the islands, and that sovereignty therefore continues (**Section A**). The UK's position can be stated quite briefly, as was done in its letter to the United Nations of 17 November 1983 in which it said:

> "... sovereignty over the Chagos Archipelago is vested in the United Kingdom of Great Britain and Northern Ireland. At no time has Mauritius had sovereignty over the Chagos Islands. In 1968, when Mauritius became an independent sovereign State, the Islands did not form part of the colony which then gained independence ..."[522]

7.4 It is not easy to disentangle Mauritius' several arguments challenging the United Kingdom's present sovereignty, which are scattered throughout the Memorial. This Chapter nevertheless seeks to deal with these arguments in some reasonable order. It will be shown that none of Mauritius' various arguments (self-determination, *uti possidetis*, or based on grounds such as the United Kingdom's undertaking to cede the BIOT to Mauritius in certain circumstances or Mauritius' submission of 'Preliminary Information' to the Commission on the Limits of the Continental Shelf) is such as to cast doubt on the United Kingdom's present sovereignty over the BIOT. (**Section B**).

A. The United Kingdom continues to have sovereignty over the British Indian Ocean Territory

7.5 As described in **Chapter II**, the United Kingdom acquired sovereignty over the Chagos Islands by cession from France in 1814[523]. It has continuously and peacefully exercised sovereignty since that date, first as a Dependency of Mauritius[524] and, since

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which are now all concluded (except for the judicial review of the MPA, in so far as the Claimant has renewed his application for leave to appeal to the Court of Appeal). It does not in fact appear that Mauritius places any real weight, for the purposes of the present annex VII arbitral proceedings, on what it terms the "denial of human rights of the Chagossians", and so it is not considered that a response is needed on that matter.

[522] A/38/598: **Annex 47**.

[523] Para. 2.17-2.18 above.

[524] Para. 2.19-2.32 above.

November 1965, as a separate British overseas territory (the British Indian Ocean Territory - BIOT)[525].

7.6 No intervening event has affected United Kingdom sovereignty. In particular, the establishment of the BIOT on 8 November 1965 involved no change in sovereignty. Nor did the independence of Mauritius on 12 March 1968.

7.7 The independence instruments are clear, as was described in **Chapter II** above[526]. Having become part of a separate British overseas territory (the BIOT) on 8 November 1965, the Chagos Archipelago was not included in the territory of Mauritius on the date on which Mauritius became a sovereign independent State (12 March 1968). The territory of the sovereign independent State of Mauritius did not, upon independence, include the Chagos Archipelago.

7.8 It is trite law that the territory of a newly independent State is established at the moment of independence. This is reflected in the *uti possidetis juris* principle, which applies in particular to cases of decolonization, but is not limited to such cases[527].

7.9 As will be shown in **Section B** below, there is no legal ground upon which it can plausibly be argued that United Kingdom sovereignty over the BIOT ceased on 12 March 1968, or that the newly independent State of Mauritius on that date acquired territorial sovereignty over the BIOT.

B. None of Mauritius' arguments is such as to cast doubt on United Kingdom sovereignty

7.10 It has been shown in **Section A** above that the United Kingdom has and continues to have sovereignty over the BIOT. So far as concerns Mauritius' claim that the United Kingdom does not have sovereignty over the BIOT, Mauritius' central argument appears to be that "the UK's claim to sovereignty … is incompatible with the fundamental right to self-

[525] Para. 2. 33-2.39 above.
[526] Paras. 2.33-2.35, 2.45-2.46 above.
[527] See paras. 7.43-7.46 below.

determination for Mauritius and its people"[528]. In this regard, Mauritius refers to the 'unlawful detachment' of the Chagos Archipelago on 8 November 1965[529]. Mauritius also invokes national unity and territorial integrity, as well as the principle of *uti possidetis juris*[530]. It argues that the agreement of the representatives of Mauritius to the detachment of the Chagos Archipelago in 1965 does not "validate" that detachment. For good measure it throws in other arguments, including a claim concerning the United Kingdom's undertaking to cede the Islands to Mauritius when they are no longer needed for defence purposes, a claim concerning the Commission on the Limits of the Continental Shelf. Mauritius' attempts to establish that it, and not the United Kingdom, is sovereign over the Chagos Archipelago, such as by asserting that "the vast majority of other States" have recognized Mauritius' sovereignty, are without merit.

(i) Mauritius' arguments based on the right of self-determination and its invocation of national unity and territorial integrity

7.11 Mauritius asserts that "the UK's claim to sovereignty - the essential foundation of its right to claim maritime zones - is incompatible with the fundamental right to self-determination for Mauritius and its people"[531]. Elsewhere, Mauritius claims that "[t]he detachment of the Chagos Archipelago was, first and foremost, contrary to the right of Mauritius to self-determination"[532]. In a closely related argument, based essentially on paragraph 6 of General Assembly 1514 (XV), Mauritius argues that the establishment of the BIOT contravened the national unity and territorial integrity of Mauritius. In doing so it overlooks the fact that, as the International Court of justice ('ICJ') explained in the *Kosovo* Advisory Opinion, "the scope of the principle of territorial integrity is confined to the sphere of relations between States"[533].

7.12 Mauritius does not, in fact, appear to rely on the Charter principle of territorial integrity, but on some supposed principle prohibiting changes in the territory of non-self-

[528] MM, para. 1.23, 6.10-6.22.
[529] MM, Chapter 3.
[530] MM, paras. 6.23-6.24.
[531] MM, para. 1.23.
[532] MM, para. 6.10.
[533] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 80 (**Authority 34**).

governing territories. No such principle is to be found in the United Nations Charter, including its Chapter XI (Declaration on Non-self-governing Territories). Instead, Mauritius bases its argument principally on paragraph 6 of General Assembly resolution 1514 (XV), cited above, and specific provisions in resolutions from 1965 and 1966 relating to Mauritius. These resolutions have been described in **Chapter II** above[534]. As will be recalled, the United Kingdom abstained on resolution 1514 (XV) and voted against the paragraphs of the later resolutions relied upon by Mauritius, making it clear that it did not accept that these provisions had any binding force, or that the Chagos islands had been an integral part of Mauritius.

7.13 The nature of Mauritius' arguments based on self-determination is unclear. As a preliminary point it is noted that Mauritius appears to be alleging a violation, in 1965, of some aspect of a right of self-determination belonging to 'Mauritius', in other words, a right for the territory of Mauritius, as distinct from the people of Mauritius. Yet the right of self-determination is a right of peoples, not of States or territories[535].

7.14 There are two main points to make in response to Mauritius' arguments based on self-determination:

a. In November 1965, there was no rule of international law concerning self-determination (and *a fortiori* no such rule of *jus cogens*) binding on the United Kingdom such as would have precluded the establishment of the BIOT.

b. Assuming *arguendo* that there were such a rule, the establishment of the BIOT in 1965 did not contravene any right of 'Mauritius' to self-determination, not least because the duly elected representatives of the people of Mauritius agreed to the detachment of the Chagos Islands.

(ii) There was in 1965 no rule of international law prohibiting the detachment of the Chagos Archipelago

[534] Paras. 2.67-2.88.
[535] Mauritius has not, in the present proceedings, raised any question concerning any claim to self-determination by the former inhabitants of the Chagos Islands. It is therefore unnecessary to discuss that matter here.

7.15 It is first necessary, in accordance with the intertemporal law, to consider whether, in November 1965, the detachment of the Chagos Islands could have violated any existing rule of law concerning self-determination binding on the United Kingdom, and in particular a *jus cogens* rule, as now asserted by Mauritius.

7.16 In its Memorial, in order to establish the existence of a right of self-determination in 1965, Mauritius relies principally upon paragraph 6 of General Assembly resolution 1514 (XV) of 1960 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*), as well as various writings and ICJ dicta from various dates[536]. In order to establish that the "prohibition of the denial of the right to self-determination" was, in November 1965, a rule of *jus cogens*, Mauritius refers to a brief citation from a book published in 1986[537] and a statement by the International Law Commission dating from 2001[538].

7.17 The United Kingdom had consistently, throughout the 1950s and 1960s, objected to references to a 'right' of self-determination in United Nations instruments, including in the drafts of the International Covenants of 1966. It did not, in 1965, accept that the principle of self-determination had hardened into a legal right, still less that the "prohibition of the denial of the right to self-determination" was a rule of *jus cogens.* Indeed, the very concept of *jus cogens* was not widely accepted by States at that time. And the United Kingdom certainly did not accept that paragraph 6 of General Assembly resolution 1514 (XV) was had crystallized into a rule of customary international law, still less a rule of *jus cogens*. The United Kingdom persistently objected to any such rule, having been one of the States which abstained on the adoption of General Assembly resolution 1514 (XX) in 1960[539]. This important resolution was highly controversial[540].

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[536] MM. paras. 6.11-6.13.

[537] MM, para. 6.14. Mauritius also cites part of a paragraph from page 91 of Shaw's book *Title to Territory in Africa: International Legal Issues*, which was published in 1986. The paragraph actually begins with the sentence, not cited in the Memorial, reading "It is arguable that the principle of self-determination also falls within the category of *jus cogens* and a number of members of the International Law Commission appeared to be of this opinion". Shaw himself was very tentative: "the weight of international opinion appears to suggest that the right [of self-determination] may be part of *ius cogens*" (**Authority 93**).

[538] *Ibid*. Mauritius does not point out that, in1966, the International Law Commission merely noted that "treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples": *Yearbook of the International Law Commission 1966*, Vol. II, p. 248, final draft articles on the law of treaties, art. 50, Commentary (3).

[539] The resolution was adopted by 89 votes in favour, with 9 abstentions (United Kingdom). For an account of the background and negotiating history of resolution 1514 (XV) see E. McWhinney, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, in Audiovisual Library of International Law:

(a) Paragraph 6 of GA resolution 1514 (XX)

7.18 Mauritius relies heavily on paragraph 6 of UN General Assembly resolution 1514 (XV), which reads:

> "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"[541].

7.19 The meaning of this paragraph is obscure. The negotiating history of resolution 1514 (XV) is not particularly illuminating. An item entitled "Question of a declaration on the granting of independence to colonial countries and peoples" was proposed for inclusion in the agenda of the General Assembly by Khrushchev, Chairman of the Council of Ministers of the Union of Soviet Socialist Republics, during his address to the Assembly on 23 September 1960. This proposal was formalized in a letter to the President of the General Assembly of the same day[542], which was submitted together with a draft Declaration on the granting of independence to colonial countries and peoples[543].

7.20 The course of the agenda item, between September and December 1960, sheds little light on the meaning of paragraph 6. Following the USSR proposal, the item was placed on the agenda and taken up directly in plenary. There are no records of the preparation of the draft resolution[544], which was introduced by Cambodia on behalf of 43 States in the plenary of the General Assembly on 28 November 1960. In introducing the draft resolution, Cambodia gave no explanation of its terms[545]. The debate stretched over 19 plenary

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(**Authority 82**). For an account of the main stages in the emergence of a right of peoples to self-determination, see M. Shaw, *International Law* (6th ed., 2008), pp. 251-255 (**Authority 94**).

[540] Rosenstock wrote in 1971 that "most of the African and Asian nations regard [resolution 1514 (XV)] as a document only slightly less sacred than the Charter …. Other states, particularly those in the West, do not hold the resolution in like esteem and are inclined to regard some of its paragraphs as considerably overstated, even as statements of political desiderata": R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL* 713 (1971), at p. 730 (**Authority 92**).

[541] MM, paras. 6.11-6.22. The Friendly Relations Declaration contains similar wording, both in the preamble and in the operative part: "any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a State or country … is incompatible with the purposes and principles of the Charter" and "Nothing in the foregoing paragraphs [on the principle of equal rights and self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves ….".

[542] A/4501, 23 September 1960.

[543] A/4502, 23 September 1960.

[544] A/L.323*.

[545] A/PV.926, paras. 9-13.

meetings[546], following which the draft resolution was adopted, without change, on 14 December 1960. The voting was 89 in favour, none against, with nine abstentions, including the United Kingdom.

7.21 Paragraph 6 of resolution 1514 (XV) was aimed at securing the political objective of precluding demands for decolonization leading to the dismemberment of the territory of a sovereign State. The representative of Indonesia said in the course of the debate:

> "Moreover, it is a matter of great importance to us that this declaration is designed to prevent any attempt to aimed at the partial or total disruption of the national unity or territorial integrity of a country. It emphatically declares in paragraphs 4, 6 and 7 that the integrity of the national territories of peoples which have attained independence shall be respected. This is a rejection of the colonial activities which create disputes such as that of West Irian between Indonesia and the Netherlands"[547].

Similarly, when Guatemala proposed a new operative paragraph reading -

> "7. The principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to recovery of territory" -

the Indonesian representative, after reading out paragraph 6, explained -

> "… when drafting this document my delegation was one of the sponsors of paragraph 6, and in bringing it into the draft resolution we had in mind that the continuation of Dutch colonialism in West Irian is a partial disruption of the national unity and territorial integrity of our country. … we consider that the idea expressed in the Guatemalan amendments is already fully expressed in paragraph 6 of our draft resolution …."[548]

7.22 McWhinney, writing in the *UN Audiovisual Library*, refers to "the warning, in the premonition of possible future post-decolonisation conflicts (as, at the time, in the former Belgian Congo), against any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a (post-decolonisation) country (art. 6)"[549].

(b) The International Covenants

[546] A/PV.925-939 and A/PV.944-947.
[547] A/PV.936, para. 55.
[548] A/PV.947, paras. 9-10.
[549] **Authority 82**.

7.23 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which embody a right of self-determination in their common Article 1, were adopted by the UN General Assembly on 16 December 1966, and entered into force on 3 January 1976 and 27 March 1976 respectively. Mauritius acceded to the Covenants in 1973, and the United Kingdom ratified them in May 1976.

7.24 The United Kingdom signed the two Covenants in 1968. In doing so, it made a declaration, maintained upon ratification in 1976 and which has not been withdrawn, stating that:

> "by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail"[550].

7.25 In 1974, the need to maintain this declaration upon ratification was considered by a Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights. The Report of the Working Group included the following:

> "The United Kingdom strongly opposed the inclusion of [article 1], holding that self-determination was a principle not a right. The essential objection from the United Kingdom point of view was that because of the vagueness of the article, it could be interpreted as imposing on a colonial power greater obligations in respect of dependent territories than the Charter itself. Most of our remaining dependent territories are still not ready to choose their eventual status. On signature of the Covenant in 1968, therefore, we sought to establish that acceptance of the Covenant would not commit us to more in the colonial field than do our present obligations under the Charter (especially Articles 1, 2 and 73)"[551].

(c) The Friendly Relations Declaration

7.26 "The principle of equal rights and self-determination of peoples" was included as a principle of international law in the Friendly Relations Declaration, adopted by the UN

[550] United Nation Treaty Series, Vol. 999.
[551] *Report of a Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights*, 1 August 1974, Annex D, para. 5: **Annex 27**.

General Assembly without a vote on 24 October 1970[552]. That this Declaration represented a watershed in the acceptance of a broad right of self-determination is clear from the authoritative account of Robert Rosenstock. Referring to the first paragraph of the Declaration's statement of "the principle of equal rights and self-determination of peoples", Rosenstock wrote:

> "This represents a significant step in the progressive development of international law when compared with the positions taken in 1964. Many states had never before accepted self-determination as a right"[553].

7.27 In the course of negotiating this Declaration, the United Kingdom's position on the legal status of the 'principle' of self-determination had been set out at length, in comments dated 18 September 1964[554]. The United Kingdom stated, *inter alia*, that -

> "the two elements in the principle of equal rights and self-determination of peoples are complementary to one another, and in so far as self-determination is a legal, and not merely a political concept, it is properly expressed as a principle and not as a right. The concept of self-determination has been invoked, or prayed in aid, in a number of different circumstances; its relevance, it is submitted, can only be determined in relation to the circumstances of each particular case, and in the light of other principles which are affirmed in the United Nations Charter"[555];

and concluded that -

> "although the principle of self-determination is a formative principle of great potency, it is not capable of sufficiently exact definition in relation to particular circumstances to amount to a legal right, and it is not recognized as such either by the Charter of the United Nations or by customary international law"[556].

7.28 It is to be noted that the Friendly Relations Declaration's formulation of the principle of equal rights and self-determination of peoples does not follow the language of paragraph 6 of resolution 1514 (XX). Instead, its language on territorial integrity and political independence is expressly limited to sovereign and independent States. It provides that:

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[552] A/Res/25/2625.
[553] R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL* 713 (1971), at p. 731
[554] A/5725/Add.4: **Annex 8**.
[555] *Ibid*., p. 2.
[556] *Ibid*., p. 6.

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent \States conducting themselves …."

(d) Other resolutions

7.29 In addition to paragraph 6 of resolution 1514 (XV), and the International Covenants, Mauritius relies upon certain other UN General Assembly resolutions, as well as resolutions of the African Union (AU) (formerly, Organization of African Unity - OAU) and the Non-aligned Movement (NAM). None of these resolutions, individually or collectively, have the effect of making unlawful the United Kingdom's detachment of the Chagos Islands from the Colony of Mauritius on 8 November 1965. There was no rule of international law binding on the United Kingdom that detachment could have breached.

7.30 Writing in 2006, Crawford says that "the principle of self-determination is now clearly recognized in international law. The status of the principle of 'territorial integrity' so far as it relates to self-determination units which are not States, is less certain. It is an established part of United Nations practice, and may be treated as a presumption as to the operation of self-determination in particular cases"[557]. He goes on to say that a "further aspect of practice under the rubric of 'territorial integrity' has been the disapproval of the alienation of territory of self-determination units *without local consent*"[558]. After referring to General Assembly resolution 2066 (XX) he writes that "[p]ractice has, not, however, been particularly consistent", and proceeds to discuss the cases of the Cocos (Keeling) Islands and Christmas Islands, "which were at least tacitly accepted by the United Nations, despite the absence of formal consent by any indigenous government in the Straits Settlement, still less by the people affected by the transfer"[559]. He then writes:

> "Separation of the Chagos Archipelago from Mauritius of the 'British Indian Ocean Territory' though from time to time contested by Mauritius, *appears also to have been accepted, at least as a temporary measure*" (emphasis added) [560].

[557] J. Crawford, *The Creation of States in International Law* (2nd ed., 2006), pp. 335-6 (**Authority 58**).
[558] *Ibid.*, p. 336 (emphasis added).
[559] *Ibid.*, pp. 336-7.
[560] *Ibid.*, p. 337. Note also the footnote to this sentence.

7.31 In short, it was not before the 1970s, at the earliest, that the United Kingdom accepted that it could be said that the principle of self-determination had become a right under general international law. That was well after the establishment of the BIOT in November 1965 and after the independence of Mauritius in March 1968. The near contemporaneous view of the United Kingdom, in its September 1964 comments to the United Nations cited at paragraph 7.27 above, was unequivocal. Self-determination was a principle, not a right. In these circumstances, either the right of self-determination had not yet become established as a rule of international law or, if it had, the United Kingdom was at the time in question a persistent objector.

(iii) Even if there were such a rule in 1965, detachment did not violate it

7.32 Mauritius' argument is unsustainable, both legally and factually. As a matter of law, it presupposes that the right of self-determination was applicable in 1965 to the detachment of the islands which became the BIOT. As has just been explained in subsection (a) above, this was not the case. But even if it had been, the application of the right would not have required the freely expressed will of the people of Mauritius to the detachment of distant islands that had never been an integral part of the territory of Mauritius. The agreement of the Government of Mauritius was politically important to the British authorities, but was not in any way a legal necessity. And in any event, that agreement was given[561].

7.33 Thus, even if Mauritius could show that there was a rule of self-determination binding on the United Kingdom in November 1965 (*quod non*), it has not shown how the establishment of the BIOT 1965 could have contravened any such right of 'Mauritius' or of the people of Mauritius. In particular, Mauritius overlooks two important points:

a. the fact that the islands were never an integral part of Mauritius; and

b. that the then representatives of Mauritius agreed to detachment.

[561] See **Chapter II, Section D.**

(a) The Chagos Archipelago was never an integral part of Mauritius

7.34 As explained in **Chapter II** above[562], the islands that now form the BIOT were never an integral part of the Colony of Mauritius. Since the 19th century they had been administered from Mauritius as a Dependency (one of the 'Lesser Dependencies'). They were not therefore an integral part of the territory of Mauritius for the purpose of the application of paragraph 6 of General Assembly resolution 1514 (XV). As the United Kingdom representative in the Fourth Committee of the UN General Assembly in November 1965 explained:

> "The islands had been uninhabited when the United Kingdom had first acquired them. They had been attached to the Mauritius and Seychelles Administrations purely as a matter of administrative convenience. After discussions with the Mauritius and Seychelles Governments - including their elected members - and with their agreement, new arrangements for the administration of the islands had been introduced on 8 November".

(b) The elected representatives of Mauritius did in fact agree to the detachment of the Chagos Archipelago

7.35 In the Memorial, Mauritius gives a tendentious and historically inaccurate account of the agreement of the elected Government of Mauritius to the detachment of the BIOT[563]. It does so in an attempt to argue that the detachment contravened the principle of self-determination because it did not take place "in accordance with the freely expressed will and desire" of the people of Mauritius. **Chapter II, Section D** above explained what really happened.

7.36 The factual basis for Mauritius' argument that there was no agreement is wholly lacking. The Premier and other senior Mauritian politicians had already agreed in principle to the detachment in September 1965 in the margins of the Constitutional Conference held in London that month. As has been shown in **Chapter II** above[564], and as is confirmed in the 1983 report of the Select Committee of the Mauritius Assembly[565], the Council of Ministers (a democratically elected body, independent of the United Kingdom Government) expressly

[562] Paras. 2.19-2.32.
[563] MM, paras. 6.25-6.30.
[564] Paras. 2.50-2.66.
[565] Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983: **Annex 46**.

agreed to detachment at the meeting of the Mauritius Council of Ministers six weeks later on 5 November 1965. As Professor Crawford has written, "[o]nly the Chagos Archipelago now remains of the Territory [BIOT]: in view of Mauritius' apparent acceptance of the position, its status as a Chapter XI territory must be considered doubtful"[566].

7.37 Mauritius now asserts, some fifty years after the event, that the UK proposal to detach the Chagos Archipelago "was reluctantly accepted by representatives of Mauritius, under conditions which amounted to duress" [567]. Elsewhere there has been reference to "blackmail"[568]. There are a number of points to make about this. First, Mauritius thus acknowledges that the representatives of Mauritius agreed to the proposed detachment. One may debate just how 'reluctant' the agreement was, and on the part of which representatives. The most reluctant seems to have been *Parti Mauricien*, but their doubts were over the level of compensation, not the principle of detachment. In any event, a reluctant agreement is nevertheless an agreement.

7.38 Second, Mauritius seems to base its allegations of 'duress' (or 'blackmail') chiefly on the record of the meeting which took place on 23 September 1965 between the British Prime Minister and the Premier of Mauritius, which has been described in Chapter II above[569]. This meeting was one of a series of meetings both in the margins of the Constitutional Conference and in Port Louis, and took place some six weeks before the agreement of the Mauritius Council of Ministers was formally given in Port Louis on 5 November 1965. In any event, the exchanges that took place do not begin to approach the threshold of 'duress' or 'blackmail', as understood in either domestic or international law[570].

7.39 Third, Mauritius also seeks support for its unfounded assertion in the concluding sentence of the 1983 report of its Select Committee, which refers to "a blackmail element"[571]. Yet nothing in the report, read as a whole, support that single sentence. The passages cited by

[566] J. Crawford, *The Creation of States in International Law* (2nd ed., 2006), Appendix 3, p. 754, n 11. The same language appeared in the first edition (1979), and appears to reflect the view in 1976/77, before Mauritius began to question UK sovereignty over the BIOT (**Authority 58**).
[567] MM, para. 6.25.
[568] Select Committee report: **Annex 46**.
[569] See paras. 2.53-2.55 above
[570] If one were to apply, by analogy, the rules relating to treaties, it is clear that the stringent requirements of article 51 and article 52 of the Vienna Convention on the Law of Treaties were nowhere near being met, either at the London meetings or - which would be more relevant - at the meeting of the Council of Ministers in Port Louis on 5 November 1965.
[571] MM, para. 6.27. The full report is at **Annex 46** to the present Counter-Memorial.

Mauritius from evidence given to the Select Committee were the expressions of politicians long after the event, in the context of a highly political investigation, and carry little if any weight. In any event, the evidence supports the fact the agreement was not coerced[572].

7.40 Fourth, it is inherently unconvincing to be raising the issue of duress decades after the event.

7.41 In its final paragraph dealing with the agreement of the Mauritius Council of Ministers, Mauritius throws in a series of disparate points[573]. Among other things it now asserts that the Mauritius Council of Ministers "did not have legal capacity to consent to the dismemberment of their country", but offers no authority for this proposition. It overlooks the obvious point that as a matter of constitutional law consent was a political matter, albeit an important one. It did not depend upon 'legal capacity'. The power to establish the BIOT rested exclusively with Her Majesty. Mauritius further refers to the fact that there was 'no referendum or consultation with the people of Mauritius". There was indeed no referendum, not least because Mauritian Ministers, including the Premier, Sir Seewoosagur Ramgoolam, were strongly opposed to any such referendum[574].

(iv) Mauritius' reliance upon uti possedetis juris

7.42 Mauritius also invokes the *uti possidetis juris* principle, albeit briefly[575]. It does so in a way that stands that principle on its head, arguing that is somehow supports a return to borders that existed at some time prior to independence. Far from supporting Mauritius' case, the principle contradicts it. There have been numerous changes in colonial boundaries preceding independence [576] including those in contemplation of or at the time of independence[577]. If all such changes were open to legal challenge the "fundamental principle

[572] See paras. 2.62-2.66.
[573] MM, para. 6.29.
[574] See the discussion in the Select Committee report: **Annex 46**.
[575] MM, paras. 6.23-6.24.
[576] See, for example, the cases cited from French West Africa in the *Frontier Dispute (Burkina Faso/Niger)* Judgment of 14 April 2013, cited at para. A5 of the **Appendix to Chapter II** above, as well as the many other cases cited in that Appendix. And, among others, see also the separation of Burma from British India in 1937, and the Partition of India and Pakistan in 1947.
[577] Examples include the separation of the Cocos (Keeling) Islands from the Straits Settlement in 1955; the establishment of the Sovereign Base Areas of Akrotiri and Dekhelia in Cyprus in 1960; the establishment of the

of the stability of boundaries"[578], to which international law and practice attach great importance[579], would be rendered nugatory.

7.43 The *uti possidetis juris* principle was first applied in connection with the accession to independence of States in Latin America[580], and was later applied in the context of 20th century decolonization, especially in Africa[581], as well as in the former Yugoslavia[582]. It has been referred to in an important series of ICJ cases[583]. In its judgment of 16 April 2013, the ICJ referred to "the inter-colonial administrative boundary at the critical date of independence"[584]. Mauritius cites the *Burkina Faso/Mali* case. But as that case itself makes clear, in the very passage cited by Mauritius,

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Cayman Islands that were formerly a dependency of Jamaica; the separation of Anguilla from the Associated State of St Kitts, Nevis and Anguilla, to form a separate colony; the detachment of Mayotte.

[578] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 37, para. 72. The Court there said: "The establishment of this boundary is a fact which, from the outset has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court *(Temple of' Preah Vihear, I.C.J. Reports 1962,* p. *34; Aegean Sea Continental Shelf: I.C.J. Reports 1978,* p. *36)*" (**Authority 12**).

[579] *Ibid*., where the Court said: "The establishment of this boundary is a fact which, from the outset has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court *(Temple of' Preah Vihear, I.C.J. Reports 1962*, p. *34; Aegean Sea Continental Shelf: I.C.J. Reports 1978,* p. *36)*". See also article 62(2)(a) of the Vienna Convention on the Law of Treaties of 1969; article 11(a) of the Vienna Convention on Succession of States in respect of Treaties of 1978; article 62(2) of the Vienna Convention of the Law of Treaties between States and International Organizations of 1986. And see the practice of the Organization of African Unity, dating back to 1964.

[580] See *Colombo-Venezuela Boundaries* case *(Colombia* v. *Venezuela),* Arbitral Award, 24 March 1922, *RIAA*, Vol. 1, p.228. (**Authority 1**).

[581] Declaration of the Organization of African Unity Assembly of Heads of State and Government, Cairo, 17-31 July 1964 ("Solemnly declares that all Member States pledge themselves to respect the borders *existing on their achievement of national independence*" (emphasis added): **Annex 7**.

[582] Arbitration Commission of the Pe9ce Conference on the Former Yugoslavia ('Badinter Commission'), Opinion No. 3 of 11 January 1992 ("Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*."): **Annex 57**. As Pellet has noted, "The Arbitration Committee laid great emphasis upon the fundamental importance which it attached to the principle of respect for frontiers existing at the moment of independence *(uti possidetis juris).* This point was not only made in its Opinion No. 3 but was also evoked in Opinion No. 2 when it recalled that, whatever the circumstances, 'the right to self-determination must not involve changes to existing frontiers'": A. Pellet, "The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples", 3 EJIL 178 (1992), at 180 (**Authority 89**).

[583] *Frontier Dispute (Burkina Faso/Mali), I.C.J. Reports 1986*, p. 554 (**Authority 10**); *Frontier Dispute (Benin/Niger), I.C.J. Reports 2005*, p. 108, para. 23 (**Authority 23**); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J Reports 2007*, p. 659, para. 152 (**Authority 29**); *Frontier Dispute (Burkina Faso/Niger) Judgment of 16 April 2013*, para. 63 (**Authority 42**).

[584] *Frontier Dispute (Burkina Faso/Niger), Judgment of 16 April 2013*, para. 72 (**Authority 42**).

> "[t]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries *at the moment when independence is achieved*" (emphasis added) [585].

As the Chamber also said, "a new State acquires sovereignty with the territorial base and boundaries *left to it by the colonial power*"[586].

7.44 The full passage from the *Burkina Faso/Mali* judgment, from which Mauritius quotes part, reads:

> "23. There are several different aspects to this principle, in its well-known application in Spanish America. The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored. However, there is more to the principle of *uti possidetis* than this particular aspect. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. This is true both of the States which took shape in the regions of South America which were dependent on the Spanish Crown, and of the States Parties to the present case, which took shape within the vast territories of French West Africa. *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.
>
> 24. The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize

[585] *Frontier Dispute (Burkina Faso/Mali), I.C.J. Reports 1986*, p. 554 at p. 566, para. 23 (**Authority 10**).
[586] *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 554 at p. 568, para. 30 (emphasis added) (**Authority 10**).

and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent" [587].

7.45 Even clearer is a later passage from the same judgment, studiously ignored by Mauritius:

"By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law - and consequently the principle of *uti possidetis* - applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law - especially legislation enacted by France for its colonies and *territoires d'outre-mer* - may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the "colonial heritage", i.e., the "photograph of the territory" at the critical date"[588].

7.46 The Court has repeatedly reaffirmed the *uti possidetis juris* principle[589]. In the *Nicaragua* v. *Colombia* judgment of 19 November 2012, the Court said:

"The Court has previously had the opportunity to acknowledge the following, which is equally applicable to the case at hand:

> "when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law; and it is perfectly possible that that law itself gave no clear and definite answer to the appurtenance of marginal areas, or sparsely populated areas of minimal economic significance (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 559, para. 333)"[590].

7.47 Applying the *uti possidetis juris* principle to the present case, what is important is the position under the applicable United Kingdom law. Under that law, it is clear beyond doubt, as explained in **Chapter II** above and in **Section A** of the present Chapter, that at the time of

[587] *Frontier Dispute (Burkina Faso/Mali), I.C.J. Reports 1986*, p. 554, at p. 566, paras. 23-24. (**Authority 10**).
[588] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 554 at p. 568, para. 30. (**Authority 10**).
[589] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J Reports 2007*, p. 657, paras. 152-3 (**Authority 29**).
[590] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, para. 64 (**Authority 39**).

its independence in 1965 the territory of Mauritius did not include the Chagos Archipelago. Nothing that has happened subsequently has changed that. In particular, Mauritius' unilateral change in its domestic law, some 14 years after independence in 1982, purporting to incorporate the Chagos Archipelago into its national territory, was without any effect on the international plane. =It would be wholly contrary to the principle of *uti possidetis juris* to seek to turn the clock back in this way, and revert to boundaries that were supposedly in place at some time prior to independence. Rather than assuring the stability of borders, the construction placed upon the principle by Mauritius would undermine such stability. Few borders anywhere in the world, not least in Africa and Europe, would not be liable to challenge if Mauritius' thesis were upheld.

(v) Mauritius' reliance on the United Kingdom's undertaking to cede the BIOT to Mauritius

7.48 Mauritius claims that the United Kingdom's undertaking to cede the islands to Mauritius when they are no longer needed for defence purposes establishes that it, Mauritius, is "entitled to avail itself of the rights of a coastal State"[591], and that it, Mauritius, has a 'prior right'[592]. Mauritius speaks of "the existence of sovereign rights of Mauritius"[593] and refers to "restoring to Mauritius the enjoyment of full rights of sovereignty which legally adhere to Mauritius"[594].

7.49 None of these forms of words can hide the plain fact that, for the time being and unless and until the cession takes place, it is the United Kingdom, and the United Kingdom alone, not Mauritius, that has sovereignty over the BIOT.

7.50 The fact that the United Kingdom has undertaken to cede the BIOT to Mauritius when it is no longer needed for defence purposes is entirely consistent with present United Kingdom sovereignty. Indeed, as Mauritius itself acknowledges in its Memorial, the

[591] MM, heading above para. 6.37.
[592] MM, para. 6.41.
[593] MM, para. 6.40.
[594] MM, para. 6.41.

undertaking "is premised on the UK having title to the Chagos Archipelago"[595]. *Nemo dat quod not habet*.

(vi) Mauritius' claim based on its actions in the Commission on the Limits of the Continental Shelf

7.51 Mauritius refers repeatedly throughout the Memorial to the fact that in May 2009 Mauritius submitted "*Preliminary Information*"[596] to the Commission on the Limits of the Continental Shelf concerning an area of shelf that would appertain to the Chagos Archipelago beyond 200 nautical miles, and that the United Kingdom made no objection. It claims that "[t]he absence of protest on the part of the UK appears to be a clear recognition that Mauritius has sovereign rights in relation to the continental shelf".

7.52 In making this argument, Mauritius overlooks the fact that the UK-Mauritius bilateral talks of 14 January 2009 took place under a 'sovereignty umbrella', recorded in the agreed communiqué. Both Governments agreed *inter alia* that "nothing in the conduct or content of the present meeting shall be interpreted as a change in the position of [either State] with regard to sovereignty over the British Indian Ocean Territory/Chagos Archipelago", and that "[n]o act or activity carried out … as a consequence and in implementation of anything agreed to in this present meeting or in any similar subsequent meeting shall constitute a basis for affirming, supporting, or denying the position of the United Kingdom or Mauritius regarding sovereignty of the British Indian Ocean Territory/Chagos Archipelago" [597].

7.53 There is nothing in Mauritius' point about the submission of 'Preliminary Information' for a number of other reasons. *First*, the CLCS Rules of Procedure[598] make express provision for land and maritime disputes in rule 46 and Annex I, which are both entitled "Submissions in case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime disputes". Rule 46(1) provides:

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[595] MM. para. 6.39.
[596] *Preliminary Information Submitted by the Republic of Mauritius Concerning the Extended Continental Shelf in the Chagos Archipelago Region Pursuant to the Decision Contained in SPLOS/183*, MCS-PI-DOC, May 2009: MM, Annex 144.
[597] **Annex 93**.
[598] CLCS/40/Rev.1, 17 April 2008.

> "In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules".

Annex I of the Rules contains two relevant provisions:

> "1. The Commission recognizes that the competence with respect to matters regarding disputes which may arise in connection with the establishment of the outer limits of the continental shelf rests with States.
> ….
>
> 5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.
>
> (b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States".

7.54 *Second*, Mauritius has not yet made a submission to the CLCS in accordance with article 76 of UNCLOS[599]. The effect of 'preliminary information' submitted in accordance with paragraph 1 of the Decision of the Meeting of States Parties contained in document SPLOS/183[600] is simply to satisfy the time period referred to in paragraph 4 of annex II to the Convention and the decision contained in SLOS/72[601]. Such preliminary information is not considered by the CLCS pending the receipt of the submission in accordance with the requirements of article 76[602].

7.55 *Third*, the *Preliminary Information* submitted by Mauritius expressly states that there is a dispute between the United Kingdom and Mauritius. Paragraph 6 of the *Preliminary Information*, entitled "Unresolved Land and Maritime Disputes", reads:

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[599] By letter dated 29 May 2013 addressed to the CLCS Secretary, Mauritius indicated that it is proposing to complete and lodge "a partial submission for an extended continental shelf in the Chagos Archipelago Region in June 2014":**Annex 135**. If and when it does so, the United Kingdom will confirm to the CLCS that, as already stated by Mauritius in its '*Preliminary Information*', there is a land dispute over the Chagos Archipelago within the meaning of paragraph 5(a) of the Rules of Procedure.

[600] Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a) (SPLOS/183, 20 June 2008): **Annex 89**.

[601] *Ibid*., para 1(a).

[602] *Ibid*., para 1(b).

> "The Republic of Mauritius states that the Chagos Archipelago is and always has been part of its territory. The Republic of Mauritius wishes to inform the Commission, however, that a dispute exists between the Republic of Mauritius and the United Kingdom over the Chagos Archipelago. Discussions are ongoing between the two governments on the matter. The last bilateral talks were held in London, United Kingdom, in January 2009".

7.56 *Fourth*, the continental shelf was already the subject of on-going bilateral talks when Mauritius submitted the *Preliminary Information* in May 2009. The United Kingdom proposed 'Co-operation on the continental shelf' as an item for the agenda of the first round of UK-Mauritius talks on Chagos Archipelago/British India Ocean Territory on 14 January 2009, and the joint communiqué records that on that occasion there was 'mutual discussion of … the continental shelf'. The joint communiqué of the second round of bilateral talks, on 21 July 2009, included the following paragraph:

> "Both delegations were of the view that it would be desirable to have a coordinated submission for an extended continental shelf in the Chagos Archipelago/British Indian Ocean Territory region to the UN Commission on the Limits of the Continental Shelf, in order not to prejudice the interest of Mauritius in that area and to facilitate its consideration by the Commission. It was agreed that a joint technical team would be set up with officials from both sides to look into possibilities and modalities of such a coordinated approach, with a view to informing the next round"[603].

In the event, it did not prove possible to arrange a meeting of technical experts, or a third meeting of bilateral talks. The United Kingdom pressed for such a meeting, but it proved impossible to agree on mutually convenient dates[604]. It should be recalled that the UK-Mauritius bilateral talks on Chagos Archipelago/British India Ocean Territory took place under the sovereignty umbrella[605].

7.57 *Fifth*, a coastal State is no obligation under UNCLOS to make a submission to the CLCS. Paragraph 4 of Annex II provides that *"[w]here a coastal State intends to establish*, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission …." (emphasis added)[606]. Whether or not to establish such limits in accordance with article 76 is a matter entirely within the discretion of the State concerned.

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[603] **Annex 100**.
[604] See paras. 3.50, 5.43 above.
[605] Spelt out in the joint communiqué.
[606] These words are repeated in rule 45(a) of the Rules of Procedure of the CLCS (CLCS/40/Rev.1).

7.58 In all the circumstances, there was no need whatsoever, to protect its sovereignty over the BIOT, for the United Kingdom to object, protest or reserve its position as regards the preliminary information submitted by Mauritius to the CLCS. Nor can the fact that the United Kingdom has itself not made a submission to the CLCS in any way affect its sovereignty.

(vii) Mauritius' claim that "the vast majority of States have recognised that the Chagos Archipelago as still belonging to Mauritius"

7.59 In paragraph 6.33 of the Memorial, Mauritius claims that "the vast majority of States have recognised that the Chagos Archipelago as still belonging to Mauritius". In this connection Mauritius refers to "resolutions and decisions of a wide section of the international community" (namely the Non-Aligned Movement; the Africa-South America Summit; the OAS/AU; and the Group of 77 and China[607]), including such resolutions adopted just prior to or after the commencement of the present arbitral proceedings, no doubt promoted by Mauritius with a view to strengthening its legal case.

7.60 Resolutions and decisions of a political nature, such as those cited by Mauritius, have no effect on sovereignty. Particularly having regard to the circumstances in which such resolutions and decisions come about, and the manner in which they are drafted and adopted, they carry little or no weight, and are without legal significance. So far as the United Kingdom is concerned they are *res inter alios acta*: the resolutions and decisions are all of bodies of which Mauritius, but not the United Kingdom, is a member. They are not instruments with any binding legal force, even for the members of the bodies concerned, and neither create nor terminate sovereignty. In so far as they are relied upon by Mauritius as indicating the views of third States on the question of sovereignty, they are of no significance. The views of third States are simply not relevant to sovereignty, a matter which has to be determined in accordance with the modes of acquisition and loss of territory recognized by international law.

[607] The "resolutions and decisions" referred to are described in MM, paras. 3.109-3.111, where they are described in the heading as "reflexions of the international community's views on sovereignty of Mauritius over the Chagos Archipelago".

7.61 In fact, it could equally be said that many States recognize United Kingdom sovereignty over the BIOT. For example, the United Kingdom has extended a considerable number of multilateral conventions to the BIOT. Such extensions have met with no protests from parties other than Mauritius, and Mauritius itself has often not reacted. Multilateral conventions to which Mauritius is a party but where it has not protested to the depositary concerning extension to the BIOT include the Convention on International Trade in Endangered Species (CITES)[608]; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents[609]; the Convention on the Conservation of Migratory Species of Wild Animals[610]; the Convention on the Transfer of Sentenced Persons[611]; the Convention on Limitation of liability for Maritime Claims[612]; the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and their Destruction[613]; and the 1977 Protocols I and II Additional to the Geneva Conventions of 12 August 1949[614]. The United Nations Convention on the Law of the Sea and the Part XI Agreement also fall into this category[615].

7.62 Occasionally Mauritius has protested, as was the case with the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; such protests have been rejected by the United Kingdom.

7.63 As described in Chapter IX below, the United Kingdom is a party to the Convention on the Indian Ocean Tuna Commission ('IOTC'), which is open to members and associate members of the Food and Agriculture Organization of the United Nations ('FAO') that are "coastal States or associate members situated wholly or partly within the [Indian Ocean] Area"[616]. The United Kingdom participates in the IOTC as a "coastal State ... situated partly within the [Indian Ocean] Area". Its participation as the relevant coastal state with respect to

[608] Extended to the BIOT upon ratification on 2 August 1976.
[609] Extended to the BIOT upon ratification on 2 May 1979.
[610] Extended to the BIOT upon ratification on 23 July 1985.
[611] Extended to the BIOT on 23 January 1989.
[612] Extended to the BIOT on 4 February 1999.
[613] Extended to the BIOT on 4 December 2001.
[614] Extended to the BIOT on 2 July 2002.
[615] Extended to the BIOT on 25 July 1997.
[616] IOTC Agreement, Article IV: **Annex 61**.

BIOT is recognised and accepted by other member states, with the sole exception of Mauritius[617].

7.64 Article 198 of the (Lisbon) Treaty on the Functioning of the European Union ('TFEU'), under which the 28 Member States of the European Union agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom listed in Annex II. The list in Annex II includes "British Indian Ocean Territory"[618]. The BIOT has been listed in the corresponding annex since the United Kingdom's accession to the Treaty of Rome with effect from 1 January 1973.

(viii) Mauritius' claims in international fora and elsewhere have been routinely rejected by the United Kingdom

7.65 Whenever Mauritius has challenged United Kingdom sovereignty over the BIOT in international fora, or directly, the United Kingdom has as necessary firmly rejected such assertions. No case can be made out to the effect that the UK has acquiesced.

7.66 As has been described in **Chapter II** above, Mauritius first raised the BIOT during the annual general debate in the UN General Assembly in 1980, some 12 years after becoming a Member of the United Nations in April 1968. Its silence within the United Nations until then is striking, and is consistent with the Mauritian Government's position in the decade or more following independence in 1968[619]. Mauritius has raised the matter most years since then, but only in about 1999 did its statements begin to claim direct sovereignty. The United Kingdom routinely responds to such statements[620].

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[617] The other Member States of the IOTC are Australia, Belize, China, Comoros, Eritrea, European Community, France, Guinea, India, Indonesia, Islamic Republic of Iran, Japan, Kenya, Republic of Korea, Madagascar, Malaysia, Maldives, Mozambique, Sultanate of Oman, Pakistan, Philippines, Seychelles, Sierra Leone, Sri Lanka, Sudan, Tanzania, Thailand, Vanuatu and Yemen.

[618] [2007] OJ C306/01: **Annex 85**. The application of Article 198 TFEU in respect of the BIOT was dealt with in *R (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, Judgment of 11 June 2013, paras. 163-200 (**Authority 43**).

[619] **Chapter II, Section E.**

[620] *Ibid*. See also fn 130 above.

(viii) *Mauritius claims to sovereignty have no merit*

7.67 At points in the Memorial Mauritius seems to claim that it currently has sovereignty over the Chagos Archipelago, or at least some kind of 'co-sovereignty' with the United Kingdom[621]. What is unclear is whether these are legal or political claims. Political demands for a change in sovereignty are not a matter for the Tribunal.

7.68 Mauritius has put forward no facts or legal argument to support a claim to sovereignty. It claims that it has 'continuously asserted its sovereignty over the Chagos Archipelago"[622]. Assertions of sovereignty are not the same as sovereignty, and in any event the United Kingdom has routinely rejected any Mauritian claims to sovereignty and restated its own position.

7.69 Nor has Mauritius put forward any facts or legal argument that would to establish some form of 'co-sovereignty' with the UK. While condominium is possible under international law, and there have been examples in the past[623], these have been exceptional and based on treaty or other special arrangement between the two States concerned. There is no such treaty or special arrangement between Mauritius and the UK regarding the BIOT. 'Co-sovereignty' or condominium does not come about through assertion or the kind of actions or omissions relied upon by Mauritius.

7.70 Mauritius appears to claim that it, rather than or perhaps in addition to, the United Kingdom is a 'coastal state' in relation to the BIOT. It is difficult to see how this claim adds anything to its assertion of sovereignty. In so far as it may be based on Mauritius' asserted or prospective rights in the maritime zones of the BIOT the claim appears to confuse a present-day coastal State with a third Sate entitled to some present or future rights. For example, the fact that a State has traditional fishing rights in another State's waters (which is not the case here) does not make it the coastal State.

C. Conclusion

[621] MM, Chapter 6(II).
[622] MM, para. 6.31.
[623] F. Morrison, 'Condominium and Coimperium', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012), Vol. II, pp. 598-601 (**Authority 84**).

7.71 As has been shown in this Chapter, the United Kingdom has sovereignty over the islands comprising the BIOT. It acquired sovereignty by cession from France in 1814, and has retained sovereignty continuously since that date. No intervening event has led to a change in sovereignty.

7.72 For its part, Mauritius has not established its sovereignty over any of the islands concerned.

CHAPTER VIII

THE MPA DOES NOT VIOLATE RIGHTS OF MAURITIUS UNDER UNCLOS

A. Introduction

8.1 Mauritius also makes a series of alternative claims on the basis that - contrary to Mauritius' principal argument - the United Kingdom is the coastal State for the purposes of UNCLOS. Relief in respect of these further claims is in the form of a request for a declaration of incompatibility with certain provisions of UNCLOS[624], although it is notable that no relief at all was claimed in respect of these claims in the Notification and Statement of Claim of 20 December 2010.

8.2 Mauritius' case is that the establishment of the MPA breaches rights with respect to fishing (see **Section B** below) and consultation (see **Section C** below), and also constitutes an abuse of rights (see **Section D** below). The United Kingdom addresses these further claims below, although it of course maintains its position that the Tribunal lacks jurisdiction with respect to these claims (see **Chapters V** and **VI** above).

B. Claims in respect of fishing

(cf. Memorial, paras. 7.5-7.35)

8.3 Mauritius' claims in respect of breach of alleged fishing rights are made both with respect to (i) the territorial sea and (ii) the EEZ[625]. In each case, Mauritius asserts that the United Kingdom has, and has breached, obligations with respect to traditional fishing rights alongside obligations owed to Mauritius pursuant to alleged legally binding undertakings.

[624] MM, p. 155.

[625] Mauritius refers consistently to the EEZ. In fact, as explained in **Chapter III** above, the zones declared by the BIOT are the FCMZ and the EPPZ. Where reference is made in this Chapter to the EEZ, it is on the basis that Mauritius has used the term or in the context of a reference to the term in provisions of UNCLOS.

(i) Alleged violations in relation to the territorial sea

(cf. Memorial, paras. 7.6-7.27)

8.4 Mauritius claims with respect to fishing rights in the territorial sea are based on article 2(3) UNCLOS. This provides:

> "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

8.5 As explained in **Chapter VI** above, the United Kingdom does not accept that the reference in article 2(3) to "other rules of international law" accords to the Tribunal jurisdiction to interpret and apply such "other rules of international law", let alone the alleged unilateral undertakings on which Mauritius relies. As a separate matter, article 2(3) does not purport to establish a general obligation, owed to all UNCLOS States Parties, of compliance with the Convention and other rules of international law:

a. So far as concerns the Convention, if a coastal State were to breach its obligation not to hamper innocent passage as established by article 24, it would not separately and in addition breach article 2(3).

b. This is because article 2(3) is part of UNCLOS' description of the legal status of the territorial sea, i.e. it covers one aspect of article 2 headed "Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil". Sovereignty over the territorial sea, like sovereignty over land territory, is of course exercised subject to the rules of international law. Article 2(3) contains a statement of this basic principle, but no more.

c. Thus, article 2(3) does not purport to establish a free-standing and unlimited obligation of compliance with all rules of international law, and it would be extraordinary if it did so. For example, a State that allegedly breaches a bilateral investment treaty through failure to pay in relation to the salvage of antique Chinese porcelain recovered from its territorial waters does not separately breach article

2(3)[626].

d. Had the drafters of article 2(3) (and its forebears of 1930 and 1958) intended to establish such an exceptional obligation, they would at least have used the language of obligation – "shall be exercised" – as used in other provisions of the Convention[627]. They did not, and article 2(3) cannot correctly be interpreted as if they did.

8.6 As a separate point, the reference in article 2(3) to 'other rules of international law' is correctly interpreted as a reference to general rules of international law, and not to specific bilateral treaty obligations (still less to alleged undertakings of the type alleged in the current case). As explained by the International Law Commission in its 1956 Report to the General Assembly (by reference to what was then article 1(2) of the Articles concerning the law of the sea[628]):

> "(4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why 'other rules of international law' are mentioned in addition to the provisions contained in the present articles.
>
> (5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in 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"[629].

8.7 Thus the language in what is now article 2(3) is aimed at general rules of international law whilst, as a separate matter, there is no intention that the language should limit any specific bilateral rules. But that intention in no sense suggests that article 2(3) should be

[626] See the facts of *Malaysian Historical Salvors BHD v. Malaysia*, ICSID Case No. ARB/05/10 (**Authority 30**).
[627] See Articles 56 and 87(2) UNCLOS. Article 56 provides: "The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI". Article 87(2) provides: "These freedoms 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, and also with due regard for the rights under this Convention with respect to activities in the Area". Cf. also arts. 19(1), 31, 58(3), 138.
[628] This provided that: "This sovereignty [over the territorial sea] is exercised subject to the conditions prescribed in these articles and by other rules of international law".
[629] Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, Doc. A/3159, *YILC*, Vol. II, 253 at 265, emphasis added.

interpreted as giving positive effect to such specific bilateral rules as a matter of separate international obligation subject to compulsory jurisdiction under UNCLOS.

8.8 It follows that, even if Mauritius did have rights in respect of traditional fishing and/or pursuant to the alleged undertakings, its reliance on article 2(3) would be misconceived. However, Mauritius does not benefit from the traditional or other fishing rights for which it contends and, even if this were wrong, the establishment of the MPA has not resulted in any breach of the rights asserted.

8.9 Although, in putting forward this part of its claim, Mauritius has pleaded the alleged traditional rights[630] before coming to the alleged rights in respect of fishing pursuant to the "legally binding undertakings"[631], it is convenient to deal with the alleged undertakings first. This is because the alleged undertakings also stand as the principle evidentiary basis for the alleged existence of traditional rights.

(a) The alleged undertakings: the underlying facts

8.10 The facts relevant to the alleged undertakings have already been considered in **Chapters II and III** above. The key points are as follows.

8.11 First, at a meeting on 23 September 1965, held in the margins of the Constitutional Conference, the following language was offered in relation to agreement on the detachment of the Chagos Archipelago to the effect that (in material part) "(vi) the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable: … (b) Fishing Rights; ..."[632]. As follows from this:

a. The recommendation was that the British Government would "use their good offices"

[630] MM, paras. 7.9-7.21.
[631] MM, paras. 7.22-7.27.
[632] MM Annex 19, para. 22(vi).

with the US Government[633]. This was a recommendation with respect to conduct, not result, and it evidently was not a recommendation that fishing rights be granted in perpetuity, and still less an undertaking to that effect.

b. The recommendation was limited to using good offices to ensure a continued availability of fishing rights ("would remain available"). Indeed, in earlier discussions the Mauritian Council of Ministers had expressed the wish for provision to be made "for safeguarding mineral rights to Mauritius and ensuring preference for Mauritius if fishing or agricultural rights were ever granted"[634].

c. The recommendation was further limited to what was "practicable".

d. It is to be noted that the rights under consideration in 1965 appear to have been in relation to rights of anchorage, and that the fishing then practised was "mainly hand line with some basket and net fishing by local population for own consumption", while the use made of international waters in the Archipelago was "nil"[635].

e. The understanding was not an international agreement and nor could it have been, given that Mauritius was not at this stage a sovereign State.

8.12 As recorded in the agreed minutes of the meeting[636], detachment on the basis of the recommendations was acceptable in principle to the Mauritian Ministers and, on 6 October 1965, the Colonial Office wrote to the Governor of Mauritius to explain that "as regard points (iv), (v) and (vi) the British Government will make appropriate representations to the

[633] See in this respect the letter from the Colonial Office to the Foreign Office dated 8 October 1965, MM Annex 22: "The main problems will arise over (iv) (v) and (vi) and we shall be considering how best to take these up with the Americans. … At all events we shall have to go through the motions with the Americans but not everybody will be surprised if on some issues they achieve no results."

[634] MM, Annex 13.

[635] See the exchange of telegrams in November 1965 between the Secretary of State and the Governor of Mauritius re Chagos Archipelago fishing. In response to the query as to the "nature of fishing practiced", it was stated that this was "mainly hand line with some basket and net fishing by local population for own consumption". As to the use of international waters, this was said to be "nil, though vessels from Seychelles and occasionally Mauritius use anchorage facilities" (MM, annex 37). See also the Legislative Assembly debates of 21 December 1965, where Mr Forget explained that the only fishing taking in place in the territorial waters of Diego Garcia is "casual fishing by those employed there" and the letter of the Governor of Mauritius of 25 April 1966: **Annexes 15 and 17**.

[636] Insofar as the same is alleged at MM, paras. 3.63 and 3.97, there was no separate verbal agreement with respect to fishing or mineral rights. As to Mauritius' reliance on the letter of 24 March 1973 at MM, Annex 69, see the subsequent correspondence: **Annexes 23 and 24**.

American Government as soon as possible"[637].

8.13 Secondly, on 5 November 1965, the Mauritius Council of Ministers "confirmed agreement to the detachment of Chagos Archipelago on conditions enumerated …"[638], although dissatisfaction was expressed with the "mere assurances" given in relation to (inter alia) the matters at point (vi), which of course included the reference to "Fishing Rights". Thus, at the time of the relevant understanding was formed, Mauritius' Council of Ministers were apparently (and correctly) of the view that this did not give rise to enforceable legal obligations.

8.14 Thirdly, it is certainly correct that the understanding that had been reached in 1965 was referred to on various subsequent occasions by representatives of the United Kingdom (as an 'understanding'[639], and sometimes as an 'undertaking'[640]). These subsequent references did not change the nature of the understanding that had been reached, and did not elevate this to the level of an international agreement or an undertaking that, consistent with Mauritius' current contentions, would give rise to binding obligations enforceable by Mauritius.

8.15 As noted in **Chapter II** above, in the course of the decades following 1965, and with reference to the understanding, Mauritian fishermen who made the relevant applications were granted free licences to fish (as is entirely consistent with the intention behind the 1965 documents[641]). There is no sense in which they were accorded - or understood to be entitled to - an absolute (and perpetual) right to fish, i.e. absent a licence or in the circumstance that the United Kingdom might decide to terminate the licensing regime, and nor did Mauritius assert the existence of free-standing fishing rights. Indeed, what is noticeable is just how few licences were applied for, how Mauritian fishing was in fact of negligible proportions (in particular in the years prior to commencement of the current proceedings), and how Mauritius

[637] MM, annex 21. Points (iv) and (v) concerned respectively US concessions over sugar imports and use of Mauritian labour and materials in the construction work by the USA on the islands.
[638] MM, annex 25.
[639] Cf. MM, annexes 54, 63, 78.
[640] Cf. MM, annexes 50 and 59.
[641] See MM, annex 13, with respect to "ensuring preference for Mauritius if fishing or agricultural rights were ever granted".

did not, e.g., challenge the reduction in the number of available licences[642].

8.16 Finally, when in the period from November 2009, Mauritius raised issues with respect to establishment of the MPA, this was on the basis of 'the sovereignty issue' and not the assertion of free-standing fishing rights within the MPA area. According to Mauritius' letter of 23 November 2009:

> "A total ban on fisheries exploitation and omission of those issues [resettlement, access to the fisheries resources, and the economic development of the islands] from any MPA project would not be compatible with the long-term resolution of, or progress in the talks, on the sovereignty issue"[643].

8.17 Had Mauritius considered that it benefited from free-standing fishing rights, it would have been expected to invoke these as a further matter to be taken into account with respect to any MPA, both in the above letter and in subsequent correspondence or meetings prior to the commencement of the current claim, notably in its letter of 30 December 2009[644] and its Note Verbale of 2 April 2010[645]. This Note Verbale referred to the various meetings between high-level representatives of the two States, where it had been "explained in very clear terms ... that Mauritius does not recognize the so-called British Indian Ocean Territory and that the Chagos Archipelago, including Diego Garcia, forms an integral part of the sovereign territory of Mauritius both under our national law and international law"[646]. No mention was made of free-standing fishing rights[647].

(b) The alleged undertakings: legal issues

8.18 So far as concerns its argument on the applicable legal principles, Mauritius relies on the *Nuclear Tests* cases[648], but these do not assist it. There are four points to make.

8.19 First, in the *Nuclear Tests* cases, the International Court stressed that a unilateral

[642] See paras. 2.99-2.102, 2.106, 2.109-2.111 and 3.41. See also the judgment of 11 June 2013 in *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at paras. 121-128 (**Authority 43**).
[643] E.g., MM, annex 155.
[644] Cf. MM, annex 157.
[645] MM, annex 167.
[646] See further paras. 5.29-5.30 above.
[647] See also the judgment of 11 June 2013 in *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at paras. 155-158 (**Authority 43**).
[648] MM, para 7.24 citing paras. 43 and 46.

declaration may have the effect of creating legal obligations for the State making the declaration only if it is clear and specific in nature[649]. This principle has been confirmed by the Court in *Case concerning Armed Activities (Congo* v. *Rwanda)*[650].

a. On the facts in *Nuclear Tests*, the Court considered the actual substance of the statements, noting that their objects were clear, and concluded that "the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed"[651]. For example, it had been stated in unambiguous terms that "the atmospheric tests which will be carried out shortly will, in the normal course of events, be the last of this type"[652].

b. By contrast, the statements relied upon by Mauritius are neither clear nor specific. As regards clarity, the reference to fishing rights in the 1965 documentation is qualified by the reference to "use good offices" and "as far as is practicable", while there is no timeframe stated, no precise course of conduct expressed and no result identified. As regards specificity, the reference to "fishing rights" was unparticularised and general in scope. It appears from one document that the rights under consideration in 1965 were merely rights of anchorage[653] and, from another, possibly turtles[654]. Another contemporaneous document suggests that all that was aimed at was "ensuring preference for Mauritius if fishing ... rights were ever granted"[655].

c. The same basic points apply with respect to the communications of 15 July 1971 and 23 July 1991 that Mauritius relies on[656]. These communications, and the practice of designating Mauritius under the 1971 Fisheries Ordinance and the issue of licences free of charge to Mauritian-flagged vessels under the 1984 Ordinance and following the creation of the FCMZ in 1991, in no sense established any clear and specific

[649] *Nuclear Tests Case (Australia* v. *France)* at paras. 43, 51 (**Authority 8**), and *Nuclear Tests Case (New Zealand* v. *France)* at paras. 46, 53 (**Authority 7**).
[650] *Case concerning Armed Activities (Congo* v. *Rwanda)*, Judgment, *I.C.J. Reports 2006*, paras. 50 and 52 (**Authority 25**).
[651] E.g. *Nuclear Tests Case (New Zealand* v. *France)* at para. 53 (**Authority 7**).
[652] Note from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs, 10 June 1974, *Nuclear Tests Case (New Zealand* v. *France)* at para. 36.
[653] MM, annex 37.
[654] **Annex 16**.
[655] See MM, annex 13.
[656] MM, paras. 7.25-7.26.

undertaking to continue to issue fishing licences to Mauritian-flagged vessels free of charge and on an indefinite basis.

8.20 Secondly, the Court in the *Nuclear Tests* cases made clear that an intention to be bound must be demonstrated[657]. The terms of the understanding and contemporaneous documents cited show that this intention was lacking, both so far as concerns the understanding reached in 1965 and the further statements relied on[658]. If the United Kingdom had intended to bind itself, it would have used quite different language (compare in this respect the language used in respect of payment of compensation, or the position in respect of any minerals or oil resources, or cession to Mauritius when BIOT is no longer required for defence purposes).

8.21 It is striking that Mauritian Ministers themselves characterised the 1965 understanding on fishing rights as a "mere assurance"[659], thus demonstrating their understanding that nothing more than a non-binding political commitment had been given. Further, at later dates, Mauritius did not protest against curtailments of the issue of licences to Mauritian-flagged vessels or other limitations on fisheries introduced for environmental reasons, such as the prohibition on fishing in lagoons[660], reduction of inshore fishing licences in 1999[661], the introduction of closed areas in 2003[662]. In this respect, it is to be noted that, in its commentaries on the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations", the ILC has highlighted "the importance of the reactions of other States concerned in evaluating the legal scope of the unilateral acts in question, whether those States take cognizance of commitments undertaken (or in some cases asserted), or, on the contrary, object to or challenge the binding nature of the 'commitments' at issue"[663].

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[657] *Nuclear Tests (New Zealand* v. *France)*, paras. 46 to 47; *Nuclear Tests (Australia* v. *France)*, paras. 43 to 44.
[658] Paras. 2.43-2.109 above.
[659] Telegram from Governor of Mauritius in November 1965 stating that Council of Ministers confirmed agreement to the detachment "on conditions enumerated" but noted that the Ministers were "dis-satisfied with mere assurances about (v) and (vi): **Annex 14**.
[660] See para. 2.101 above.
[661] See para. 5.34 b. above.
[662] See para. 3.18 above.
[663] See commentary to Principle 2, at para. (3), ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *YILC*, 2006, Vol. II, Part Two, 372, footnotes omitted (**Authority 72)**. The commentary refers to certain reactions of the non-nuclear weapon States to statements made in April 2005 by permanent members of the Security Council. Those reactions were similar in nature to the reaction of Mauritius above, and were characterised by the Special Rapporteur as appearing to

8.22 Thirdly, the Court stressed that, in order to determine the legal effect of a statement, it must examine the circumstances in which it was made (as well as the actual content)[664]. The key circumstances to highlight in this respect are that there was only limited and "casual" fishing at the time the 1965 understanding was reached[665], while fishing as of the date of the communications of 15 July 1971 and 23 July 1991 relied upon remained small scale (at most)[666].

8.23 Finally, the Court stated that a restrictive interpretation is called for[667], and no legal intention can be assumed to have been expressed[668]. This is also clear from principle 7 of the International Law Commission's 2006 Guiding Principles. The ambiguous wording in the 1965 understanding and in the later communications relied upon must create (at the very least) such a case of doubt, and there is no sufficient (or indeed any) basis for construing an undertaking to continue on an indefinite basis to issue fishing licenses to Mauritian-flagged vessels.

8.24 Mauritius also relies on the ILC's "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations"[669], but these do not assist it as the Principles largely reiterate the points set out above. In particular, according to the Principles:

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reflect the political nature of the statements. See Eighth report on unilateral acts of States, 26 May 2005, Doc. A/CN.4/557.

[664] *Nuclear Tests (Australia* v. *France)*, para. 51 (**Authority 8**); *Nuclear Tests (New Zealand* v. *France)*, (**Authority 7**) para. 53: "It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced." See also *Frontier Dispute (Burkina Faso* v. *Mali)*, *I.C.J. Reports 1986*, p. 554, 574 at para. 40 "In order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred" (**Authority 10**).

[665] See Mr Forget's reply before the Mauritius Legislative Assembly dated 21 December 1965: Regarding a question of safeguarding fishing rights, Mr Forget replied "I am not clear what the Hon. Member means by the word safeguarded. So far as I am aware the only fishing that now takes place in the territorial waters of Diego Garcia is "casual fishing by those employed there": **Annex 15**.

[666] See paras. 2.94-2.96, 2.99, 2.103, 2.106. See also the judgment of 11 June 2013 in *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at paras. 128, 155 (**Authority 43**).

[667] *Nuclear Tests Case (Australia* v. *France)* para. 44 (**Authority 8**), and *New Zealand* v. *France* para. 47: "Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound-the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for" (**Authority 7**).

[668] See Eckart, *Promises of States under International Law*, at p. 213: "a restrictive interpretation will have to be applied when ascertaining whether a state intended to bind itself legally which in practice means that in cases of doubt triggered especially by ambiguous and unclear wording, no legal intention can be assumed to have been expressed" (**Authority 63**).

[669] MM, para. 7.23.

a. There must be a will to be bound. Principle 1 states: "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations".

b. The circumstances, including relevant reactions, inform the legal effect of the statement. Principle 3 states: "To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise"[670].

c. The declaration must meet certain requirements of formality, which emphasise the solemnity needed to establish unilateral international obligations. In particular, a unilateral declaration "binds the State internationally if it is made by an authority with the power to do so" (Principle 4). It will be recalled that, in *Nuclear Tests*, the declarations had been made by the Head of State of France.

d. The declaration will only entail obligations for the formulating State if it is stated in clear and specific terms. As stated in Principle 7: "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms". Of course, as noted above, insofar as Mauritius relies on any declaration from 1965, it is recalled that Mauritius was not then a sovereign State.

e. In the case of doubt as to the scope of the obligations, such obligations must be interpreted in a restrictive manner. As also stated in Principle 7: "In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner".

8.25 In short, the requirements of Principle 7 are not met, whilst the consideration of Mauritius' reaction (the characterisation of the 1965 understanding as a "mere assurance" and the limited nature of subsequent fishing) that is mandated by Principle 3 confirms this.

[670] See also Principle 7, which states in relevant part: "In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."

8.26 Indeed, the reality is that, from 1965 onwards, Mauritius demonstrated little if any interest in the "fishing rights" and did not in fact seek to invoke legal obligations under any alleged undertaking (until this case commenced). As explained in **Chapter II** above, fishing by Mauritian fishermen was conducted pursuant to designation under the relevant Ordinance and subsequently pursuant to the licensing procedure (first introduced in 1984), not with reference to the alleged undertaking. The number of licenses issued was minimal and in some years no licences were issued at all[671], while Mauritius notably did not protest when the area open to fishing was reduced for environmental reasons[672].

8.27 Further, when in the 2009 bilateral talks Mauritius raised concerns with respect to establishment of the MPA, this was on the basis of the sovereignty issue and not the assertion of free-standing fishing rights within the MPA area[673]. Mauritius was ready to proceed with a joint MPA, and it did not invoke the existence of legally effective (or indeed any) fishing rights, although such - if they existed - would have been of evident importance in the consultations[674]. Two points follow from this omission.

a. The fact that there was not, and is not, any binding unilateral declaration is affirmed by the omission (see also Principle 3 of the ILC's Guiding Principles in this respect). Had there been a sound factual basis to the assertions now made for the purposes of the present proceedings, it may safely be inferred that, in all of its correspondence and formal meetings with the United Kingdom concerning the MPA in the period from May 2009 to December 2010, Mauritius would have asserted that the MPA was unlawful because it breached binding undertakings in respect of continuing fishing rights. Yet it did not do so.

b. In such circumstances, Mauritius cannot wait, commence arbitral proceedings, and only then seek to invoke fishing rights, with a view to obtaining declarations the effect

[671] See e.g. Note from East African Department dated 29 September 1980 cites the power of designation under section 4 of the 1971 Ordinance and notes that Mauritians "have made little use of their rights": **Annex 41**. See also the judgment of 11 June 2013 in *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at paras. 128, 155 (**Authority 43**).
[672] As set out in para. 8.21 above.
[673] See paras. 3.42-3.49 above. This was confirmed in the judgment of 11 June 2013 in *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at paras. 155-158 (**Authority 43**).
[674] See in particular the note of the meeting of 21 July 2009, paras. 8-10: **Annex 101**. Nor did Mauritius raise this subsequently: see paras. 3.50-3.52, 3.62-3.66, 3.68, 5.29-5.32, 5.39-5.42 above.

of which would be to bring the MPA to an end (while notably alleging failures to consult and cooperate on the United Kingdom's part). This is an avenue closed to Mauritius as a matter of jurisdiction (see the consideration of article 283 in **Chapter V** above), but also likewise when seen through the prism of principles of estoppel or acquiescence[675]. To adopt the words of the Court in the *Temple of Preah Vihear* case, it is clear that the circumstances were "such as called for some reaction, within a reasonable period, on the part of the [Mauritian] authorities"[676]. Yet none such came, and it is not open to Mauritius to introduce these matters now. The United Kingdom acted in good faith on its understanding that Mauritius did not oppose a no-take MPA on the grounds of existing fishing rights, commencing a comprehensive and costly public consultation process, subsequently implementing the MPA, and finding alternative sources to fund protection of BIOT waters (previously funded by licence fees and government funding). And in this respect it is emphasised that, had the existence of fishing rights been raised by Mauritius, the matter would have been given the most careful consideration.

8.28 Finally, even if Mauritius were able to show the existence of unilateral undertakings giving rise to legal obligations on the part of the United Kingdom, and also the absence of any estoppel and/or acquiescence, it would still be unable to make out any case on breach. As stated in the ILC's Guiding Principles, at Principle 10:

> "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:
>
> (a) any specific terms of the declaration relating to revocation;
>
> (b) the extent to which those to whom the obligations are owed have relied on such obligations;
>
> (c) the extent to which there has been a fundamental change in the circumstances".

[675] See e.g. Bowett, 'Estoppel Before International Tribunals And Its Relation To Acquiescence', 33 *BYIL* 1957 at 199-194 (**Authority 48**); I.C. MacGibbon, 'Estoppel in International Law', *ICLQ* 7 (1958), p. 468 at 512: "estoppel in international law reflects the possible variations... of the underlying principle of consistency which may be summed up in the *maxim allegans contraria non audiendus est*" (**Authority 81**). See also, e.g., *North Sea Continental Shelf Cases*, *I.C.J. Reports 1969*, p. 26, para. 30 (**Authority 6**); *Land, Island and Maritime Frontier Case (El-Salavador* v. *Honduras), I.C.J. Reports 1992*, p. 351, pp. 92, 118 (**Authority 11**).

[676] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand) (Merits), I.C.J. Reports 1962*, p. 23. (**Authority 4**).

8.29 As noted in the commentary to Principle 10, what is prohibited is specifically the arbitrary withdrawal or amendment of a unilateral undertaking, not terminations of any nature. As the commentary states: "There can be no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances"[677].

8.30 Insofar as there has been a revocation, this was not arbitrary. Rather, following consultation with Mauritius and other stakeholders, the United Kingdom established the MPA in furtherance of the protection of marine resources and the marine environment. Save with respect to its claim of abuse of rights which is based on very specific allegations of fact (see further below), Mauritius has no case on arbitrariness, and rightly so. Any such case would evidently fail, and it is to be noted that one factor to be taken into account would be the underlying fact - demonstrated by the very poor take up of licences to fish - that Mauritius has not relied on the existence of obligations (see Principle 10(b) above).

(c) Alleged traditional fishing rights

8.31 There are no traditional fishing rights at issue and, even if there were, the existence of such rights would not operate so as to prevent the establishment of the MPA.

8.32 As to the first of these two points, whilst it is correct that there are various references in the documents to traditional fishing rights, it is evident that these are not intended to reflect the case where "the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all …" (see the words of Sir Gerald Fitzmaurice, as relied on by Mauritius)[678]. In this respect:

a. As of 1965, there appears to have been "casual" fishing by Chagos Islanders, but such

[677] See commentary to Principle 10, at para. (2), ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *YILC*, 2006, Vol. II, Part Two, 380 (**Authority 72)**. See also *Nuclear Tests (Australia v. France; New Zealand* v. *France), I.C.J. Reports 1974*, p. 270, para. 51, and p. 475, para. 53 (**Authority 7 and Authority 8**).
[678] MM, para. 7.11, referring to Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, p. 181.

fishing has long since ceased[679].

b. Further, the evidence is that the fishing as of 1965 was close to shore, and "traditional fishing" in such areas could not be used as a springboard for claims of "traditional fishing" in maritime zones that were not established until many years later.

c. As to the more recent fishing by Mauritian fishermen, this has been (i) pursuant to licence (cf. Sir Gerald Fitzmaurice above), but also (ii) limited and intermittent. It does not come close to traditional fishing as it is commonly understood.

8.33 In any event, the further point is that UNCLOS does not accord to traditional fishing rights the impact for which Mauritius contends, and it is notable that it has been unable to point to a single provision of UNCLOS on which it can rely.

a. The fact that traditional fishing rights are expressly referred to, and protected, to the extent provided for by article 51(1) with respect to archipelagic waters simply serves to highlight the absence of such reference or protection when it comes to territorial waters (or waters up to 200 nautical miles)[680]. Further, the rationale behind article 51(1) appears to have been to protect traditional fishing rights exercised in what had formerly been the high seas, but were now to be the equivalent of internal waters under a new regime specifically created by UNCLOS, whereas the fishing around the Chagos Islands in 1965 was confined to inland waters and the territorial sea[681].

b. The jurisprudence concerning the entitlement to artisanal fishing notwithstanding a maritime delimitation (*Eritrea* v. *Yemen*) is not relevant and does not assist Mauritius[682]. Mauritius is unable to demonstrate the existence of any traditional fishing regime giving rise to "entitlements that all the fishermen have exercised continuously through the ages"[683], let alone "rights result[ing] from a situation of

[679] See also the judgment of 11 June 2013 in *R(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), at para. 151 (**Authority 43**).
[680] Cf. MM, para. 7.30. Article 51(1) provides in relevant part that "an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters".
[681] See paras. 2.94-2.96 above, and see also the Working Paper, Provision 213, p. 137 at **Annex 28**.
[682] Cf. MM, para. 7.13.
[683] Cf. *Eritrea* v. *Yemen, Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation)*, 17 December 1999, para. 104 (**Authority 15**).

economic dependence and long-term reliance on certain fishing grounds"[684], while this is not in any event a case concerned with the transfer of sovereignty in the context of boundary delimitation[685].

8.34 Finally, as with the alleged undertakings, the time for the assertion of alleged traditional fishing rights was in the course of the bilateral meetings and communications of 2009-2010 when, again, such matters would have been given the most careful consideration.

(ii) Alleged violations in relation to the EEZ

(cf. Memorial, paras. 7.28-7.35)

8.35 Mauritius' claims with respect to the incompatibility of establishment of the MPA and alleged rights in the EEZ are made (principally) by reference to article 56(2) UNCLOS and the obligation there to 'have due regard to the rights and duties of other States'. Article 56(2) provides in full:

> "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

8.36 It is immediately evident that the obligation under article 56(2) is dependent on the existence of relevant 'rights and duties of other States' and, further, stops well short of an obligation to give effect to such rights and duties. The obligation is to have "due regard" to the same.

8.37 As follows from the discussion above, and from **Chapter II**, Mauritius does not have relevant rights in the FCMZ/EPPZ. Further:

a. As of 1965, even accepting Mauritius' argument (for present purposes only) that there

[684] Cf. MM, para. 7.11, relying on *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, Judgment, *I.C.J. Reports 1974*, p. 175, at para. 61 (and also para. 54).
[685] Cf. MM, para. 7.10, relying on the Award in the *Abyei* arbitration, *Government of Sudan* v. *Sudan People's Liberation Movement/Army*, Final Award of 22 July 2009, para. 753.

was a legally binding undertaking in respect of fishing rights, this could only have been within the territorial waters then appertaining to the Chagos Islands. The United Kingdom could not have undertaken, and evidently did not undertake, to accord rights in the high seas.

b. The subsequent acts of the United Kingdom did not somehow extend alleged fishing rights, or traditional fishing rights, to the FCMZ/EPPZ [686]. Rather, Mauritian fishermen, applying for the relevant licences, were granted these free of charge. In none of the communications between the two States has the United Kingdom undertaken to continue indefinitely to issue fishing licences to Mauritian-flagged vessels free of charge.

8.38 In any event, there has been no failure to have "due regard" to any alleged rights. The simple point is that the United Kingdom went well beyond any obligation under article 56(2), and engaged in bilateral consultations with Mauritius (and others) before the MPA was proclaimed whilst, in those consultations, Mauritius did not even raise the existence of fishing rights that needed to be taken into account (see further **Section C** below[687]). In such circumstances, there cannot plausibly be any question of breach of article 56(2).

8.39 Finally, it is to be noted that Mauritius' reliance on article 55 UNCLOS adds nothing to this part of its claim[688].

C. The alleged failures to consult

(cf. Memorial, paras. 7.36-7.80)

(i) The provisions of UNCLOS relied on

8.40 Mauritius seeks to read into UNCLOS obligations of consultation that are either not to be found in the plain language of the provisions relied on or are not applicable in the

[686] Cf. MM, para. 7.31.
[687] See also paras. 3.50-3.52, 3.62-3.66, 3.68, 5.29-5.32, 5.39-5.42 above.
[688] Cf. MM, para. 7.33. Article 55 provides: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which 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".

circumstances of this case. While it is therefore necessary to examine in turn each of the six provisions of UNCLOS that Mauritius invokes in seeking to establish an applicable obligation to consult[689], it is recalled at the outset that it was Mauritius that brought to an end bilateral talks in which the possible establishment of the MPA was being discussed (see further under sub-section (ii) below).

(a) Article 2(3)

8.41 With respect to the territorial sea, Mauritius seeks to base the obligation to consult on article 2(3). As already noted, this does not create specific obligations of compliance. Further, even if article 2(3) did establish a general obligation to comply with all rules of international law, there is no general international law rule of consultation that would apply where a State chooses to establish a specific regime (such as the MPA) in its territorial waters.

8.42 The *Lac Lanoux* case concerned the use of international watercourses and does not establish a generally applicable principle of consultation (even if it were the applicable law, which it is not). The United Kingdom reiterates the points made on reliance on *Lac Lanoux* at paragraph 6.49 above. Mauritius is likewise not assisted by cases to the effect that States that dispute a maritime boundary are under an obligation to enter into meaningful negotiations[690]. This is not a case involving either use of an international watercourse or maritime delimitation.

8.43 Mauritius' assertion of abuse of right is also inapposite. Either there is an obligation to consult with respect to a coastal State's activities in the territorial sea in the provision identified by Mauritius, i.e. article 2(3), or there is not. Article 300 does not impose free-standing obligations with respect to good faith and abuse of rights, and so does not add anything in a context where there are merely allegations of a failure to secure Mauritius' agreement to establishment of the MPA and to consult[691]. Mauritius makes a discrete

[689] In addition, article 7 of the 1995 Agreement, on which Mauritius relies to establish an applicable obligation to consult, is considered in **Chapter IX** below.
[690] Cf. MM, para. 7.39, relying on the well-known passage in *North Sea Continental Shelf (Germany* v. *Denmark)*, Judgment, *I.C.J. Reports 1960*, p. 3 at para. 85.
[691] MM, para. 7.41.

argument with respect to abuse based on allegations that the MPA was established for improper motive (see further at **Section D** below) [692].

(b) Article 56(2)

8.44 As already noted, article 56(2) establishes an obligation on the coastal State in the EEZ to "have due regard to the rights and duties of other States". Its application to this case is dependent on Mauritius establishing the existence of relevant rights, as to which the United Kingdom has stated its position under **Section B** of this Chapter. It follows that reliance on the very different circumstances of the *Fisheries Jurisdiction* cases, where relevant rights had been established, does not assist Mauritius[693].

8.45 Further, article 56(2) does not establish an obligation to consult. Where the drafters of UNCLOS intended to establish some form of obligation to consult they did this in express terms (see e.g. article 66(2) with respect to anadromous stocks)[694]. While it is correct that article 56(2) also requires the coastal State "to act in a manner compatible with the provisions of this Convention", that merely begs the question as to whether there are elsewhere in the Convention applicable provisions establishing obligations of consultation.

8.46 Article 197 is irrelevant in this respect [695], since it concerns cooperation "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention". It is not concerned with one State's declaration of a marine protected area. Likewise, Mauritius is not assisted by references in the ITLOS jurisprudence to the duty to cooperate being a fundamental principle in the prevention of pollution of the marine environment (in the context of alleged radioactive releases to the Irish Sea in the *MOX Plant* case, and major reclamation works in *Land Reclamation by Singapore*) [696]. The MPA is, by contrast, aimed at protecting the marine ecosystem through establishing a no-take marine reserve.

[692] At MM, para. 7.81 et seq. At MM, para. 7.42, Mauritius also relies on a passage from Resolution III contained in Annex I to the Final Act of the Third United Nations Conference on the Law of the Sea. This is not relevant, and raises the issues of sovereignty already considered in **Chapter VII** above.
[693] Cf. MM, paras. 7.46-7.47.
[694] Cf. MM, paras. 7.43-7.54.
[695] Cf. MM, para. 7.45.
[696] Cf. MM, para. 7.45 and fn. 531, referring to *The MOX Plant Case*, Order of 3 December 2001, para. 82, and *Land Reclamation by Singapore in and around the Straits of Johor*, Order of 8 October 2003, para. 92.

8.47 Further, insofar as it may be said that the United Kingdom has recognised that Mauritius has a legitimate interest in the future of the Chagos Islands[697], this is the recognition that Mauritius is the only State that could assert a claim to the Islands in the event that the United Kingdom relinquishes its sovereignty. Such recognition does not confer upon Mauritius special rights of consultation in respect of all acts of the United Kingdom within the FCMZ/EPPZ, and this is all the more so where such acts are wholly reversible in nature and in no sense impact upon any future sovereign rights and jurisdiction of Mauritius. The alleged recognition of a need to consult with Mauritius in various other contexts a number of years or even decades prior to proclamation of the MPA takes matters no further.

(c) Articles 63(1), 63(2) and 64

8.48 Mauritius' case on breach of alleged obligations to consult in respect of straddling stocks and highly migratory species is considered in Chapter IX below (articles 63-64 UNCLOS), alongside its claims of breach of the 1995 UN Fish Stocks Agreement. It is sufficient to note here that:

a. The obligation set out in article 63(2) applies only to fish stocks in the high seas area adjacent to the EEZ of a coastal state and only vis-à-vis "the States fishing for such stocks in the adjacent area". Mauritian vessels do not fish in adjacent waters, nor is its own EEZ adjacent to the MPA (see **Figure 2.2** on p. 49). Similarly the obligation set out in article 64 applies only vis-à-vis "The coastal State and other States whose nationals fish in the region...". Mauritius is not one of those States.

b. The cooperation called for by articles 63 and 64 is to be fulfilled either "directly or through appropriate subregional or regional organizations" (articles 63(1) and (2)) or "appropriate international organizations" (article 64(1)). Both the United Kingdom and Mauritius have chosen to cooperate for this purpose through the Indian Ocean Tuna Commission. There is no obligation for the United Kingdom to cooperate directly with Mauritius[698].

[697] MM, paras. 7.49-7.54.
[698] Cf. MM, para 7.68.

(d) Article 194(1)

8.49 Article 194(1) contains an obligation to endeavour to harmonise policies with respect to measures "that are necessary to prevent, reduce and control pollution of the marine environment from any source". It is said that the United Kingdom has breached article 194(1) as "it made no attempt to engage with Mauritius or other States to harmonise the pollution policies of the 'MPA' with their own"[699]. As follows from Chapter VI above, Article 194(1) is not applicable in the circumstances of the current case[700]. This is quite apart from the fact that, so far as concerns Mauritius' reference to other States, that is not a matter for Mauritius; and so far as concerns Mauritius itself, it will be recalled that it was Mauritius that refused to engage with the United Kingdom, not *vice versa* (and see further under sub-section (ii) below).

(e) Article 62(5)

8.50 Article 62(5) provides that: "Coastal States shall give due notice of conservation and management laws and regulations". The claim is that there has been a failure to make the laws and regulations concerning the MPA readily accessible[701]. It would appear that Mauritius considers that there are laws and regulations concerning the MPA that are not in the public domain. That is incorrect.

(ii) There was no failure to consult

8.51 As has already been explained in **Chapter V** above, the simple point is that ongoing bilateral consultations in respect of (inter alia) the MPA were brought to an end by Mauritius. In such circumstances, there is no basis whatsoever for alleging any failure to consult on the part of the United Kingdom.

8.52 The key points are:

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[699] MM, para. 7.78.
[700] M.H. Nordquist (ed.), *UNCLOS 1982: A Commentary*, Vol. V, p. 105 (**Authority 85**); C.C. Churchill, "Some Reflections on the Operation of the LOSC Dispute Settlement System", in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 407 (**Authority 54**).
[701] MM, Para. 7.79.

a. The United Kingdom engaged in meaningful discussions with Mauritius over the establishment of the MPA and it was not "misleading and inaccurate" to say that the proposal had been an initiative of the Chagos Environment Network and not the United Kingdom[702]. It was not until 6 May 2009 that the Secretary of State for Foreign and Commonwealth Affairs decided that consideration should be given to the possibility of creating a large-scale BIOT MPA[703].

b. The MPA proposal was outlined in some detail to the Mauritian delegates in the bilateral talks held in Port Louis, Mauritius, on 21 July 2009[704]. The talks were constructive. The note of the meeting records:

"8. … There was a proposal from the Chagos Environmental Network (CEN). One of the ideas being mooted was that the whole of the EEZ be a no-take zone for fishing. The scientific basis had not yet been fully established but the idea merited consideration. An alternative route would be a more gradual process, ie, to designate the reefs as no take or another proposal of a different / larger area than that of the closure of the reef areas extending 12 n miles from the 200m depth contour and leave the rest of the fishery open.

9. There were powerful arguments in the UK to establish a marine protected area. However, many questions still needed to be worked through. The UK delegation explained the advantage to Mauritius that through a marine protected area, the value of the Territory would be raised and this resource would eventually be ceded to Mauritius. No decisions had yet been taken. The UK was discussing issues with the US: BIOT was created for defence purposes and the environmental agenda must not overcome that purpose.

10. The Mauritian delegation explained that they had taken exception to the proposal from the CEN but on the basis that it implied the Mauritians had no interest in the environment. They had also found it necessary to protest on sovereignty grounds. There was a general agreement that scientific experts should be brought together. However, the Mauritians welcomed the project but would need to have more details and understand the involvement of the Mauritian government. The UK delegation explained that not many details were available as the UK wanted to talk to Mauritius before the proposals were developed. If helpful the UK could, for the purposes of discussion, produce a proposal with variations on paper for the Mauritians to look at.

[702] Cf. MM, para. 7.56. See further paras. 3.30-3.37 above.
[703] See para. 3.38 above.
[704] See paras. 3.42-3.48.

11. The UK delegation added that the Foreign Secretary was minded to go towards a consultative process and that would be a standard public consultation. However, the UK had wanted to speak to Mauritius about the ideas beforehand. Also, we needed to bear in mind the case before the ECtHR. Any ideas proposed would be without prejudice to any judgment by the Court"[705].

c. The BIOT Administration subsequently sought to engage Mauritius in forms of participation and ownership in the public consultation process, but Mauritius did not respond to these overtures, and nor did Mauritian officials come to London for another round of talks. However, at this time i.e. prior to the commencement of the public consultation, Mauritian officials did not communicate a refusal to be involved in the public consultation[706].

d. The public consultation commenced on 10 November 2009 and ran till 5 March 2010. As part of the consultation, meetings were organised by the independent facilitator in Port Louis in Mauritius and Victoria in the Seychelles, and with the Chagossian community in the United Kingdom in Crawley[707].

e. The integrity of the public consultation was challenged in the recent judicial review proceedings, but that challenge was rejected on 11 June 2013 (see *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*).

f. Mauritius did not engage in the public consultation, and introduced what it must have known would be unacceptable pre-conditions to continuing the bilateral talks, thereby bringing these to an end. Whereas in the Note Verbale of 11 November 2009, the United Kingdom underlined that the purpose of the consultation was to gain views on a proposal, that no policy decision had been made, and looked forward to further bilateral talks on the issue[708], the Mauritian statements from November 2009 adopted a firm position that the MPA would interfere with its sovereignty[709]. In the letter of 30 December 2009 from its Minister of Foreign Affairs, Regional Integration

[705] **Annex 101**, para 23, emphasis added. As noted at para. 3.46 above, access to fishing rights was a separate agenda item, and was not put forward by Mauritius as a ground of objection to the MPA.
[706] See paras. 3.50-3.52 above.
[707] See paras. 3.55-3.60 above.
[708] MM, annex 154.
[709] See paras. 5.29 c.-f., 5.39, 5.43 above.

and International Trade to his UK counterpart, Mauritius refused to discuss the MPA unless issues of sovereignty were included:

> "On the substance of the proposal … the Government of Mauritius considers that the establishment of a Marine Protected Area around the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago …
>
> Moreover, the issues of resettlement in the Chagos Archipelago, access to the fisheries resources and the economic development of the islands in a manner that would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos Archipelago are matters of high priority to the Government of Mauritius. The exclusion of such important issues in any discussion relating to the proposed establishment of a Marine Protected Area would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago and progress in the ongoing talks between Mauritius and the United Kingdom.
>
> In these circumstances, as I have mentioned, Mauritius is not in a position to hold separate consultations with the team of experts of the UK on the proposal to establish a Marine Protected Area" [710].

g. There was no agreement between Prime Ministers to put the MPA on hold[711].

8.53 In conclusion, there was a public consultation exercise in which Mauritius could have engaged, but chose not to do so. That was a matter for Mauritius, just as was its decision to make consideration of sovereignty issues a pre-condition for its participation in further bilateral talks. However, it is not open to Mauritius, now, to rely on its non-participation in the public consultation or the non-resumption of bilateral talks, and at the same time allege breach by the United Kingdom of obligations to consult under the Convention.

8.54 The true position is that the United Kingdom acted throughout in good faith; it consulted with Mauritius before taking any decision to move forward with the MPA proposal in a public consultation; it sought to and wished to continue discussions in a bilateral process, which Mauritius withdrew from.

D. The Alleged Abuse of Rights

(cf. Memorial, paras. 7.81-7.99)

[710] MM, annex 157. See also *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), paras. 132-137 (**Authority 43**).
[711] See paras. 3.63 above.

(i) The alleged abuses

8.55 While allegations of abuse of right are made with some frequency in State to State litigation, they have rarely if ever been upheld. According to Kiss (who Mauritius relies upon in this context), "the principle has been mentioned in several cases as a possible basis for a condemnation for violation of international law, but without having been actually used for that purpose"[712]. The allegations of Mauritius in this case do not come anywhere near to establishing any such violation on the part of the United Kingdom.

8.56 Mauritius' abuse of rights argument falls into two parts.

8.57 The first is largely a re-packaging of its claims in relation to breach of provisions of the Convention through failure to take into account alleged traditional fishing rights[713], failure to comply with alleged undertakings[714], and failure to engage in meaningful consultations[715]. It is said that even if there was no breach of the other provisions of UNCLOS that it relies upon, establishment of the MPA was nonetheless an abuse of rights enjoyed by the United Kingdom under the Convention and contrary to article 300. It is not said which specific rights have been exercised by the United Kingdom in an abusive fashion[716], but the thrust of the argument appears to be that inadequate account has been taken of rights of Mauritius in respect of fishing, access to marine resources, and consultation. Thus, on Mauritius' case, article 300 is to be taken as adding an undetermined layer of obligations into the Convention such that, even where there has been no breach of (say) an obligation to consult under the Convention, there can be a breach of article 300 arising out of a failure to consult.

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[712] Alexandre Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law* (2012) (**Authority 75**). See also Lauterpacht, to whom Mauritius also refers, concluding that: "The doctrine of abuse of rights is therefore an instrument which … must be wielded with studied restraint": *The Development of International Law by the International Court* (1958), p. 164 (**Authority 80**).

[713] Cf. MM, para. 7.88.

[714] Cf. MM, para. 7.89.

[715] Cf. MM, para. 7.90.

[716] Cf. *The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Judgment of 28 May 2013, at para. 137: "The Tribunal finds that it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when "the rights, jurisdiction and freedoms recognised" in the Convention are exercised in an abusive manner" (**Authority 44**).

8.58 That makes no sense. The underlying proposition appears to be that a State Party to UNCLOS cannot consistent with article 300 exercise rights under the Convention if to do so is to cut across alleged rights of another State Party, albeit that there is no breach of the Convention. There is nothing in article 300 to suggest that it is to be applied this way[717], even if, which appears to be assumed by Mauritius, the Tribunal is taken as having jurisdiction over the alleged undertakings and such alleged undertakings give rise to legally enforceable rights on the part of Mauritius (which the United Kingdom of course contests). Further, even if article 300 were to be taken as prohibiting an unnecessary or arbitrary exercise of rights[718], Mauritius does not come close to establishing any such exercise on the part of the United Kingdom. As follows from **Chapter III** above, the MPA has a sound (and unchallenged) scientific basis, was established in good faith, and will be to the benefit of BIOT and also of much wider benefit to the international community.

8.59 Mauritius also contends for an abuse of rights in the more usual sense of a right exercised intentionally for an end different from that for which the right has been created[719]. The elements of alleged abuse are said to reside in:

a. The failure to accompany establishment of the MPA with detailed regulations;

b. The failure to appropriate any budget for the MPA;

c. Absence of effective enforcement;

d. The exclusion of Diego Garcia[720].

[717] The argument is understood to derive from Kiss: see MM, para. 7.84. According to Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law* (2012), para. 4, there may be an abuse of rights where "a State exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers injury" (**Authority 75**). This is the passage relied on by Mauritius. Kiss continues, however: "Such a situation can result, for example, from the inconsiderate use of a shared natural resource, or a migratory species, or the radio-electronic spectrum. Here the States sharing the same resource suffer a reduction in their enjoyment of the resource to which they are entitled. In reality, however, the existing rights and the legitimate interests of the States concerned have to be balanced in such cases. It can be considered that an abuse of right exists only when the injury suffered by the aggrieved State exceeds the benefit resulting for another State from the enjoyment of its own right". Even were this to be a correct application of article 300, it would be for Mauritius to show (i) the existence of rights, and (ii) that somehow the loss of access to fishing licences that were not, as a matter of practice, applied for outweighs the benefits to BIOT and the global community of establishment of the MPA. It has not even sought to engage in such a balancing exercise.
[718] See the tentative suggestion in the *Virginia Commentary*, Part XVI, p. 152.
[719] MM, paras. 7.91-7.98.
[720] MM, paras. 7.94-7.97.

8.60 These factors are said to raise doubts as to the effectiveness of the MPA with regard to its purported objectives, and therefore as to the objectives themselves[721]. In addition, the doubts are said to be reinforced by reported remarks that "establishing a marine park would, in effect, put paid to resettlement claims of the archipelagos' former residents"[722].

(ii) There was no abuse

8.61 It is to be noted at the outset that an equivalent argument on improper motive was run, and was rejected by the Administrative Court in notably clear cut terms, in the recent judicial review proceedings (see *R(Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*)[723].

8.62 The relevant facts are as set out in **Chapter III** above. There has been a long-standing policy of protection and preservation of the resources of the waters of and around the BIOT and, as explained at paragraphs 3.18 above, marine protected areas in BIOT waters had been considered by the BIOT authorities well before the initiative that led to the MPA in 2010. The establishment of the MPA has followed detailed scientific consideration and public consultation[724]. The allegation of abuse is fanciful, if also regrettable.

8.63 As to the instances of conduct relied upon to found abuse:

a. *The failure to accompany establishment of the MPA with detailed regulations*: Detailed legislation implementing the MPA is being prepared but in the meantime, as

[721] MM, paras. 7.98.
[722] *Ibid.*, referring to MM, annex 146.
[723] See the judgment of 11 June 2013, at paras. 21-78 and, in particular, paras. 54-77. As the Court concluded at para. 76: "For the claimant's case on improper purpose to be right a truly remarkable set of circumstances would have to have existed. Somewhere deep in government a long-term decision would have to have been taken to frustrate Chagossian ambitions by promoting the MPA. Both the administrator of the territory in which it was to be declared, Ms Yeadon, and the person who made the decision, the Foreign Secretary, would have to have been kept in ignorance of the true purpose. Someone - Mr Roberts? - would have been the only relevant official to have known the truth. He, and whoever else was privy to the secret, must then have decided to promote a measure which could not achieve their purpose, for the reasons explained above, while explaining to all concerned that the MPA would have to be reconsidered in the light of an adverse judgment of the Strasbourg Court. Those circumstances would provide an unconvincing plot for a novel. They cannot found a finding for the claimant on this issue" (**Authority 43**).
[724] See paras. 3. 35, 3.38-3.61 above.

explained above, the ban on commercial fishing in the MPA is implemented under the existing fisheries legislation[725].

b. *The failure to appropriate any budget for the MPA*: The funding of the MPA is by a public-private partnership between the BIOT Administration and private sector NGOs, including Pew and the Bertarelli Foundation. The BIOT Administration, with the support of the United Kingdom Government and the National Environment Research Council, has established a Scientific Advisory Group to advise the BIOT Administration on the scientific aspects of managing the MPA. The core of this work is to establish research baselines and to prioritise proposals for research. The United Kingdom Government (through its Department for the Environment, Food and Rural Affairs) has awarded a grant for further research in the BIOT which will fund three more scientific surveys of the BIOT marine environment over the next two and a half years in addition to the two which have already taken place since the MPA was established[726].

c. *Absence of effective enforcement*: The prohibition on fishing without a licence in BIOT waters is enforced by the BIOT patrol vessel and protection officers[727].

d. *The exclusion of Diego Garcia*: Under the current MPA framework regulated non-commercial fishing by yachtsmen for personal consumption and recreational fishing off Diego Garcia are allowed. The catches are very small. As noted in **Chapter III** above, while commercial fishing was still permitted, recreational fishing amounted to significantly less than 1% of the entire amount of fish caught in BIOT waters[728]. As with the issues considered in paragraphs (a) to (c) above, it is perplexing that such matters should be raised in the context of State/State litigation to found an abuse of rights claim.

[725] See para. 3.3 above.
[726] See paras. 3.71-3.72 above.
[727] See para. 3.69 above.
[728] See para. 3.70 above.

8.64 As to the reported remarks on which Mauritius relies[729], a meeting was held at the US Embassy on 12 May 2009. The United States expressed concerns that establishing a marine protected area might weaken the integrity of immigration controls and so facilitate resettlement and otherwise compromise the security of their military installations. It was also concerned that the legislative and regulatory framework governing a marine protected area might constrain military operations and manoeuvres, and that over time these regulations might, through the pressure of the environmental lobby, become more restrictive. The issues were discussed from a number of perspectives, including, as is normal, from the perspective of public and media reaction. As a matter of policy, it was clear that any form of entrenchment of the marine protected area would be unacceptable to the United Kingdom and United States Governments on operational security grounds, and that the establishment of the MPA would and should have no impact on the question of resettlement. In accordance with its long-established policy, the United Kingdom can neither confirm nor deny the authenticity of the document on which Mauritius relies, nor the veracity of its contents[730].

E. Conclusion

8.65 In conclusion, Mauritius does not come close to establishing any abuse of rights in the instant case. The MPA has a scientific basis that is unchallenged by Mauritius, it was established in good faith, and will be to the benefit of BIOT and also of much wider benefit. The burden is on Mauritius to show that rights have been exercised abusively[731], and also (on its own approach) to show injury in the form of serious consequences established by clear and convincing evidence [732] . It has not, and cannot, meet that burden.

[729] MM, para. 7.98.

[730] Insofar as Mauritius continues to rely on a document that appears to have been obtained illicitly by a person who was not authorised to obtain it (from a US electronic document storage facility elsewhere than in the US Embassy in London), the UK will rely on the inviolability of the document pursuant to Articles 24 and 27(2) of the 1961 Vienna Convention on Diplomatic Relations. In particular, pursuant to Article 24: "The archives and documents of the mission shall be inviolable at any time and wherever they may be." As noted in Denza, *Diplomatic Law*, p. 226: "The inviolability of the official correspondence of a mission has two aspects - it makes it unlawful for the correspondence to be opened by the authorities of the receiving state and it precludes the correspondence being used as evidence in the courts of the receiving state. As regards use of correspondence as evidence, Article 27.2 is probably unnecessary in view of the fact that Article 24 of the Convention gives inviolability to the archives and documents of the mission "wherever they may be'" (**Authority 62**).

[731] See e.g. *Case concerning Certain German Interests in Polish Upper Silesia (Merits), P.C.I.J. Series A*, No. 7, at p. 30 (**Authority 3**).

[732] See Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law* (2012), para. 30 (**Authority 75**), referring to *Trail Smelter Case, United States* v. *Canada*, Second Decision, (1949) III *RIAA* 1938, 11th March 1941, p. 1965.

CHAPTER IX

THE MPA DOES NOT VIOLATE THE OBLIGATION OF THE UNITED KINGDOM TO CO-OPERATE WITH RESPECT TO MANAGING FISH STOCKS IN THE MPA

9.1 This Chapter responds to Mauritius' allegation that in declaring an MPA around the British Indian Ocean Territory the United Kingdom failed to co-operate with other states as required by UNCLOS articles 63 and 64, and the UN Straddling and Highly Migratory Fish Stocks Agreement (UN Fish Stocks Agreement), article 7[733]. **Chapter VI** of this Counter-Memorial shows why the Tribunal has no jurisdiction over this element of the case, but the following sections of this Chapter also explain why, in any event, the claim is without merit.

9.2 Contrary to what Mauritius alleges, the United Kingdom actively co-operates, with Mauritius and other states, through the Indian Ocean Tuna Commission ('IOTC'). In doing so it has more that satisfied the requirements of articles 63 and 64 of UNCLOS, and of article 7 of the UN Fish Stocks Agreement. In this respect:

a. **Section A** sets out the relevant provisions of the IOTC Agreement, which would be the applicable law if the Tribunal had jurisdiction, not UNCLOS or the UN Fish Stocks Agreement. It shows that the United Kingdom did not violate articles 63 or 64 of UNCLOS when establishing the MPA, that the co-operation required by those articles is fulfilled through the IOTC, and that in any event Mauritius has no standing to allege a violation since its vessels do not fish in the relevant area.

b. **Section** B shows that the obligation to co-operate pursuant to UN Fish Stocks Agreement article 7 also applies only vis-à-vis other states "whose nationals fish for such stocks in the adjacent high seas area". Since Mauritius is not one of those States article 7 is irrelevant to Mauritian objections to the institution of the MPA, or to Mauritian claims to fish in the MPA.

[733] MM, paras. 7.63-7.66.

9.3 In these circumstances there is no violation of article 7 of the UN Fish Stocks Agreement or of UNCLOS articles 63 and 64.

A. Indian Ocean Tuna Commission Agreement

9.4 Membership of the IOTC is open to members and associate members of the FAO that are "coastal States or associate members situated wholly or partly within the [Indian Ocean] Area"[734]. The United Kingdom participates in the IOTC as a "coastal State....situated partly within the [Indian Ocean] Area". Its participation as the relevant coastal State with respect to the BIOT is recognised and accepted by other member States, except Mauritius. IOTC reports treat the BIOT as a coastal State for the purposes of the agreement[735].

9.5 The United Kingdom contributes to the IOTC's budget and cooperates actively in its work. For example Dr Chris Mees represented the United Kingdom in the 12th Session of the IOTC Scientific Committee in April 2012. The key issue for the United Kingdom was the continued illegal, unregulated and unreported ('IUU') fishing in BIOT waters by Sri Lankan flagged vessels. The United Kingdom presented an Information Note (IOTC–2012–CoC09-08b) proposing action by the Commission.

9.6 Mauritius is also a member of the IOTC, although it is "not presently classified as a fishing nation for tuna species"[736]. The 2011 Mauritius National Report to the IOTC summarises Mauritian fishing as follows:

> "Four national fishing vessels, less than 24 meters in length, targeting swordfish landed 89 tonnes of chilled fish. The catch composed of 49.2% swordfish and 18.4 % yellowfin, 12.1% bigeye and 9.4 % albacore tuna. The fishing areas were spread between latitudes 120S and 230S and longitudes 520E and 630E. About 350 small-scale fishermen operating around the 27 anchored Fish Aggregating Devices set around the island landed 258 tonnes of tuna and the catch was mainly composed of albacore tuna. The sports/recreational fishery supplied the local market with an

[734] IOTC Agreement, Article IV : **Annex 61.**
[735] See eg IOTC, Report of the 15th Session, Colombo, Sri Lanka 18–22 March 2011, p.14, paras. 71-2 [IUU fishing in BIOT waters] (**Annex 123**); IOTC, 15th Report of the Scientific Committee, Mahé, Seychelles, 10–15 December 2012, p. 65 [implementation of national plan of action] (**Annex 131**); IOTC, 14th Report of the Scientific Committee, Mahé, Seychelles, 12–17 December 2011, p. 59 (**Annex 126**).
[736] IOTC 14th Report of the Scientific Committee, 2011, p.54.

additional estimated amount of 350 tonnes and the species comprised marlins, sailfish, tuna, dolphinfish and wahoo"[737].

So far as concerns specifically the BIOT, two Mauritian-flagged vessels were licensed to fish for tuna in the waters of the BIOT between 1991 and 1999. However, no Mauritian-flagged vessels have applied for such licences since 1999[738]. It is clear from its own national report that Mauritian fishing is mainly carried out in the waters around Mauritius and that the large volume of tuna and other fish processed in or transhipped through Mauritius is caught by foreign vessels operating under licence.

9.7 Although the United Kingdom did consult and co-operate with Mauritius and other States parties through the IOTC, Mauritius nevertheless claims that, when adopting the MPA, the United Kingdom failed in its alleged duty to cooperate with Mauritius and the IOTC[739]. It bases this claim not on article 8 of the IOTC Agreement but on articles 63 and 64 of UNCLOS, and article 7 of the United Nations Fish Stocks Agreement of 1995. Four points can be made in response to this argument.

9.8 First, as already explained in **Chapter VI**, this is another attempt to challenge the discretionary exercise by the United Kingdom of its sovereign rights in relation to living resources, and "the terms and conditions established in its conservation and management laws and regulations"[740]. For that reason this part of its case again falls within the terms of article 297(3)(a) and is excluded from the compulsory jurisdiction of an Annex VII tribunal.

9.9 Second, as also observed in **Chapter VI**, the IOTC Agreement is the applicable law with respect to co-operation among IOTC member states, not articles 63 and 64 of UNCLOS or article 7 of the UN Fish Stocks Agreement. The IOTC Agreement expressly preserves the sovereign rights of the coastal state with respect to conservation and management of fish stocks within the 200 nautical mile area[741].

[737] 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: **Annex 130**. The report notes that Mauritius concentrates on fish processing and issues licences for foreign boats to fish in its EEZ.
[738] See Chapter III above, paras. 2.110, 3.41.
[739] MM, paras. 7.63-4.
[740] Article 297(3)(a).
[741] Article XVI ; see below, para. 9.13.

9.10 Third, the cooperation called for by articles 63 and 64 is to be fulfilled either "directly or through appropriate subregional or regional organizations" (article 63) or "appropriate international organizations" (article 64). Both the United Kingdom and Mauritius have chosen to cooperate for this purpose through the IOTC. An account of that cooperation is set out in **Section B** below. Contrary to what Mauritius claims[742], there is no obligation for the United Kingdom to cooperate directly with Mauritius when multilateral cooperation is plainly more appropriate.

9.11 Fourth, even if articles 63 and 64 were the applicable law, the United Kingdom has not violated either article with respect to Mauritius. The obligation set out in article 63(2) applies only to fish stocks in the high seas area adjacent to the EEZ of a coastal State and only vis-à-vis "the States fishing for such stocks in the adjacent area". Mauritian vessels do not fish in the adjacent waters, nor is Mauritius' own EEZ adjacent to the MPA [See **Figure 2.2** on p. 49.]. The outer limits of the 200 nautical mile zones of BIOT and Mauritius are some 500 miles distant from each other. Vis-à-vis Mauritius, Article 63(2) is on its own terms inapplicable to the fish stocks found within and adjacent to the BIOT MPA.

9.12 Similarly the obligation set out in article 64 applies only vis-à-vis "The coastal State and other States whose nationals fish in the region ...". Mauritius is not one of those States. The *Virginia Commentary* summarises the position with respect to article 64:

> "Article 64 confirms the sovereign right of a coastal State to manage highly migratory species in its exclusive economic zone. It supplements the other provisions of Part V dealing with living resources. State practice confirms that in the exclusive economic zone coastal State jurisdiction properly extends to highly migratory species. The article requires the coastal State to cooperate with "other States whose nationals fish in the region" in the management of highly migratory species in that region, both within and beyond the exclusive economic zone of States in that region. The objectives in this cooperative management are to ensure the conservation and to promote the optimum utilization of stocks of highly migratory species in that region"[743].

9.13 Even if Mauritian nationals or vessels did fish in the same region, however, article 116 gives priority to the rights and interests of coastal States, and thus to the conservation measures adopted by the United Kingdom within the MPA. Article 116 provides:

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[742] MM, para 7.68.
[743] M. Nordquist (ed.), *UNCLOS 1982: A Commentary* (Dordrecht, 1993), Vol. II, p. 657 (**Authority 85**).

"All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section."

9.14 It has been argued that this provision "means that the right to fish on the high seas is subject to the sovereign rights, as well as the interests, of coastal states as provided in the articles of Part V of the 1982 Convention. ... Assuming the states concerned have not reached agreement on conservation in the high seas area, one interpretation of article 116 is that the coastal state is considered authorized to establish conservation measures applicable to the stock as a whole, including the high seas portion, and to demand compliance by high seas fishing states"[744]. Whatever the merits of this interpretation of article 116, the analysis offered by Professor Burke is reflected in Article XVI of the IOTC Agreement:

"This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction".

9.15 The IOTC Agreement thus confirms that conservation measures taken by the United Kingdom within the MPA pursuant to articles 63 and 64 of UNCLOS have precedence over the rights or interests of States whose nationals fish in adjacent high seas areas. As such the United Kingdom is entitled to expect the cooperation of Mauritius in maintaining the effectiveness of the MPA. As set out in paragraph 9.24 below, that cooperation has not been forthcoming.

B. UN Straddling and Highly Migratory Fish Stocks Agreement

9.16 Mauritius also alleges a breach of article 7 of the UN Fish Stocks Agreement. Specifically it alleges that the United Kingdom has failed "to make every effort to agree on

[744] W.T. Burke, *The New International Law of Fisheries* (1994), pp. 133-4 (**Authority 50**).

compatible conservation and management measures within a reasonable time" [art 7(3)][745]. This is simply not true: as the following section of this Chapter will show, the United Kingdom has fully participated in the IOTC, the body responsible for conservation and management of the relevant high seas fish stocks. Moreover, the applicable law is the IOTC Agreement, not the UN Fish Stocks Agreement.

9.17 Insofar as relevant to the present dispute, article 7 of the UN Fish Stocks Agreement was intended to ensure that overfishing in one area did not adversely affect straddling fish stocks in adjacent areas, or highly migratory fish stocks across their entire migratory range[746]. However, Mauritius has been very selective in quoting article 7 and, if it were applicable, there could be no basis for alleging a breach by the United Kingdom of that article. It is necessary to read the relevant sections of the article in full to appreciate why Mauritius' claim is misconceived. Article 7 provides:

> "*Compatibility of conservation and management measures*
>
> (1) Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:
>
> (a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas areas;
>
> (b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

[745] MM, para 7.66.

[746] D. Balton concludes that 'Article 7 of the agreement solves the compatibility problem'. See 'Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks', (1996) 27 *Ocean Development and Int Law* 125, 137 (**Authority 46**). The negotiating history of the 1995 Agreement is set out in FAO, *Fisheries Circular No 898: Structure and Process of the 1993-1995 UN Conference on Straddling and Highly Migratory Fish Stocks and Highly Migratory Fish Stocks* (Rome, 1995): **Annex 67**.

(2) Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks. In determining compatible conservation and management measures, States shall:

(a) take into account the conservation and management measures adopted and applied in accordance with article 61 of the Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures;

(b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;

(c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;

(d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;

(e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and

(f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.

(3) In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

(4) If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.

(5) Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may submit the dispute, for the purpose of obtaining provisional measures, in accordance with the procedures for the settlement of disputes provided for in Part VIII.

(6) Provisional arrangements or measures entered into or prescribed pursuant to paragraph 5 shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure".

(*7 – 9 omitted*).

9.18 Three points are obvious. First, the obligation to co-operate in article 7 applies only vis-à-vis other states "whose nationals fish for such stocks in the adjacent high seas area" [article 7(2)]. Mauritius is not one of those states. Its vessels do not fish for high seas stocks in areas adjacent to the MPA[747]. It has no rights under this article and thus no standing to complain about conservation and management measures taken by the United Kingdom within the MPA[748].

9.19 Second, the obligation to cooperate set out in articles 7(2) and 7(3) is an obligation on the part of States whose nationals fish on the high seas "to ensure that measures established in respect of such stocks [i.e. tuna] for the high seas do not undermine the effectiveness" of conservation and management measures adopted by "coastal States within areas under national jurisdiction". In the present case the relevant coastal state is the United Kingdom and the relevant area under its national jurisdiction is the BIOT FCMZ/EPPZ. Articles 7(2) and 7(3) are therefore concerned with fishing by other states in adjacent high seas areas which undermines the effectiveness of conservation measures taken by the United Kingdom within the FCMZ/EPPZ by way of, e.g., an MPA. It is not the United Kingdom which has an obligation "to agree on compatible conservation and management measures" as Mauritius alleges[749]. On the contrary, it is other parties fishing on the high seas who have an obligation to agree measures compatible with those taken by the United Kingdom. That conclusion is confirmed by Article XVI of the IOTC Agreement cited previously.[750]

[747] Para 9.5 above.
[748] *South West Africa Cases* (1966) ICJ Reports 6, paras 20-24; 2001 Articles on State Responsibility, Article 42. See J Crawford, *The ILC's Articles on State Responsibility* (Cambridge 2002) 254-60 (**Authority 57**); C. Gray, *Judicial Remedies in International Law* (Oxford 1987) 211-15 (**Authority 66**). Contrast *Obligation to Prosecute or Extradite (Belgium v Senegal*) (2012) ICJ Reports, paras 68-70. (**Authority 38**).
[749] MM, para 7.70.
[750] Para. 9.14 above.

9.20 Even if article 7 did give states which fish in adjacent high seas areas a right to be consulted before introduction of the MPA, Mauritius is not one of those States[751]. Article 7 is thus irrelevant to Mauritian objections to the institution of the MPA, or to Mauritian claims to fish in the MPA, although such claims may indeed undermine the effectiveness of fishery conservation measures taken by the United Kingdom in the MPA. Moreover, if Mauritian vessels or nationals did fish in the adjacent high seas area, then the conclusion set out in paragraphs 9.11 and 9.12 above would follow. In that case, however, article 7(2) of the UN Fish Stocks Agreement is even clearer than UNCLOS article 116 in giving priority to conservation measures adopted by the coastal state[752].

9.21 As indicated in paragraphs 9.24-9.25 below, the United Kingdom has cooperated with other IOTC member states, including participation in ongoing discussions on the utility and effectiveness of closing areas to fishing[753]. If, as Mauritius alleges, there is "a multilateral measure better designed to protect highly migratory species"[754], then it is open to Mauritius or any other party to make proposals in the IOTC. No such proposals have emanated from Mauritius. However, it must also be appreciated that the MPA is not principally designed to protect highly migratory species.[755] Rather its principal motivation is to protect the biodiversity and ecosystem of the MPA from damage caused by harmful fishing methods. That is a legitimate concern, which the United Kingdom is entitled to prioritise in accordance with article 7(2) of the UN Fish Stocks Agreement.

9.22 Third, as is also the case under UNCLOS articles 63 and 64, the appropriate forum for cooperation pursuant to the UN Fish Stocks Agreement is the IOTC. Article 8(1) of the UN Fish Stocks Agreement provides as follows:

> "Coastal States and States fishing on the high seas shall, in accordance with the Convention, pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific

[751] Para 9.11 above.
[752] P. Davies and C. Redgwell, The International Legal Regulation of Straddling Fish Stocks (1996) *BYIL* 199, at 263, regard article 7(2) as "evidence of the priority accorded coastal state interest". (**Authority 61)**
[753] See IOTC, *A preliminary investigation into the effects of Indian Ocean MPAs on yellowfin tuna, Thunnus albacares, with particular emphasis on the IOTC closed area*, IOTC 14th Scientific Committee Report, IOTC–2011–SC14–40[E]: **Annex 124**.
[754] MM, para 7.71.
[755] See **Chapter III.**

characteristics of the subregion or region, to ensure effective conservation and management of such stocks".

9.23 This article envisages cooperation "either directly or through appropriate subregional or regional fisheries management organizations or arrangements". In the present case the IOTC is the appropriate regional fisheries organisation through which both the United Kingdom (BIOT) and Mauritius have chosen to cooperate. That conclusion is illustrated by the active participation of the United Kingdom (BIOT) and Mauritius in the IOTC, by the fact that the United Kingdom (BIOT) reports on the MPA to the IOTC, and by the treatment of the United Kingdom (BIOT) as the relevant coastal state for the purposes of the IOTC[756].

9.24 The United Kingdom (BIOT) cooperates actively with other IOTC members on conservation of tuna stocks in the Indian Ocean. It reports on the BIOT research to the Scientific Committee of the IOTC[757]; it presents discussion papers at Scientific Committee meetings[758]; it collaborates with other states in facilitating the Committee's work[759]; and it participates actively in the work of this body and of the Commission on such matters as closed areas, quotas, and illegal, unregulated and unreported fishing. All of this is evident in any of the IOTC's annual reports or in the reports of its scientific committee[760]. At meetings of the IOTC, Mauritius has never raised the question of cooperation with the United Kingdom over MPA fisheries. Its only relevant intervention in these meetings has been to press its sovereignty claim over the BIOT or to object to proposals made by the United Kingdom with respect to the BIOT[761]. Mauritius has also objected to the United Kingdom's participation in meetings of like-minded coastal States[762]. Mauritius cannot complain of a failure by the United Kingdom (BIOT) to cooperate while at the same time refusing to allow the United Kingdom (BIOT) to participate in the work of the Commission.

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[756] See eg IOTC, Report of the 15th Session, Colombo, Sri Lanka 18–22 March 2011, p.14, paras. 71-2 [IUU fishing in BIOT waters] (**Annex 123**); IOTC, 15th Report of the Scientific Committee 2012, p.65 [implementation of national plan of action] (**Annex 131**); IOTC, 14th Report of the Scientific Committee 2011, p.59 [ditto]: **Annex 126**.

[757] See e.g *UK (British Indian Ocean Territory) National Report*, summarised in the IOTC 14th Scientific Committee Report 2011: Annex 127.

[758] E.g., on the impact of the IOTC / network of closures: see *A preliminary investigation into the effects of Indian Ocean MPAs on yellowfin tuna, Thunnus albacares, with particular emphasis on the IOTC closed area*, IOTC, 14th Scientific Committee Report: **Annex 124**.

[759] See, e.g., IOTC, 15th Report of the Scientific Committee, 2012: **Annex 131**.

[760] See references in fns. 753-759 above.

[761] IOTC 14th Report of the Scientific Committee 2011, p.14 (**Annex 126**); IOTC 15th Report of the Scientific Committee 2012, p. 18: **Annex 131**.

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

9.25 Of course, Mauritius otherwise participates actively in the work of the IOTC: in that sense both the United Kingdom and Mauritius cooperate through the IOTC as envisaged by articles 7 and 8 of the UN Fish Stocks Agreement. It is simply not credible in that context to accuse the United Kingdom (BIOT) of violating either UNCLOS articles 63-64 or article 7 of the UN Fish Stocks Agreement.

C. Conclusions

9.26 Mauritius cannot complain of a violation of articles 63 or 64 of UNCLOS, or of article 7 of the 1995 UN Fish Stocks Agreement because it is not a State whose nationals fish in the relevant area adjacent to the MPA. Moreover, even if the Tribunal had jurisdiction with respect to a dispute under the IOTC Agreement or under the UN Fish Stocks Agreement, which it does not, Mauritius wholly fails to substantiate its claims of non-cooperation. As detailed above, the United Kingdom has cooperated as required within the framework of the IOTC Agreement, whether pursuant to article 8 of that Agreement, or article 7 of the UN Fish Stocks Agreement, or articles 63 and 64 of UNCLOS. Mauritius' claims to the contrary have no basis in fact or law. Finally, if all the above were wrong and the Tribunal were somehow to conclude that the United Kingdom and Mauritius have failed to cooperate as required by any of these provisions, the appropriate remedy would be for the parties to resume cooperation within the context of the IOTC.

SUBMISSIONS

For the reasons set out in this Counter-Memorial, the United Kingdom of Great Britain and Northern Ireland respectfully requests the Tribunal

(i) to find that it is without jurisdiction over each of the claims of Mauritius;

(ii) in the alternative, to dismiss the claims of Mauritius.

In addition, the United Kingdom of Great Britain and Northern Ireland requests the Tribunal to determine that the costs incurred by the United Kingdom in presenting its case (including in respect of the Challenge to an Arbitrator) shall be borne by Mauritius, and that Mauritius shall reimburse the United Kingdom for its share of the expenses of the Tribunal.

M. C. Purdasy

(*pp.* Margaret Purdasy, Deputy Agent)

Christopher A. Whomersley

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Agent of the Government of the United Kingdom of Great Britain and Northern Ireland

15 July 2013