PERMANENT COURT OF ARBITRATION

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

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In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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PCA Reference MU-UK

(Final Amended Version)

HEARING ON BIFURCATION

Friday, January 11, 2013

DIAC - Dubai International Arbitration Centre
Dubai Chamber of Commerce & Industry
Baniyas Road, Deira
Dubai, U.A.E.

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

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

MR. BROOKS W. DALY, Registrar

Court Reporter:

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On behalf of the Claimant:

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APPEARANCES: (Continued)

On behalf of the United Kingdom:

MR. CHRISTOPHER WHOMERSLEY,
Deputy Legal Adviser
Foreign and Commonwealth Office
Agent for the United Kingdom

MR. QUDSI RASHEED
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Deputy Agent for the United Kingdom

SIR MICHAEL WOOD
20 Essex Street Chambers, London

MR. SAMUEL WORDSWORTH
Essex Court Chambers, London

C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Well, good morning, ladies and gentlemen. I declare open this phase of the proceedings between the Republic of Mauritius and the United Kingdom in the dispute concerning the Marine Protected Area related to the Chagos Archipelago, a matter that has been referred to arbitration under the provisions of the United Nations Convention on the Law of the sea.

Under the Rules of Procedure for the Tribunal adopted on the 29th of March 2012, the United Kingdom has requested that its Preliminary Objections to jurisdiction submitted to the Tribunal on the 31st of October 2012 be considered at a hearing separate from the merits.

The United Kingdom further requested, pursuant to Article 11(4) of the Rules of Procedure, that a hearing be held in order to determine whether such a separation of the questions of jurisdiction and admissibility on the one hand and the merits on the other should occur. This question is referred to in the Rules as bifurcation.

The issue, therefore, before us today is whether the objections to jurisdiction raised by the United Kingdom are suitable for determination in a separate phase of the proceedings. We're not here to decide on those objections themselves, still less to decide any questions belonging to the merits of the case.

09:35 In a moment I shall call upon the Agents for the Parties to announce their appearance together with their teams of counsel. But before doing so, I should inform you that the Tribunal Members, having met privately yesterday, discussed how members might ask questions of counsel as the hearing progresses. It was decided that Members of the Tribunal individually might ask questions at any time.

Additionally, during the luncheon adjournment the Tribunal might formulate questions, if considers them desirable or necessary, to put to the Parties immediately upon the resumption of the hearing in the afternoon for a response during the periods allocated in the hearing schedule for rebuttals or in the final half hour of the hearing designated for that purpose.

Finally, the Tribunal and the Permanent Court of arbitration wishes to express their deep appreciation of the excellent facilities made available to them, without cost, by the Dubai International Arbitration Centre and its Director, Mr. Nassib Ziadé.

In calling now on the Agents of the Parties, I invite them also to make any comment relating to the procedure I have outlined or to make proposals of a practical or organizational kind.

I call first upon the Agent for the United Kingdom. Mr. Whomersley.

09:36 MR. WHOMERSLEY: Mr. President, Members of the Tribunal, thank you very much.

Shall I first introduce the members of my team. On my right is Mr. Qudsi Rasheed, who is the Deputy Agent for the United Kingdom and Assistant Legal Adviser in the Foreign and Commonwealth Office. On his right is Sir Michael Wood, of counsel; and, on his right is Mr. Samuel Wordsworth, also of counsel. Mr. President, Members of the Tribunal, I think we are perfectly happy with the procedure which you have just outlined.

Thank you.

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

I call now upon the Agent for the Republic of Mauritius.

Mr. Dabee.

MR. DABEE: Thank you, Mr. President.

Mr. President and distinguished Members of the Tribunal, let me on behalf of the delegation of the Republic of Mauritius state that it is my pleasure and honor to be appearing before you to address you this morning.

We are thankful to you, Mr. President and distinguished Members of the Tribunal, for finding time so early in this new year to hear this matter, a matter which is one of great importance to Mauritius.

09:38 We are also grateful to the PCA and in particular to the Registrar for the exemplary way in which they have been carrying out their mandate. They have acted expeditiously and diligently and been ensuring procedural fairness throughout the process so far.

We welcome today's hearing and the opportunity it offers to engage with our colleagues from the U.K. delegation. That being said, I must say we were disappointed to receive a letter on the 8th of November of last year that appeared to raise a doubt as to the seriousness of Mauritius's approach to the question of bifurcation.

Mr. President, may I take this opportunity to draw attention to the fact that the Rules of Procedure have been agreed to by the Parties in their entirety following extensive consultations. Article 11(3) expressly provides, and I quote, "The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's Final Award. If either Party so requests, the Tribunal shall hold hearings prior to ruling on any objections to jurisdiction or admissibility."

The U.K. has expressed its concerns over--

PRESIDENT SHEARER: I'm sorry, Mr. Dabee, I have to interrupt there. I think you're now going into the arguments.

MR. DABEE: Obviously I'll wait.

09:39 PRESIDENT SHEARER: And I invited you simply to introduce your team, and then we will hand the floor over to the U.K. You will have an opportunity--

MR. DABEE: I will proceed straightaway to introduce them.

PRESIDENT SHEARER: Please do so.

MR. DABEE: Allow me at this stage, Mr. President, to introduce the members of the delegation of the Republic of Mauritius. To my right is Professor Philippe Sands. Next to him is Professor James Crawford and Ms. Alison Macdonald. And to my far right is Ambassador Meetarbhan from our mission in New York.

On the table behind from my right to left we have our Deputy Agent--we have first Ms. Elizabeth Wilmshurst; secondly, Ms. Young Kim Fat; then Ms. Aruna Narain, our Deputy Agent; and also Remi Reichhold, next to Ms. Elizabeth Wilmshurst.

I will very briefly refer to the way in which our delegation will proceed with our representation or, rather, we will leave that to a later stage.

Thank you, Mr. President.

PRESIDENT SHEARER: Thank you, Mr. Dabee.

Well, now, neither side has made any comments on the organizational arrangements, so we presume that everything is in order to proceed according to the hearing schedule that has been set out.

09:41 I call on the Agent for the United Kingdom, Mr. Whomersley.

ORAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. WHOMERSLEY: Thank you, Mr. President.

Mr. President, Members of the Tribunal, we are grateful to you for agreeing to the present procedural hearing, which is taking place in accordance with Article 11 of the Rules of Procedure adopted on 29 March 2012, that Article being entitled "Preliminary Objections." Mr. President, as you've said, the purpose of today's hearing is to discuss the procedure for dealing with the United Kingdom's Preliminary Objections to Jurisdiction, which were submitted on 31 October 2012, in accordance with Article 11 of the Rules.

As you say, this is not an occasion to debate the substance of those objections except insofar as that is necessary in order to determine the procedure to be followed.

Mr. President, in submitting our Preliminary Objections on 31 October, we invited Mauritius to recognize that our Preliminary Objections were serious and substantial, and were manifestly well suited to being addressed as a preliminary matter. Had Mauritius done so, the present hearing would probably have been unnecessary.

But, in a letter dated 2 November, Mauritius stated that it considered, "that the objections raised by the United Kingdom are properly to be addressed together with the merits."

09:42 And, in Written Observations of 21 November, Mauritius invited you to, "order that the United Kingdom's Preliminary Objections be joined to the merits."

The United Kingdom has responded with a written reply dated 21 December.

Mr. President, Members of the Tribunal, for the reasons given in writing in our Preliminary Objections of 31 October, in our written reply of 21 December, and orally today, the United Kingdom will respectfully request, in accordance with Article 11(2)(a) of the Rules of Procedure, that each of its Preliminary Objections be dealt with as a preliminary matter. Mr. President, counsel for the United Kingdom will address you as follows:

First, Sir Michael Wood will look at the approach we consider it would be appropriate for this Tribunal to adopt. In doing so, he will set out what we see as the relevant law and practice on the procedural issue that is before you today; namely, whether or not Preliminary Objections such as those put forward by the United Kingdom should, in an arbitration of this sort, be deferred to the Final Award.

Sir Michael will then followed by Mr. Wordsworth, who will consider the United Kingdom's three Preliminary Objections in the light of that law and practice.

May I, therefore, request that you invite Sir Michael to address the Tribunal.

09:44

PRESIDENT SHEARER: Thank you, Mr. Whomersley.

And I call upon Sir Michael to address the Tribunal. Thank you.

SIR MICHAEL WOOD: Mr. President, Members of the Tribunal, as the Agent has just explained, my task is to describe the law and practice on this procedural issue before you today and the approach that we say the Tribunal should adopt. Mr. Wordsworth will then apply this to each of the Preliminary Objections raised by the United Kingdom.

I want to stress, as the Agent has just done, that it is, in our submission, clear on any reasonable approach that the Preliminary Objections to jurisdiction in the present case are serious and discrete and suitable for consideration at a preliminary phase. There is no basis, we say, in the present case for abbreviating the procedures and skipping the Provisional Objections phase. In fact, it would, in the circumstance of this case, be quite extraordinary for the Preliminary Objections to be considered together with the merits.

I shall first make some general observations about the importance of Preliminary Objections in State-to-State litigation.

I will then turn to points of agreement and disagreement between the Parties.

Next, I shall look at the applicable legal provisions

09:46 as supplemented by the law and practice of other international courts and tribunals.

And, finally, I shall suggest how, in our view, the Tribunal should approach the matter before it today.

As you have said, Mr. President, the sole question before the Tribunal at this hearing is whether the United Kingdom's Preliminary Objections should be addressed as a preliminary matter--that is, at a Preliminary Objections phase--separate and prior to any hearing on the merits; or whether, notwithstanding that the United Kingdom has chosen to submit them as preliminary objections, as it is entitled to do under the Rules of Procedure, they should be deferred to the Final Award.

We note that in the very last sentence of its Skeleton Argument, Mauritius has now introduced the new thought that, and I quote, "If any part of Mauritius's claim is considered by the Tribunal to be unquestionably within its jurisdiction, it should not hold a preliminary jurisdictional phase in respect of any of the U.K.'s other objections." That, we say, is plain wrong. The Tribunal could anyway not reach such an unquestionable view at the present stage without a hearing on jurisdiction, and the suggestion that a Preliminary Objections phase must, of necessity, be on all objections, has no basis whatsoever in the practice.

We do, of course, say that all our objections are

09:48 suitable for consideration as a preliminary matter, but if the Tribunal were to take a different view, that would be no reason for not having a discrete Preliminary Objections phase on the remaining objections. Not to do so would run counter to a principal aim of the institution of Preliminary Objections, that a State should not be required to argue the merits of a claim where there are real doubts about jurisdiction that can be resolved at a preliminary phase.

Mr. President, it's important to keep in mind that the question before you today is quite different from that addressed by the ICJ and ITLOS. Under their Rules, the question they may have to address is whether a preliminary objection is or is not exclusively of a preliminary character, but they do so after full written and oral pleadings at a Preliminary Objections phase separate from any merits phase. The present hearing is quite different in nature and necessarily calls for a different approach.

Before coming to the approach that we say should be adopted by the Tribunal on this occasion, I shall first say a word about the importance of the institution of Preliminary Objections in State-to-State litigation. This is the context for consideration of the Tribunal's powers under its Rules of Procedure.

It is not by chance that there is a highly developed procedure for Preliminary Objections in inter-State litigation.

09:50 Jurisdiction in State-to-State cases flows from the consent of States. No State may be brought before an international court or a tribunal unless it consents thereto. That does not, of course, mean that the State is the sole judge of whether it has consented. The principle of consent goes hand-in-hand with the Compétence de la Compétence. But it does mean that a State should not be brought before an international court or tribunal and required to defend itself on the merits where there are real doubts about jurisdiction, and that question has not been decided.

I would recall that in the ICAO Council case, the ICJ referred to, and I quote, "an essential point of legal principle...namely, that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction on the matter or whose jurisdiction has not yet been established." That's Page 56 of the transcript of the judgment, and you will find the relevant passage on Page 34 of the folders which we have provided.

As the ICJ said at Paragraph 51 of its 2007 Preliminary Objections judgment in Nicaragua Colombia--that's at Page 40 of the bundle--"In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection

09:51 would determine the dispute, or some element thereof, on the merits."

The adverse consequences if States could be brought before international courts and tribunals whose jurisdiction was unresolved and required to defend themselves on the merits on the matters that may be of great sensitivity, such as sovereignty, are, we say, obvious.

Another reason for the institution of Preliminary Objections is the good administration of justice. It is fundamental to the good administration of justice that the proceedings be conducted efficiently and economically, consistent always with doing justice.

Mr. President, it may be useful to look at points of agreement and disagreement between the Parties. The Parties do seem to be in substantial agreement on certain matters:

First, that the governing provision is Article 11 of the Rules of Procedure;

Second, that Article 11 itself does not lay down any test or criteria for the decision which you have to take following today's hearing;

Third, that Article 11 differs in an important respect from Article 79 of the ICJ Rules and Article 97 of the ITLOS Rules.

Each of these provides for automatic suspension of the proceedings on the merits if a party raises Preliminary

09:53 Objections.

Fourth, that for the application of Article 11, guidance should be sought in the general principles of international law relating to the handling of Preliminary Objections as evidenced by the practice of international courts and tribunals, in particular the ICJ.

But there are also key points of disagreement. These may be summarized as follows:

First, disagreement on the approach which should be adopted by the Tribunal in reaching its decision following today's hearing. In particular, we disagree on (a) whether there is a presumption that Preliminary Objections will or will not be heard at a Preliminary Objections phase and (b) on the role of the exclusively preliminary character test at the present stage and the practice in its application at the Preliminary Objections phase.

And, second, we disagree on whether applying the relevant approach to each of our Preliminary Objections the Tribunal should or should not defer one or more on them to the Final Award, and Mr. Wordsworth will address this.

Mr. President, Mauritius says in its Written Observations that it agrees with what it terms the U.K.'s ultimate conclusion, that the applicable test is whether the objection has an exclusively preliminary character. That is not, in fact, what the U.K. said. At Paragraph 6.4 of our

09:55 Preliminary Objections, we said, "In addressing this matter"--that is the practice of the ICJ and ITLOS--"one important factor that has to be emphasized is "whether the facts and arguments in support of...Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend," and whether the objections are of an exclusively preliminary character.

That, of course, picks up the language of Guyana v. Suriname, Order Number 2, to which I shall return.

In our submission, the proper approach is for you to determine whether you are able to conclude on the basis of the written pleadings to date and today's hearing and without a full hearing on Preliminary Objections that the Preliminary Objections cannot be resolved at a Preliminary Objections phase and must, therefore, be deferred to the Final Award. If you're not able to reach that conclusion, then, we submit, the Preliminary Objections should be dealt with at a separate Preliminary Objections phase.

Mr. President, Members of the Tribunal, the starting point for a consideration of the proper approach is UNCLOS and the Tribunal's Rules. Like the ITLOS and ICJ Statutes, Part XV and Annex VII of UNCLOS offer limited guidance. Article 288(4) provides that, in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal. This is an explicit

09:57 statement of Compétence de la Compétence, which we find reflected in Article 11(1) of the Rules of Procedure.

Article 294 is also of interest. This, you will recall, sets out a unique preliminary proceedings procedure never so far invoked. Its Paragraph 3 states that, "Nothing in this Article affects the right of any Party to a dispute to make preliminary objections in accordance with the applicable Rules of Procedure." An express reference in the Convention to the right to make preliminary objections.

I would also recall, as you did in your Reasoned Decision on Challenge, that Part XV establishes a unified system for settlement of disputes concerning the interpretation and application of the provisions of the Convention, what you referred to as the comprehensive dispute settlement framework created by the Convention. That was Paragraph 168.

I will now turn briefly to the Tribunal's Rules of Procedure. Article 11, which you will find at Page 2 of the bundle that we have provided, is entitled "Preliminary Objections," and it makes separate and express provision for Preliminary Objections.

Paragraph 1 provides that the Tribunal shall have the power to rule on objections to jurisdiction.

Paragraph 2 specifies when a submission that the Tribunal does not have jurisdiction--specifies when a submission that the Tribunal does not have jurisdiction shall

09:59 be made. 2(a) provides that, and I quote, "Where the United Kingdom requests that the submissions be dealt with as a preliminary issue"--we have so requested--"the submission shall be made as soon as possible but not later than three months from the time of the filing of the Memorial." That time limit reflects the ICJ Rules as amended in the Year 2000. The Preliminary Objections were filed within that time limit.

I note in passing that Paragraph 2 reflects the familiar distinction between objections to jurisdiction that are raised as Preliminary Objections and objections to jurisdiction that are not so raised and which are, therefore, usually dealt with at the merits stage.

Paragraph 3 reads: "The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's Final Award. If either Party so requests, the Arbitral Tribunal shall hold hearings prior to ruling on any Objection to Jurisdiction or admissibility.

And then Paragraphs 4 and 5 concern the procedure for today's hearing.

It is necessary to say a word about the drafting history of Article 11(3). Mauritius has suggested that this paragraph is materially identical to Article 10(3) in the Guyana-Suriname Rules, and that the Parties used those as a

10:01 precedent for drafting the rules of procedure. They say that at Paragraph 8 of their Written Observations. The Guyana-Suriname Rules were one of the set of Rules that the Parties looked at, but by no means the only one.

More importantly, while Paragraphs 1 and 2 of Article 11 are identical to the Guyana-Suriname Rules and the MOX Plant Rules and the Trinidad and Tobago and Barbados Rules, Paragraph 3 is quite different and was the subject of extensive exchanges between the Parties and with the Tribunal. Mauritius did, indeed, seek to include a Paragraph 3 that was identical to the Guyana-Suriname rule. The U.K. made a counterproposal. The current Paragraph 3 was proposed to the Parties by the Tribunal itself when they were unable to agree on a text.

In signifying U.K. acceptance of the Tribunal's proposal, the U.K. Agent wrote on 24 February 2012 as follows; I quote: "The U.K. considers that there is likely to be a series of important jurisdictional issues for the Tribunal to determine on, each of which is unusually well suited to consideration at a separate jurisdictional phase. Against this backdrop, the U.K. considers it is very likely to request that there should be a discrete jurisdictional phase and is, therefore, able to accept the Tribunal's proposed wording which it considers to be consistent with the rule at Article 22(4) of the PCA Optional Rules for arbitrating disputes between two States; namely, that in general, an arbitral tribunal should

10:03 rule on a plea concerning jurisdiction or admissibility as a preliminary question.

Mauritius, on the other hand, wrote on 27 February saying that the Tribunal's text did, and I quote, "not prejudice in any way (a) whether an Objection to Jurisdiction would be bifurcated or joined to the merits and (b) whether the issue of bifurcation or joining to the merits should itself be the subject of the hearing." So, it follows that the difference being aired today were flagged up at the time the Rules were adopted.

Mr. President, I turn back to the actual language of Paragraph 3. Paragraph 3 contains two important provisions, both of which, in our view, point towards a Preliminary Objections phase as the natural route to be followed. We first read that the Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's Final Award. The Article thus speaks of deferring the objection to the Final Award. To defer is to delay or cause to be delayed until the future; postpone. Collins English Dictionary.

Next comes a sentence saying that, if either Party so requests, the Arbitral Tribunal shall hold hearings prior to ruling on any objections to jurisdiction or admissibility. The United Kingdom has so requested. It is, therefore, clear, that

10:04 the Tribunal must hold hearings prior to ruling on the Preliminary Objections. In our submission, the language of the Rules points towards hearings on jurisdiction that are separate from the hearings on the merits.

Mr. President and Members of the Tribunal, turning to the approach to be adopted, I would first note, as Mauritius said at Paragraph 17 of its Written Observations, that the Rules of Procedure do not identify the criteria to be applied by the Tribunal in determining the timing of a hearing--the timing of the hearings mandated by the Rules. That is true. They do not establish any specific test or approach to be applied.

You will recall that in the Reasoned Decision on Challenge, you decided that, and I quote, "The law to be applied in the present arbitration is that to be found in Annex VII of the Convention supplemented by the law and practice of international courts and tribunals in inter-State cases." That was at Paragraph 165. And in considering the proper construction of Article 11 of the Rules, it is, indeed, helpful to look in particular at the law and practice of other courts and tribunals that may exercise jurisdiction under Part XV of UNCLOS; that is, ITLOS, the ICJ, and Annex VII tribunals.

Mauritius has adopted a similar approach at Paragraph 17 of its Written Observations. It submits that, and I quote, "It is appropriate for the Tribunal to take into

10:06 account general principles of international law and the practice of other courts and tribunals. In doing so, however, the Tribunal needs to bear in mind the point that I referred to earlier; namely, that in the case of the ICJ or ITLOS, the decision on whether the preliminary objection, though raised as such, should nevertheless be deferred to the merits stage is only taken following a Preliminary Objections phase, not after the brief exchange of written pleadings and a short procedural hearing like the present one, the purpose of which is not to go into to the substance of the Preliminary Objections.

It is instructive to recall the development of the ICJ Rules on Preliminary Objections. This was explained by the Court at Paragraphs 39 to 41 of its 1986 Nicaragua Judgment. It's also dealt with in Judge Jiménez de Aréchaga's celebrated article in the 1973 American Journal. The aim of the changes in 1972 was to reduce the Court's broad power under the former rules dating from 1936, but based on earlier practice to join the preliminary objection to the merits whenever the interests of the good administration of justice so require.

As the Court put it in Nicaragua, Paragraph 39, "If this power was exercised, there was always a risk; namely, that the Court would ultimately decide the case on the basis of the preliminary objection after requiring the Parties fully to plead the merits. And this did, in fact, occur (Barcelona Traction). The result was regarded in some quarters as an

10:08 unnecessary prolongation of an expensive and time-consuming procedure."

And the Court went on to note at Paragraph 40 that the solution of considering all Preliminary Objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. To find out, for instance, whether there is a dispute between the Parties or whether the Court has jurisdiction does not normally require an analysis of the merits of the case.

Under the new Rules of Court as adopted in 1972, the Court no longer has that broad power to join preliminary objections to the merits, and you will find Article 79 of the current Rules at Page 4 of the bundle.

Article 79(9), which was 79(7) in the 1972 Rules, provides that after hearing the Parties, the Court shall give its decision in the form of a judgment by which it shall either uphold the objection, reject it, or declare that the objection does not possess in the circumstances of the case an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for the further proceedings.

It's important to note that at the same time a paragraph was added to Article 79 in order to ensure that the Court would be in a position to determine its jurisdiction at

10:10 the preliminary stage, even where that required the Parties to argue questions of fact and law that would normally be argued at the merits stage. Paragraph 8 of Rule 79 reads: "In order to enable the Court to determine its jurisdiction"--this is limited to objections to jurisdiction--"at the preliminary stage, the Court, whenever necessary, may call upon the Parties to argue all questions of law and fact and to adduce all evidence which bears on the issue."

A similar provision is to be found in the Paragraph 5 of Article 97 of the ITLOS rules. While your Rule 11 does not expressly provide for such a power, it is clearly inherent in the other provisions of your Rules.

Professor Talmon has explained the resulting position in the following terms, at marginal Note 179 of his commentary on Article 43 of the Court's statute, and you will find that passage right at the top of Page 9 in the bundle, and I quote: "Rather than carrying the preliminary objections over into the merits phase, questions of fact and law touching upon the merits are now brought forward into the jurisdictional phase to dispose of the objections at the earliest possible stage of the proceedings."

And he continued, about a third of the way down the page: "While the Court may hear argument at the preliminary stage of the proceedings on questions of fact and law touching upon the merits, it may not at that stage decide or pre-judge

10:11 the dispute or some elements thereof on the merits. Thus, under the present Rules, objections shall be decided at the preliminary stage wherever reasonably possible: In dubio preliminarium eligendum.

"This also seems to be in line"--this is still Professor Talmon--"this also seems to be in line with the approach taken by the Court, which has been very cautious in declaring an objection to be not exclusively preliminary in character, and, in fact, has done so only on three occasions." Since the adoption of the new rule in 1972--that is over 40 years ago--over the last 40 years, the Court has only found that three of the many Preliminary Objections that had been presented to it were not exclusively preliminary. All the rest the Court either accepted or rejected at the preliminary objections phase. The three cases are Nicaragua, Lockerbie, and Cameroon-Nigeria. Each is mentioned by Mauritius in its Written Observations, but without going into detail. It is necessary to look briefly at the details in order to understand the significance of these three cases, and to see how very different they are from the Preliminary Objections before this Tribunal.

In Nicaragua, the Court considered the effect of the U.S. multilateral treaty reservation, the Vandenberg reservation in the U.S. Optional Clause Declaration. This, you will recall, required that all the Parties to a multilateral

10:13 treaty affected by the decision were also Parties to the case. And the Court noted that, it was only when the general lines of the judgment to be given became clear that the States affected could be identified. It had little difficulty, therefore, in concluding that the objection did not possess in the circumstance of the case an exclusively preliminary character. That's at Paragraphs 75 and 76 of the judgment.

In Lockerbie, the United Kingdom raised a preliminary objection to the admissibility--admissibility, not jurisdiction--of the Libyan claims, asking that the Court rule that intervening Security Council resolutions had rendered the claims without object. That's at Paragraph 47. The Court recalled the history of the rule change in 1972 and found that the objection was not exclusively preliminary in character because it would involve at least two decisions that went to the merits: "That the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions"; and "that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court, therefore, has no doubt, and I quote, 'that Libya's rights on the merits would not only be affected by a decision at this stage of the proceedings not to proceed to judgment on the merits, but would constitute in many respects the very subject matter of that decision. The objections, said

10:15 the Court, had the character of a defense on the merits." That's at Paragraph 50.

In fact, the application of the not exclusively preliminary test in this case was controversial, and I would draw attention to the joint declaration of Judges Guillaume and Fleischhauer in which they described the decision as, running counter to the object and purpose of Article 79 of the Rules and setting a dangerous precedent for the future.

The third case is Cameroon-Nigeria. There, as you will recall, the Court rejected the first seven of Nigeria's Preliminary Objections. The eighth was to the effect that the prolongation of the maritime boundary delimitation would affect the rights of third States and was, to that extent, inadmissible. Again, admissibility, not jurisdiction.

In reaching the conclusion that this preliminary objection did not possess in the circumstances of the case an exclusively preliminary character, the Court stated at Paragraph 116--and you will find this passage on Page 65 of the bundle--that the Court cannot in the present case give a decision on the eighth preliminary objection as a preliminary matter. In order to determine where a prolonged maritime boundary beyond Point G would run, where and to what extent it would meet possible claims of other States and how its judgment would affect the rights and interests of these States, the Court would of necessity have to deal with the merits of

10:17 Cameroon's request.

Consistent with the law and practice of ITLOS and the ICJ and also with the first sentence of Article 11(3) of the Tribunal's Rules, it is our submission that the Tribunal's powers under the Rules of Procedure are to be exercised in accordance with the principle that Preliminary Objections are to be dealt with at a preliminary objections phase unless there is some specific reason why this cannot be done. The most recent and authoritative expression of this approach is, as I'd noted earlier, to be found in the ICJ's Preliminary Objections judgment in Nicaragua-Colombia, and that case is particularly instructive.

The judgment of 13 December 2007 contains a section entitled "the appropriate stage of proceedings for examination of Preliminary Objections." That's at pages 38 to 40 of our bundle. After setting out the different views of the Parties and recalling Article 79(9) of its Rules, the Court further recalled that in the Nuclear Tests cases, it emphasized that while examining questions of jurisdiction and admissibility, it is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification, as matters of jurisdiction and admissibility but are of such a nature as to require examination before those matters.

And the Court went on to say at Paragraph 51, "In

10:19 principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceeding, unless the Court does not have before it all facts necessary to decide the questions raised, or if answering the preliminary objection would determine the dispute or some elements thereof on the merits. The Court finds itself in neither of these situations in the present case. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case," and then it refers to the German Interests in the Polish-Upper Silesia judgment.

Rather than referring to this recent case, our friends opposite have referred you to the Right of Passage judgment and the 1964 Barcelona Traction judgment which they anyway misread. In Barcelona Traction, for example, following an extended discussion, the ICJ concluded in the passage cited by Mauritius, "[The Court] will not [join the preliminary objection to the merits] except for good cause, seeing that the object of a preliminary objection is to avoid not merely a decision on but even any discussion of the merits." You will find that in the Reports at pages 43 to 44.

And our friends cite this passage but then distort its meaning to conclude that you cannot enter into any discussion of the merits at the preliminary objections phase. The Court was not saying that at all. It was saying that the purpose of Preliminary Objections, from the perspective of the objecting

10:21 State was not only to avoid a merits decision, but also to avoid any discussion of the merits as would occur in the usual course at the merits phase.

Returning for a moment to the Nicaragua-Colombia case, Judge Keith well expressed the policy considerations behind preliminary objections in his Declaration. In Paragraph 1 he said the following: "The Court has the power and the responsibility, when it may properly do so, to decide at a preliminary stage of a case a matter in dispute between the Parties if deciding that matter will facilitate the resolution of the case. That power and responsibility arises from the principle of the good administration of justice."

And he went on to say, "The Court should not leave unresolved for later and further argument a matter which in the particular circumstances of the case may be properly decided at that earlier stage."

It has been seen that the powers of the ICJ and ITLOS to find that a preliminary objection is not exclusively preliminary are narrowly confined and not exercised lightly, and that it is after a full hearing of the Preliminary Objections that it takes such decision. The power of a Tribunal to decide without such a full hearing that a preliminary objection should be deferred to the merits should be exercised at least as cautiously, if not more so, if the right of the objecting State is not to be overridden without

10:22 proper cause.

Of course, there are some cases where there are concerns, as, for example, in Guyana-Suriname where a State raises preliminary objections that are not serious simply to gain time, but that is not our case, and I do not believe Mauritius has suggested otherwise.

Order Number 2 in Guyana-Suriname--Pages 67-68 of our bundle--in Paragraph 2, the Tribunal unanimously decided and ordered that, "because the facts and argument in support of Suriname's submissions on its Preliminary Objections are in significant measure the same as the facts and arguments on which of the merits case depend and the objections are not of an exclusively preliminary character, the Tribunal does not consider it appropriate to rule on the Preliminary Objections at this stage." This paragraph helps to explain what "not of an exclusively preliminary character" means, and in our submission sets out a single test in terms very similar to those used by Rosenne in his study of the Court. He wrote, and you will find this at Page 18 of the bundle that: "As a rough rule of thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of a case depend, or when to decide the objection would require a decision on what in the particular case are substantive aspects of the merits, the plea is not an objection but a defense to the merits."

10:24 It was because the Guyana-Suriname Tribunal was able, based on the written proceedings and the one day procedural hearing to decide that the facts and arguments in support of Suriname's submissions in its Preliminary Objections were in significant measure the same as the facts and arguments on which the merits of the case depended that it decided to forego a preliminary objections phase. On the basis of the preliminary objections that had been put forward, that was an unsurprising conclusion. But in any event, the Tribunal's decision on the matter proved to have been absolutely right, in that at Paragraph 280 of its Award the Tribunal dismissed Suriname's Objection to Jurisdiction in a single sentence.

The purpose of Article 11(3) is to give the Tribunal a measure of flexibility in dealing with the case, where a State would otherwise employ Preliminary Objections as a delaying tactic or because the facts and arguments pleaded in support are in significant measure the same as those on which the merits of the case depend. Outside these two clear situations, there would appear to be no justification and we would say no power under the Rules properly construed for the exercise of the power to require Preliminary Objections to be deferred to the hearing of the merits.

Another main purpose of the Preliminary Objections procedure is to seek to avoid a lengthy, costly, and unnecessary merits phase. Mauritius itself has not shown that

10:26 a preliminary objections phase would be lengthy, costly, and unnecessary. On the contrary, on its own argument, the very same issues about jurisdiction would need to be gone into only at a later stage and alongside full argument on the merits. We see no reason why there should be much, if any, saving. But, of course, if the United Kingdom's Preliminary Objections were upheld, there would be very considerable savings.

The right approach at the present stage of the proceedings, in our submission, under the Rules read in the light of international practice and case law, is for the Tribunal to determine whether it is in a position to conclude now on the basis of the written pleadings so far and the present hearing, and without a full hearing on the Preliminary Objections, that a preliminary objection should be deferred to the Final Award. That is disposed of only at the merits stage.

If the Tribunal cannot conclude without a Preliminary Objections hearing that it (a) does not have before it all the facts necessary to decide the questions raised on the preliminary objection or (b) answering the preliminary objection would determine the dispute or some elements thereof on the merits, then, in our submission, it should hear the preliminary objection first as a preliminary matter in the usual way.

Mauritius suggests that the U.K.'s request involves an attempt to terminate Mauritius's claim without any

10:28 consideration of the underlying merits. Yet the whole purpose of the institution of Preliminary Objections is precisely, in appropriate cases, to enable claims to be disposed of without consideration of the underlying merits. As Judges Guillaume and Fleischhauer said in their Joint Declaration in Lockerbie, "That acceptance of the preliminary objection of the United Kingdom would have brought the case to an end is also not an argument against its exclusively preliminary character: The ending of a case is the intention of every preliminary objection."

Mr. President, Members of the Tribunal, that concludes what I have to say on the approach that we say should be adopted by the Tribunal, and may I now ask you to invite Mr. Wordsworth to the podium.

PRESIDENT SHEARER: Thank you.

Now I call upon Mr. Wordsworth.

MR. WORDSWORTH: Mr. President, Members of the Tribunal, I want to start by looking briefly at how Mauritius has put its claim before turning to the details of the U.K.'s individual Preliminary Objections and our position on why each of these is suitable for determination as a preliminary matter.

The claim is summarized at Paragraph 1.3 of Mauritius's Memorial and again in similar terms at Paragraph 5.2 in Mauritius's chapter on jurisdiction--that's Chapter 5--and it's worth taking you briefly to what Mauritius

10:30 says at Paragraph 1.3, just so you have the broad overview that Mauritius gives of its own claim.

It says: "Mauritius's case is that the MPA is unlawful under the Convention because it is a regime which has been imposed by a State which has no authority to act as it has done."

There are two parts to the argument: "First, the U.K. does not have any sovereignty over the Chagos Archipelago. It 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 U.K. has acknowledged the rights and the legitimate interests of Mauritius in relation to the Chagos Archipelago, such that the U.K. is not entitled in the law under the Convention to impose the purported MPA or establish the maritime zones over the objections of Mauritius." That's the first element of the claim.

Secondly, it continues, "independently of the question of sovereignty"--so the first element is all about the question of sovereignty--"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 U.K. 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."

So, the claim is divided by Mauritius into elements of

10:31 the claim that depend on and are independent of sovereignty, and these differing heads of claim give rise to different Preliminary Objections on the part of the United Kingdom.

The U.K.'s first preliminary objection is to the Tribunal's jurisdiction over the claim that the U.K. does not have sovereignty over the so-called "Chagos Archipelago," and is not the coastal State, et cetera. This objection is made on the basis that the determination of sovereignty on which the claim clearly depends falls outside the scope of the Tribunal's jurisdiction under Article 288(1) of UNCLOS--a critical provision, of course--that is, the Tribunal's jurisdiction to decide disputes concerning the interpretation or application of the provisions of UNCLOS.

The second preliminary objection is that the requirements of Article 283--283(1), I should say, have not been met; i.e., there was no dispute and there has been no exchange of views both of which are jurisdictional requirements to the making of a claim under Section 2 of Part XV as follows from Articles 283(1) and 286.

Mauritius says that there has been a concession, that the necessary Article 283 exchange of views has taken place so far as concerns the sovereignty claim. That's not correct, and I will come back to that point in due course.

By contrast, the third objection does concern the non-sovereignty aspects of the claim alone and is made on the

10:33 grounds that these fall outside the scope of jurisdiction established in Part XV principally by virtue of Article 297 of UNCLOS.

Each of the three Preliminary Objections made by the U.K. turns solely on the scope of consent to compulsory dispute settlement within Part XV of UNCLOS, and is readily identifiable as precisely the type of jurisdiction objection that lends itself to determination as a preliminary matter and, indeed, is regularly addressed as such. Their determination requires that the Tribunal interpret the jurisdictional provisions of Part XV and apply these in the light of the alleged dispute and the record of exchanges leading up to the arbitral claim, as has been done at a preliminary phase on countless other occasions by international courts and tribunals.

I turn to the individual objections in more detail.

The first preliminary objection is made because Mauritius's claim for breaches of Articles 2(1), 55, 76, 77, and 81 of UNCLOS are wholly dependent on this Tribunal making prior determinations as to the U.K. lacking sovereignty over the British Indian Overseas Territory, such that it is not or somehow cannot act as the coastal State for the purposes of those provisions of UNCLOS.

Along the way, as we identified at Paragraph 3.35 of the U.K.'s Preliminary Objections, the Tribunal is being asked

10:35 by Mauritius to determine first that the detachment of the Chagos Archipelago was contrary to rights of self-determination that Mauritius is entitled to assert, and this, in turn, comprises a series of findings that you, the Tribunal, are going to have to make on Mauritius's case as to the relevant units of self-determination and the competence of the General Assembly to interpret the right of such self-determination.

Secondly, the Tribunal is being asked to determine that there was no valid agreement to the detachment of the Chagos Archipelago.

Thirdly, that Mauritius has continuously asserted its sovereignty over the Chagos Archipelago and that the United Kingdom has recognized that sovereignty in certain respects.

Fourthly, that Mauritius thus has retained sovereignty over the Chagos Archipelago and is the or a coastal State for the purposes of UNCLOS.

And, in addition, you're being asked to find that the United Kingdom has, in any event, given a series of enforceable undertakings that denied the United Kingdom the entitlement to act as the coastal State within the meaning of the 1982 Convention.

Now, Mauritius has not now suggested that we are wrong about any of this. It has not said that you can somehow avoid deciding the issue of sovereignty, although it does seek to play down the critical determinations by saying, and I quote, 10:37 Paragraph 39 of its Written Observations, "that the question of sovereignty arises incidentally to the maritime issue, which the Tribunal must decide."

The U.K.'s point--and it's a straightforward one in the sense that it turns on the meaning of Article 288(1) UNCLOS and also Articles 297 and 298 on which Mauritius relies in order to establish your jurisdiction--is that the Tribunal lacks jurisdiction to decide what Mauritius itself recognizes is a question of sovereignty.

As to Article 288(1), the Tribunal has no jurisdiction to decide disputes that do not concern the interpretation or application of UNCLOS. Mauritius disagrees and says that this all turns on the interpretation and application of the words "the coastal State." The basic argument is set out at Paragraph 5.2 of Mauritius's Memorial, and it's developed at Paragraph 5.26, where it's even said that, I quote, "There is ample authority in support of the proposition that a court or tribunal, acting under Part XV of the Convention, has jurisdiction to decide whether a State is a coastal State."

The United Kingdom disagrees with the point of principle in the strongest of terms, and I note that in the Memorial there is no clue whatsoever as to where this ample authority is to be found.

In fact, Mauritius's argument is flatly inconsistent with the wording, negotiating history, and broad intent behind

10:38 Part XV. Nor, as the U.K. explained at Paragraphs 3.20 and following of its Preliminary Objections, can Article 293 be used as a conduit through which to introduce sources of law which the Tribunal has no jurisdiction to apply, a point that would appear in line with the Separate Opinions of judges Wölfrum and Cot in the recent Libertad case before ITLOS.

These are all legal issues that are suitable for and, indeed, cry out for determination as a preliminary matter. As to Article 297(1), Mauritius's argument is that this merely establishes exclusions, I quote, "with regard to the exercise by a coastal State of its sovereign rights or jurisdiction." That's a quote, of course, from 297(1) itself. And Mauritius says that there is nothing to exclude disputes over whether a State is a coastal State in the first place. That's Mauritius's Memorial at Paragraph 5.25.

The U.K. has identified its position in its Preliminary Objections Paragraph 3.40; so far as concerns suitability for hearing as a preliminary matter, the Tribunal will no doubt be able to resolve the issue on interpretation in short order. The U.K. considers that it would have been bizarre to agree in Article 297(1) to a restriction on disputes concerning the exercise of sovereign rights, and yet to agree at the same time to jurisdiction over the anterior and more fundamental question as to whether the sovereign right existed in the first place.

10:40 Indeed, Article 297(3)(a) shows that this was not the case, at least as far as concerns the EEZ; and, of itself, this knocks out a large part of the sovereignty claim.

As to Mauritius's reliance on Article 298(1)(a), this opt-out provision in fact demonstrates how a court or tribunal under Part XV could not have the jurisdiction or incidental jurisdiction that Mauritius contends for.

Supposing it is accepted solely for the purposes of this part of the argument that this provision is correctly interpreted as implying that whether there is no Article 298(1)(a) Declaration excluding jurisdiction a court or Tribunal may rule on matters of territorial sovereignty that arise incidentally whether as a maritime delimitation dispute under Articles 15, 74, or 83 of the Convention. That's Mauritius's starting point.

This would merely demonstrate how it is inconceivable that States Parties to the Convention would have agreed to a determination of matters of territorial sovereignty that arose in other contexts without an equivalent opt-out provision. Yet, of course, there is no equivalent opt-out provision.

On Mauritius's case, wherever a State becomes a party to UNCLOS, it is at risk of determination of its territorial sovereignty in respect of the application of any of the many provisions that involve the rights and duties of the coastal State, with no opportunity of opting out from that jurisdiction

10:42 in contrast to the position with respect to Articles 15, 74, and 83 concerning maritime delimitation. In short, the absence of any such opt-out provision is a very obvious indicator that no jurisdiction over such questions of sovereignty was intended or established.

Now, Mauritius has not yet sought to answer that point. No doubt it would like to see such arguments lost amidst the issues on self-determination and the like, but these are discrete jurisdictional issues, and there is no basis for treating them as otherwise. Indeed, the very importance of the jurisdictional issues that Mauritius's sovereignty claim gives rise to and the potential ramifications so far as concerns UNCLOS States generally argue strongly in favor of their receiving the undivided attention of the Parties and the Tribunal in a preliminary phase.

So, what does Mauritius say? Its principal argument, as we understand it, is that the U.K. is asking the Tribunal to characterize the real dispute as one of sovereignty, which is something that cannot done at the jurisdictional phase, and hence it says this preliminary objection should be deferred to the merits phase.

There are three answers to this:

First, the Tribunal can, of course, determine what the real issue in dispute is in the course of a separate jurisdictional phase. The whole point of provisions such as

10:44 Article 283 is that there is an identifiable dispute even prior to the initiation of proceedings. And as, for example, the April 2011 judgment of the ICJ in the Georgia and Russia case shows, Courts and tribunals will go to the required lengths at the jurisdictional phase to establish what, if any, disputes have arisen and when.

The dicta of the ICJ that the U.K. has relied on at Paragraph 3.1 of its Preliminary Objections that, I quote, "The Court will itself determine the real dispute that is being submitted to it," is taken from the decision at the preliminary objections phase in the Fisheries Jurisdiction, Spain and Canada, Para 31. This refers, in turn, to the decision at the preliminary objections phase in the Qatar and Bahrain case at pages 24 and 25.

The ICJ is not for one moment saying that you have to wait around before hearing all the evidence in the case to identify what the real dispute is, which is what Mauritius is now contending for.

Likewise, if it were essential--and it is not--the Tribunal could certainly make any necessary determinations as to whether Mauritius's right to say in its notably defensive stance that this is a sui generis case or how or whether this matters, which is by no means clear to us.

Secondly, it appears to be Mauritius's position that the issue of sovereignty, the question of sovereignty which is

10:46 how Mauritius puts it, is not the real issue in the case, and we see that from Paragraphs 30 and following of Mauritius's Written Observations. Well, if Mauritius's position is that, prior to its Notification, it made a claim that Declaration of the MPA was in breach of various provisions of UNCLOS because the U.K. is not the coastal State for the purposes of UNCLOS, no doubt that will be made clear in the submissions that we're about to hear. We are not aware of any such claim having been made prior to initiation of these proceedings, and the same applies to the non-sovereignty claims.

And, of course, the Tribunal is entitled to look at the records of diplomatic exchanges to see what the real dispute is. Indeed, the various ICJ cases we rely on say this in terms. You'll see the references to those ICJ cases, I should say, at Paragraph 3.1 of our Preliminary Objections.

Thirdly, however, this is all an irrelevance. The U.K.'s first preliminary objection is not dependent on the question of whether Mauritius's claim before the Tribunal is principally concerned with the long-standing dispute over sovereignty or whether Mauritius is or is not right to assert that its claim is sui generis. The objection turns on the question of whether the Tribunal has jurisdiction to decide this question of sovereignty. That is, as Mauritius has accepted, an essential part of its claims of breach of Articles 2(1), 55, 76, 77, and 81 of UNCLOS.

10:48 The position of the U.K. is that the Tribunal does not have such jurisdiction, and this is regardless of whether those issues are characterized as central to or ancillary to or incidental to the claim.

And resolution of this preliminary objection does not require any decision on factual issues that are intertwined with the merits, as Mauritius would have the Tribunal believe. All that is required is that the Tribunal determine the scope of its jurisdiction to rule on the question of sovereignty, not, of course, to make the relevant rulings. And precisely the same applies with respect to alleged undertakings on which Mauritius relies as somehow restricting the U.K.'s sovereignty.

Now, I should add that this is all a million miles away from the jurisdictional objection under consideration in Guyana and Suriname, notwithstanding the suggestions being made in Mauritius's Skeleton Argument. There, the Tribunal was, indeed, being asked to decide what appeared to be a complex matter on the merits at the preliminary objections phase.

I'd invite the Tribunal at some stage to turn the pages of Suriname's Preliminary Objections of May 2005, a 50-page document replete with maps and figures of which less than four pages--that is Chapter 4 in that particular preliminary objection--are devoted to explaining the jurisdictional objections. The pleadings is on the PCA Web site. But my basic point can be made by reference to Paragraph

10:49 4.14 of Suriname's pleadings, which reads as follows: "Suriname submits that, for the Tribunal to determine in the present case that an unsettled dispute between the Parties exists, it is necessary and sufficient to determine that there is no agreement between the Parties as to the location of the land boundary terminus." So, no agreement on where the land boundary ends, which was a highly controversial matter on the merits.

Suriname continues: "That necessarily means that if there is a dispute between the Parties as to the location of the terminus, then the Tribunal lacks the authority to resolve it. As Suriname will demonstrate in the next chapter, there is no binding agreement on the land boundary terminus." So, in the very following chapter, Suriname dives into the merits to explain how it's right that there is no agreement or where the land boundary ends.

"Consequently"--and this is how the jurisdictional objection itself is formulated--"Consequently, the Tribunal does not have jurisdiction to determine any question relating to the land boundary, including the land terminus, and"--one almost takes a sort of deep breath to continue the legal argument--"and, accordingly, it follows that the Tribunal does not have jurisdiction to determine the maritime boundary between the Parties."

So, Suriname's position, and it might be said with

10:51 respect it's a rather convoluted position, turned on the absence of jurisdiction to decide a so-called "mixed dispute." That is, a maritime delimitation dispute that incidentally requires some determination of sovereignty over land territory. But in order even to get to that jurisdiction objection, the Tribunal first has to plunge into the merits to decide that there was, indeed, no agreed land boundary.

The important point here, of course, is that there is no hint of an equivalent plunge that the United Kingdom is asking you to take in deciding its preliminary objection.

This brings me to an oddity concerning how arguments relating to so-called "mixed disputes" are said by Mauritius to fit within the U.K.'s Preliminary Objections. According to Mauritius--and this is the argument that's stated out at Paragraphs 40 to 42 of its Written Observations and Paragraph 11 of its Skeleton Argument, the U.K. concedes that the question of whether jurisdiction under Part XV extends to mixed disputes is a matter of argument at the merits stage. So, apparently we have made a concession: Mixed issues, they go off to the merits. Well, of course, the U.K. has done no such thing.

In light of that, I'm just going to have to touch briefly on what the U.K. does say about mixed disputes in its Preliminary Objections as Paragraphs 3.42 and following. There, the U.K. sets out two basic arguments:

10:53 First, it explains that the Tribunal need not enter into the detail of a debate on whether a court or tribunal under Part XV can determine both maritime boundaries and incidental territorial issues. You don't need to go there. And this is because Mauritius is, in fact, seeking an unwarranted, far-reaching, and entirely unsupported extension of the underlying concept, seeking to lift it from the discrete area of maritime delimitation so as to apply it in respect of any--of any, "other issues raised under the Convention." That's what it says at Paragraph 5.26 of the Memorial. Thus, the U.K.'s position is that, at a preliminary objections phase, the Tribunal can and should decide that the views that have been expressed on jurisdiction over the territorial aspects in mixed disputes do not assist Mauritius in its attempt to establish a so-called "incidental jurisdiction" in this case. This is not a maritime delimitation case. We never get into the debate over mixed disputes. That's a discrete legal issue entirely suitable for determination at a preliminary objections phase.

Secondly, we do enter into the mixed-disputes debate in our jurisdictional objections. We say the U.K.--that the proposition that issues of territorial sovereignty can be decided under Part XV in the context of maritime delimitation is controversial, it's not supported by Article 298(1)(a) UNCLOS or Articles 15, 74, and 83, and is anyway put forward as

10:55 being subject to limits.

And as to this last point, we referred to potential criteria that are put forward by Judge Treves, which the U.K. explained would not in any event be met. And that is because the central thrust of the claim is to seek determination of a long-standing dispute over territorial sovereignty.

In other words, whichever way one approaches the issue of incidental jurisdiction in a mixed dispute, and even if one were to accept that it is somehow applicable in the current context, Mauritius cannot meet the standards that are being suggested. As to how this can be thought to be an acceptance of the Tribunal's jurisdiction over mixed disputes is a matter for the merits, we are baffled.

In conclusion on this first preliminary objection, there is nothing here that points to a need to defer determination to the merits stage. There is nothing to suggest that the Tribunal would not at a Preliminary Objections phase have before it all facts necessary to decide the questions raised or that answering the preliminary objection would determine the dispute or some elements thereof. That is, of course, to refer to the Nicaragua and Cameroon case that Sir Michael just took you to.

If we are right that the sovereignty issue is the real dispute in the case, then resolution of this first preliminary objection in the U.K.'s favor may lead to dismissal of the

10:57 claim in its entirety. If we are wrong on that matter of characterization, or the Tribunal considers the non-sovereignty claims still constitute issues in dispute, then even leaving to one side the second and third Preliminary Objections determination of this first objection in the U.K.'s favor would reduce the scope of the case very significantly, indeed.

In addition, the separate consideration of this matter, the question of sovereignty, undistracted by the many--jurisdiction over the question of sovereignty I should emphasize--undistracted by the many issues that Mauritius has raised on the merits, would enable both Parties and the Tribunal to focus on a critical question as to the scope of jurisdiction enjoyed under Part XV, leading to an award that would be read with the closest attention by all actual or potential Parties to UNCLOS that exercised the rights of coastal States, in respect of any territory, island territory or other, over which sovereignty is either or may be contested.

I turn now to the U.K.'s second preliminary objection made by reference to Articles 283(1) and 286, which we consider to be an equally clear candidate for hearing as a preliminary matter. The Members of the Tribunal will be very familiar, indeed, with the application of Article 283 and equivalent jurisdictional provisions that require the existence of a dispute and some form of negotiations prior to the commencement of proceedings. The issue is straightforward, and Mauritius

10:58 has struggled to suggest otherwise. All that is required is for the Tribunal to interpret Article 283 looking at the relevant jurisprudence and to apply Article 283 in light of the record of diplomatic exchanges.

As to application, the position could not be more clear. There has never been any mention by Mauritius of any of the non-sovereignty claims, prior, of course, to the Notification of claim; and, hence, there was no dispute and no exchange of views within the meaning of Article 283.

This is particularly notable, I might say in the margins, given that many of the non-sovereignty claims concerned alleged failures of Notification and cooperation, matters which one would have thought be particularly well suited to early identification and an exchange of views with a view to resolution of a dispute.

When it comes to the sovereignty claim, as I mentioned earlier, Mauritius says that the U.K. has conceded that there has been an Article 283 exchange of views in relation to the question of sovereignty, and you can see that at Paragraph 15 of its Skeleton Argument, picking up on the point from Paragraph 61 in the Written Observations. Well, as I said earlier, this is not correct.

Certainly, the second preliminary objection has to date been focused on the non-sovereignty claims, on the basis that you don't even get to Article 283 when looking at the

11:00 sovereignty claim as this is outside the jurisdictional scope of Part XV.

But if Mauritius's position is that the claims now brought are different from the long-standing sovereignty dispute and they're to be seen as specific claims for breach by the U.K. through its Declaration of the MPA of certain provisions of UNCLOS that establish rights of the coastal State, it will, indeed, be for Mauritius to show that those claims were made prior to its notification and that there was an exchange of views both as required by Article 283. And I should say: There is absolutely nothing to suggest that this was the case.

And in this respect, the Tribunal may wish to have in mind the decision last summer in Belgium and Senegal, where the ICJ distinguished between breaches of customary international law obligations to prosecute or extradite in respect of torture and similar claims made by reference to the UN Convention against torture. The Court found that it had jurisdiction only with relation to the latter because Belgium had never made any mention of a customary international law claim in the exchanges prior to making its application. By obvious analogy, the fact that there may have been exchanges on the long-standing issue of sovereignty, for example, as a matter of the customary rules on self-determination, does not mean that there has been any requisite exchange of views so far as concerns claims under

11:02 UNCLOS with respect to the MPA.

Now, the application of Article 283 is not, of course, a matter to be developed today. But the point is, insofar as there are legal or factual determinations to be made that go to whether a dispute has arisen and whether has been an exchange of views, it is absolutely standard for such matters to be decided in a jurisdictional phase, a discrete jurisdictional phase. Suggestions to the contrary in Mauritius's Written Observations are incorrect and unsupported by any authority.

It is said in the Written Observations at Paragraph 66 that the Tribunal's task under Article 283 would not be confined, I quote, "as it may be in some cases to looking at a small number of Notes Verbales and assessing whether they indicate the subject matter of the dispute with sufficient clarity."

Well, in fact, so far as concerns the MPA, Mauritius relies for the purposes of Article 283 on around 20 bilateral exchanges in the Years 2009 and 2010, and I refer you to Paragraph 5.38 and Footnote 395 of Mauritius's Memorial.

To take a recent example, that might be compared with the 80 or more exchanges spanning a period of 17 years in many different fora, and concerning many different Parties that the ICJ sifted through to determine the Preliminary Objections on existence of a dispute and negotiations in the Georgia and Russia case. The Court or Tribunal can, of course, go through

11:04 a long record of exchanges--indeed a far longer record than in the current case--without deciding issues on the merits.

And if, as Mauritius is belatedly suggesting in its Written Observations and Skeleton Argument, the relevant record, in fact, goes back several decades and does not just cover 2009 and 2010 as it said in its Memorial, well, that makes no odds at all.

Mauritius also says at Paragraph 18 of its Skeleton Argument, that the U.K. is unrealistic to assert that this objection, "raises no issues of fact," and I can deal with that by turning to what the U.K., in fact, said, which is at Paragraph 6.13 of its Preliminary Objections. It says, referring to the Article 283 preliminary objection, "The preliminary objection raises no issues of fact, save as to any issues that may arise as to what was raised in any exchange of views upon which Mauritius may seek to rely."

So, of course, we say that you may have to and can look at facts so far as concerns the record of exchanges.

In sum, there is again no basis for concluding that the Tribunal would not have before it all facts necessary to decide the questions raised with respect to the Article 283 preliminary objection or that answering the preliminary objection would determine the dispute or some elements thereof on the merits.

If objections such as the first and second objections

11:06 that go to the question of whether a given dispute falls within a compromissory clause or whether preconditions to jurisdiction have been met, are to be considered as unsuitable for determination at a preliminary stage, then one has to wonder when, if ever, there would be a separate preliminary objections phase.

I turn to the third preliminary objection, which concerns solely the claims of breach that, to borrow Mauritius's characterization at Paragraphs 1.3 and 5.2 of its Memorial, arise independently of the question of sovereignty. There are 10 individual allegations of breach where it's to be emphasized that the U.K.'s position is that not one of these was raised prior to commencement of the current proceedings. They are all new, and one never gets to these alleged breaches if the U.K. is right on the application of Article 283.

The preliminary objection turns largely on the interpretation and application of Article 297 of UNCLOS, which will have come as no surprise to Mauritius, given that in its identification of the asserted jurisdictional bases in its Memorial--that is, at Paragraph 5.35 of the Memorial--Mauritius took the trouble to explain in relation to each of the 10 allegations of breach how jurisdiction was not excluded by virtue of Article 297. And it follows, naturally enough, that what disposition of this third preliminary objection requires is the interpretation of Article 297 and its application in

11:08 light of the specific allegations of breach made by Mauritius.

The point is that we are still very firmly within the question of the scope of consent to jurisdiction under Part XV of UNCLOS, but we're now looking at limitations and exclusions to jurisdiction that flow from the express wording of Article 297.

Of the 10 claims, three are said to fall within Article 297(1)(c); thus, it is said that these fall within Section 2 of Part XV--i.e., they fall within your jurisdiction--on the basis--and this is what Article 297(1)(c) says--that it is "alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment, which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention." That's 297(1)(c).

The U.K.'s point is simply that no allegations have been made that fall within this provision. Mauritius has pointed to no such specified international rules and standards, and its invocation of Articles 55, 62(5), and 194 of the Convention don't change that.

Mauritius says we are wrong, but its point on lack of suitability for determination of this issue at a preliminary phase appears to be no more than the Tribunal would have to

11:09 look at evidence on the MPA. It's very unclear what evidence it has in mind. But, of course, insofar as considered necessary, the Tribunal can look at documents establishing the MPA at the preliminary objections phase and decide, for example, whether it's aimed at prevention of pollution, as Mauritius contends. The suggestion to the contrary is untenable. It would be like saying that in the investment treaty context the Tribunal couldn't decide at a jurisdictional phase whether there was a qualifying investor or investment, if this required some factual determination, or likewise whether the claim went beyond specified restrictions on the offer to arbitrate. The critical issue for determination is, whether, as a matter of Article 297(1)(c), Mauritius's claim invokes international rules and standards falling within that provision. That is an exercise that turns essentially on determinations of law and certainly not on disputed issues of fact, resolution of which would pre-judge issues on the merits.

The next batch of claims concern alleged breaches of Article 63(1), 63(2), 64(1) UNCLOS and Article 7 of the 1995 Agreement relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. The main point here is that, as follows from the express exclusion of Article 297(3)(a), this Tribunal can have no jurisdiction over any dispute relating to sovereign rights with respect to the living resources in the Exclusive Economic Zone or their

11:11 exercise. The exclusion is quite straightforward as is its application in the context of a preliminary objections phase.

Mauritius's allegations in respect of access to or conservation of fisheries were that the U.K. must seek agreement and/or cooperate directly with Mauritius and relevant organizations fall squarely within the exception to jurisdiction that's established by 297(3)(a). That position is confirmed by findings in both the Southern Bluefin Tuna case and Barbados and Trinidad and Tobago, as explained in Chapter 5 of the U.K.'s Preliminary Objections. To resolve the objection, there is no need to get into the alleged undertakings on which Mauritius relies.

And precisely the same applies to the U.K.'s objections that this Tribunal has, as a separate matter, no jurisdiction to determine breaches of the 1995 Fish Stock Agreement, and that matters within the Indian Ocean Tuna Commission Agreement must be decided in accordance with the compulsory dispute settlement at its Article 23, as, of course, must follow from Articles 281 and 282 of the UNCLOS.

Of course, Mauritius may disagree, but it has notably struggled to put forward reasons as to why resolution of the disagreements here would involve any issues on the merits. Mauritius's big point, tellingly enough, appears to be that Article 297(3)(a) would not apply with respect to the territorial sea; that is, Mauritius's Article 2(3) claim. And

11:13 Mauritius turns this into a foot-in-the-door-type argument. It says, as you are anyway going to have to look at the merits of our claim in relation to the territorial sea, there is no point in a bifurcation which could apply only to the claims in respect of the EEZ. Now, that is, with respect, a complete non sequitur. Even if you were to conclude that a particular aspect of the Preliminary Objections would need to be addressed in a final award, that would be no reason for deferring the rest of the objections.

The further obvious problem is that, even if it were assumed in Mauritius's favor that disputes over living resources in the territorial sea may fall, in principle, within the scope of noted jurisdiction under Article 297, which is far from a straightforward issue, the U.K. has raised a discrete jurisdictional objection in relation to Mauritius's claim in respect of the territorial sea. The claim depends on the existence of alleged undertakings given by the U.K., and the Tribunal has no jurisdiction with respect to those alleged undertakings. And the same applies with respect to alleged in-shore fishing rights. The Tribunal's jurisdiction is confined by Article 288(1) to disputes concerning the interpretation or application of the Convention. The reference to other rules of international law in Article 2(3) does not serve to incorporate such Rules so as to bring them within compulsory dispute settlement under Part XV. And still less

11:15 does it serve to incorporate alleged unilateral undertakings of the kind that Mauritius now seeks to rely on.

Mauritius, of course, says that Article 2(3) does contain a renvoi that would allow the Tribunal jurisdiction over the alleged undertakings. But all this shows is that there is a discrete issue as to whether Article 2(3), correctly interpreted, extends the Tribunal's jurisdiction. That is a closely confined matter that is suitable for resolution at a preliminary phase.

The two remaining allegations of breach concern non-living resources and abuse of rights. Realistically, this is not a case about non-living resources; but insofar as Mauritius wants to push this aspect of the claim, the most obvious answer is that it, too, comes down to the application of the alleged undertakings, a matter which we say is beyond your Tribunal--beyond your jurisdiction under Article 288(1).

As to the alleged abuse of rights, the U.K.'s position is that allegation of a breach of Article 300 does not give rise to an independent basis for compulsory settlement. Notably, and in support of that position, there is an agreed dispute-settlement mechanism under Article 297(3)(b) for alleged manifest failures and arbitrary acts of the coastal State, but this is by way of conciliation and not arbitration.

Were there any broader independent jurisdiction for abuse-of-rights claims, the restrictions to compulsory dispute

11:17 settlement agreed in Article 297(3) could be by-passed almost at will by the introduction of an abuse-of-rights claim.

Again, the jurisdictional issues are not intertwined with the merits, and there is nothing in these or any other aspects of the third preliminary objection that points to the conclusion that it should be deferred to the merits phase.

PRESIDENT SHEARER: Could I just interrupt to ask how much longer you will be. We're going to adjourn at 11:15.

MR. WORDSWORTH: I should be, I think, no more than 30 seconds.

PRESIDENT SHEARER: Okay.

MR. WORDSWORTH: I hope nobody has got the stopwatch on.

To sum up, the U.K. has put before you three Preliminary Objections each of which is serious and substantial. If successful they knock out a complex claim on the merits in its entirety. Mauritius says that the U.K. should be made to defend its case on the merits, notwithstanding the existence on any argument of serious questions as to the Tribunal's jurisdiction. That contention makes no practical sense and is inconsistent with the practice that Sir Michael has taken you to.

In light of that practice and the relevant principles, including the importance of the institution of preliminary objections to States and the proper administration of justice, 11:18 the U.K. submits that its Preliminary Objections should be accorded a full and discrete hearing on issues of jurisdiction.

Mr. President, Members of the Tribunal, thank you very much.

PRESIDENT SHEARER: Thank you, Mr. Wordsworth.

Are there any questions from the Tribunal? No.

Well, then we will adjourn for morning tea break until 11:45. Thank you.

(Brief recess.)

PRESIDENT SHEARER: Yes, Mr. Dabee, I call upon you to give your argument.

ORAL ARGUMENT BY COUNSEL FOR REPUBLIC OF MAURITIUS

MR. DABEE: Thank you, Mr. President.

Since I made some of the premature introductory remarks earlier this morning, some water has already flown under the bridge, so, I will, therefore, limit myself to briefly referring to the order in which counsel for Mauritius will be making their presentations.

There will, first of all, be Professor Sands, who will be making a number of general introductory points on the bifurcation issue.

And secondly, more specifically, addressing you on the U.K. third Preliminary Objection, which relates to the claims made by Mauritius in relation to Articles 2(3), 55, 56(2), 63, 64, 194, and 300 of UNCLOS and Article 7 of the 1995 Fish Stock

11:48 Agreement, which is referred to in Chapter 7 of our Memorial.

This will followed by the address of Professor Crawford, who will for his part be making submissions on the question of sui generis and also the treatment to be given to land boundary issues under the Convention.

And, lastly, Alison Macdonald will be dealing with U.K.'s argument that, in respect of Mauritius's claim that the MPA is incompatible with the Convention, there is no dispute concerning the application or interpretation of the Convention.

She will also be addressing you on the legal test that applies to the question of bifurcation.

Without much further ado, I shall invite the Tribunal to ask Professor Sands to address you.

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

Yes.

PROFESSOR SANDS: Mr. President and Members of the Tribunal, I am going to make a short number of introductory points and then turn to the third of the United Kingdom's Preliminary Objections.

The United Kingdom's written submissions in preparation for this hearing were, indeed, skeletal. They were addressed in Chapter 6 of the United Kingdom's Preliminary Objections in five pages. Mauritius responded with its Written Observations on the 21st of November in considerable detail. The United Kingdom indicated that it was not minded to put in

11:50 any further response, but upon the invitation of the Tribunal, then did so, and both Parties have subsequently submitted short Skeleton Arguments.

Can I just say you're getting a bundle of materials that hopefully do not duplicate but supplement the United Kingdom's. We've also distributed or you ought to get a USB stick which will have all of the cases referred to in full. We didn't want to print out thousands of pages, but we thought you might want them. So, the USB has the full text of the cases that we're referring to.

We've set out our arguments on this issue in some detail in our Written Observations of the 21st of November, and obviously in the time available and for other reasons we don't intend simply to repeat everything. We will do our best to respond to what the United Kingdom has said this morning which, of course, has fleshed out considerably what they'd put in in writing.

Article 11(3) is the governing text here. It deals with the issue of bifurcation. The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's Final Award. We say--we don't think there is any disagreement on this--but this formulation is entirely neutral as to the stage of when Preliminary Objections should be addressed. What we do

11:52 disagree with is the argument repeated this morning that there is somehow a presumption in favor of bifurcation.

We also strongly object, as Ms. Macdonald will address in further detail to the United Kingdom's argument, that Preliminary Objections should only be addressed with the merits, a reversal of the burden type of argument, if the Tribunal is able to decide definitively that the Preliminary Objections can only be decided at the merits stage. We say that is not the standard to be applied and it would lead to the duplication of time, cost, and very significant delay, and Ms. Macdonald will say more about this in due course. Neither Article 11(3) nor the single most relevant authority, which is, of course, Guyana v. Suriname, on which I will say a bit more in a moment, supports the approach of the United Kingdom on this point.

There is nothing, moreover, we say, that is, as the United Kingdom puts it, controversial about Article 11(3). That point is made in their Skeleton at Paragraph 3. The language was drawn from the Rules of Procedure in Guyana v. Suriname, and those in turn were drawn from and closely follow the rules of procedure in the MOX case, which, of course, involved the United Kingdom, and those are available in your tabs.

Article 11(3) certainly did raise a couple of minor issues in their drafting, but the United Kingdom did not, in

11:54 the context of the elaboration of the draft text, propose that somehow proceeding on the merits should be suspended and that there should be an equivalent rule to that in the ICJ or the ITLOS practice. It was more about the ascertainment of the views of the Parties. You don't have evidence before you on that, but I don't think that issue is much disputed. This is not a controversial issue. It follows the practice of two other Annex VII Arbitration Tribunals.

Now, of course, the issue of bifurcation did not arise in the MOX Case, but it did arise in the case of Guyana v. Suriname as you, Mr. President, will recall very well, and I think Judge Greenwood was not involved in the proceedings at that stage.

And we heard some of the limited submissions this morning on that case. We would invite you to read the entirety of the day's transcript when the equivalent hearing was held. We've put that in your bundle.

Suriname argued exactly like the United Kingdom, and I stand before you having heard much of these arguments before. As you will recall, Mr. President, Suriname made extraordinarily similar arguments about the unprecedented nature of the issue that was being addressed, and we were faced, I acting for Guyana in that case, with the formidable opposition of Shabtai Rosenne in what I think was his last hearing, and it was a great privilege to appear in a case with

11:55 him, and he addressed the Tribunal and said that Guyana's argument was unprecedented, that is Page 15, Line 30 of the transcript, and that the proceedings on the merits, he said, had been suspended with the filing of Suriname's Preliminary Objections. Of course, that view was not accepted by the Tribunal, and the conclusion applies equally in these proceedings. And as matters stand, the United Kingdom is due to file its Counter-Memorial by the first of March. The merits proceedings have not been suspended.

Later on that day, on behalf of Suriname, we heard arguments from David Colson, an extremely distinguished international lawyer, who argued that if there was no agreement on the land boundary terminus, then there was no jurisdiction and, as he put it, the case was over, and that argument was put by him at Page 48, Line 38 of the transcript.

He argued that an Annex VII Tribunal's jurisdiction failed entirely if the dispute, and I quote, "also involved the question of territorial sovereignty, be it a question of disputed sovereignty over an island or a question of the position at the end of the land boundary." Page 49, Lines 21 to 29. Puts us in a directly analogous situation in relation to the matters addressed in these proceedings. And at the benefit of hindsight, it is easy to look back and minimize what your Tribunal did, Mr. President, in that case, and it was faced with directly analogous arguments.

11:57 And they went further, just as the United Kingdom has gone further today. They said that the Tribunal would cause tremendous risks if it went forward without a separate hearing on jurisdiction, and its treatment of these questions, and I quote--this is David Colson again, "will be closely studied and have potential worldwide implications." That's Page 50, Lines 1 to 7. The principles, he said, were fundamental and far-reaching. All of these arguments were rejected by the Tribunal in a robust and unanimous decision that has received no criticism at all. The Tribunal did not have a separate jurisdiction phase. It joined jurisdiction to the merits to deal with the issue of sovereignty. It ruled that it had jurisdiction, and it proceeded to delimit the maritime boundary. It resolved the dispute in a matter that was entirely acceptable to both Parties. The world of UNCLOS and the law of the sea did not collapse following that decision by that Tribunal not to have a separate phase on jurisdiction. The United Kingdom has not argued that the decision was wrong. But we say it is directly analogous, and it falls I think to Mauritius to invite this tribunal to adopt exactly the same robust approach. The alternative is a costly and delayed procedure. It is true, we cannot give you the precise costs, nor can we tell you exactly how many months or years it would take to sort out the jurisdictional issues, but I think there is no dispute that both would be added to very significantly.

11:59 And we say that at the end of that process of a jurisdictional hearing, you would inevitably join the issues to the merits, and we would then hear them for a second time in relation to the merits with which they form an intimate part.

We do not ask you today to form any view on the merits or to form any view on the strength of the United Kingdom's jurisdictional objections. We don't seek to minimize those jurisdictional objections or to maximize them, but both are for a later stage. They are not for today. At this stage, the only issue is whether the Tribunal can address all the United Kingdom's objections without trespassing inappropriately into the merits, whether on issues of fact and evidence or on legal matters.

In our submission, if you have any doubts about that in relation to any part of Mauritius's claim, then the correct and safer approach is to join jurisdictional issues to the merits. That's what's required by the sound administration of justice as well as of issues of cost, and it disadvantages neither Party. That is the function of an arbitral tribunal in this procedure as in many others.

With that in mind, let's turn to the United Kingdom's three Preliminary Objections. We're going to begin with the third, which is Mauritius's claim that the MPA is incompatible with UNCLOS, and the argument of the United Kingdom that this is not within the jurisdiction of the Tribunal. We're doing

12:01 this because, as you will have picked up the arguments of the United Kingdom are particularly thin on this issue, a recognition, we say, that the Tribunal is bound to find that it has jurisdiction over all of these claims.

This aspect of the objections relates to the claims made by Mauritius in relation to Articles 2(3), 55, 56(2), 63, 64, 194, and 300 of UNCLOS, and Article 7 of the 1995 Agreement. We've addressed all of this in Chapter 7 of our Memorial.

We're not going to have time to deal with all of these heads of claim. They're fully addressed in our Written Observations of the 21st of November at Paragraphs 68 to 84. So, I'm going to turn to selected examples by reference to fisheries rights, consultations, and abuse of rights, and invite the Tribunal to ask itself the following question:

Can this Tribunal's jurisdiction on these claims be addressed without any consideration of matters that are properly for the merits, whether they're legal arguments or factual or evidential matters? And we say self-evidently that is to be answered negatively. That cannot be done, and you will have noticed today how, despite its best efforts to learn from the experience of Suriname, United Kingdom, and in particular Mr. Wordsworth kept turning to issues that go to the merits and to issues of substantive fact.

The United Kingdom takes an opposite view. It says

12:03 that the Tribunal can dismiss each and every one of these claims at a preliminary stage without any consideration, in an inappropriate way of matters that relate to the merits. We say this is a bold and very far-reaching argument. It requires the United Kingdom to persuade this Tribunal at this stage that the totality of Mauritius's claims can be dismissed without the Tribunal getting into any aspects of the merits.

You don't have to look at the evidence concerning the recognition and preservation of Mauritius's historic fishing and mineral rights in the Chagos Archipelago. You don't have to look at the 1965 Lancaster House undertakings and the subsequent practice by the United Kingdom in relation to those undertakings, of central importance not just to the Article 2(3) claim but to all aspects of the claims.

The United Kingdom says you don't have to look at any of the material relating to the processes by which the MPA came into being. You can simply put on one side, including in relation to exchanges of views, the assurance given by British Prime Minister Gordon Brown to the Mauritian Prime Minister, Mr. Ramgoolam, that the MPA would not be implemented. You don't need to look at any evidence, says the United Kingdom, in relation to the question of the adequacy by which the United Kingdom did or did not take into account the views of Mauritius in relation to the MPA.

The United Kingdom also says that you do not need to

12:04 look at any evidence, even in relation to the abuse-of-rights claim that in creating the MPA, the United Kingdom was motivated by a desire to ensure the continued exclusion of the former residents of the Chagos Archipelago as reflected in the WikiLeaks documents. And you will be aware now, as both sides are, that the man who spoke of the Man Fridays and the great benefit of the marine protected area has been summoned to appear before the English High Court and will do so in a few weeks' time, to explain precisely what he meant when he made those comments to the United Kingdom.

But all of that you can completely set to one side. And most extraordinarily of all, the United Kingdom says you do not need to consider any evidence about the MPA. You don't have to look at its size and its geographical boundaries. You don't have to look at the applicable legal and regulatory framework. You don't have to look at the nature of the exclusion zone around Diego Garcia or the continued fishing that it permits. We've noted that last year 27 tons of tuna were caught for recreational fishing purposes, but Mauritian fishermen have been excluded but that you don't need to look at in relation to dealing with the issues of jurisdiction, nor do you need to look at, although you heard Mr. Wordsworth this morning talk about the question of whether the MPA had environmental as opposed to fisheries purposes. You don't need to look at that, says the United Kingdom. Nor do you need to

12:06 look at any practical measures that have been taken. All of that can be set aside and you can deal with the entire issue of this matter as a simple discrete jurisdictional issue.

Well, that is a bold argument, and you heard Mr. Wordsworth repeatedly today trespass into areas of the merits just as the United Kingdom's Preliminary Objections repeatedly invite this Tribunal to form a view on the merits, just as the United Kingdom did in the Lockerbie case, and we refer you to Paragraph 50 of that judgment. There is no difference in relation to what you are being asked to do in relation to the merits in this case as compared to that case.

There, of course, the United Kingdom's objection on grounds of inadmissibility was rejected by the Court on the grounds that it trespassed into the merits with which it was closely interwoven. As the Court put it, the United Kingdom, and I quote, "broached many substantive problems in its written and oral pleadings in this phase." That is Paragraph 50. The United Kingdom has done exactly the same thing in this case, although it has striven to avoid the difficulties into which Suriname fell. It, too, has broached the substantive problems, and I'm going to give you some examples of how it has done that in its Preliminary Objections.

Take a look, for example, at Paragraph 2.12 of the Preliminary Objections. What does the United Kingdom say there? It asserts that its undertakings concerning Mauritian

12:08 fishing and other resource matters in 1965 and at all times thereafter, and I quote, "were not such as to create rights for Mauritius under international law or to impose obligations on the United Kingdom vis-à-vis Mauritius." That is pure merits material.

And then they go on to say, "this is clear," and I'm quoting, "from a plain reading of the documents on which Mauritius relies." Not expressing a view on the merits of the United Kingdom's argument, but that is a merits argument. It is not something this Tribunal can form a view on at a jurisdictional phase. Whether today or in a year or two years' time, if we were to meet again, you would be taken to that section and you would be invited in effect to form a view at a jurisdictional phase that the United Kingdom was correct on that. We say you can't do that at a jurisdictional phase, any more than you can at this phase because it is a matter that goes to the merits, and it is at the heart of the United Kingdom's pleading this assertion. It informs the entirety of its case in relation to fisheries.

The 1965 fisheries undertakings, by way of example, are essential to the determination of the U.K. and the question of compliance, for example, with Article 2(3) of the Convention, and I regret very much the reference to a foot-in-the-door argument. For more than four decades, Mauritian fishermen have been able to fish in territorial

12:10 waters off the Chagos Archipelago. That stopped in 2010 with the adoption of the Marine Protected Area. So, it is not a foot-in-the-door either for the Mauritian State or for the fishermen who are no longer able in engage in their livelihood as a direct result of the Marine Protected Area, and that is in the territorial sea and beyond. But for now I'm focusing on territorial sea.

Article 2(3) provides that the rights of sovereignty in the territorial sea must be exercised, and I quote, "subject to other rules of international law." Now, the United Kingdom, interestingly, has characterized that provision as raising an issue of fact, that is Preliminary Objections at Paragraph 5.48, and then it goes on to say that in relation to the Article 2(3) claim, and I quote, "that it depends entirely--depends entirely--on whether there is an undertaking binding under international law." That is self-evidently a matter for the merits. It cannot be addressed at the jurisdiction phase. We can sit here in a year's time arguing about this issue and we will say to you, you can't decide that issue at a jurisdictional phase. That is for the merits.

What else does the United Kingdom have to say about Article 2(3)? Well, in its written pleadings, very little. It devoted a single paragraph to the issue in its Preliminary Objections Paragraph 5.48, and it makes no written argument in its written submissions as to what Article 2(3), and it was

12:11 careful today about what it said. Its written reply of the 21st of December makes no mention of Article 2(3), and today only a little more was said.

The United Kingdom doesn't argue that this claim is excluded by Article 297 at Paragraph 3. It implies in its written pleadings but never actually argues that the Parties' difference of view as to the interpretation and application of Article 2(3) falls outside the jurisdiction of the Tribunal.

But that, we say, cannot be right. The meaning and effect of Article 2(3) is plainly in dispute between the Parties, and is obviously a matter that falls within the jurisdiction of the Tribunal. Article 297(3) could have excluded that dispute from the compulsory jurisdiction of the Tribunal, but it does not do so, and the United Kingdom has not argued that it does so. Nor are we arguing for an extension of any jurisdiction of this Tribunal to apply other rules of international law. We are inviting you to interpret and apply Article 2(3) of the 1982 Convention, and that requires you to look at the undertakings given by the United Kingdom and to consider whether they form part of those other rules of international law. I'm not going to argue that now, the point is it is for the merits. We do not see how this Tribunal could decide that issue at the jurisdictional phase.

What the United Kingdom does by way of nothing more than bold assertion is argue, as I mentioned, that the United

12:13 Kingdom's undertakings are not exercised subject to other rules of international law. That's for the merits. The Tribunal is being invited by the United Kingdom to form a definitive interpretation of Article 2(3) at the jurisdictional phase and then to apply that interpretation to the facts. We say that cannot happen at the jurisdictional phase. That is, in essence, what happened in the Lockerbie case, cannot be done in this case any more than it could be done in that case. As the Court said, it has, and I quote, "no doubt that Libya's rights on the merits would not only be affected by a decision at this stage of the proceedings not to proceed to judgment on the merits, but would constitute in many respects the very subject matter of that decision." That's what the United Kingdom is asking you to do in relation to Article 2(3) and the undertakings given by the United Kingdom in 1965.

Turn to the issues of consultation, exactly the same issue arises of trespassing inappropriately into the forbidden area of the merits. Let's take, for example, Article 56(2) and Article 194, both of which, in paraphrase, require the United Kingdom to take into account the views of other States and/or to seek to harmonize its policies with other States.

This isn't excluded from the jurisdiction of the Tribunal by reason of Article 297(3)(a) as the dispute doesn't relate to sovereign rights with respect to the living resources in the EEZ or their exercise. The United Kingdom hasn't argued

12:15 that this claim is caught by 297(3)(a). Instead, it argues that Mauritius's claim is not about international rules and standards for the protection and preservation of the marine environment within 297(1)(c) of the Convention. And it seeks to portray this objection again simply as a discreet matter of treaty interpretation, one that can be entirely divorced from any inappropriate consideration of the facts.

So, how, then, does the United Kingdom explain to the Tribunal that this Tribunal can decide whether or not the Marine Protected Area falls within the United Kingdom's interpretation of 297(1)(c) without looking in detail at the evidence of what the MPA does? You only need to look at the limited material the United Kingdom has put out in relation to the MPA. For example, the consultation document that it purported to hold, where it says that the MPA will contribute, and I quote, "to clean oceans and seas." That's an environmental objective. The question of whether or not it goes far enough to bring the case within the jurisdiction of the Tribunal is not to be decided today or at a jurisdiction phase. It requires you to look at the merits of what this MPA is about and whether, as we say, it has environmental objectives or, as the U.K. now appears to be saying, remarkably, it has no environmental objectives, merely fisheries protection objectives. That's not what the evidence shows.

12:17 Again, having said that you don't need to trespass on the facts, the United Kingdom contradicts itself. We will refer you to another paragraph of the Preliminary Objections. Paragraph 5.52. Where the United Kingdom makes and then relies upon three overtly merits-related assertions about the Marine Protected Area. Now, these are made, except in the relation to the abuse of rights argument, but they also inform the arguments of Article 56(2) and Article 194.

What does the United Kingdom say? The United Kingdom says that the MPA, and I quote, "protects the environment and living resources," contradicting the argument it has made earlier in relation to 194 and 56(2).

Self-evidently it is not irreversible.

And thirdly, it has "in fact had a very limited impact, if any, on Mauritian fishery vessels."

How can you possibly form a view at a jurisdiction phase on those matters? You can't, this case is evidently going to have to go to the merits where you will have to consider the jurisdictional arguments put by reference to these merits-based assertions. There is just no escaping that consequence, and that's why we've begun with Preliminary Objection Number 3. You're going to have to move to the merits, we submit, to examine these jurisdictional objections.

The United Kingdom has plainly, in relation to Preliminary Objection Number 3 broached substantive problems in

12:18 its written pleadings. As the Court put it in the Lockerbie case.

Turn to abuse of rights. Mauritius's legal position is set out at Paragraphs 7.81 to 7.99 of the Memorial. We've argued that Article 300 of the Convention encompasses circumstances where a State exercises a right intentionally for an end which is different from that for which the right has been created, and we say--it doesn't appear to be disputed in terms by the United Kingdom--that Article 300 is not excluded from the exercise of compulsory jurisdiction by Article 297(3). The United Kingdom makes no argument that it is.

What the United Kingdom says is that the evidential threshold for Article 300 claims is high, and in making that argument it concedes you've got to look to the evidence.

And it also argues that Article 300 claims aren't free-standing but must be connected to another cause of action under the Convention, and they cite to a single paragraph, the Southern Bluefin Tuna Case, which, with great respect, does not support the proposition they make. The United Kingdom basically argues that the Tribunal can decline to exercise jurisdiction over Article 300 because it's nothing more than a packaging of other claims. Repackaging of other claims. Again, it's a far-reaching argument.

But the key point is, it's completely interwoven with the merits, and the United Kingdom recognizes that.

12:20 Paragraph 5.52 of its Preliminary Objections, which I've already drawn your attention to, refers to the argument of the United Kingdom that the MPA has "a very limited impact, if any, on Mauritian fishery vessels." Well, at the merits phase, we will give you the impact on Mauritian fishery vessels, and we will make it very clear that that impact has been very significant. It has stopped Mauritian fishermen from carrying out their livelihood. But that's not for here. That is a merits argument.

In this way, says the United Kingdom, you don't need to look at any of the evidence in relation to the intention of the Marine Protected Area. You don't have to form a view as to what Colin Roberts meant when he referred to an MPA that would prevent Man Fridays from returning back to the islands. We simply do not understand how you could conclude that the Article 300 claim is simply a repackaging of these other allegations in circumstances in which the United Kingdom invites you by its own pleadings to form a view on merits-related matters.

By way of conclusion, the United Kingdom's argument here for a separate jurisdiction phase is weak, it's very weak. The arguments the United Kingdom makes are plainly and manifestly interwoven with matters that pertain to the merits, and they cannot possibly be addressed at a preliminary stage. You have been directed to no case in which an equivalent set of

12:22 issues has been discussed at a preliminary stage, and it is the simple brevity of the United Kingdom's arguments both in their written form and this morning from Mr. Wordsworth that make very clear that this is a Jurisdictional Objection that has to be addressed with the merits.

That brings us to the question of the interweaving of those arguments with the claims of whether the United Kingdom has sufficient or any sovereign rights with respect to the living resources in the relevant maritime areas and related matters, and it is to that which Professor Crawford, with your permission, will now turn.

PRESIDENT SHEARER: Thank you very much, Professor Sands. I give the floor to Professor Crawford.

PROFESSOR CRAWFORD: Thank you, Mr. President, Members of the Tribunal.

We heard Sir Michael Wood this morning discussing the issues very much on the premise that we are before the International Court of Justice and a Preliminary Objection has been filed, and the case would be automatically suspended, and there is a round, possibly two rounds of written pleadings, and the Court has heard three days or a week of argument in two rounds. The Court has considered the case at some length in deliberations. It then has to decide whether to decide the points or to leave it to the merits. That's the procedure of the International Court. It is not the procedure of this

12:24 Tribunal. Annex VII Arbitration is an alternative to International Court adjudication, which the Parties one way or another select at the time that they make the relevant decisions in respect of the jurisdictional provisions under Part XV.

The question for you is not whether having gone through such a lengthy procedure, you will rather exceptionally join something to the merits so as to have still further procedures in relation to it. It is whether it is efficient to deal with the United Kingdom's case in two stages or one. We heard quite a lot this morning about the suppression of argument, but there is no intention on the part of Mauritius to suppress any opportunity of the United Kingdom to make its argument. It will have a full opportunity at the appropriate stage to make all the jurisdictional arguments it likes, and we will have to respond to them.

The question is simply one of efficiency in relation to a dispute which we say is clear and undoubted, which exists and which affects people and which should be resolved in as efficient a manner as possible.

A second point. The question here is not one of competing tribunals. It is not whether there is a preference under Part XV for the jurisdiction of the International Tribunal on the Law of the Sea or the International Court or Annex VII Tribunals, each with their own particularities, 12:26 personnel, and procedures. The question is one of the scope of the Convention itself. Now, that question obviously doesn't arise today because it goes to the ultimate question of jurisdiction.

But nonetheless, there is a tendency to consider arguments about the scope of the Convention as it were implicitly from a confrontational point of view. We say that's undesirable. Different tribunals operate on the basis of parity in relation to the Convention, and the Convention has the same meaning whether it is before a tribunal, the Law of the Sea Tribunal, or the Court.

So, we come here not to argue the substance of the United Kingdom Preliminary Objections but an incident in procedure in advance of that procedure. Mr. Wordsworth, while professing that position, did not entirely follow it. We heard this morning in a compressed form the substantive argument about Preliminary Objections. Reminds me of the line in Byron, Don Juan, about the damsel who, whispering she ne'er consent, consented. Mr. Wordsworth, whispering he may ne'er argue about the substance of the Preliminary Objections, nonetheless did so.

It is a temptation to follow him down that track, since we're talking about temptation, but I will only do so to a limited extent. I want to make three propositions of a preliminary character which, in my view, although we will hear

12:28 Mr. Wordsworth this afternoon, can't be questioned because there is an inference underlying the United Kingdom's position, as all positions based upon floodgates arguments that there is something dire that will follow from your decision not to bifurcate. And as with many floodgates arguments, the ground beneath the gates of the reservoir remains resolutely dry.

The first proposition is this: UNCLOS does not categorically or in terms say that there is no jurisdiction over land boundary issues connected to maritime claims, except in one context, and that's Article 298, the language relating to compulsory conciliation. Let me remind you of that language: "Provided further"--this is in the section concerning optional exclusion of certain disputes--"provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission."

You can't say that the drafters of Part XV did not have in mind the question of jurisdiction concerning sovereignty or other rights over continental or insular land territory. How did they deal with it? They dealt with it specifically in the context of compulsory conciliation in Optional Clause in Article 298 and not otherwise.

The fact that this limitation applies expressly to the optional provision in Article 298 and not to Article 297 speaks

12:29 volumes. As my old teacher in elements of law taught me, expressum facit cessare tacitum, although he pronounced it better, or expressio unius exclusio alterius. It's significant that Article 298 also excludes not that part of the dispute which concerns sovereignty or other rights over continental or insular land territory. It excludes compulsory jurisdiction not just that dispute but the connected dispute over maritime jurisdiction or delimitation, however. In other words, the language of Article 298 expressly recognizes that there can be two disputes initially separate, one over sovereignty or other rights over the continental or insular land territory, one over maritime delimitation, and that the second of those disputes may necessarily involve the concurrent consideration of the first.

The solution adopted only for the purpose of compulsory conciliation is to exclude that requirement in relation to both disputes--in relation to both disputes--in those cases and only in those cases where the linkage is necessarily inherent, where the connection is necessary or the linkage is necessarily inherent.

How do you know whether the linkage is necessary or inherent? You actually need to know quite a lot about the case.

It is not suggested in Article 298 that you can take one without the other. You either take them both or not at

12:31 all. And this aspect only applies to disputes concerning the interpretation and application of Articles 15, 74, and 93 relating to sea boundary delimitations or those involving historic bays or titles. It does not apply to disputes concerning the interpretation of other provisions of the Convention, including those connected with entitlement, a point of major significance, and including those relied on by Mauritius in the present case.

Mr. Wordsworth said that it would be absurd to infer that States having laid down provisions dealing with maritime delimitation would have consented to something greater, but conventions and especially Framework Conventions of this sort of UNCLOS are not to be interpreted against inferences of what States would have consented to, had they thought about it, when the evidence is that they did think about it, that they thought about it carefully and dealt with matters in a particular way.

Article 298 is entitled, and you hardly need to be told, optional exceptions to applicability of Section 2. Part XV is entitled, Settlement of Disputes.

The Law of the Sea is not to be confined, as the International Tribunal has recently reminded us, to the formally interpreted textual references in particular Articles, without reference to its overriding purpose, and we say that that is relevant even at this stage in terms of your decision to deal with the whole of the case. The case, the whole case

12:33 and nothing but the case, we would say.

To repeat my first proposition, UNCLOS does not categorically or in terms say that there is no jurisdiction over land boundary issues connected to maritime claims except in the context of compulsory conciliation. The fact of the manner in which it does so affirms the strong version of the incidental powers doctrine. You will be doing nothing outre by joining it to the merits. I can be briefer as to my second and third propositions.

Proposition 2, where there is jurisdiction over land boundary issues--whether there is jurisdiction over land boundary issues connected to maritime claims or not depends on the claims as enunciated on the correct characterization and on the underlying factual and legal situation. And due to a lack of time, I won't take you to the actual passage but I will refer you to what Professor Boyle, whose absence today we regret, said in the passage cited in the Mauritius Memorial at Paragraph 530, everything depends on how the case is formulated. Those are his words. And for a more general discussion of the issues of jurisdiction under the Convention in what I would describe as a balanced way, I refer you to the paper of Judge Rao at Page 887 to 892, which is in the dossier.

So, everything depends on how the case is formulated, how it is argued and what the factual and legal parameters are.

Proposition 3--and I'm sorry, I have to find the piece

12:34 of paper--sorry, I can't find it for the moment, but it's a quotation from the speech of President Wölfrum, who was then before the General Assembly quoted by Judge Hoffmann, as he now is, before the Asian African legal consultative organization. Maritime boundaries cannot be determined in isolation without reference to territory. Maritime boundaries cannot be determined in isolation without reference to territory.

I take those three points together, and I add the simple and well accepted point that it is for the Claimant in the first instance to formulate its claim though we accept, of course, that it is for the Tribunal to evaluate it. And I will refer in particular to the request for interpretation in the case concerning the land and maritime boundary between Cameroon and Nigeria Preliminary Objections, the judgment in ICJ Reports 1999, Page 31. It was a case where Nigeria, for whom I was appearing, wanted to say that the responsibility questions that were raised were really raised as a series of individual incidents which required individual elaboration, which they certainly hadn't had from Cameroon. We sought interpretation of the judgment that dismissed that Preliminary Objection.

The Court said in effect it is for the Claimant to set out its claim. This responsibility of claim is formulated in generic terms, and it's not for the Respondent to say it should have been pleaded in a different way. Of course, it will be evaluated on its merits. It was evaluated on its merits, and

12:36 it was summarily dismissed. But still at the jurisdictional level it's a matter for the Claimant to say what its case is.

Of course, the Tribunal can say that the Court or Tribunal can then say, having looked at the case and its surroundings, we say that this is the point you're making, that the power of appreciation exists. But it's not to be exercised in such a way as to block the Claimant from recourse to the Court.

I should say something in this context about the Nicaragua-Colombia Preliminary Objections case which has been heavily relied upon by the United Kingdom. That was a case that was profoundly affected by the fact that it was argued under the Pact of Bogota to which Colombia was then a party, which has a provision, a very important provision in the economy of the Pact of Bogota excluding from the jurisdiction of the Court matters which have already been settled or resolved by Treaty or judicial decision, and I would refer you with respect to the very able Separate Opinion of Judge Abraham in that case, which is in your materials, in which that is very carefully explained.

In effect, Colombia chose to argue the whole of its primary case in relation to that dispute as a Preliminary Objection under that provision of the Pact of Bogota.

It put forward its claim to sovereignty over the archipelago as a whole, including all of its features, and over

12:38 the maritime delimitation as of the 82nd meridian as if it was a jurisdictional question. And the Court followed it to some extent down that line by upholding Colombian sovereignty over the three named islands and over the archipelago without deciding what the archipelago was.

Without the Pact of Bogota and its key provision on settled disputes, that issue would have been an issue of merits, and Judge Abraham makes that very clear.

Nuclear Tests which the United Kingdom relied on in its written observations did not concern anything remotely approaching the question that concerns you, which is joined or separate argument at a preliminary procedural stage. It concerned what might be described as postliminary objections, if I can invent a word, or rather the choice of remedies after the case has been fully argued.

At the present stage of the case, the question is quite different, there is a distinction between a decision to join to the merits, having heard argument on jurisdiction and admissibility, and a decision to have a separate jurisdictional phase.

The United Kingdom says or said in its written pleadings that this application was in effect a disguised territorial claim. Mr. Wordsworth this morning said it was an undisguised territorial claim. In effect, it's saying that the MPA Coastal State issue is the mere peg on which to hang the

12:40 hat of that claim. But there is no basis for that finding at the preliminary stage. This case has always been about the MPA, and its implications for Mauritius's legal position. If the United Kingdom is right, when there is an underlying dispute which may not be a dispute as such under the Law of the Sea and that dispute gives rise to a further dispute which is concerned with the Law of the Sea, there is no jurisdiction because of that connection, and that, we say, is simply wrong as a matter of law. It is within the competence of the Tribunal to assess the dispute that has arisen in the light of the circumstances.

I'm not sure how much further to follow Mr. Wordsworth down his primrose trail of arguing the substance, but let me say a word about characterization.

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. But there are special circumstances here to which I should refer. I won't take you to the documents in detail, but this case does involve special circumstances. Mr. Wordsworth referred to the argument about something being sui generis and

12:42 described it as defensive. Well, an argument that something is sui generis is neither defensive nor offensive. It's simply the attachment of a Latin label. The Latin label we might apply in this case is maximum sui generis because this case really does have special features. I refer you to the Lancaster House Agreement, Tab 9; to the General Assembly Resolution 2066, which is Tab 10, to the statements about settled British policy in relation to the Chagos Archipelago made by Mrs. Thatcher in the House of Commons at Tab 11; and, above all, to the CLCS submission of 2009, preliminary submission, made by Mauritius without objection from the United Kingdom, which is Tab 12.

All of these circumstances make this case special, and we say you have to appreciate this case in the light of those circumstances. UNCLOS is a Framework Convention, and tribunals with jurisdiction over the interpretation and application of UNCLOS can also decide those cases, still cases concerning the interpretation and application of UNCLOS by reference to other rules of international law. There is no assumption against the consistency of other rules of international law with the provisions of UNCLOS, rather the reverse.

That means that the jurisdiction of the tribunals under the Convention is not cribbed, cabined and confined by the specific language of particular provisions, but it may extend to other aspects of the overall dispute, still

12:44 characterized as a dispute under UNCLOS which the Tribunal has to decide; otherwise, UNCLOS becomes not a framework but a straight-jacket.

These are broader considerations, and I don't deny that they're broader consideration, but they're relevant to the exercise of your discretion in this case. In the end, we say it comes down to quite a simple question. What is most efficient in the handling of this dispute? And the attempts by the United Kingdom to establish a series of Berlin Walls between you and the consideration of the dispute should fail.

Mr. President, Members of the Tribunal, there will be some more remarks in relation to Mr. Wordsworth's discourses this afternoon, but for the moment that's all I need to say.

PRESIDENT SHEARER: Thank you, Professor Crawford.

So, I will now call on Ms. Macdonald to address us. Thank you.

MS. MACDONALD: Mr. President, Members of the Tribunal, in my submissions, which conclude Mauritius's first round of submissions, I will address two points: Firstly, the U.K.'s argument that in respect of Mauritius's claims that the MPA is incompatible with the convention or perhaps now also in respect of what it calls Mauritius's sovereignty claim, there exists no dispute within the meaning of the Convention provisions, there has been no adequate exchange of views.

And, secondly, picking up from Professor Sands, I will

12:46 look further at the legal test which applies to the question of bifurcation.

So, firstly the existence of a dispute. Now, the U.K.'s Preliminary Objections Paragraph 4.1 discussed the cumulative requirements of Articles 283 and 286 of the Convention, that there be firstly a dispute and, secondly, an exchange of views. The U.K. says this: Neither of these requirements has been met as regards Mauritius's other (non-sovereignty claims) in the present case. There is no mention anywhere in the Preliminary Objections that this objection applies to what the U.K. has termed Mauritius's sovereignty claim. That's a completely new argument which we have heard for the first time this morning.

Now, this is not the day to address its substance, but as a brief initial reaction to this new point, Mauritius would express some surprise at the proposition that over the last 45 years it has failed to make clear its strongly held view that the U.K. is not entitled to declare any maritime zone, including the MPA, around the Chagos Archipelago. But as I say, that will be for another day. Back to the issues for today.

The U.K. claims, and this is its Preliminary Objections Paragraph 6.13(b), that, and I quote "this Preliminary Objection raises no issues of fact," and then it goes on to say in parentheses, "save as to any issues that may

12:48 arise as to what was raised in any exchange of views upon which Mauritius may seek to rely."

Well, it all depends on how much lies in those parentheses. The U.K. position is essentially that this objection raises no issues of fact because it can be determined by a simple, straightforward review of a slender diplomatic record from 2009 and 2010. Twenty documents, they say, a simple task. And perhaps one could imagine a situation where one State declares a maritime zone to which another State objects, where the States concerned have no previous history and you simply look at a couple of letters, and you decide. In such a case matters might--might--be as straightforward as the U.K. suggests. But this case is not such a case, for two reasons:

Firstly, the complex history between the two States. As you will have seen from Mauritius's Memorial, every aspect of this claim, every part of it, traces back to the events of 1965 in London, as Mauritius was gaining its independence. And to the undertakings given in the Lancaster House undertakings which you have seen.

The reaction of Mauritius to the MPA in 2010 can only be understood and assessed in the context of four decades of exchanges about Mauritius's rights over the archipelago, and this is all the more so now that this U.K. objection apparently also extends to what it calls the sovereignty claim, on any

12:49 view, a very complex dispute which dates back to 1965.

The second reason why this is not just a question of looking at a few letters is the issue of other maritime zones in the archipelago. As we have discussed in Chapter 4 of our Memorial, the MPA is merely the culmination of and builds on a series of previous steps:

Firstly, the fishing limits and the territorial sea which the U.K. purported to establish in 1967.

Secondly, the Fisheries Conservation and Management Zone which it purported to establish in 1991.

And, thirdly, the Environmental Protection and Preservation Zone which it purported to establish in 2003.

Now, as you will have seen from Chapter 4 of our Memorial, Mauritius protested the establishment of each of these various zones, 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.

Now, just as the MPA in its legal structure simply builds on and incorporates the maritime zones which went before it, Mauritius's reaction to the MPA also builds on and incorporates and is conditioned by its protests about those previous zones. So, this is not just a mechanical task of looking at 2009 and looking at 2010. This goes right back--and it is intertwined particularly now that we hear the question of

12:51 sovereignty is up for grabs in this Preliminary Objection as well.

And because, of course, the well settled case law that a State, in an exchange of views, need not refer to specific treaty provisions, this is not as simple as flicking through the record and looking for mentions of UNCLOS. Not at all. One needs to look at what the subject matter of the dispute was, what was the subject matter of the various protests, the bilateral contact, the diplomatic exchanges, the talks in 2009--all of these matters over the last 45 years.

And this long and complex history is also essential for a proper understanding and analysis of Mauritius's decision about when to draw those exchanges to an ends by filing this claim.

Now, it's well-established, of course, that a State does not need to persist with exchanges on negotiations where there is no reasonable prospects of resolving the issue. And as we've set out in our written observations on bifurcation, the U.K. went ahead with the MPA in clear breach of the promise by Mr. Brown, then the U.K. Prime Minister, to Mr. Ramgoolam, the Mauritian Prime Minister, that it wouldn't do so.

Now, after a broken promise at the highest level, what prospect was there that further letters on this subject would persuade the U.K. to back down? Is Mauritius really supposed to, as we heard this morning, have written saying, well, as we

12:53 have been saying for the last 45 years we still don't think you're entitled to do this kind of thing. Is that really what this Tribunal's jurisdiction depends upon?

Now, this is a question which we say can only be answered when determining this objection in light of a full view of the history, and it's just one example of the way in which in this case, context is everything. Here you have a long-running sovereignty dispute which is completely intertwined with the Convention issues which we have dealt with in the other parts of our submissions, and we say there is simply no fair or practical way of analyzing these instances of a dispute and the existence of the necessary exchanges of views as a preliminary issue.

Now, looking at the legal test, which you will apply when considering this and the other Preliminary Objections which Professor Sands and Professor Crawford have dealt with, Professor Sands has introduced this issue in his submissions, and the starting point is, of course, the Rules of Procedure which the Parties have agreed. Article 11, we say, is clearly, on a simple reading, neutral as to the timing of any hearing on jurisdiction. Article 11(3), we say, makes it quite clear that where such objections are raised, the Tribunal has the power either to address them as a preliminary matter or to defer them to the Final Award. We say that because that's simply what it says. It's clear from the language of this Article, we say, 12:54 there is no presumption in either direction; rather, the Tribunal is in the fortunate position of having the flexibility to choose whatever procedure it considers to be the fairest and the most efficient in all the circumstances of the case.

Professor Sands has dealt with the Annex VII Tribunal's decision on bifurcation in Guyana v. Suriname. And again, we say that this is very helpful in considering how to proceed in this case. Of course, the facts were different in that case, they always are--but we say that this case shows that an Annex VII Tribunal applying a provision very similar--and you can see this in Tab 1 of the materials that we've given to you--is not required to deal with jurisdictional objections as a preliminary issue where they are, quote, "not of an exclusively preliminary character."

Now, the U.K. urges you to be aware, this is at Paragraph 5(b) of its Skeleton, it urges you to be aware of the exclusively preliminary character test, which it points out has its origin in the 1972 Amendments to the ICJ Rules of Court, but we say, well, the Guyana v. Suriname Decision is a striking example of the application of this test not by the ICJ but in the highly relevant context of an Annex VII Tribunal on the basis of a very similar procedural framework to that which we have in this case.

Now, in arguing for a natural default position, as it calls it, of bifurcation, that we use that phrase at

12:56 Paragraph 6 3(c) of its Preliminary Objections, the U.K. appears to rely, although it appears to rely in some instances and then disavow at other moments the practice of the ICJ and of ITLOS, but, of course, the ICJ Rules provide for mandatory bifurcation, at least in the sense that objections to jurisdiction will be dealt with separately in the first instance, which is a crucial distinction between that Court and this Tribunal.

At the bifurcation hearing, and you can see this in the transcript, in the Guyana v. Suriname case, Suriname sought to argue that like the ICJ, the Annex VII Tribunal could only decide to join jurisdiction to the merits after a full jurisdictional hearing. In other words, it could only decide properly that something was of an exclusively preliminary character having gone through a full jurisdictional phase, not after a hearing such as took place in the Summer of 2005 in that case or such as we are having today. We invite you to look in due course at the transcript of the hearing of the 8th of July 2005, and you will find that this point was raised by Professor Rosenne at Page 16 of that transcript.

And that argument, of course, was roundly rejected by the Tribunal in that case. The Tribunal in that case felt perfectly able after some written exchanges on the question of bifurcation in a hearing just like we're having today to take that step and to join matters to the merits. And as Professor

12:58 Sands has said, that has drawn no criticism. The structure of UNCLOS has not crumbled. And we say that the Tribunal's Order Number 2 in that case is a clear acknowledgment of the different structure of, on the one hand the Rules of Procedure that we have in this case and, on the other hand, the less flexible procedures which apply because of the way that the Rules are structured in the ICJ and in ITLOS.

U.K. made an interesting suggestion this morning, Mr. Wood was discussing Rule 79(8) of the ICJ Rules of Court which allows that Court to order Parties to raise all questions of fact and law at the preliminary stage. In other words, if it thinks it's appropriate, it can effectively turn the jurisdiction phase into something very close to the merits stage, and the U.K. suggested that implicitly this Tribunal enjoys the same power.

Now, we note firstly that there is no--that that is a power expressly granted to the ICJ by Rule 79(8), that there is nothing equivalent in the Rules of Procedure in this case. But be that as it may whether or not the suggestion is correct that the Tribunal could implicitly do that, what we need to think about is how does it help the U.K. to suggest that this Tribunal has the power to turn a jurisdiction phase into the merits phase? If the U.K. is really driven to suggesting that its preliminary--that the Tribunal needs such a power in order to deal with its Preliminary Objections, well, we say if you

13:00 have to turn the jurisdiction phase into a merits phase, have a merits phase. There is no real saving if that's the path that you go down. There is no saving of time, and there is no saving of costs.

Now, after this short analysis of the Rules of Procedure, I look briefly at the principles which guide the Tribunal in its exercise of the broad discretion, which I think that both parties are agreed that those Rules confer on the Tribunal, to proceed as is fairest and most efficient in the particular circumstances of this case. We say that there are two key principles that guide that discretion:

Firstly, where an objection to jurisdiction requires the examination of substantial amounts of evidence, then reasons of efficiency and the proper administration of justice point strongly away from bifurcation. In other words, there is no point in starting on the procedure that may well lead to you examining the same evidence twice.

And the second point we make that we say guides the discretion in this area is that where an Objection to Jurisdiction requires consideration of the merits of the case--and Professor Sands has touched on this--this also makes the case completely unsuitable for bifurcation. And I will deal in a little bit more detail with each of these points in turn.

Firstly, the question of evidence. As Professor

13:01 Crawford has noted, the U.K. relies heavily on the decision of the ICJ in Nicaragua-Colombia and in particular has cited in its Skeleton and today, Paragraph 51 where the Court said that the Preliminary Objection must be joined to the merits if the Court "does not have before it all the facts necessary to decide the questions raised or if answering the Preliminary Objection would determine the dispute or some element thereof on the merits."

Now, as Professor Crawford has pointed out, this has to be understood as a test to be applied after there has been what is always a mandatory hearing on jurisdiction before that Court at which the Parties have had the opportunity to rely on whatever evidence they choose to call. Obviously at that stage, if the Court doesn't have before it the facts necessary to decide the questions raised, it will have to proceed to the merits. But the question for this Tribunal, when looking at the evidence, is a different one. It's a forward-looking one. What is the evidence which would have to be considered in order to allow out the Tribunal to rule on the objections to jurisdiction? What evidence does it need to look at?

Now, when looking at that question, it's important to consider what difference there would be between the amount of evidence it needs to look at to look at the Preliminary Objections and the amount of evidence it needs to look at to rule on the merits. Where Preliminary Objections require

13:03 extensive consideration of the evidence, we say, there is little purpose in holding a separate jurisdictional phase. It simply causes delay and it causes expense. In the words of the Permanent Court in the Mavrommatis Palestine Concessions Case, a lengthy and costly jurisdictional phase is inefficient and, "not calculated to ensure the administration of justice."

Our key point here is that the issue isn't whether the facts necessary to rule on the Preliminary Objections could be placed before the Tribunal--of course they could be--the question is, as I've said, is whether those necessary facts would be significantly fewer and tighter than the facts which are needed to decide the case on the merits. And that would need to be a significant saving in order to justify the delay and the expense of a separate jurisdictional phase, particularly when we're talking, as Professor Crawford mentioned, of a situation in the world which is ongoing and which affects people. It's not--it seems sometimes in these surroundings when we're discussing these technical matters of law like a very remote issue, but it's ongoing, and it has a real human impact. And in those circumstances, we say delay is something which is not to be injected lightly into these proceedings.

Now, the second point which we say may guide your discretion here is the relationship between the Jurisdictional Objections and the merits. The ICJ has warned on many

13:04 occasions and we cited a few in our written observations, for example, the cases cited at Paragraphs 39 to 40 of the Nicaragua Decision, the ICJ has warned against taking preliminary issues which, quote, "would run the risk of adjudicating on questions which appertain to the merits or of pre-judging a solution."

And we say the U.K.'s objections fall squarely within this category and will lead the Tribunal straight into the forbidden area of the merits, and each of those who have addressed you have looked at different areas of the U.K.'s Preliminary Objections and how tied up they are with the merits.

But the U.K., I think, overstates Mauritius's position here. It says at Paragraph 5(b) of its Skeleton, that Mauritius appears to suggest that where a Preliminary Objection engages any factual determinations or a discussion of any factual or legal issues that may separately be germane to issues on the merits, it is not of an exclusively preliminary character. This is an ingenious repackaging of Mauritius's case on this point, but this is not Mauritius's case on this point. Rather, as I hope that we have made clear both in our written and our oral submissions, our position is that, in this case, the U.K.'s Preliminary Objections are, to use the language of the Barcelona Traction Decision, solely related to the merits or to questions of fact or law touching on the merits, but they cannot be considered separately without going into the merits.

Now, to take only one but a very striking example, Professor Sands has already referred to Paragraph 2.12 of the U.K. Preliminary Objections which state that the undertakings concerning Mauritius's fishing and resource matters, quote, "were not such as to create rights for Mauritius under international law or to impose obligations on the U.K. vis-à-vis Mauritius," and the U.K. goes on to claim that, quote, "this is clear from a plain reading of the documents on which Mauritius relies." Now, Professor Sands, in his submissions, has shown you how this assertion is really at the heart of the U.K.'s case on all of the fisheries arguments. Now, I remind you of this paragraph because this is a powerful example, we say, of an issue which is essential to the U.K.'s case on jurisdiction but could not conceivably be separated from the merits. In a case involving historic fishing rights, a ruling on the existence and extent of one Party's historic fishing rights goes right to the heart of the case.

And this paragraph, we say, is also a good example of the U.K. conflating the two separate points which we have been discussing here: Firstly, the relevance of quantity of evidence, and secondly the relevance of relationship to the merits.

Now, even if the U.K. were correct to say that its

13:07 legal case on historic fishing rights was, quote, "clear from a plain reading of the documents," which Mauritius does not for a moment accept, this fails completely to deal with the other reason why this is not a point which could possibly be resolved as a preliminary stage, which is, of course, that. Whatever the amount of evidence you need in order to decide this point, this is a merits question par excellence.

So, Members of the Tribunal, Mr. President, in conclusion of the application of the legal test, we say two things: The evidence required to decide on the U.K.'s objections is so substantial that a jurisdictional hearing would just replicate much of the work that everybody would have to undertake at a merits hearing.

And we say, secondly, entering into those issues inevitably draws the Tribunal into pre-judging the merits, and this is why we say it would not be fair, and it wouldn't be efficient to hold a preliminary hearing in this case.

Mr. President, Members of the Tribunal, that concludes the first round submissions of the Republic of Mauritius, unless the Tribunal has any questions that it wishes me to address at this stage.

PRESIDENT SHEARER: Thank you, Ms. Macdonald.

I think well, in that case, I think we will take a recess for lunch and resume at 2:15. Thank you very much.

(Whereupon, at 1:08 p.m., the hearing was adjourned

13:09 until 2:15 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT SHEARER: Well, ladies and gentlemen, we resume the session.

I'd indicated earlier this morning that we might have formulated some questions for you, but maybe it's a comment on the excellence of the food that was provided and so on that we feel that you have done very well in the opening stages, and we haven't, in fact, got any questions for you to respond to at any time this afternoon. That may be welcome news or unwelcome news. Some counsel like being interrupted frequently, but, of course, it does not preclude the possibility that during the course of the rejoinders or rebuttals this afternoon that a judge may have a question, so that's always a possibility.

Anyway, at this stage, I call upon the Agent for the United Kingdom to lead off in their response to the Mauritian arguments. Thank you.

Mr. Whomersley.

MR. WHOMERSLEY: Mr. President, Members of the Tribunal, thank you very much. Yes, we will be speaking, I think, relatively briefly. It will first be Sir Michael Wood and then Mr. Wordsworth, and then I will make a short concluding statement, if I may.

PRESIDENT SHEARER: Thank you very much.

Yes, Sir Michael.

REBUTTAL ARGUMENT BY COUNSEL FOR UNITED KINGDOM

14:22 SIR MICHAEL WOOD: I will be brief, and that also reflects the quality of the food perhaps.

I shall limit myself to responding to just a few of the points that Mauritius made this morning. I think that what they said shows that there really is a good deal of common ground between us on some of the fundamentals of the procedural situation that we're in, but I would like to make clear that we did not seek to adopt the Suriname arguments as used in the Guyana case. We were not saying that the proceedings on the merits were automatically suspended. We read very carefully what was said by counsel for Suriname and decided not to adopt that argument.

However, I would like to quote the late Shabtai Rosenne, who summed up the position on Preliminary Objections in his entry in the Max Planck Encyclopedia of Public International Law, when he said in his entry on jurisdiction and admissibility, the main feature of a Preliminary Objection is that the decision on the objection is requested before any further proceedings on the merits take place, and raises issues that can be dealt with in a formal decision at the relevant preliminary stage of the proceedings. That, in my submission, sums up the essence of what it is to make a preliminary objection.

Ms. Macdonald this morning said that the test for the decision that you have to take following today's hearing

14:24 depended on two things, as I understood it: The quantity of the evidence and questions of fairness and efficiency. Well, it seems to me the quantity--the quantity--of evidence is really neither here nor there, and there is no authority for that proposition. Indeed, you could say that the more it is necessary to look into the facts to determine whether the Tribunal has jurisdiction, the stronger is the case for a preliminary objections phase. The preliminary objections phase will then clear the way for any merits phase that may take place. Of course, one shouldn't assume there will be a merits phase, but if you had a preliminary objections phase on the question of jurisdiction and you've dealt with all the facts relating to that, that will simplify considerably the merits phase.

In any event, I think the reference to quantities of evidence really adds nothing to the efficiency point to which Ms. Macdonald brought your attention. And on that, we would say that a separate preliminary objections phase is, in fact, likely to increase efficiency, not reduce it. It ensures that issues can be dealt with discretely, that the merits phase can be simplified, reduced, to the extent that the Preliminary Objections are upheld.

It's precisely the purpose of a preliminary objections phase that the objections are considered in limine litis, and there are three possible outcomes. One or more of the

14:26 objections may be upheld, thus avoiding the need to consider the merits with the resource and, indeed, political implications that that may involve. Even if only some of the objections are disposed of in that way, the savings and clarity that may be brought to the merits proceedings may be considerable.

The second result is that one or more of the Preliminary Objections are dismissed. That, too, leads to clarity at the merits stage, and that, too, may have important political consequences.

Or, as we saw--and this is rare--the result may be that one or more of the Preliminary Objections is deferred to the merits stage. That is a possible outcome of any preliminary measures phase, though it's rare in relation to practice of the ICJ.

But even in that case where an objection is deferred to the merits, there will be in all probability useful clarification and a crystallization of the issues that will simplify the final hearing. One shouldn't assume that there will simply be duplication. The Parties will see to that themselves; and, if they don't, the Tribunal will no doubt see to it.

This brings me back to Mauritius's all-or-nothing approach to a preliminary objections phase. That is their submission that if just one of the Preliminary Objections is to

14:28 be deferred, all should be deferred to the merits. As I said this morning, there is no authority for that approach, and, in our submission, it has nothing to commend it in terms of efficiency. On the contrary, if one or more of the provisional--of the Provisional Objections are--sorry, Preliminary Objections--are upheld, that could avoid the need for any merits phase. If, for example, in this case the 283 objections were upheld, then the merits phase could fall away completely, regardless of the other Preliminary Objections. Or, in any event, it could at least greatly reduce the scope of the merits phase.

Just a word about Article 11 of the Rules, which we agree is the primary legal text. We heard a lot from the other side again about the neutral nature of Paragraph 3. I took you this morning to the text, which we say at least points to a separate hearing on objections, jurisdictional objections. I wouldn't put it higher than that, but Mauritius itself having claimed that this is neutral, goes on to say in effect there is a--the onus is on the United Kingdom to show why these objections should be dealt with as a separate phase, so they're not themselves suggesting that the approach should be neutral, but I think we could all agree that Article 11 itself does not set out an onus--set out a--Article 11 itself is, indeed, relatively neutral. What is not neutral, however, is the practice of international courts and tribunals, of dealing with

14:30 Preliminary Objections, particularly those relating to jurisdiction at a separate phase where there is no reason why that cannot be done.

Ms. Macdonald emphasized efficiency. As I explained this morning, the Preliminary Objections institution is not only about efficiency. It also reflects the more fundamental point about the role of consent in inter-State litigation. I drew your attention to what the International Court said in the ICAO Council case, where it referred to an essential point of legal principle; namely, that a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter or whose jurisdiction has not yet been established. We would say that where there are real doubts about the jurisdiction of a tribunal, they should be resolved at a separate preliminary phase, if there is no obstacle to that being done.

And it's not only courts, but also States that have expressed this policy behind disposing of Preliminary Objections at an early stage. Such views were expressed in the Sixth Committee as long ago as the 1970s and are equally valid today. Again, to quote Rosenne, at Page 810 of his book, he notes that the view is expressed that it will be useful for the Court--this was before the amendment of the Rules in 1972--that it will be useful for the Court to decide expeditiously on all questions relating to jurisdiction. The practice of reserving

14:32 decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connection with the South West Africa and Barcelona Traction Cases.

It's important to emphasize that in this case, our Preliminary Objections are objections to jurisdiction. They're not objections to admissibility, they're not objections of any other kind that might be raised as a preliminary matter. And the Rules of Court, the case law, the writings, all make the point that objections to jurisdiction as opposed to other objections must be dealt with at a preliminary phase if the objecting State so requests. It is the essence of such objections that they challenge the right of the Court or the Tribunal not only to decide, but to hear the merits of the case.

In conclusion, I will just recapitulate, if I may, what we said the test was. It was not addressed in these terms by Mauritius, but we said that the right approach at this stage is for the Tribunal to determine whether it is in a position to conclude now that the preliminary objection should be deferred to the Final Award; that is, disposed of only at the merits stage. If the Tribunal cannot so conclude, if it cannot conclude that (a) it does not have before it all the facts necessary to decide the questions raised in the preliminary objection or (b) that answering the preliminary objection would

14:34 determine the dispute or some elements thereof on the merits, then it should hear the preliminary objection as a preliminary matter.

I emphasize the word "determine." This morning we heard from Mauritius a number of formulations, "consider the merits." What is obviously a bar to deciding a preliminary objection at a preliminary stage is if you have to actually determine the merits of the case, but the fact that you have to go into them, as the phrase is, or consider them, is perfectly natural in the case of Preliminary Objections in those cases.

So, with those basic remarks, I would ask you to invite Mr. Wordsworth to respond to the rest of Mauritius's submissions from this morning.

PRESIDENT SHEARER: Thank you very much, Sir Michael.

Mr. Wordsworth. Thank you.

MR. WORDSWORTH: Mr. President, Members of the Tribunal, I propose to deal with the issues in the same order as I addressed them this morning. That means that I propose to start with many thanks to my good friend Professor Crawford to his comparison of me to being in the same position as Don Juan's damsel.

Now, not quite so, I think, because of course you have to know what our preliminary objections are before deciding whether they are suitable or not for determination as a preliminary matter, and we say, of course, they are, having

14:36 given you some explanation as to the nature of the objections.

But what I did note, of course, is that Professor Crawford then did go straight down the route of arguing the substance of the first preliminary objection; that is, our objection to your deciding the so-called "question of sovereignty," and he focused in particular on Article 298(1)(a). Well, all very well and good. And, yes, it is a very interesting provision, but its interpretation is a matter that is preeminently well suited to a discrete jurisdictional phase.

Is Mauritius right that Article 298(1)(a) establishes an incidental jurisdiction in respect of all Claims where a coastal State's rights are involved? We say not, and Professor Crawford's invitation to you not to dwell on the text, and I quote, "the formally interpreted textual references in particular articles without reference to its overriding purpose," simply emphasizes this point. It shows it's a difficult issue. It's a difficult issue that goes to a centrally important issue so far as concerns the jurisdiction of a court or tribunal under Part XV of UNCLOS.

And I do note that Professor Crawford's reference or his slight guiding of you away from the "formally interpreted textual references in particular articles," steering you in the direction of overriding purpose, of course, object and purpose, is scarcely a vote of confidence in favor of Mauritius's

14:38 interpretation of Article 298(1), and it certainly does nothing to address my point that Article 298(1) or that the Article 298(1) opt-out provision, as it is, is confined to maritime delimitation, and that if Mauritius is right to say that Part XV did, indeed, confer jurisdiction in principle to determine highly controversial issues of sovereignty, there would be some equivalent opt-out provision to that which we see in respect of maritime delimitation in Article 298(1), and there simply is no such equivalent opt-out provision to be found.

The argument that the answer to this difficult, interesting, discrete jurisdictional issue, the argument that the answer can be found in the object and purpose of the Convention is a curious one, curious one not the least when one recalls what the Preamble of the Convention, in fact, says, and this is the introduction to the Preamble. This is the very First Statement that's made there: "The States Parties to this Convention, prompted by the desire to settle in a spirit of mutual understanding and cooperation, all issues relating to the Law of the Sea." Not a sniff there on issues of territorial sovereignty one might say.

And if when we are looking at object and purpose, then, of course, we'd invite you to be turning to the well-known passages as to the importance of Part XV and the scope of jurisdiction, and we would say absence of jurisdiction in relation to territorial issues that appear from the

14:40 negotiating record, and you see the references at Paragraph 3.40 of our Preliminary Objections. The critical point for today is that all of these interesting legal issues on the extent of jurisdiction under Part XV in relation to questions of sovereignty are precisely well suited to determination at a preliminary phase. Professor Crawford said it all depends on how the case is formulated. Well, fine. We are not asking you to decide Preliminary Objections without looking at how Mauritius has formulated its claim. To the contrary, and this is why I took you to Paragraph 1.3 of Mauritius's Memorial and how it has identified the question of sovereignty.

The starting point is the claim, and then you look at our Preliminary Objections.

And indeed, Professor Crawford accepts in terms that it is, and I quote, "It is within the competence of the Tribunal to assess the dispute that has arisen in these circumstances." That's at Page 96 of the transcript, Lines 11 through 12. And he says that, "The Tribunal has at all stages of its process the right to characterize a dispute." Well, quite so. That's Page 96, Lines 16 and 17.

So, there is no longer any issue about that, nor could there be in any sensible way, but it is said that there are special circumstances in this case, and that somehow these get in the way.

14:42 And this, of course, brings in the sui generis argument, which, I would have to say, is, indeed, defensive, as I said earlier. And I say it's defensive because it is a sort of don't-worry argument. If one looks at Paragraph 1.10 of Mauritius's Memorial, it makes its point about this case being deeply embedded in colonialism, and then it says, "for these reasons, this sui generis case cannot be considered in the same light as other disputes that raise issues of sovereignty and the exercise of rights of over maritime spaces." Of course it's defensive, of course Mauritius is aware it is asking this Tribunal to define critical controversial issues of sovereignty is going to ring alarm bells across all States Parties to UNCLOS that have any disputed issues as over territorial sovereignty.

"Is it sui generis? Well, maybe Mauritius is right, maybe it's not right, but the real point is that this sui generis assertion does not impact on the question of the scope of your jurisdiction under Article 288(1). Either you have jurisdiction to decide the question of sovereignty or you do not. And that is a question you can decide at a preliminary phase without going into the sui generis assertion at all; or, if you think it matters, and we really think it does not matter, you can decide whether you accept Mauritius's characterization of its claim as sui generis or not. None of this makes you decide issues on the merits of a jurisdictional

14:44 phase.

I turn to what Ms. Macdonald has said on Article 283. Mauritius persists in the argument that you're going to have to go through decades of diplomatic exchanges that will take you into the merits. There are two points to make about that.

First, this is not what Mauritius said in its Memorial, where it said that the relevant exchanges took place in 2009-2010, and it's worth just taking you briefly to Paragraph 5.38 of the Memorial. And I say Chapter 5 is an important piece of the background reading to today's application because that is where Mauritius sets out its case on jurisdiction. It has a Section 4, which is called "Exchange of Views," and it's that--there are only two short paragraphs underneath under that heading, and the critical one is 5.38.

"As set out in Chapter 4, there is evidently dispute between Mauritius and the U.K. concerning the legality of the MPA under the Convention and the 1995 Agreement. This is reflected in 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.

So, 2009-2010, there is then a footnote reference. Footnote 395, you will see there they refer to four sets of paragraphs from Chapter 4.

Now, if you go to those individual paragraphs, what

14:46 you will see is references to the events of 2009 and 2010. That's why I say they're relying on what is a very recent diplomatic record.

The paragraph continues, "As set out in Chapter 4, there has been a full exchange of views between Mauritius and the U.K. concerning the dispute in regard to the MPA and related matters, including the deposit with the UN Secretary-General of coordinates of delimitation in accordance with Article 75 of the Convention. Those exchanges encompass both the U.K.'s claimed entitlement to establish an MPA as a coastal State and its exercise of purported rights under the Convention. By 2010, by December 2010, it was plain that any further exchange of views would be futile--that was a point that Ms. Macdonald came back to--as the U.K. was fully committed to the establishment of the MPA including as a means of preventing the return of the Chagossians. Mauritius was, therefore, entitled to initiate these arbitration proceedings."

So, it might be thought that in putting before you the prospect of going through decades of diplomatic correspondence that Mauritius is trying to find difficulties as far as concerns today's hearing rather than putting before you problems that would actually be faced at a jurisdictional phase. But if it now insists on going back in time, there is no great problem, as I said earlier. So what? We're still puzzled by the idea that you might have to go back decades, 14:47 particularly puzzled, of course, when you think that the disputes concerns the legality under UNCLOS of an MPA declared in April 2010, and in circumstances where it may be added United Kingdom only ratified UNCLOS in 1997.

How, one might ask, could there be a dispute and an exchange of views in relation to dispute of a convention not in force between the Parties concerned?

And in this respect we refer you to Paragraph 34 of the Georgia and Russia case where the ICJ expressly distinguished the materials that Georgia relied on to establish the dispute in negotiations in that case, distinguishing between those materials dated before and after Georgia's ratification of the Convention for the Eradication of Racial Discrimination in 1999.

The obvious point is that in looking at whatever quantities of diplomatic exchanges Mauritius seeks to put before you, what you have to consider before you is first, does this establish the existence of the UNCLOS dispute that Mauritius puts before you in this case; and, secondly, has there been an exchange of views on that dispute? It may conceivably be a lengthy exercise, as it was in the Georgia and Russian case, but it is not one that engages decisions on the merits. The same applies as far as concerns the hopeful suggestion that you can't decide on whether further exchanges would have been futile as of December 2010. Of course you can.

14:49 As, for example, the Court did at the preliminary objections phase in the Lockerbie case, and as is being done in jurisdictional phases in countless investment treaty cases.

I turn to the issues in our third preliminary objection raised by Professor Sands, while I shall deal along the way with his attempt to say this is all just a re-run of the Guyana and Suriname case. There is an invitation to you to read the transcript on the hearing on bifurcation in that matter, and please do, we would say, although we do think it would be helpful, first, for you to look at Suriname's Preliminary Objections, the written document, written filing that I referred to this morning of May 2005, so you fully understand the objections that were being put forward. I say that with all due deference to the President because, of course, he is extremely familiar with this already.

As Sir Michael said earlier, you will see that the legal position adopted by the late Professor Rosenne in that case was quite different to that of the U.K.'s position today.

As to Guyana's position, counsel for Guyana began with the statement that a hearing on Suriname's objections--and I'm quoting from Page 17 of the transcript, Lines 23 to 25--would be futile in the sense that the result would inevitably lead to a joinder of issues of jurisdiction to the merits.

He continued, transcript Page 18, Lines 36 to 37, that Suriname's request was premised on a defense to the merits. It

14:51 is not an argument about jurisdiction.

And he said a little later that, "If there were a separate Decision on Jurisdiction, it would be a decision which we say would be found to conclude that you cannot separate these issues out from the merits. Well, that's a perfectly sensible test, and, indeed, it is a perfectly fair exposition so far as concerns Suriname's so-called preliminary objection."

Later, as Guyana's counsel continued, and I quote, "You have seen the memorandum on objections that Suriname has put in. It all goes to the defense on the merits, whether or not there was an agreement on Point 61, whether or not Suriname was or was not justified to use force, and so on and so forth. The arguments are inevitably and inextricably linked to the merits." That's Page 26 of the Guyana-Suriname transcript, Lines 32 to 38. Well, quite right so far as concerns Guyana and Suriname. But the contention that the Preliminary Objections in this case are similarly inextricably linked to the merits is pure wishful thinking.

As to our so-called "weak point" on Article 2.97 and then our sovereignty claims, the argument came down to taking two short passages from our Preliminary Objections and saying that you have to decide any factual issue that we may have alluded to in our Preliminary Objections. Now, that is not so, and this is not how we've put our Preliminary Objections either, either in writing or in our submissions today.

14:53 Mauritius's point comes down to three instances where it says you have to get into the merits. On the question of application of Article 297(1)(c) on the application of specified international rules and standards, it says you have to go into evidence on what the MPA is; and, as I said earlier, of course you can do that in applying Article 297. Of course you can look at the documents establishing the MPA.

I recall, in its Memorial, Mauritius relies on three provisions as far concerns this part of its non-sovereignty claims, Articles 55, 62(5), and 194 of the Convention. We have specific jurisdictional objections which show how those provisions do not fall within Article 297(1)(c). Articles 55 and 62(5) concern the regime of the EEZ and utilization of living resources within the EEZ, and the intent behind Article 297(1)(c) was evidently not to introduce into dispute-resolution matters that are specifically excluded by Article 297(3)(a). Their invocation of these two provisions simply doesn't get them through the door so far as concerns Article 297(1)(c), a specifically jurisdictional issue.

The same applies to Mauritius's invocation of 297(1)(c) with respect to its claim for breach of Article 63(1). That is the claim of failure to coordinate with respect to the development of tuna stocks.

As to Article 194, this concerns measures necessary to prevent, reduce, and control pollution of the marine

14:55 environment, not the Declaration of an MPA. Mauritius says we're wrong. Well, fine, but these are matters we can decide at a separate jurisdictional phase. As I said earlier, the Tribunal can, if need be, look at documents establishing the MPA at a preliminary objections phase and decide, for example, whether it is aimed at prevention of pollution as Mauritius contends so far as concerns its Article 194 claim.

This takes me to Mauritius's territorial sea claim under Article 2(3). This is now said to be a no-go area, and you're not allowed even to interpret Article 2(3) for jurisdictional purposes, which is flatly inconsistent with the ICJ's approach that the jurisdictional objections phase in the Oil Platforms Case, which you may, in fact, recall is helpfully explained in the Separate Opinion of Judge Higgins in that case.

Article 2(3) reads--and it's probably worth just going to this briefly so you have it fully in mind--the sovereignty over the territorial sea is exercised subject to the Convention and to other rules of international law.

What we say about that provision and the jurisdictional objection that we ask you to resolve in due course at a discrete jurisdictional phase is at 5.45 and following of our Preliminary Objections. As we explained there, UNCLOS does not give other States any right to fish in the territorial sea. Mauritius's claim to do so depends

14:57 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 merchant vessels in the territorial sea or on the basis of in-shore fishing rights traditionally exercised by Mauritian fisherman. Whether Mauritius has these rights within the BIOT territorial sea or by its waters beyond the territorial sea is not a question relating to the interpretation or application of UNCLOS as required by Article 288(1), and is not covered by any agreement to submit disputes concerning such non-UNCLOS rights to Part XV dispute settlement pursuant to Article 288(2).

So, we say this part of the claim is beyond your jurisdiction. It's a jurisdictional argument. The point is then developed at 5.48. "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." I think Professor Sands may have got excited about that point. "But Article 2(3) does not incorporate other treaties nor a fortiori unilateral undertakings into the Convention. Mauritius simply assumes that Article 297 confers jurisdiction over disputes concerning the territorial sea that do not concern innocent passage."

There is the jurisdictional argument. We say you look at Article 2(3), and you, as the Tribunal, do not have the

14:59 jurisdiction within 2(3) to decide on the nature and content of all these undertakings. Right or wrong, it's a point that you're entirely entitled to engage in at a preliminary objections phase. That is precisely what the International Court of Justice did in the Oil Platforms Case. It interpreted the provisions; you will remember the 1955 Iran-U.S. Treaty of Amity for jurisdictional purposes to see if the facts alleged by Iran could constitute breaches of the Treaty relied on, the individual provisions of the Treaty relied on. And you will recall that it knocked out most of the heads of the claim but let in one head of claim dealing with breach, and I think it was, Article 10 to do with freedom of Commerce and Navigation. These are matters that you can quite properly engage in at a discrete jurisdictional phase.

I should add, however, that the claim seems to come down to an allegation that somehow, in 1965, long before there was any concept of an EEZ, the U.K. exercised its sovereign rights so as to restrict what it could do in the future so as concerns Declaration of an MPA. If that is so, that's what this claim is really about, it comes down to an exercise of sovereign rights, and that is precisely the subject of an exclusion under Article 297 of the 1982 Convention.

Another pure jurisdictional issue.

On abuse of rights, I need only take you back to what we say in our Preliminary Objections, and that's at

15:01 Paragraph 5.54. We say, "The Article 300 claim is simply a repackaging of Mauritius's other allegations of breaches of UNCLOS. If the Tribunal has no jurisdiction over the alleged violations of the relevant fisheries articles of UNCLOS--that's Article 61 through to 64--then it follows it can have no jurisdiction over an alleged abuse of rights arising out of the same provisions. If the Tribunal were to interpret abuse of rights in Article 300 as creating an independent basis of jurisdiction over fisheries disputes, it would render Articles 297(3)(a) and (b) redundant and undermine the carefully constructed dispute-resolution provisions of Part XV of UNCLOS."

Again, a pure discrete jurisdictional issue.

Finally, I want to return briefly to the practicalities because it is worth pausing to compare, in pure case management terms, the competing possibilities of, on the one hand, a discrete jurisdictional phase of, say, three days' argument addressing serious and important jurisdictional objections against the competing possibility of a joint hearing of jurisdiction and of merits, spanning, say, three weeks in the course of which, in addition to these jurisdictional issues, Mauritius would be making its argument on sovereignty over the islands on the basis of the principles of territorial integrity, self-determination, and so on, complex and time-consuming issues, and then you would be looking at its

15:03 claim for existence of certain specific rights stemming from the 1965 arrangements and then its arguments as to how these were breached by the MPA and its claim that the MPA breaches the 10 provisions of the Convention. This they did in detail in Paragraph 5.35 of the Memorial and then, of course, the U.K. has to defend the claims.

And the end result of all this might well be no more than to take one distinctly possible outcome, a ruling from the Tribunal that the requirements of Article 283 were never met, and it lacks jurisdiction, or another distinctly possible outcome--more than distinctly, we would say, that the Tribunal has no jurisdiction to decide questions of sovereignty, and you have got there after a lengthy and costly three-week hearing.

In fact, it's probably wrong to focus just on the time of the hearing. And important also to focus on the length of time it would take putting together the written pleadings that would lead into the hearing.

We say, coming to those decisions on jurisdiction at the end of a lengthy merits hearings would represent a most unsatisfactory result in case management terms, at least from the perspective of the United Kingdom, but also from the perspective of the Tribunal, the members of which no doubt have many other demands on their time other than sitting through exhausting arguments on the merits that, in the end, it decides that it did not have to decide.

15:05 And thinking through these practical realities serves to demonstrate that the U.K.'s approach to Article 11(3) must be the correct one. Article 11(3) cannot be sensibly interpreted as directed to such an approach, markedly out of scope with the practice of the ICJ and ITLOS that produces a result that simply makes no sense in case management terms, and also cuts across the whole purpose of preliminary objections in protecting a State from having to defend the merits of a claim where there are material issues as to jurisdiction.

Mr. President, Members of the Tribunal, I thank you for your kind attention. And if there are no questions at this stage, I ask you to call Mr. Whomersley to the podium to conclude our submissions.

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

Yes, I call upon Mr. Whomersley to make a final statement. Thank you.

MR. WHOMERSLEY: Mr. President, Members of the Tribunal, at this stage I will only say one thing: The United Kingdom takes a very serious view of this case. Mauritius is seeking to challenge United Kingdom's sovereignty over part of its land territory by invoking the Law of the Sea Convention. This is not only a challenge to our sovereignty, something no State will take lightly, it is also a serious challenge to the Law of the Sea Convention itself.

15:07 It remains for me to make the concluding submissions on behalf of the United Kingdom, and I will do so briefly. For the reasons given in writing and orally today, the United Kingdom respectfully requests the Tribunal not to defer the United Kingdom's Preliminary Objections to the Final Award, but to decide in accordance with Article 11(2)(a) of the Rules of Procedure that its Preliminary Objections be dealt with as a preliminary matter.

I would like finally to thank you, Mr. President, Members of the Tribunal, for your kind attention today. I would like to thank our Registry provided by the PCA's international bureau and to our kind hosts here in Dubai, the Dubai International Arbitration Centre for the excellent arrangements that have been put in place for this hearing.

Thank you very much, Mr. President.

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

Now I call upon the Agent for Mauritius, Mr. Dabee.

Oh, we have a break, of course. I'm terribly sorry. Well, we've set aside half an hour for break--45 minutes, and as from quarter past 2:00, 10 past 3:00, well, we will resume at 4:00. Will that be satisfactory? Okay.

(Off the record from 3:09 p.m. to 4:00 p.m.)

PRESIDENT SHEARER: Well, now, I will call now on Mr. Dabee. I'm sorry to have given you a fright before, but

16:01 now it is your turn to--

MR. DABEE: Mr. President, we shall be rebutting, and Professor Crawford will address you first followed by Alison Macdonald, and finally I will make a few concluding remarks after they finish.

PRESIDENT SHEARER: Thank you very much.

Professor Crawford.

REBUTTAL ARGUMENT BY COUNSEL FOR MAURITIUS

PROFESSOR CRAWFORD: Thank you, Mr. President and Members of the Tribunal. I shall add to what the Agent just said, that we will be brief, mercifully perhaps at this stage of the afternoon.

The Tribunal has no questions and we have nothing to say on Preliminary Objection 3. Everything that needed to be said was said this morning.

But I have something to say about Preliminary Objection 1, and Ms. Macdonald has something to say about Preliminary Objection 2, and we will try and do that as briefly as possible.

Mr. President and Members of the Tribunal, we believe that we have established three things, and there is not much room for disagreement on those three things.

First is that under your Rules, as formulated, there is no presumption in favor of bifurcation. And the practice of tribunals varies, but these Rules do not provide for

16:03 suspension. They do not provide for a maxi hearing on jurisdiction. As, Sir Michael Wood said, they are more or less balanced. We don't think that the practice of the ICJ can be added to one side of the equation in a situation in which the language of the ICJ statute is actually not replicated.

The second thing, I think, on which we agree is that the Tribunal has the discretion in this matter, taking into account all the circumstances.

And the third thing, although Mr. Wordsworth professes to disagree with this, but it seems to me to be inevitable from the language of the relevant texts, is that Courts and tribunals under Part XV of the Convention have some level of incidental jurisdiction; how much, one can debate.

The United Kingdom took quite a lot of time discussing the abstract question whether the issue of sovereignty over territory was ever within jurisdiction, and that question can be debated in Law Review articles, but the question is not whether it's ever within jurisdiction; it's whether it's within jurisdiction in this case.

In other words, the question is whether this interesting abstract law review question can be divorced from the merits of this case and determined on the basis of general legal argument and authority. We say that it cannot, and there are three reasons for that:

First, this is a mixed dispute. It's a dispute about

16:04 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.

It's impossible to examine the nature or to characterize a mixed dispute without looking at the facts, the history, and the context. Mr. Wordsworth put it in Cartesian terms when he said that either you have jurisdiction or you have not. But whether you have jurisdiction in relation to a mixed dispute is a question that can't be decided in the abstract, and there is no presumption that it should be decided as a separate question.

We say that the facts, the history and the context are such that the question cannot or should not be considered in the abstract and they are such that the U.K. in this case, at least, could not or should not have declared the Marine Protection Area unilaterally. That's the second point. The facts, the history, and the context are such that the question whether the U.K. could or should have declared the MPA unilaterally arises in relation to those facts and circumstances.

If, for example, the Tribunal was to consider the question, the abstract question, the law review question of jurisdiction over sovereignty in general, in the second round we would argue--and unless this Tribunal told us not to--that although that may be true in general, it was not true in relation to these facts in this situation. Now, either you preempt that question by deciding it without examining the facts or you leave it to the merits to decide. The first is unfair. The second is more convenient. And this leads to my third point, which concerns efficiency and non-duplication of effort.

Now, you've heard what both sides have had to say on the question of efficiency and its views assessed in the circumstances. I have to say that I have been in one or two cases in which the Tribunal--I use the word "Tribunal" in a generic sense--has appeared to preempt the merits by some decision taken at the preliminary stage, and it leaves a bad taste in the mouth whether or not the case proceeds. Case management is one thing and allowing the parties to make their arguments is another thing, and the Tribunal should, in case of doubt, prefer the second course to the first.

The change in the ICJ Rules that occurred in the late Seventies was due to the debacle of the South West Africa Cases and the Barcelona Traction Case, as was referred to by my learned friend Mr. Wordsworth. They were cases which lasted the best part of a decade in which, for example, as described in the recent biography of Sir Percy Spender, the President in

16:08 the South West Africa Cases, which the world was listening to the Court, in 1966, having had a full case decision on the merits, listening to the Court and having a decision of an abstract--sorry--a rather arid character in relation to the issues that appear to have been decided. And that case is a mile away from this case. This case was started relatively recently, has been dealt with very efficiently, is due to be argued on the merits next year, and the suggestion is that it should be strung out in a way which is unnecessary having regard to the character of the issues and the pleadings and is--will involve duplication in the way that I've already suggested.

The International Court cases dealing with incidental consideration of the merits at the jurisdictional stage use the Permanent Court formula to touch upon particular issues, and it's clear that at the jurisdictional stage, the Tribunal may touch upon or consider issues of the merits in the context of its decision. But to use a distinction that Don Juan's damsel would have recognized, there is a distinction between touching upon something and embracing it. And in the present case, if you are to decide this case satisfactorily, it will require you to embrace the merits in a full-hearted way. In other words, there will be two substantial hearings, as we say that it's inevitable there will be a second, in which many of the same issues will be canvassed and recanvassed in slightly different

16:10 legal contexts, and that's not efficient.

Mr. Wordsworth said that I did not refer to the equivalent opt-out issue in relation to the rest of the UNCLOS. But we have to take UNCLOS as it stands, and, as it stands, it makes a distinction in Article 298 between maritime delimitation cases and cases involving, for example, entitlement to maritime territory, Article 121. If the Parties had wanted to exclude on an optional basis consideration whether particular rocks, for example, are entitled to an exclusive economic zone, they would have included Article 121, Paragraph 3 in the provisions of Article 298. They didn't do so. It's been said that Part XV of the Convention was overprepared, overdrafted, overnegotiated. It certainly took a long time to do because other things were going on, but it was very carefully considered.

And the distinction that it draws between maritime delimitation and other cases is a distinction which strikes the eye, and it seems, with respect, illegitimate to use unspecified or largely unspecified aspects of the travaux préparatoires in order to deny the obvious inference that's to be drawn from Article 298.

Reference is made to the Preamble of the Convention. The Preamble of the Convention refers to all issues of the Law of the Sea--all issues of the Law of the Sea--and the indications are that it was intended to be comprehensive.

16:12 What's the point of referring to other matters of international law unless you already have a relatively comprehensive jurisdiction?

United Kingdom is silent in relation to my reference to Professor Boyle's view, which can't be described as heterodox, so let me take you to the relevant pages. This is the article in the 1997 International Comparative Law Quarterly, where he says at Page 44, and it's Tab 7 in this morning's bundle, if you would like to look at it.

At Page 44, he says the second problem in relation to maritime boundaries, "the second problem arises from the combination of Articles 297 and 298. Take a dispute involving EEZ claims around a disputed island or rock, such as Rockall, and the exercise of fisheries jurisdiction by one State within this EEZ. How do we characterize this dispute?[...]Does it necessarily involve disputed sovereignty over land territory so that even compulsory conciliation is excluded? Or is it a dispute about entitlement to an EEZ under Part V in Article 121, Paragraph 3, of the Convention? If it is the last, it is not excluded from compulsory jurisdiction under either Article 297 or 298. Much may thus depend on how our hypothetical dispute is put."

It's not necessary for present purposes, I should say in fairness, to answer these questions, but they should suffice to show that everything turns in practice not on what each case

16:14 involves but on how the issues are formulated. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently and it falls inside.

That was an exploration of the possibilities, and I have explored them even further today, and the Tribunal will no doubt have to explore them in due course. We say it is both fairer and more efficient and consistent with the Procedural Timetable that you've laid down that you consider them together with the merits in a single hearing.

Mr. Wordsworth refers to the sui generis argument to which he was not, I may say, very generous. But as I've said, if you decide this case in the abstract, unless you exclude the sui generis argument, it remains on the table for the merits phase, and we will argue it in greater detail at that stage, but our case really is different. This really is a case where whatever the position of the United Kingdom, Mauritius had recognized legal interests in relation to the Marine Protected Area, and that issue will not be evaded by a jurisdictional decision on the abstract question.

Counsel referred--although the Tribunal has directed us not to refer to new authority, counsel did refer to new authority in the form of the Oil Platforms Case in which the Court disqualified two of the three Articles of the Treaty of Amity on which Iran relied as capable of supporting jurisdiction in relation to allegations of destruction of Oil

16:15 Platforms during armed conflict in the Gulf. I have to say, I vividly remember after that decision was handed down being told by colleagues, the Court has decided some of the merits for you. But however that may be, it's important to look at the two Articles which the Court actually held were not capable of covering the allegations made.

Article 1 said, this in resounding terms nearly 20 years after the Iranian Revolution, there should be firm and enduring peace and sincere friendship--sincere friendship--between the United States and Iran. And the Court said, and I think with some credibility, that a clause of that sort was not capable of supporting the incorporation by reference of Article 2(4) and 51 of the United Nations Charter, not to say anything about Chapter 7. It was a preambular paragraph which was relevant to interpretation of the Convention but nothing else.

That's a long way from our reliance on provisions such as Article 2(3) of the Convention, which are determinant in meaning, capable of meaning what they say and which do expressly incorporate by reference the Rules of international law. But the Court said that it cannot, taken in isolation, be a basis for the jurisdiction of the Court; and courts sometimes do that, but we say this is not such a case.

The second Article is Article 4, which dealt with the fair and equitable treatment of companies of the other State.

16:17 Now, the fact is that the oil platforms are owned by a State-owned corporation, but again the Court said that Article 4 was not capable of bearing the weight, did not cover the claim that was made. That does not involve reformulating the claim. The claim was made in explicit terms in relation to the use of armed force against the oil platforms in the Gulf. But it was clearly not covered by provisions on which Iran relies. That left another Article, Article 10, which the Court held was capable of covering the dispute, although whether it did was, of course, a matter left to the merits.

It has to be conceded that the Courts have shown some level of discretion in deciding whether to bifurcate or not, and I already conceded--already accepted that some discretion is involved, but for the reasons we have given and for reasons which Ms. Macdonald will elaborate upon further, any discretion you have in this case should be exercised firmly in favor of not bifurcating, of dealing with the case as a single entity because that's the way it has been presented, and that's more consistent with the Procedural Timetable which this Tribunal has laid down.

Mr. President, unless there are any questions, that's all I have to say, and I ask you to call upon Ms. Macdonald.

PRESIDENT SHEARER: Thank you very much, Professor Crawford.

So, I call on Ms. Macdonald. Thank you.

16:19 MS. MACDONALD: Thank you.

Just two brief concluding topics from me, the first being a few words on the U.K.'s second preliminary objection, namely whether or not there is a dispute under the Convention and whether there has been the necessary exchange of views.

We said almost everything that we wanted to say on this topic this morning, but I thought it was important to look for a moment at Paragraph 5.38 of Mauritius's Memorial on which the U.K. places some weight. I don't ask the Members of the Tribunal to turn it up at present, but for the transcript and for the note, there are a number of points that we make about it.

This paragraph is said to, I think, involve some concession by Mauritius, that, indeed, all that the Tribunal needs to do to decide on this preliminary objection is to take a snapshot of the diplomatic record in 2009 and 2010. We invite the Tribunal to read that paragraph, and the Tribunal will see that it says, among other things, as set out in Chapter 4--and you will recall that Chapter 4 of Mauritius's Memorial sets out the U.K.'s successive claims to maritime zones over the Chagos Archipelago over several decades. It is not limited to the formation of the MPA, and it sets out Mauritius's consistent and strong objections to the U.K.'s entitlement to declare those zones.

As set out in Chapter 4, there has been a full

16:21 exchange of views between Mauritius and the U.K. concerning the dispute in regard to the MPA and related matters, and we give one example of the related matters, including the deposit with the UN Secretary-General of coordinates and delimitation in accordance with Article 75 of the Convention, an event which, of course, took place in 2003, as we set out in Chapter 4.

So, this is not a question as one example that we give. There is not a question at all of any suggestion by Mauritius that what you can do is simply look at the exchanges which are closest in time to the declaration of the MPA, when, in fact, this is a zone which, quite clearly on its face and in its very legal structure, builds upon past zones to which Mauritius has consistently objected over decades, where those consistent objections have been expressly pleaded and relied upon in Mauritius's Memorial annexed to it and, to add another complicating factor, where those consistent objections are intertwined with the complex and long-running sovereignty dispute, which we have separately dealt with.

So, we say that there is absolutely nothing in this paragraph or otherwise to detract from Mauritius's position that this is a matter which is complex, requires the Tribunal to look very carefully at the long and unhappy history in order to understand both the expressions that Mauritius has made of the substance of its objections over the years; and secondly, properly to place an analysis of that into a proper context.

16:22 That's all we say about the U.K.'s second preliminary objection and its reliance on that paragraph.

Now, just to pick up on the final point that Mr. Wordsworth made, which he headed "practicalities."

He asked you to compare two situations: A three-day preliminary hearing on jurisdiction alone, and a three-week merits hearing.

And we say that's a false comparison. Why? Because of the substantial quantity of evidence you will have to review in order to rule on the U.K.'s objections, and this stems from the nature of those objections and the nature of the evidence that's required to look at those. So, it's simply a false comparison. There is not realistically going to be anything other than a very substantial and significant jurisdiction hearing in this case, if that is the path that the Tribunal chooses to follow.

The real comparison, we say, is between a lengthy preliminary hearing then followed, if the Tribunal rules it has jurisdiction over the claim, by a lengthy merits hearing covering much of the same ground, or a lengthy merits hearing at which everything is dealt with at once, without trying to hive matters off or hearing evidence which the U.K. says will then not be duplicated at the merits hearing, so leaving some evidence in the past and not looking at it again even though it's relevant to the merits when you get to the merits hearing.

16:24 It's not clear to us at all how such a procedure would clarify matters or would streamline matters or would in any way be an efficient way to proceed.

And, as Professor Crawford has mentioned, on the Rules of Procedure in this case, the merits hearing is due to commence no later than February of next year. So, in just over a year's time the matter will be argued.

The U.K. doesn't mention in its second round of submissions the question of delay. It asks you only to look at, on the question of practicalities, the respective lengths of the two hearings, as it chooses to compare. And we say not only is there a completely false dichotomy between the impractically slender jurisdiction hearing, which is mooted, and the lengthy merits hearing that there would be, but also this completely ignores the other very important point, which is it's in the interest of everybody--the Parties and the broader administration of justice--to get this case resolved, and there is a clear, sensible timetable and path by which this would be argued in just over a year's time rather than introducing a phase which we say we have to be justified by the clearest possible considerations of both justice and expediency.

The U.K. seemed in its second round ready to accept that the jurisdictional hearing would be substantial when you look at it. For example, Sir Michael Wood said, well, in fact, 16:26 the more you have to look at the facts of the jurisdictional hearing, he claimed at one point, the more reason there is to have a lengthy jurisdictional hearing.

We think what that inverts, what has been the practice of international tribunals to date, which has been to steer clear of preliminary hearings, where they are so intertwined with the evidence that they're going to be substantial and lengthy. The answer seems to be from the U.K. whether it will help to clarify matters in some way for the merits.

But we say, well, that's not as helpful or straightforward to spread the evidence over two hearings and try to avoid duplication as to have all the evidence in one hearing without delay. That, we say, is the most sensible perspective from the point of view of administering fair and efficient justice as between the Parties.

And one area where the U.K. certainly seems to accept that there will have to be lengthy expert evidence is the Article 283 argument, the U.K.'s second preliminary objection that I touched on a moment ago, where Mr. Wordsworth said in terms that the review of the evidence, I quote, "may conceivably be a lengthy exercise."

So they are accepting, I think, really, that this is not going to be a three-day preliminary hearing. It's going to be a lengthy preliminary hearing where we will then have to try to contort ourselves to avoid duplication at the merits

16:27 hearing, and we say that's a contortion that's simply not going to be achieved.

We have to bear in mind not just practicality here, but also principle. We didn't hear much from the U.K. in the second round about the relationship of its Preliminary Objections with the merits. And again this isn't just a question of weighing the quantity of evidence that would be involved in a preliminary hearing, important though that is from the perspective of the administration of justice.

This is also a very important question of principle where the international authorities are completely consistent. You cannot, should not enter into Preliminary Objections where that would risk pre-judging the merits.

And, of course, the reason for that is fairness to the Claimant State because that means that the merits of their claim will be, as it were, judged when they have one hand tied behind their back, when the merits haven't been fully gone into.

So, ultimately, we say, the test is perfectly encapsulated in Paragraph 2 of Order Number 2 in the Guyana case, where the Tribunal said, well, the facts and arguments in support of Suriname's submissions in its Preliminary Objections are in significant measure the same as the facts and arguments in which the merits of the case depend, and the objections are not of an exclusively preliminary character. That completely

16:29 encapsulates what we say about this case.

And we're not trying to say the facts are the same or the Preliminary Objections are of the same nature. We are saying applying that same test, which we say is apt, we meet both limbs of it. And we say, why should you introduce extra delay, extra cost into the process for no good reason? We say it's wrong in principle and it's impractical.

And, Mr. President, Members of the Tribunal, that is all I had to say on the application of the legal tests of the case, and I ask you to invite Mr. Dabee to make Mauritius's concluding remarks.

PRESIDENT SHEARER: Thank you, Ms. Macdonald.

And I give the floor now to Mr. Dabee. Thank you.

MR. DABEE: Mr. President, at the end of his concluding remarks, Agent for the U.K. made this fairly direct and strong statement, i.e., he said, if I am quoting him well, what Mauritius is seeking is to challenge the Law of the Sea Convention and also challenging the U.K.'s sovereignty.

If we pause for a second and without in any way attempting to reopen any arguments that have already been made today, I will just speak on one matter which we have argued in our case. Let's consider the averment that historic rights of Mauritian citizens' fishing rights have been abrogated. Is this what Agent for the U.K. is inviting the Tribunal to consider as falling outside the Law of the Sea issues referred

16:30 to in the Preamble to the Convention? Is this what Agent for the U.K. wanted to believe constituted a challenge to the sovereignty of the U.K.?

Well, these and the other many other submissions made on behalf of the Republic of Mauritius would be matters for you to give your attention to. We simply submit that we have put before you sufficiently cogent argument to persuade you to order and, in fact, Mauritius invites the Tribunal to order, that all of the U.K.'s Preliminary Objections be deferred for consideration at the merits stage.

Well, unless there are other issues which delegation for Mauritius needs to enlighten the Tribunal about, we consider that we have done with our case. If that is so, Mr. President, we would thank the President and the Members of the Tribunal for the patience for us today, and also wish to seize the opportunity to thank the Dubai Chamber for putting these excellent facilities at our disposal.

Thank you, Mr. President.

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

Well, now, it remains for me to, first of all, indicate that the Tribunal will obviously deliberate on these arguments and will hand down its decision, make its order in due course. I cannot at this stage give you a firm indication of when that will be, but obviously we will treat this with both expedition, at the same time careful consideration of all

16:32 the arguments that we have heard, both written and in today's proceedings.

I would like to thank the Agents and counsel, advisors of both Parties for their excellent presentations and their care and courtesy.

I would like to thank Mr. Daly, our Registrar, for all his work, and also Mr. David Kasdan for his transcript.

The only thing, just before concluding altogether, I understand that you have been notified that there will be a photographer in attendance, and so would you please remain behind after the formal closure for those photographs to be taken. But thank you very much again, and these proceedings are now concluded. Thank you.

(Whereupon, at 4:33 p.m., the hearing on bifurcation was concluded.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN