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

MAURITIUS

v.

UNITED KINGDOM

WRITTEN REPLY OF THE UNITED KINGDOM TO THE WRITTEN OBSERVATIONS OF MAURIITIUS

PROCEDURAL HEARING OF 11 JANUARY 2013

21 DECEMBER 2012

A. INTRODUCTION

1.1 The United Kingdom refers to the letter from the Permanent Court of Arbitration of 13 December 2012, in which it was stated by reference to Article 11(4) of the Rules of Procedure that:

> "The Tribunal's intention was that arguments or authorities would not be introduced for the first time during the course of the January hearing that could have been raised within the procedure for written submissions foreseen in the Rules of Procedure. Accordingly, should the United Kingdom consider that it wishes to provide a written Reply to the Written Observations of Mauritius on Bifurcation, the Tribunal hereby extends the deadline for such submission until **Sunday, 23 December 2012.**"

1.2 The present Written Reply is submitted in response to this explanation and extended deadline. It is, however, emphasised that the United Kingdom's previous decision not to serve a reply was, as indicated in its letter of 4 December 2012, motivated by its belief "that the respective positions of the Parties are now clear from the written submissions to date", and not by any desire to surprise Mauritius by deploying new argument or authority to which it might be unable readily to respond (to the extent that it considered fit) at the forthcoming hearing.

1.3 In this respect, it is recalled that, in its letter dated 10 December 2012, the United Kingdom stated that it would be happy to provide the Tribunal and the Government of Mauritius with the names of any authorities that it intended to rely on by 7 January 2013. This may be contrasted with the approach of Mauritius at the last hearing, i.e. the hearing on challenge of 4 October 2011. There, Mauritius prepared Judges' Folders containing a considerable number of completely new authorities, without giving any advance notice.

1.4 For practical reasons (including the involvement of its Counsel in other proceedings), the United Kingdom has not finalized the preparation of its 11 January 2013 oral pleadings. It follows that the submissions below are necessarily in outline form, and it is not possible to identify at this stage each individual authority that may be relied on. However, the proposal that a list of authorities be submitted by 7 January 2013 remains, and it is suggested that this apply in respect of both Parties.

B. LEGAL PRINCIPLES

2.1. The United Kingdom's position on the preliminary nature of its objections to jurisdiction was set out in Chapter 6 of its Preliminary Objections dated 31 October 2012, to which Mauritius replied on 21 November 2012. In its letter of 4 December 2012, the United Kingdom indicated that it considered that -

> "the issues that now fall for determination are (i) the nature of the test to be applied by the Tribunal pursuant to Article 11(3) in assessing whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award, and (ii) application of that test to each of the three preliminary objections raised by the United Kingdom."

2.2. There will thus be two strands to the United Kingdom's response. The first concerns the legal principles relevant to the joinder of preliminary objections to the merits. And the second will apply these principles to the United Kingdom's preliminary objections, showing that each is well-suited to determination at a preliminary phase. This is a matter that flows from the nature of the jurisdictional objections identified in the United Kingdom's Preliminary Objections dated 31 October 2012. The Tribunal has that filing, and it would not appear useful to revisit or summarise its contents here.

2.3. As to the applicable legal principles, the question before the Tribunal at the hearing on 11 January 2012 is whether the United Kingdom's Preliminary Objections, or any of them, should be heard at the same time as the merits, rather than being addressed as a preliminary matter, that is, at a preliminary objections phase, with a hearing separate and prior to any hearing on the merits.

2.4. The overriding test, in the United Kingdom's submission, is whether the Tribunal is able to conclude, on the basis of the written pleadings to date and the hearing on 11 January 2013, that the Preliminary Objections are unsuitable for consideration at a Preliminary Objections phase. If it not able so to conclude, then there should be a separate hearing on the Preliminary Objections.

2.5. It will be submitted that the Tribunal should only decide to hear a particular Preliminary Objection at the same time as the merits if it is able to decide definitively, on the basis of the written pleadings to date and the oral pleadings on 11 January 2012, that the Preliminary Objection can only be decided at the merits stage.

2.6. Only exceptionally (as in *Guyana v. Suriname*) where it is clear to an Annex VII tribunal, without the benefit of a separate hearing, that a preliminary objection does not have an exclusively preliminary character, should it join a preliminary objection to the merits and forego a separate preliminary objections phase.

2.7. The United Kingdom proposes, at the hearing on 11 January 2013, to address the applicable legal principles under three main headings:

First, the provisions of the 1982 Law of the Sea Convention (UNCLOS) and of this Tribunal's Rules of Procedure, in so far as they are relevant to the question before the Tribunal on 11 January 2013.

Second, the general principles of international law relating to the procedure for handling preliminary objections, as evidenced by the practice of international courts and tribunals. Such general principles may supplement the relevant provisions of the Convention and the Rules, and assist the Tribunal in interpreting and applying those provisions. The United Kingdom will address in particular the law and practice of other courts and tribunals that may exercise jurisdiction under Part XV of UNCLOS: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), and other Annex VII arbitral tribunals.

Third, the criteria which should be applied to determining whether, exceptionally, preliminary objections to jurisdiction should not be heard at preliminary stage, as is the normal practice in inter-State litigation.

2.8. With respect to the second and third headings referred to above, in addition to the various authorities referred to by Mauritius in its Written Observations of 21 November 2012, the United Kingdom intends to refer at the oral hearing to the following:

(i) Rosenne, *The Law and Practice of the International Court, 1920-2005* (2006), in particular Chapter 13, and authorities cited therein.

(ii) Zimmermann et al eds., *The Statute of the International Court of Justice. A Commentary* (2nd ed., 2012), in particular the sections on General Principles of Procedural Law, Article 36 and Article 43, and authorities cited therein.

(iii) Rosenne, "International Court of Justice", in *Max Planck Encyclopedia of Public International Law* (2012).

(iv) *Mauritius v United Kingdom, Reasoned Decision on Challenge*, 30 November 2011.

(v) *ARA Libertad, Joint Separate Opinion, Judges Wolfrum and Cot*, International Tribunal for the Law of the Sea, 15 December 2012.

2.9. As noted above, the United Kingdom proposes that the Parties exchange a more detailed list of authorities shortly prior to the hearing.

2.10. After describing the applicable principles, the United Kingdom will apply the principles to each of its Preliminary Objections. It will show that in the case of none of them is the Tribunal in a position to decide definitively, on the basis of the written pleadings to date and the oral pleadings on 11 January 2012, that the Preliminary Objection can only be decided at the merits stage.

C. INTER-GOVERNMENTAL EXCHANGES

3.1 In its letter of 13 December 2012, the Tribunal requested that the records of the inter-governmental exchanges of 3 June 2010 and 22 July 2010, referenced in the United Kingdom's letter of 4 December 2012, be introduced into the record as exhibits.

3.2 In this respect, the United Kingdom's letter of 4 December 2012 had annexed its records of the two exchanges referred to by Mauritius in paragraph 65 of its Written Observations of 21 November 2012 (in the context of the issue of whether there was an exchange of views between the Parties as required by article 283(1) of the Convention), that is, two replies given by the Prime Minister of Mauritius in parliamentary sessions

of Mauritius dated 27 July and 9 November 2010 referring to inter-governmental exchanges of 3 June and 22 July 2012 respectively.

3.3 By way of further explanation, Mauritius was responding in its Written Observations[1] to the statement that Mauritius "had not even sought to communicate with the United Kingdom about the MPA for over eight months between 2 April 2010 and 20 December 2010 when it submitted its Notification and Statement of Claim". According to the record of specific exchanges relied on by Mauritius in its Memorial to meet the jurisdictional requirements of article 283, this statement is correct. Mauritius disputes this point in its Written Observations and takes the opportunity to refer to the two further exchanges referred to above (not included in its Memorial) as "examples" of further correspondence between the parties after 2 April 2010 and before the filing of its Application on 20 December 2010. The reference to the two exchanges of 3 June and 22 July 2010 as "examples" suggests that Mauritius considers that there were other relevant exchanges between the Parties in this period.

3.4 Accordingly, the United Kingdom has undertaken a complete search of its records for the period 2 April – 20 December 2010 to ensure the Tribunal has, as far as possible, a particularised record of the exchanges between Mauritius and the United Kingdom concerning BIOT in this period. The United Kingdom has identified six meetings between Mauritius and the United Kingdom in the 2 April – 20 December 2010, including those on 3 June and 22 July referred to by Mauritius, and exhibits its records of those meetings (in chronological order) as follows:

Date (2010)	**Details**
29 May	Andrew Pocock, the Director of the FCO's Africa Directorate, met Mahen Kundasamy, Mauritius' High Commissioner in London. A note of the meeting was taken by Hayley Stebbing, a Desk Officer at the FCO's Mauritius Desk, also present at the meeting, and recorded in an internal email dated 27 May 2010, forwarded by Sarah Riley, Head of the FCO's Southern Africa

[1] See para. 65 of Mauritius' Written Observations, responding to the United Kingdom's Preliminary Objections, para 4.26.

Directorate, also present at the meeting. A redacted copy of the email is attached as **exhibit 1**.

3 June — William Hague, the United Kingdom's Foreign Secretary, met Dr Ramgoolam, Mauritius' Prime Minister. A note of the meeting was taken by Catherine Brooker, Private Secretary to the Foreign Secretary who also attended the meeting. Ms Brooker's record of the meeting is recorded in an internal email dated 6 June 2010. A redacted copy of the email is attached as **exhibit 2**.

15 June — Andrew Pocock, Director of the FCO's Africa Directorate, met Mahen Kundasamy, Mauritius' High Commissioner in London. A note of the meeting was taken by Hayley Stebbing, Desk Officer for Mauritius at the FCO, also present at the meeting, and recorded in an internal email of the same date. A redacted copy of the email is attached as **exhibit 3**.

22 July — Henry Bellingham, Minister of State for Foreign and Commonwealth Affairs, met Arvin Boollel, Mauritius' Minister for Foreign Affairs, Regional Integration and International Trade in the margins of the AU Summit in Kampala on 22 July 2010. A record of the meeting was taken by Emily Maltman, Private Secretary to the Minister of State, also present at the meeting, and recorded in an internal email dated 9 August 2010. A redacted copy of the email is attached as **exhibit 4.**

9 Sept — Nick Leake, the United Kingdom's newly appointed High Commissioner in Port Louis, met separately with President Jugnauth, Arvin Boollel, the Minister for Foreign Affairs, Regional Integration and International Trade, Arvin Boollel, and the Prime Minister, Dr Ramgoolam. The High Commissioner circulated an internal note of these meetings by eGram dated 14 September 2010. A redacted copy of the eGram is attached as **exhibit 5.**

10 Sept	Tim Hitchens, the newly appointed Director of the FCO's Africa Directorate, met Mahen Kundasamy, Mauritius' High Commissioner in London. Hayley Stebbing, Desk Officer for Mauritius at the FCO, also present at the meeting, took a note of the meeting and recorded it in an internal email dated 13 September 2010. A redacted copy of the email is attached as **exhibit 6**.

3.5 In each case the redacted passages relate to matters other than BIOT.

3.6 The MPA was referred to in four of these six meetings (3 June, 15 June, 22 July and 9 September 2010). However, and as shown by the United Kingdom's records of these meetings, Mauritius did not once raise a dispute that the MPA was in breach of the provisions of UNCLOS. The United Kingdom's essential point – that Mauritius cannot show that it has met the jurisdictional requirements of article 283 – remains unaltered.

C A Whomersley
Agent for the United Kingdom
21 December 2012