PERMANENT COURT OF ARBITRATION

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

x

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

-x

PCA Reference MU-UK

Volume 1

HEARING ON JURISDICTION AND THE MERITS

Tuesday, April 22, 2014

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

The hearing in the above-entitled matter convened at 2:30 p.m. before:

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

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Registrar
MR. GARTH L. SCHOFIELD
PCA Legal Counsel
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Well, good afternoon, ladies and gentlemen. I declare open the continuation of the proceedings between the Republic of Mauritius and the United Kingdom, convened under Annex VII of the United Nations Convention on the Law of the Sea. The present hearing will be concerned with both jurisdiction and merits.

I will now call upon the Parties to announce formally their appearances, after which I propose to raise several procedural matters before inviting each side to present its Opening Statements.

Mr. Dabee.

MR. DABEE: Good afternoon, Mr. President and distinguished Members of the Tribunal.

It's my pleasure to introduce to you the members of our delegation. Immediately to my right in the first row is Professor –

PRESIDENT SHEARER: Mr. Dabee, have you got your microphone switched on?

MR. DABEE: Yes.

Immediately, Mr. President, to my right in the first row are Professor Sands QC, Professor James Crawford, S.C., and Mr. Paul Reichler.

In the second row, Mr. Suresh Seeballuck, who is the Secretary to Cabinet and Head of the Civil Service. Next to him is Ambassador Meetarbhan, who is our Permanent Representative to the United Nations in New York. Next to him is Miss Alison Macdonald. And then Mr. Andrew Loewenstein.

In the third row behind, again to my right, we have our Deputy Agent, Mrs. Aruna Narain; next to her Miss Martine Young Kim Fat, together with Ms. Elizabeth Wilmshurst and Dr. Douglas Guilfoyle.

In the fourth row, we have Mr. Remi Reichhold as well as Mr. Yuri Parkhomenko, and we are also assisted by, and seated next to them, Mr. Rodrigo Tranamil and Miss Nancy Lopez.

That makes up our delegation.

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

Yes, Mr. Whomersley.

MR. WHOMERSLEY: Good afternoon, Mr. President, Members of the Tribunal. I am also very honored to be here to address you this afternoon. I will just very briefly introduce the United Kingdom team for today.

We probably will move around, but I will introduce them in their present positions. So, in the first front there, I have the great honor to introduce Mr. Dominic Grieve, who is the Attorney General for the United Kingdom. Next to him is Mr. Douglas Wilson, who is from the Attorney General's Office, and at the far end is my colleague Margaret Purdasy, who is the Deputy Agent for the United Kingdom.

The back benches, if I can call them that, behind there, you will see Michael Wood, Sam Wordsworth and Alan Boyle, all of counsel, and at the far end, one of my colleagues from the Foreign Office, Ms. Jo Bowyer.

Then, behind there, we have on the far end Penelope Nevill of counsel; Rebecca Raynsford, who is also from the Attorney General's Office; Amy Sander of counsel; and Eran Sthoeger, who is a legal researcher who is assisting us.

I thank you for this opportunity to introduce the team, and obviously if we could be of further assistance, we would be very happy to do so.

Thank you.

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

Well now, before turning to the procedural matters that I mentioned earlier, may I

first welcome you all to this beautiful city, so rich in historical, architectural, and cultural interest. Istanbul is, thus, an appropriate place in which to realize one of the main purposes of the United Nations Charter, which is the peaceful settlement of international disputes.

In this connection, I would like to record the Tribunal's thanks to the Parties for their spirit of cooperation and courtesy in dealing with each other and with the Tribunal.

I also record with gratitude the excellent professional service given to us all by the Registrar and his colleagues at the Permanent Court of Arbitration, both here and in The Hague.

I now turn to certain procedural matters before calling upon the Parties to present their Opening Statements, and I have just been reminded of a banal point: Would you please ensure that your mobiles are turned to silent, if they are not already, if you have not already done that.

Now, first of all, there are five matters to raise very briefly. First of all, regarding the publication of pleadings and the annexes, as you know, there has been an exchange of views between the Parties on that by email messages, and the Tribunal notes the Parties' positions regarding the publication of pleadings and the annexes taken in this recent correspondence.

The Tribunal, after discussing this matter, has decided that the pleadings be made public immediately and that the Parties seek to agree, by 5:00 p.m. on Tuesday the 29th of April, on which of the annexes to the pleadings should be made public. And by that same time, 29th of April, 5:00 p.m., the Parties shall inform the Tribunal of any disagreement regarding the publication of annexes, in which case such matters will be reserved for the determination of the Tribunal.

The second matter is regarding additional documents. The Tribunal notes that the Parties have agreed to the addition of certain documents to the record, including one Note Verbale, one report, and three press articles submitted by Mauritius, and two letters submitted by the United Kingdom. These and any other new documents agreed by the Parties for admission to the record

should be assigned annex numbers and included in an updated version of the Parties' respective consolidated lists of annexes.

The third matter is with regard to the redaction of documents and the question of whether the documents could be opened more fully. I have to report that I attended the British Consulate General yesterday afternoon to consider the grounds for the redactions made to the documents contained in Annex 185 of the Reply of Mauritius. Now, by letter of today – and I think that has been circulated already – my Report has been given to you.

In summary, I have found that each redaction is justified, and I have discussed my findings in detail with the other Members of the Tribunal, and the Tribunal has accepted my findings and has decided that the redacted passages should not be subject to disclosure in these proceedings. Now, the details of those findings will be contained in the document that has been sent to you.

Next is the question of Annex 185 to the Reply of Mauritius. The Tribunal notes that following the Parties' exchange of correspondence on the issue of redaction, the documents comprising Annex 185 have been updated, and Mauritius is requested to submit an updated Annex 185 and to inform the Tribunal of any other updates to the annexes to the Reply of Mauritius that may be necessary as a result.

And, finally, regarding the place of this Hearing, the Tribunal notes that Article 9(2) of the Rules of Procedure provides that the place of hearings in this matter shall be Dubai, which is where the Hearing on Bifurcation was held. But in view of our prior correspondence and the fact that the Parties and the Tribunal are assembled here, I haven't heard of anybody who has mistakenly gone to Dubai and is anxiously awaiting events – I think it is safe to record our agreement to the amendment of Article 9(2) to reflect that Istanbul is the place for the Hearing on the Merits and Jurisdiction.

So, with that, I think that covers the procedural matters. If you have anything on

that, those matters could be raised later, but I think it is now appropriate to call upon the Agent of the Republic of Mauritius to present the Opening Statement.

Thank you.

Yes, Mr. Dabee.

MR. DABEE: Thank you, Mr. President. And thank you also for clarifying those procedural matters.

REPUBLIC OF MAURITIUS v. UNITED KINGDOM - HEARING

INTRODUCTORY REMARKS BY MR D.K. DABEE G.O.S.K., S.C., SOLICITOR-GENERAL AND AGENT OF THE REPUBLIC OF MAURITIUS, 22 APRIL 2014, ISTANBUL

Mr. President,

Distinguished members of the Tribunal,

On behalf of the delegation of the Republic of Mauritius, it is my privilege and honour to appear before you this afternoon.

We are thankful to you, Mr. President, and distinguished members of the Tribunal, for the attention that you are able to give to these proceedings on the legality under the 1982 United Nations Convention on the Law of the Sea of the "Marine Protected Area" which the United Kingdom purported to create around the Chagos Archipelago, as announced by Foreign Secretary David Miliband, in April 2010. This case addresses matters of the greatest significance to Mauritius and its citizens, including those who were forcibly removed by the United Kingdom from the Chagos Archipelago. 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, not the least in arranging these hearings in Istanbul.

We welcome today's hearing, and the opportunity that it offers to engage with our colleagues from the United Kingdom delegation, and we very much look forward to hearing the

UK delegation seek to justify in law the acts of the United Kingdom. It is unfortunate, however, that we have to be here at all.

The dispute before you arises against a background of specific events that occurred some five decades ago, a stain on a generally excellent relationship with the United Kingdom. It is our hope that this Tribunal will be able to act to resolve this dispute, to assist the Parties in reaching an outcome that is just, and fully respectful of the law that is reflected in the 1982 Convention.

The dispute between the Parties raises a number of issues, on the facts, on the law, and even on the extent of the jurisdiction of this Tribunal. This dispute, Mr. President, cannot simply be pushed under a carpet. From an African perspective – and here let me say that Mauritius is an African State that obtained its independence from its former colonial power in 1968 – so, from an African perspective, there should be no dispute about this. From that perspective, the UK had no right to act as it did four years ago, in purporting to create the "Marine Protected Area": we seek your confirmation that it has no entitlement to create the "MPA", and that the "MPA" it has purported to establish is inconsistent with the requirements of a significant number of provisions of the 1982 Convention. Indeed, you will be aware that there is not a single African State that recognises the lawfulness of what the United Kingdom has done. The African position has been endorsed by the broader international community, namely the Non-Aligned Movement, the Group of 77 and China, and the Africa-South America Summit. On the other hand, the United Kingdom is asking you to maintain a colonial *status quo*, a use of the Convention that its negotiators surely never intended.

Mr. President,

and Members of the Tribunal,

You have before you the voluminous pleadings of very fully pleaded cases. Our team is available to provide any such assistance as you might need. We will be pleased to offer our

fullest cooperation to the delegation of the United Kingdom in making these proceedings as helpful as possible to the Tribunal in resolving this dispute.

Our next three days, Mr. President, will be devoted as follows:

Tomorrow, we'll be dealing with the facts. On Thursday, we will address the merits and the violations by the United Kingdom of the law. And on Friday, we will respond to the issues of jurisdiction raised by the United Kingdom.

At the start of each day we will be providing you, the Tribunal, with a breakdown of the running order for each day, together with time estimates. We welcome questions, of course, from the Tribunal at any time during the course of the proceedings, and we will do our utmost to respond to those questions in a timely and complete way.

Finally, to assist the Tribunal, we have made available a folder for each Arbitrator, to which your attention will be directed during our different presentations. Copies have also been made available to the United Kingdom, and we will strive to ensure that the folders are complete, but I do hope that you will bear with us if, on occasion, you are taken to a document that is not located in the folder. In that regard, we do express our appreciation for the idea raised by the Tribunal of hyperlinking the documents referred to in the pleadings, and this we have found to be most useful!

Mr. President, I shall now ask you to invite Professor Sands to make the introductory comments of Mauritius on the various matters before you.

Thank you, Mr. President.

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

Yes, Mr. Sands.

ARBITRATION UNDER ANNEX VII TO 1982 UNCLOS

Republic of Mauritius

v.

United Kingdom

SPEECH 2

Professor Philippe Sands QC

Tuesday 22 April 2014

I. Introduction

Mr. President, Members of the Tribunal,

1. It's a privilege to appear before this distinguished Tribunal on behalf of the Republic of Mauritius. And it affords to me the opportunity to put the case addressed by Mauritius over the next few days in its broad context. With the completion of the written pleadings the differences between the parties are stark, on the law, on the evidence, on the merits, and, of course, on the issues of jurisdiction to which the United Kingdom is perhaps understandably attached, given the rather unhappy tale that is told in the documents before you.

2. Before proceeding, there is one housekeeping matter to address. Each of you should have before you a white hard-cover binder, the Arbitrator's Folders, and inside you will see a number of documents. We will be taking you to each of these documents, and you will see behind the Table of Contents there is a tab marked 2 and then a series of gray tabs. I'm going to be taking you to these documents in the course of the next hour or so. If you open your Folders, you will see there are 19 tabs for today marked under the number 2. This number signifies my presentation – just speech 2. There will be 16 speeches in all. In advance of each session, morning and afternoon, we will supplement the folders that you have with new tabs, under cover of different file dividers for each speech so that you will be able to mark up if you wish or not the same document, and we will not replicate so that one latest speaker will refer back to the document in the earlier tab. We have made

Copies of the Folder available to our friends from the United Kingdom and also to the PCA Registry.

3. So, against that introduction matter, I turn to our case. Mauritius's case is that the supposed "MPA" as we shall call it is unlawful under the 1982 Convention. It is a regime imposed by unilateral act by a State that had no authority to act as it purported to do. The claim is in two parts, as you will have seen from the written pleadings, which are connected: the *first* part is that the United Kingdom is not "the coastal State" (within the meaning of the 1982 Convention) and so is not entitled to declare an "MPA" (or indeed any other maritime zone) around the Chagos Archipelago. The so-called "British Indian Ocean Territory" is a colonial vestige we say, albeit one in respect of which the United Kingdom has nevertheless proceeded on the basis that Mauritius has at least some rights and interests that reflect the attributes of "a coastal State." The *second* part of our claim is that – independently of who is "the coastal State" – the purported "MPA" has been adopted in a manner that is inconsistent with the requirements of the 1982 Convention, including Parts II, V, VI, XII, and XVI.[1]

4. This introduction will last for about 50 minutes. But I hope you might bear with us if we're slightly beyond. We would, of course, expect any additional time which we need, to be deducted from our time, we don't seek more time overall. I will not, of course, touch on all of the issues that divide the Parties. What I want to do is alight briefly on some of the key areas of difference. And I want to do it by taking you to the raw materials, the documents, to show you how it is that the United Kingdom is seeking to avoid engaging with some of the most damaging material. Over the course of the next three days, you will see that a number of common themes emerge in the United Kingdom's approach to the case: unhelpful documents (or parts of documents) are studiously avoided; facts tend to be asserted without evidence; legal arguments are made without authority; the views of Ministers, senior civil servants and even distinguished legal advisors are

[1] Mauritius Memorial ("MM"), para. 1.3.

pooh-poohed. There are common themes that draw a direct link from 1965 to 2010, and you get a sense of a continuum in the *modus operandi* of the United Kingdom; the lack of transparency, and it might be said candour; the use of that well-known technique of presenting Mauritius with a *fait accompli* or the United Nations; the offering of sweeteners. And there's a running theme that goes all the way through the documents: the use of fear, frightening Mauritius back in 1965 that it might not get independence, frightening the Tribunal today that it might open the floodgates. Against that background, I'm going to make eight points.

5. **My first point, Point 1**: the United Kingdom is inviting the Tribunal to ratify a legacy of British colonialism, a remnant of Empire. Now, in these proceedings, the UK for the first time ever, before any international court or Tribunal, has to justify in law the actions that it took in and after 1965, a most unhappy episode. That history infects the tone of the UK pleadings, not least the Rejoinder, you'll have picked up the whiff of the slightly patronizing air, the sense of irritation (that they have been hauled before this Tribunal at all), the use of unfortunate pejoratives to describe our arguments ("spurious" or "idiosyncratic"),[2] or the thrust of our arguments generally, (the "mantra" of Mauritius).[3] But how striking it is that nowhere in the pleadings is there any hint of regret for the events that took place in 1965, nothing, no expression of remorse for the deportation of an entire population, a once thriving and active community of approximately 2000 Chagossians. We invite you to keep this context and this legacy, sad legacy, at the forefront of your minds.

6. This brings me to my second point: the Chagos Archipelago is and has always been an integral part of the territory of Mauritius. The United Kingdom makes the implausible and somewhat convoluted argument that the "detachment" from Mauritius did not contravene international law, including the principle of self-determination, because the islands of the Chagos

[2] United Kingdom Rejoinder ("UKR"), para. 8.56.
[3] See UKR, paras. 2.21 and 5.22.

Archipelago "were never part of the territory of Mauritius".[4] Miss Macdonald will address this issue in some detail tomorrow morning. It is an approach that we say is both extraordinary and counter-intuitive, it's been resuscitated and developed for the purposes of this case. Yet the record shows that the United Kingdom spoke about and treated the separation, the excision of the Chagos Archipelago as a "detachment." That is its word. So, let's deal with the reality: one does not detach one object from another unless it is a part of that other. Why bother to seek to obtain the purported agreement of the Mauritian Premier back in 1965? Why pay compensation? Why present the United Nations General Assembly with a *fait accompli* if the territory being detached wasn't even a part of the territory of Mauritius?

7. The documents speak very clearly on this point. I can illustrate it – as well as the United Kingdom's rather curious, semi-detached approach to its own records – by taking you to a Minute, that sent by Colonial Secretary Anthony Greenwood, no relation I say for the record, which was sent to Prime Minister Harold Wilson, on the 5th of November 1965. You'll see it at Tab 2.1 in your folder. And if you could go straight to page 2. And what you'll see with these folders as we go, in the bottom right-hand corner of each page, which is copied just to save a few forests double sided, a number in red, we've stamped on it Mauritius folder page 2 just for ease of reference, and we'll have a continuing numbering going all the way through. If you can go to the bottom of page 2, right at the bottom, Tab 2.1, Page 2, at the bottom, you'll see paragraph 5, and you'll see the last part of paragraph 5. It says: it is "essential that the arrangements for detachment of these islands should be completed as soon as possible." And then if you go on over to the next page to paragraph 6, you'll see the following: "From the United Nations' point of view, the timing is particularly awkward. We are already under attack over Aden and Rhodesia, and whilst it's possible that the arrangements for detachment will be ignored when they become public, it seems more likely that they will be added to the list of imperialist measures for which we are attacked.

[4] UKR, Chapter IIB, p. 11.

We shall be accused of creating a new colony in a period of de-colonization and of establishing new military bases when we should be getting out of the old ones." And if I could just take you down to the bottom of paragraph 7 at the last line, "it is therefore important," the Colonial Secretary writes, "that we should be able to present the UN with a fait accompli." Now, if the Chagos Archipelago wasn't a part of Mauritius, why was there such a need for these shenanigans?

8. The UK approach to the evidence is, we say, rather semi-detached. In the Rejoinder it argues the importance of agreement to "detachment," and it invokes "a note from the Colonial Office," which it quotes, that "our view is that the willing acceptance in the two Colonies is essential to our object."[5] Now, to that note, the UK annexes the note of the 10th of May 1965, and you will find that at Tab 2.2. And we are only putting in documents here that are going to be central documents in the case, so we're likely to keep coming back to these documents, which we hope you will become familiar with them. And if you look at that document and note of the 10th of May 1965, you will see in the first paragraph that the second sentence begins, "You are aware also,"—first paragraph of that document, second sentence in the first paragraph, "you are aware also that it is," and in these words which I emphasize, "our view that the willing acceptance in the two colonies is essential to our object." That's the only bit the United Kingdom quoted in its pleadings. There's a comma, and let's read what follows: "and that in order to secure this, it will be necessary to compensate the two governments <u>for their loss of territory</u>." Now, those words of the loss of territory were left out. And I emphasize the word "their." Whose territory is the Colonial Office referring to? Well, it's obvious. It's the territory of Mauritius. That was the legal situation in May 1965, and it remains the legal situation today.

9. Until 1980 the United Kingdom talked about the islands being "returned" or that they would "revert" to Mauritius once they were no longer needed for defense purposes: and this was made explicit in the famous Lancaster House undertaking which was given on the 23rd of

[5] UKR, p. 27, footnote 119.

September 1965, and you'll find that over the page. I'm going through consecutively, so you may as well, if you wish, if it's convenient, keep them open, and there you will find the Minute that is at Annex 19 of the Mauritius Memorial. And if you turn to page 11, the bottom of that document, we're now on Tab 3, page 11 of the bundle, you will see at the top there's a little subparagraph 7, and the undertaking is given that, ("if the need for the facilities on the islands disappeared, the islands should be returned to Mauritius"). Returned to Mauritius. Now, you don't have a return of something unless there's a pre-existing right. And you have noted that mysteriously the word "return" was dropped, in fact, it was dropped after 1980, and if you're in why it was dropped, you'll find the answer in the Rejoinder at Annex 25. And there, it's not in these documents, you will see a telegram from the Foreign Office in October 1980 which provides advice on responses to press enquiries. And it says, and I quote: "for legal reasons cede should be adhered to; revert or return should be avoided".[6] In any event, whatever word the United Kingdom may wish to use, the evidence makes crystal clear the United Kingdom considered the Chagos Archipelago to be part of the territory of Mauritius in 1965, and Ms. Macdonald will return to this point.

10. The contrary argument we say is hopeless, and it's not only historically hopeless back in the Sixties. Recent internal memoranda from the UK confirm that reality and that view persisted right up until recent times. Still before this litigation began it has to be said, and this is reflected in the fishing and mineral rights recognized by the United Kingdom, to which Mr. Reichler will take you. Let's look briefly at a note prepared on the 22nd of April 2008 to record an early, secret meeting between the Pew Foundation and "BIOT" officials. It's over the page, the next tab, Tab No. 4 at page 13. And you will see there in the second, bottom half of the page, and e-mail from Joanne Yeadon, whose name you will be familiar with, dated the 22nd of April 2008. And I want to take you to paragraph 3 and the third sentence of paragraph 3, which responds to the ideas of Pew, and I quote, "But there were obstacles, the first being: Mauritius." Mauritius had nationalistic

[6] UKR, Annex 25.

and economic reasons for potentially not liking Pew's ideas. "They wanted the islands back and would probably want to exploit them for tourism. HMG was, if you like, a temporary freeholder, as we have said, we will return the islands to Mauritius once they are no longer needed for defence purposes. You see, once they were in the private domain, the use of the word returns. So, any agreement between the UK Government and Pew Trust may falter when Mauritius regains sovereignty."[7] "Temporary freeholder"? "Regains sovereignty"? 2008. The UK argument that these were never part of the territory of Mauritius is imaginary. It is a concoction made up for the purposes of this case.

11. That brings me to **Point 3**: the UK is simply unwilling to confront the reality and the evidence before the Tribunal. Let's return to the events of September the 23rd, 1965, when the United Kingdom Prime Minister, Harold Wilson, met Premier Ramgoolam at 10 Downing Street. This was the crucial meeting. A minute submitted to the UK Prime Minister in advance highlighted, by his Private Secretary, the objective of the meeting, and you'll find that at the next tab, which is Tab 5, page 15. And it's a short note accompanying at attachment. It's to the Prime Minister, as you see on the top of that fanned corner, and then it says, Mauritius, and then it says the following: "Sir Seewoosagur Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago."[8] I attach a brief prepared by the Colonial Office with which the Minister of Defence and the Foreign Office are on the whole content. The key sentence in the brief is the last sentence of it on page 3. Let's go to that last sentence on page 3, which you will find at the bottom of page 19 of the document. And that says at the bottom, bottom of page 19. Throughout consideration of this problem, all departments have accepted the importance of securing consent of the Mauritius Government to detachment. The premier knows the importance we attach to this. In the last resort, however,

[7] United Kingdom Counter-Memorial ("UKCM"), Annex 87.
[8] MM, Annex 17.

detachment could be carried without Mauritius' consent. And this possibility has been left open in recent discussions in Defence and Overseas Policy Committee. The Prime Minister may, therefore, wish to make some oblique reference to the fact that HMG have the legal right to detach Chagos by Order in Council without Mauritius' consent, but this would be a grave step. Coming back to those other words, "frightening with hope," you won't find them referred to anywhere in the British written pleadings. They just would rather those words were not used. Let's go then to the record of the meeting itself between Prime Minister Wilson and Premier Ramgoolam. You'll see that over the next page at Tab 6. And this time I'd like to take you down the page down to page 22 at the bottom. And here we have a summary of what Harold Wilson says. The Prime Minister went on to say that in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with independence or without it. On the defence point, Diego Garcia could either be detached by order in council or with the agreement of the Premier and his colleagues. The best solution of all might be independence and detachment by agreement, although it could not, of course, commit the Colonial Secretary to this point."[9]

Now, In the face of this material, we say it is wholly implausible to claim, as the United Kingdom does, that there was no connection at all between the grant of independence and the detachment of Chagos. It's a hopeless argument. There is here an unwillingness of the United Kingdom to confront the reality of the documents. That's why we say they hope you will never get to this reality for reasons of jurisdiction.

12. Against this background, let's move forward nearly five decades to April 2010, and we will deal in the coming days with the history in between. My **Point 4**: <u>the "MPA" we say is the product of policy-making "on the hoof" and it's a policy that the United Kingdom undertook at the highest levels of government to put on hold.</u> The years have passed between 1965 and 2010, but the approach of the United Kingdom appears not to have changed a great deal in those years. These

[9] MM, Annex 18.

proceedings were triggered by the unexpected announcement by Foreign Secretary David Miliband that he had decided to create a 'Marine Protected Area'. And to great fanfare, his office issued a press release. You'll find that over the page at Tab 7. You will see at the top, it is titled, "New Protection for Marine Life", and it indicates that the Foreign Secretary David Miliband instructed the "BIOT" Commissioner to declare a marine protected area. And then as you go down, you will see that Mr. Miliband says that the marine protected area will "double the global coverage of the world's oceans under protection." Its creation is a "major step forward." And yet curiously, the announcement was accompanied by no regulations, no budget, and no scientific plan of action. One might have expected the United Kingdom to offer some expert evidence on the pressing scientific or ecological need for an "MPA", or even a witness of fact to explain the careful and organized way in which this policy was cobbled together. There is nothing, not a single statement.

13. Mr. Miliband's announcement was, as I said, a complete surprise to Mauritius. Much information comes to Mauritius from the media. The UK seems to tell Mauritius very little. But Mr. Miliband did call Prime Minister Ramgoolam just a few hours before his announcement. Another year, another *fait accompli it might be said*. "You'll remember that note about dealing with the United Nations. "[10]

14. *Plus ca change, plus c'est la même chose*. We now know – thanks to the documents that came to public light in proceedings in English judicial review matters but not disclosed to this Tribunal – that the 2010 decision lacked the support of Mr. Miliband's closest advisers, that it was taken in the face of a clear warning that litigation of this kind would follow and that it violated Mauritius's rights. Policy making "on the hoof", one of his advisers called it.[11]

15. Suffice it to say, the decision came as a great surprise to Mauritius. Why? Because just a few months earlier, in November 2009, at a meeting of the Commonwealth Heads of Government,

[10] MM, Annex 26 (emphasis in the original).
[11] Mauritius Reply ("MR") Annex 157.

no less, Prime Minister Ramgoolam was given a clear undertaking by British Prime Minister, Gordon Brown, that the entire project would be put on hold. Dr. Ramgoolam has offered this Tribunal a witness statement on what has transpired, and you will see it at Tab 8. The key paragraphs are paragraphs 12 to 15, and you will find those at the end of the document at page 27. Just paraphrase for the first bit, the context is CHOGM, a particular issue and difficulty has arisen. Mr. Brown asks for help from Mr. Ramgoolam. Mr. Ramgoolam offers help. Mr. Brown says, "What would you like me to do?" And at Paragraph 14 you have the following: "I replied: "You must put a stop to it". There could have been no doubt that "I was referring to the proposed 'marine protected area.'" Then at paragraph 15, "Mr. Brown then said: "I will put it on hold."" Go over the page and look at paragraph 21. Mr. Ramgoolam explains that he met Mr. Brown on the 17th of April 2013. I think it may have been the funeral of Baroness Thatcher. "On that occasion I mentioned my understanding that the subject of his commitment to me had been raised in court proceedings in London and reiterated the deep concern and disappointment of Mauritius" in relation to the "MPA". And then paragraph 22. "Mr. Brown plainly understood the commitment to which I was referring. He did not deny that he had ever made such a commitment, and he didn't indicate any surprise or lack of understanding of what I had raised. Mr. Brown simply said", and I quote, "The truth always comes out." What does the UK say in its pleadings about this? Well, they rewrite what Mr. Ramgoolam has said because they refer only to the putting of the consultation on hold, which is not what the document refers to. So, let's look at what the United Kingdom actually says in its pleadings. It's very instructive as to how they go about this matter. At Tab 9 you will see an extract from the UK Rejoinder, page 44. We're on page 29 at the tab now, if I can take you to paragraph 3.14. At the bottom of 3.14 it says: "As stated in the Counter-Memorial, enquiries were made at the time, in December 2009, and Prime Minister Brown made clear that he had given no undertaking to withdraw the public consultation. Now, there's a footnote reference, Footnote 207. Let's go down to the bottom of the page and see what

Footnote 207 says. It says, UKCM, UK Counter-Memorial, para 3.63. And then turn over the page. We're now on page 30 on the back of the previous page, and here you've got paragraph 3.63 of the UK Counter-Memorial at page 86. We're still in the same tab. It's page 30, Mauritius folder. And at the bottom of paragraph 3.63 of the Counter-Memorial, it says: "when the allegation first arose in late December 2009 that the United Kingdom Prime Minister had given any such undertaking to withdraw the public consultation, the Prime Minister was asked whether he had: he said he had not."[12] Where's the footnote? Where's the evidence? There is none. There is no evidence to support the assertion the Prime Minister denied what he had said. They could have called him. They could have put in a witness statement. They could have called Prime Minister Ramgoolam to cross-examine him. None of the above. The statement stands entirely unchallenged, and we say that is significant.

16. That brings me to **Point 5:** the "MPA" was stated to be a measure to conserve biodiversity on land and sea, not a fisheries or resource management measure." That is how it was announced by Mr. Miliband, and that is how it proceeded until these proceedings were underway, and then the UK changed tack. And what the United Kingdom now says in its Counter-Memorial is that the "MPA" is nothing more than a repackaging of earlier legislation plus an administrative ban on commercial fishing.[13] The reason for the change is self-evident. It's to help the UK in its jurisdictional arguments. Our invitation to you is to assess the "MPA" for what it purports to be and what it really is.

17. Now, relatedly, the UK asserts that Mauritius "invites the Tribunal to overlook the fact that the "MPA" is a matter of great benefit … to all states in the region and … more widely", a "conservation measure of global importance".[14] So, what is it? Repackaging measure or a conservation measure of global importance. They can't make up their minds. But what they do

[12] UKCM, para. 3.63.
[13] UKCM, paras. 3.69 and 6.32.
[14] UKR, para. 1.7.

is they say that Mauritius has no commitment to conservation or environmental protection, that the challenge to the legality of the "MPA" is a challenge to a measure that we should all be supportive of. The suggestion is both audacious and misconceived. And I'll make just two brief points on it. Mauritius has a long-standing and strong commitment to environmental protection. Anyone who's been to the country knows why. It is recognized as a global leader. [15] But second, let's look at the actions of Mauritius internationally. They speak for themselves. In our Written Observations on the Question of Bifurcation, you'll recall we gave an example. We attached at Annex 3 to those written observations the 2010 Agreement between France and Mauritius on Economic, Scientific and Environmental Co-management in relation to Tromelin Island and its Surrounding Maritime Areas. And that agreement had three implementing agreements, all signed on the 7th of June 2010. So, exactly as this MPA business is underway. And you'll find that at Tab 10. You'll find it in French, Page 31. You can see the accord cadre. And then at page 44, you will find the courtesy English translations, for which I thank my colleagues. I just will take you briefly to page 58. At Page 58 is the implementing agreement on environmental co-management. On 58 of the Mauritius folder, you can see there the implementing agreement. Just over the page just very briefly, can I just take you to Article VII of the implementing agreement, which is on environmental co-management. And you'll see the objectives of this agreement shall be implemented in the following stages. And it sets out three stages. One, the first stage shall consist of an environmental audit. Two, the second stage shall consist in elaborating a master plan for the environment. Three, the last stage shall consist in assessing the relevance of creating if necessary marine protected areas. So, we're a country that has no interest in the environment, but we entered into these agreements for the creation under appropriate conditions of marine protected areas. That, we say, is how you create a marine protected area in these circumstances, not the on-the-hoof unilateral decision making of the kind characterized by

[15] See for example *ibid.,* pp. 16-17 and http://environment.gov.mu/English/Pages/default.aspx.

the "MPA". We say this tale illustrates the undermining of environmental objectives is on that side of room, not on this side of the room.

18. The true purpose of the "MPA," its political purpose, is reflected in the UK's actions over the past four years. Adopted in April 2010, four years have passed with no real substantive action. The UK's Counter-Memorial cryptically refers to "public-private partnerships, no funds available, no budget, no regulations. What does the United Kingdom say in response? Existing legislation is sufficient. Further implementing legislation is being prepared. What about enforcement? The Rejoinder offers the assertion that the "BIOT" Administration has commenced a significant piece of work on planning for next generation of enforcement. Well, there hasn't been a first generation of enforcement. In the meantime, what we have if you want to talk about enforcement right at the heart of the "MPA" is a giant exclusion zone in which fishing activity proceeds unabated and at a significant level, some 30 tonnes of tuna and like species in 2010, and major projects are carried out without any environmental assessment at all. Total lack of transparency. How do we find out what's going on in Chagos? We read about it in The Independent newspaper. That's how we find out what's going on. And at Tab 11, you will find the newspaper article, which I won't take you to now, an article in The Independent which alerted us to a major pollution pocket. And then we tracked down and obtained the report to the "BIOT" Commissioner on environmental conditions in the Chagos Archipelago. Now, this is a document you would have thought the United Kingdom would make available to this Tribunal. No, they don't want it to be made even publicly available, and some poor soul had to go and make an application under environmental information laws to get hold of this document, and finally it came out. I invite you to read it for yourselves. It identifies three pressing issues. At page 72 you get a description of major environmental degradation being taken without any environmental assessment at all. At page 74, we learn that one of the principal sources of pollution in the Chagos Archipelago is, oh, the Pacific Marlin. The enforcement vessel is the main culprit, a regular culprit it says in the text.

And then you see on the next page at page 75 they're allowing what they call hydroblasting of ships. Professor Sheppard, who's obviously an independent spirit, writes at the bottom of page 75, "it is not appropriate for hazardous waste to be dumped into lagoon waters of Diego Garcia." That's what's going on in Diego Garcia.[16] So, you can see why there is scepticism about what the "MPA" is really about. And two documents really suffice which allow us to know what was really going on here when they purported to create a Marine Protected Area.

19. Likewise, in its written pleadings Mauritius pointed to the absence of regulations adopted for the "MPA."[17] What does the UK say in response? Existing legislation is "sufficient",[18] and "further implementing legislation is being prepared".[19] That is it, nothing else. Pure assertion, no evidence. No doubt you will hear about the new consultation to explore the possible return of a few Chagossians, but that too is open-ended and a result of the terrible publicity that has come to the UK with the events of the past few years.

20. The first is the Wikileaks document, which relates to events on the 12th of May 2009, and the views of the good Colin Roberts, which you will find at Tab 13. I don't need to take you to it now in any great detail. It is a most unfortunate document. You will note that they have not tendered Mr. Roberts as a witness in this case. If they had, we would happily have cross-examined him, but they have not felt it appropriate, one assumes, to take the risk. At Page 78 of the Mauritius folder, you will see at Paragraph 7 of the Note prepared, no doubt, by a diligent American diplomat, the unfortunate phrase used by Mr. Roberts, that there would be "no human footprints" or "Man Fridays" on uninhabited islands, hearkening back to earlier era, and establishing a marine park would in effect put paid to resettlement claims of the Chagos Archipelago's former residents. Over the page, if that weren't enough, you would find an extract from the cross-examination of –

[16] *Ibid*.,para. 3.59.
[17] See e.g. MM, para. 4.82; MR, p. 11 footnote 34, paras. 3.72 and 6.124.
[18] UKR, para.8.76(e).
[19] *Ibid*.

ARBITRATOR GREENWOOD: Mr. Sands, could you just tell me, whose is the emphasis? Whose underlining is this?

PROFESSOR SANDS: This may be emphasis. If you go back to Page 76, we got this from a newspaper in Mauritius, from the Web site of a newspaper in Mauritius. We could get you, I think, a clean copy, if you would like one, and my sense of it is that the underlining comes from the editors of the Mauritian newspaper. And I suspect it was not in the original, but we can try to get the original, if that would be helpful.

ARBITRATOR GREENWOOD: I would be interested to know, but thank you very much just the same.

PROFESSOR SANDS: If you go over the page to Tab 16, you will see the cross-examination in part, and I just want to take you to the right-hand column at the bottom of Page 147, you get the rather candid statement by Mr. Roberts as to what was really going on here, and I quote:

"I go back to one of the origins of our proposals in relation to strengthening environmental protection in the British Indian Ocean Territory." And then the key words: "We recognized that the Government was in a very difficult public position." He's referring to the period 2008-2009. "Not only was there a great deal of political pressure relating to the Chagossian movement, but we also were dealing with a series of allegations relating to rendition, and we were looking to see what we could do to try and improve the reputation of the Government in relation to the British Indian Ocean Territory." So, there you've got a rather candid assessment of what was going on. That is the reality of what motivated those actions that related to what Mr. Miliband's advisor called "policy-making on the hoof."

Coming to Point 6, which I could put very briefly, we will deal with this in more detail, obviously, we say the "MPA" manifestly violates the requirements of the Convention because the United Kingdom is not entitled to declare an MPA, and because even if it is entitled to declare an

MPA, it violates numerous provisions of the Convention. It's been fully pleaded; and, in the interest of time, I'm going to give but a couple of the most glaring examples. The U.K. gave undertakings in relation to Mauritius's fishing up to 200 miles around the Chagos Archipelago. The "MPA" totally extinguishes the right to fish. It takes them away in their entirety without consultation, without prior notice. Gone. The violation of Articles 2(3), 56, and 194 is, on that basis, manifest, and I will explain why in the coming days. And then, as we will continue later, the U.K. also allowed Mauritius to file Preliminary Information to the Commission on the Limits of the Continental Shelf. Indeed, it encouraged Mauritius to do that in 2010, in May. It then didn't object for five years, and then out of the blue, in the second round of pleadings in this case, it announces for first time that Mauritius has no entitlement to make such a filing. That is plainly inconsistent with the requirements of Article 76 of the Convention and Article 300 of the Convention.

Let me bring the thread of my first points together as follows: The U.K. arguments as to the merits – from September 1965 to April 2010 – are so weak that their case rests in its entirety, we say, on the jurisdictional objections offered with a somewhat desperate and exasperated air. The sharp tilt of the U.K. arguments in that direction reflects the manifest weakness on the merits. To be clear, we're not seeking to belittle the U.K. arguments on jurisdiction, although it does complain, rather entertainingly, that we've relegated them to the end of our pleading. We're not the first State to have done that. They're relegated to the end of our oral arguments also, I'm bound to tell you, but only because, in our submission, they can only be addressed once you have a clear understanding of the facts and the legal arguments on the merits that we are making.

21. And so to **Point 7**: <u>the dispute over the "MPA" is a dispute over which this Tribunal has jurisdiction</u>. The UK says you have jurisdiction over nothing. You are not entitled to interpret the words "coastal state," you're not entitled to determine whether the creation of an "MPA" that extends to over half a million square kilometres of ocean violates any provision of the 1982

Convention. They say you cannot touch any aspect of the United Kingdom's sovereignty claim. From Article 2(3) to Article 300, and to every other provision in between, they say you have no right to exercise jurisdiction at all. None of this, says the United Kingdom, is a matter for compulsory dispute settlement under Part XV.

22. Now, that argument cannot be said to lack audacity! The argument will be addressed in detail on Friday by me, by Mr. Loewenstein and Mr. Reichler. I will explain why there is no bar to this Tribunal being able to address the claim by Mauritius that the UK is not a "coastal State." The Tribunal has jurisdiction because:

- One, this is a dispute concerning the interpretation or application of the Convention;
- Two, it is not excluded from jurisdiction by virtue of one of the exception clauses in the Convention;
- And three – this is significant – the Convention contains no unwritten exclusion of disputes that touch on questions of sovereignty over territory, as the UK argues.

23. "Had there been no sovereignty issue", the UK asserts, "it can safely be inferred there would now be no case".[20] Wrong: if there were no sovereignty issue, it would be Mauritius that was proclaiming or regulating maritime zones, without the need for a case. But there is a sovereignty issue, and that that as such cannot mean that this Tribunal does not have jurisdiction or cannot exercise jurisdiction. The dispute obviously concerns the use of the oceans – how can you purport to regulate more than half a million square kilometers of ocean and stand before this Tribunal and say with a straight face that no provisions of UNCLOS are engaged, it's all about sovereignty. Nor can it be said that the dispute is *only* about sovereignty over land: there is a dispute about the use of the oceans that concerns both the lawfulness of the measures taken and the entitlement to take such measures.

24. The view that the purported exercise of entitlements is within the jurisdiction of this

[20] UKR, para. 1.5.

Tribunal is widely recognised. We noticed the UK had been notably restrained about the scholarship of Professor Boyle, but his 1997 article was prescient – precocious even – and the approach that he has outlined in that 1997 piece has not been shown to be wrong by subsequent developments, having regard to the practice of other Annex VII tribunals: in light of the *Guyana v Suriname* decision, and the issue of the land boundary terminus, the jurisdiction of the Annex VII Tribunal in *Bangladesh v India* over the issue of the location of the land boundary terminus – and the determination of sovereignty all around it – was simply not in issue in that case as many people in this room know. Things have moved on since the old academic articles on which the United Kingdom relies – almost all of which predate the adoption of the Convention or its entry into force, or the case-law to which I have referred and to which we will come back to.

25. At Tab 2.15, you have, in full, Professor Boyle's article.[21] (Tab 2.15, folder page 94) We aren't going to take you to it now, but the United Kingdom had invited you to read it in full and we think that's a very good idea. You will see at Page 49 of the article, Page 94 of Tab 15, that there is there a statement of academic authority which is wholly supportive of the case brought by Mauritius and it has been supported by other academic authorities and by several judges of the International Tribunal for the Law of the Sea.

26. The heart of his thinking in part is in relation to whether a declaration has been made under Article 298(1)(a). Professor Boyle says that where no declaration has been made under that provision there are circumstances in which an Annex XII Tribunal can deal with a "land […] dispute". And he accepts too, and this is at Page 94 of the document, that "in compulsory jurisdiction cases, the Tribunal may have to decide matters of general international law that are not part of the Law of the Sea, and Article 293(1) allows for this" (folder page 94). On Professor Boyle's scholarly approach, there is no immutable bar to jurisdiction. As I will show on Friday,

[21] MR, Annex 103, A. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", 46 *ICLQ* 37 (1997).

that view is shared by many others. There is nothing in the travaux preparatoires to support the view that it was the intentions of the drafters to exclude a dispute raising facts that are at issue in this case from Part XV and over two rounds of pleadings, the United Kingdom has not been able to show otherwise. To adopt the approach for which the United Kingdom argues would be to give ITLOS and Annex VII tribunals a second tier status: the International Court of Justice could deal with this issue, provided it is under the Law of the Sea Convention, says the United Kingdom, but ITLOS and Annex VII tribunals could not do so. Of course UNCLOS does provide explicit exceptions from its jurisdiction but why should this Tribunal assume implicit exceptions beyond those, or write in its own exceptions that the drafters declined to insert in a very carefully crafted text? Is that really what the drafters of the Convention intended?

27. This brings me to **Point 8**, my final point: this dispute truly is *sui generis*. How many other cases are you, distinguished members of the tribunal, able to think of in which a State refers to itself as a "temporary freeholder", or a State which recognizes in another State a reversionary interest? In how many other cases was a colonial territory detached in violation of the right of self-determination in the run-up to independence? The reality is, as we will see, as you know, the United Kingdom recognized the rights of Mauritius in the territory, including the right to fish and to benefit from oil and mineral exploitation activities.

28. Let me take you to one example of the unique facts before you. There is surely no other case that raises this fact. As detailed in our Memorial, on 6 May 2009 – before this dispute crystallized – Mauritius filed Preliminary Information to the UN Commission on the Limits of the Continental Shelf, they did so with the advance knowledge and encouragement of the United Kingdom.[22] (Tab 2.16, folder page 100) You will find the submission at Tab 2.16. Which State is entitled to submit such information? By Article 76(8) of the Convention, the "coastal state" files such information. Why was it done? To ensure that a full submission could be made in

[22] MM, Annex 144.

accordance with Article 4 of Annex II to the Convention in a timely way. And we invite you in this regard to look in due course at the document that we have put in at Tab 2.17, which is the Decision of UNCLOS States Parties of 20 June 2008, moving back the deadline for filing preliminary information to May 2009, you know it well.[23] (Tab 2.17, folder page 113) So, what happened? In January 2009 the UK announced at a bilateral meeting of the two States that it had no interest in submitting its own claim.[24] And it has not filed preliminary information. The submission by Mauritius, and the UK has said it doesn't intend to and has no interest in doing so. The submission by Mauritius is thus the only one on the table. Having encouraged the filing, having been told that it had happened when the two States met in July 2009, for five years there was no protest by the United Kingdom. Indeed, the Counter-Memorial continued in that frame, it offered no objection to the filing, accepting that the submission of preliminary information has legal consequences, namely "to satisfy the time period referred to in paragraph 4 of annex II to the Convention and the decision contained in SLOS/72".[25] And then out of the blue came the Rejoinder, confirming (at paragraph 8.40) that there had been no protest, the United Kingdom had recognized that it was out of time for making a submission, and then very subtly, very, very subtly changing its position, and you will see that at Tab 2.18 and I do just want to take you to that because it is important. It is a change in position by the United Kingdom at the end of the written case. Tab 2.18, you can read the words at the bottom of Paragraph 8.39: Mauritius "is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to BIOT".[26] (Tab 2.18, folder page 116)

29. That's a new objection – articulated for the first time – on the preliminary information issue. So, on the one hand there has been no protest, on the other hand we have this statement. So, we look forward to clarification: that having tacitly accepted the filing, how can the UK now

[23] Mauritius Authority 68.
[24] See MM, para. 4.31.
[25] UKCM, para. 7.54
[26] UKR, para. 8.39.

object to it consistently with its obligations under the Convention to act in good faith as Article 300 requires? In light of this change of position Mauritius will, in due course, be inviting the Tribunal to declare that Mauritius was entitled to make that filing in May 2009 and that the United Kingdom should do nothing now to thwart the filing of a full submission by Mauritius. That is a dispute which is plainly within the jurisdiction of this tribunal. Is the sovereignty issue any less incidental to the resolution of a dispute under Article 76 than it is to the resolution of a dispute, for example, under Article 74? No, it is not we say.

30. So, this is but one rather clear example of the unique characteristics of this case, and the United Kingdom has not been able to identify any case, nor do we think there is one, which meets these kinds of facts.

31. If nothing else, the United Kingdom has been consistent in seeking to play the fear card. It says that Mauritius is asking the Tribunal "to rule in favour of the existence of a system for the compulsory settlement of all territorial disputes over islands or mainland territories with a coastline".[27] No, that is not was we are doing: we are asking the Tribunal to rule that the United Kingdom is not entitled to create this "Marine Protected Area" because it is not – on the cognizance of the United Kingdom itself – "the coastal State" within the meaning of the Convention. It is not "the coastal State" because it has expressly acknowledged that:

- One, that Mauritius holds sovereign rights in reversion regarding minerals;
- Two, Mauritius holds fishing rights all the way up to 200 nautical miles;
- Three, the UK has made plain the islands will be returned (not given), returned to Mauritius; and
- Four, the UK has acknowledged Mauritius' special interests over the long term in relation to these islands; and

[27] UKR, para. 1.6.

- Five, no protest in relation to the filing of preliminary information on an extended Continental Shelf.

These are all acknowledgements by the United Kingdom of the special rights of Mauritius and they put this case in a category of one. These rights are intimately linked with Convention rights that appertain to the Convention. The fact that the United Kingdom is in continuing breach of a fundamental principle of international law, the principle of self-determination, applicable under Article 293, underlines the vital importance of this case, not only to this Tribunal not only to these Parties but to the international community as a whole.

32. Let me emphasize and be clear: the Tribunal can give a decision which can be ring-fenced. There is no risk of the floodgates being opened by this case. And whilst I am on that point, may I remind you that any decision this Tribunal may take will have no consequences for the United States military base on Diego Garcia: that commitment has long been given in the National Assembly of Mauritius by the Prime Minister, and it has been articulated more recently in the Note Verbale communicated directly by Mauritius to the United States with which it has had engagement on 28 of March last. And you will find that, won't take you to it now, in Tab 2.19 of the folder. (Tab 2.19, folder page 117)

Mr. President, members of the Tribunal:

33. Over the next three days we are not simply going to repeat what is set out in the written pleadings. We are going to engage with the arguments raised by the United Kingdom and we want to do so in a constructive and a cooperative manner as things have gone already so very nicely in this wonderful city that you have referred to. Tomorrow we will address the facts. On Thursday we will address the legal merits. On Friday we will deal with the UK arguments on jurisdiction but the Tribunal jurisdiction to deal with this case. As we address these matters, we invite this Tribunal to keep in mind the rather startling – and often contradictory – propositions the United Kingdom has put before the Tribunal. I will not list all of them, but let me give you a

flavor:

- that the Chagos Archipelago was never a part of Mauritius, although this point was somehow not made back in 1965;
- that when, in September 1965, Harold Wilson was told he must "frighten with hope" the Premier of Mauritius, there was no suggestion of any linkage between "detachment" and independence;
- that "detachment" actually doesn't mean "detachment";
- that this is not a "mixed dispute" because it doesn't involve matters of the law of the sea;
- that despite the self-characterisation by the United Kingdom as a "temporary freeholder", and a recognised right of reversion, somehow Mauritius has no attributes of a "coastal State";
- that despite the UK's encouragement that Mauritius file preliminary information, it somehow is not entitled to have filed such information;
- that despite the mountain of evidence to the contrary, the UK never actually did make any real undertakings to Mauritius in relation to fishing, mineral or other rights – but that if it did they had no legal consequences;
- that actually the "MPA" wasn't really established to protect "the environment, flora and fauna of the islands", as the UK said at Paragraph 3.3 of its Counter-Memorial, and it isn't really the "major step forward" proclaimed by Mr. Miliband, but merely a repackaging;
- that the "MPA" is somehow nevertheless a genuine attempt to protect the biodiversity of the marine environment, even though there are no regulations, no budget, and (a single vessel to patrol an area the size of France);
- that in November 2009 there was no commitment from Gordon Brown to Prime Minister Ramgoolam to put the MPA "on hold";
- that the various provisions of UNCLOS – one thinks of Article 2(3) – don't actually create any obligations, all they are intended to do is describe the situation;

- that the creation of the "MPA" doesn't engage a single provision of UNCLOS, although it covers half a million square kilometres of ocean;
- that even if it does, there is not a single provision of UNCLOS over which the Tribunal has jurisdiction; and, in fact, to cut to the chase;
- that Mauritius is not entitled to anything under UNCLOS in relation to this area or its own territory.

34. Mr. President, members of the Tribunal, you could, I suppose, suspend disbelief, in relation to all of these matters, you could ignore the historical record, you could put aside all of the evidence, you could interpret the 1982 Convention and its Part XV into a completely meaningless text. That would, of course, have the great merit for the United Kingdom of allowing you to preserve the colonial status quo, an outcome which the United Kingdom tells you, was the intentions of the drafters of this Convention. We say you cannot do any of those things, and that the reading of the United Kingdom pleading leaves the impression of living in a time warp, in the days of imperialism, when states drew borders, removed populations and expected international courts and international tribunals to do their bidding.

35. On that note, it is a surprise perhaps, that the United Kingdom has not taken you to one judgment from exactly that period, which was being argued exactly as the United Kingdom detached the Chagos Archipelago. You will all recall the judgment of the International Court of Justice, adopted on the casting vote of Sir Percy Spender, with Sir Gerald Fitzmaurice holding on to his coat-tails (or perhaps it was the other way around), to the effect that Ethiopia and Liberia were not entitled to bring claims against South Africa in respect of its actions and omissions in South West Africa.[28] The judgment springs to mind as one reads paragraph 8.39 of the United Kingdom Rejoinder: Mauritius "has no standing before the CLCS with respect to BIOT". One wonders how it might be possible for anyone to read the evidence that was available in the

[28] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1996*, p. 6.

Memorial and Reply to then craft so very unfortunate a sentence. The United Kingdom is defending a colonial record in a forum created by a post-colonial treaty. Mauritius has come to this Tribunal with full respect for you and for the United Kingdom with a dispute that falls squarely within the Convention and Part XV. And we seek your assistance in helping the Parties to resolve this most unhappy of disputes.

Thank you very much, Mr. President.

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

Now, does that bring us to the end of the Opening Statements of the Republic of Mauritius?

I think at this point we take a break for 20 minutes, and then after the break we will hear from the United Kingdom. Thank you. We will adjourn.

(Brief recess.)

PRESIDENT SHEARER: We will resume the Hearing. And shall I call upon Mr. Whomersley first, or Mr. Grieve?

MR. WHOMERSLEY: Mr. Grieve.

PRESIDENT SHEARER: Thank you very much.

SPEECH BY THE ATTORNEY GENERAL: 22 APRIL 2014

MAURITIUS v. THE UNITED KINGDOM ARBITRATION

Mr. President, Members of the Tribunal, the Delegation of Mauritius,

I would like first of all to say how honoured I am to be speaking in front of this distinguished Tribunal and in such pleasant surroundings. It is a pleasure to be here in Istanbul, but particularly here in the Pera Palace Hotel.

I would also like to thank the Permanent Court of Arbitration and its staff for all their hard work in arranging the hearing to date, and I have no doubt that, based on their excellent performance so far, we can expect that the next two and a half weeks should run very smoothly.

Mr. President, as Attorney General of England and Wales, I am here to speak to you this afternoon on behalf of the United Kingdom. From tomorrow, I will hand over to my colleagues to take forward the presentation of the United Kingdom's case. But the Government of the United Kingdom felt that it was right, as a way of demonstrating the importance which we attach to the case, that I should make the opening statement on behalf of my country.

Mr. President, Members of the Tribunal, I wish to make five key points on behalf of the United Kingdom in this opening speech. First, I would like to talk about the United Kingdom's approach towards its relations with Mauritius both generally and on the question of the British Indian Ocean Territory. My next point will concern the history of Mauritian interest in British Indian Ocean Territory. Thirdly, I shall explain the position of the Government of the United Kingdom on a matter which, while not part of this case, is clearly part of the background, namely the possible resettlement of the Territory. Fourthly, I want to address the crucial matter of your jurisdiction to deal with the case, particularly insofar as it concerns the issue of sovereignty, which has been clearly raised both in the pleadings but also in the opening speeches, which you've heard before you. I will then say a few words about the Marine Protected Area around the Territory.

Finally, I will try to summarise my key legal submissions to be made to you by my learned colleagues on behalf of the United Kingdom during the course of the hearing as it unfolds.

So, Mr. President, let me begin by saying that the United Kingdom greatly values its relationship with Mauritius, and I think I can venture to say that, apart from the issue of the British Indian Ocean Territory, relations between the two Governments are excellent and indeed cordial. Moreover, the British Government have always expressed a willingness to cooperate closely with Mauritius over the issue of the British Indian Ocean Territory. We have no doubts about our sovereignty over the Territory, but we have always been clear that the differences

between us should not present any obstacle to practical cooperation on matters of common interest between the UK and Mauritius. In particular, we are very willing to talk further to Mauritius about the practical implementation of the Marine Protected Area. This includes a willingness on our part to listen to any points that Mauritius might wish to make about the implementation of the MPA. Indeed my colleague, Mr. Mark Simmonds, one of the Ministers in the Foreign and Commonwealth Office, wrote to Mr. Boolell, the Foreign Minister of Mauritius, only last month asking for input from Mauritius on our consideration of improvements to the current framework for managing the Marine Protected Area. I regret to say that Mr. Boolell has declined this invitation. Nevertheless, I am happy to repeat today the assurances about the United Kingdom's willingness to cooperate, which have been made on a number of occasions to our Mauritian colleagues.

And I have obviously noted – and I will come back to this in a moment – the way in which opening its case, it highlighted that in another area of sovereignty dispute with the French over the island of Tromelin, that the Mauritian Government appears to have been very content with an engagement with another Government against which it has a sovereignty claim in relation to how to manage fisheries and, I think, a Marine Protected Area, although I think in reality if one looks at such documents no such area has yet come into being.

Let me also add that the British Government have always tried to engage with Mauritius in as cooperative manner as possible, without standing on the legal niceties. In many respects we have gone far beyond what any legal obligations would require. I do hope and submit to this Tribunal that we will not be penalised for doing this by suggesting that the result of such action is that we have come under further legal obligations. I say that because in listening very carefully to what Mr. Sands had to say in his opening, it seemed to me that that was at least one of the main thrusts of his argument - that because the United Kingdom had been willing to engage and involve Mauritius in the way in which the Chagos Archipelago and the BIOT was run, that

therefore in some way it had shed some essential part of its sovereignty in the process. If the Tribunal did so hold, it would, we submit, discourage States from seeking practical ways to cooperate while leaving aside their legal differences.

Secondly, Mr. President, I think it is important to note that, although Mauritius became independent in 1968, it was not until twelve years later that they first made a claim to the sovereignty of the Territory. It was not until a change of Government in Mauritius in 1982 that Mauritian law was amended to lay a formal claim to British Indian Ocean Territory. Although they sought to explain away this delay, their reasons are frankly unconvincing. The fact is that British Indian Ocean Territory has never been part of the colony of Mauritius – it had been a dependency and ruled by the Governor of Mauritius as a matter of administrative convenience. Perhaps, Mr. President, worth bearing in mind, that we are talking here of a large group of islands which were ceded by the French to the United Kingdom in 1814. Much play was made about maintaining integrity in terms of decolonization, but it is perhaps worth pointing out that those Territories currently constitute two sovereign States: Seychelles and Mauritius; the BIOT, to which Mauritius lays claim and, as we've also heard, the island of Tromelin, which currently is under French sovereignty but to which Mauritius also makes a claim. And although what was said about British Ocean Territory in the mid-1960s, in the lead-up to Mauritius independence has loomed large in this arbitration, it is also right, I would submit, to point out that it is only with the benefit of hindsight that this has appeared to be a key issue. In fact at the time, there were far more important issues to be considered, most noticeably in how minority rights would be protected in the Constitution, and arrangements about dealing with internal and external threats to Mauritius were met, and that's quite apparent when one looks at the documents that were generated at the time and which appear in your bundles. And finally, I would also say this on this point, it's right to point out that the United Kingdom made clear to the United Nations in 1965 that the islands were attached to Mauritius purely as a matter of

administrative convenience; so the suggestion that was made in the opening on behalf of the Government of Mauritius by Mr. Sands that in some way this is a recent concoction by the United Kingdom Government to justify something which they had not previously said is manifestly wrong.

Thirdly, Mr. President and Members of the Tribunal, you will have read in the submissions by Mauritius, and quite possibly in the newspapers, about those who lived in the British Indian Ocean Territory prior to 1973. Now, I have to say I was a little startled to hear what Mr. Sands had to say on this point because I can only repeat what the British Government has said on a number of occasions in the past. That is, that we regret very much the circumstances in which they were removed from the islands and recognise that what was done then should not have happened. A substantial sum in compensation was paid to the former inhabitants in the 1980s – a point that was recognised by the European Court of Human Rights in their recent decision. When in Opposition, the political party of which I'm a member said that we would look again at our current policy for BIOT. When we first came into Government, we were constrained by the proceedings in the European Court of Human Rights. But immediately after those proceedings were concluded, my colleague, the Foreign Secretary, announced that we would be looking again at the question of the United Kingdom's policy towards BIOT. As part of that review we are looking again at the question of resettlement. And we hope to be able to reach conclusions in the early part of next year in respect of that. I say all this so that, Mr. President, you and the Members of the Tribunal can be fully informed on the position. It is clear that these issues are not, in fact, relevant to the questions that you will have to address in this claim that has been brought before you. But I think it is important that I put the position of the British Government on these questions on the record. And also I hope to dispel a suggestion that British Government has never expressed any regret in the matter, because it has done so repeatedly.

My fourth point concerns the prospect which Mauritian colleagues have alluringly presented to you, namely that you should be able to decide upon the sovereignty of the British Indian Ocean Territory. As I have said, we are confident of our own sovereignty. But the dispute settlement procedures set out in the United Nations Convention on the Law of the Sea, which are the ones you have to apply in these proceedings, cannot be used to test the issue through a judicial procedure. On the contrary, I am clear and would submit that it would be dangerous – and I use the word 'dangerous' advisedly – if you were to seek to go down that route. It is clear that the States Parties to the Convention did not intend, when they became a party to it, to confer upon the courts and tribunals referred to in the Convention a general and very wide power to adjudicate upon any dispute about the sovereignty over land territory that happened to have a coast. Mauritius is in effect asking this Tribunal to reach a decision on jurisdiction that would be seen to be perverse. We have no doubt at all that for the Tribunal to seek to apply such a wide ranging jurisdiction would be quite wrong and would call into question the whole system of dispute settlement under the Convention, and with it, the Convention itself. I speak to you bluntly about this because we perceive these to be very serious issues, and it is only right that I should draw your attention to them.

Next, Mr. President, I want to explain to you the Government's attitude towards the establishment of marine protected areas. As the Members of the Tribunal will know, the internationally agreed target is that ten per cent of the world's oceans should be declared as marine protected areas by 2020. In fact, and frankly regrettably, it looks as if this target is not going to be met. But the United Kingdom Government has made it clear that it is keen to do what it can to pursue that objective. Indeed, the marine protected areas around the British Indian Ocean Territory, together with that around another UK territory, South Georgia and the South Sandwich Islands, are two of the largest marine protected areas in the world. We are proud of the fact that two British territories have marine protected areas around them, and of the

contribution they are making to the global public good. I need hardly say therefore that we would greet with considerable alarm any decision by this Tribunal which casts doubt upon the validity of the declarations of marine protected areas, either in general, or around territories where third states may claim sovereignty. We are committed to furthering biodiversity of the oceans, and we believe that one significant way of doing this is through the establishment of marine protected areas.

Mr. President, Members of the Tribunal, it is not understating the case to say that the world's oceans are in peril; indeed, that is the term used by various United Nations agencies.[29] The UN Secretary-General, Ban Ki-Moon, in his Oceans Compact initiative launched in August 2012 to address ocean health and governance, observed that: "[h]umans … have put the oceans under risk of irreversible damage by over-fishing, climate change and ocean acidification (from absorbed carbon emissions), increasing pollution, unsustainable coastal area development, and unwanted impacts from resource extraction, resulting in loss of biodiversity, decreased abundance of species, damage to habitats and loss of ecological functions".[30]

The United Nations Food and Agriculture Organisation said in its 2012 Report on the State of the World's Fisheries that the "state of world marine fisheries is worsening". According to its figures, 87.3 percent of the world's fish stocks are either over-exploited, requiring strict management plans to restore their full and sustainable productivity, or are very close to their maximum sustainable production, requiring effective management to avoid decline.[31]

[29] The interagency Report prepared by UNESCO, the IMO, the FAO and UN Development Programme for the 2012 Rio+20 UN Conference on Sustainable Development, "A Blueprint for Ocean and Coastal Sustainability", 2011 ("A Blueprint for Ocean and Coastal Sustainability"), p. 4, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/interagency_blue_paper_ocean_rioPlus20.pdf

[30] "The Oceans Compact: Healthy Oceans for Prosperity – An Initiative of the United Nations Secretary-General", July 2012, p. 2, http://www.un.org/depts/los/ocean_compact/SGs%20OCEAN%20COMPACT%202012-EN-low%20res.pdf

[31] Food and Agriculture Organization of the United Nations ("FAO"), *The State of World Fisheries and Aquaculture 2012*, p. 11, http://www.fao.org/docrep/016/i2727e/i2727e00.htm

According to UNESCO and others, 60% of the world's major marine ecosystems that underpin livelihoods have been degraded or are being used unsustainably[32].

And that has a direct impact on the livelihoods and food security of millions, including in particular Low Income Food Deficit Countries, many of which lie in and around the Indian Ocean.

According to 2012 UN figures, around 40 per cent of the world's coral reefs have been lost due to human impacts or are degraded[33]. The 2008 Status of the World's Coral Reefs Report gives a figure of around 34%, with another 20% under threat in 20-40 years[34]. And other estimates are more pessimistic, suggesting the global coral reef ecosystem is on a trajectory to collapse within a human generation[35].

Now, Mr. President, I focus on coral reefs because these are the nurseries of tropical coastal fish stocks and a storehouse of biodiversity. Without them, as one expert has put it, "What we will be left with is an algal-dominated hard ocean bottom… with lots of microbial life soaking up the sun's energy by photosynthesis, few fish but lots of jellyfish grazing on the microbes. It will be slimy and look a lot like the ecosystems of the Precambrian era, which ended more than 500 million years ago".[36]

And all of that is particularly true of the Indian Ocean, which has experienced massive fisheries exploitation since 1950. As a result, Indian Ocean reef fisheries are grossly

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[32] UNESCO website, "Facts and figures on marine biodiversity", http://www.unesco.org/new/en/natural-sciences/ioc-oceans/priority-areas/rio-20-ocean/blueprint-for-the-future-we-want/marine-biodiversity/facts-and-figures-on-marine-biodiversity/

[33] A Blueprint for Ocean and Coastal Sustainability, above n. 29, p. 14.

[34] Koldewey et al, "Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve", *Marine Pollution Bulletin* (2010), vol. 60, p. 1906, UKR, Annex 63, at p. 7 (internal page numbering of version in Annex 63), UKAF, Folder 1, Tab 18, citing Global Coral Reef Monitoring Network, Wilkinson ed., "Status of Coral Reefs of the World 2008".

[35] See the entry on the Chagos Conservation Trust ("CCT") website: http://chagos-trust.org/news/world-without-coral-reefs. The CCT's members and trustees include scientists working on coral reefs: see http://chagos-trust.org/about/who-we-are.

[36] Dr Roger Bradbury, 'A World Without Coral Reefs', *The New York Times*, 13 July 2012: http://www.nytimes.com/2012/07/14/opinion/a-world-without-coral-reefs.html?_r=0

overexploited[37], as is the yellowfin tuna fishery[38]. 90% of the sharks are gone[39]. And they are regarded as being a great indices of the overall health of the ecosystem. Many representative Indian Ocean ecosystems have been badly damaged[40] in the "decades of destruction" since the 1970s caused by huge increases in population and pollution, increasing overfishing, and, more recently, the impact of climate change[41]. The seas around three-quarters of Indian Ocean islands and the Ocean rim have deteriorated markedly[42]. And 17% of the coral reefs of the Indian Ocean are estimated to have been lost; 22% are in a critical condition; and 32% are threatened[43].

If you have not already had the opportunity to do so, I do invite the Tribunal to look at the three ten minute films which we submitted with our Rejoinder. I don't know whether you have yet had an opportunity of doing that. I hope you have seen the footage in the first BIOT Science in Action film which shows the stark contrast between the healthy BIOT reefs and those in Madagascar which have significantly deteriorated as a result of human activities. They are few signs of life and fish in comparison to those in the MPA.

In that context, I was a little startled to see Mr. Sands suggest that the creation of the MPA was in some way a sham and that that could be illustrated by the lack of action that was being taken. He took you to the report of Mr. Sheppard, an environmental expert, that the United Kingdom Government had sent out, in fact, principally to look at the conditions in the lagoon at Diego Garcia, which is outside of the MPA area, but also to make some more general comments. I would strongly submit that if you come and go back to look at that document, far

[37] "Marine conservation in the British Indian Ocean Territory: science issues and opportunities", Final Report of Workshop held 5-6 August 2009 at the National Oceanography Centre, Southampton ("NOC Report"), UKCM, Annex 102, UKAF, Folder 1, Tab 17, p. 7,.
[38] Koldewey et al, above n. 34, p. 3, citing Indian Ocean Tuna Commission figures.
[39] NOC Report, above n. 37, p. 6.
[40] NOC Report, above n. 37, p. 2.
[41] DVD, Chagos Science in Action I, around 1 min 25 sec.
[42] DVD, Chagos Science in Action I, around 1 min 50 sec.
[43] NOC Report, above n. 37, p. 4.

from suggesting that the United Kingdom is doing nothing about the careful management of the MPA, that it actually illustrates really detailed and careful management been carried out, not just within the MPA but within the lagoon as well, to ensure that the near-pristine conditions are maintained, even when there are probably quite minor threats to it from within the operation of Diego Garcia base itself.

Marine protected areas are recognised by scientists and the international community as essential[44] to promote the conservation and management of oceans and fisheries[45], as reflected in the internationally agreed target of 10 per cent coverage by 2020[46]. The 2002 World Summit on Sustainable Development demanded that all over exploited fish stocks be restored to the level that can produce maximum sustainable yield by 2015. These goals will almost certainly be missed. Certainly, the 2015 target for restoration of overexploited fish stocks is unlikely to be met, according to the FAO.[47] In 2010, the global MPA coverage was only just over 1% and, as I have already noted, is unlikely to be achieved.

The BIOT MPA is a regionally and internationally critical step in beginning to address the risk of irreversible damage to the oceans. It has substantially increased the global coverage of MPAs. The scientific case for the BIOT MPA is robust actually hasn't been challenged in this case at all. The waters around British Indian Ocean Territory are some of the most pristine in the Indian Ocean, indeed on the planet, and have a genuinely world-wide importance: scientists agree it is an exceptional place and merits protection.

The three short films I have mentioned provide an illustration of this. But perhaps I might interject that, as a diver myself, the films show what for me is a truly remarkable environment and rather different, if may say so, from the very pleasant environment, but nevertheless

[44] Koldewey et al, above n. 34, p. 5.
[45] Johannesburg Plan of Implementation, 2002 World Summit on Sustainable Development (UKCM, para. 3.23); FAO report on *The State of World Fisheries and Aquaculture 2012*, above n. 31, pp. 164-5.
[46] UKCM, para. 3.25.
[47] FAO report on *The State of World Fisheries and Aquaculture 2012*, above n. 31, p. 11.

markedly different, where I was diving only four to five days ago in the Maldives, a mere few hundred miles north of BIOT.

The MPA, because of its size, location, biodiversity, and the near-pristine nature and health of the Chagos coral reefs, is likely to make a significant contribution to the wider biological productivity of the Indian Ocean more generally[48]. Size is important because many conservation-related benefits increase non-linearly with size. Smaller areas are much less effective in maintaining viable habitats or populations of threatened species.[49]

Indeed, large scale MPAs, like the BIOT MPA, are important for protecting migratory and highly mobile pelagic species, as well as those species that remain within the MPA[50]. The bycatch of sharks and rays and other species in the BIOT tuna longline and purse fisheries was previously significant, especially for sharks, and that happens wherever such fishing takes place[51].

The assessment of the potential benefits to fisheries and biodiversity in the Indian Ocean of the BIOT MPA are there in Doctor Koldewey and her colleagues, in the report published in the peer reviewed *Marine Pollution Bulletin*, which is amongst your documents, and that concluded that "the closure of Chagos/BIOT to all commercial fishing will eliminate bycatch in the Western Indian Ocean as a whole by providing a temporal and spatial haven"[52] and will maintain both fish populations and the near-pristine habitat that exists in the area.

The BIOT MPA safeguards around half the high quality reefs in the Indian Ocean[53], and Doctor Koldewey's publication notes the BIOT MPA is particularly important because of the status of the world's reefs.

[48] NOC Report, above n. 37, p. 1.
[49] Ibid., p. 4.
[50] Ceccarelli, "The value of oceanic marine reserves for protecting highly mobile pelagic species: Coral Sea case study", UKR, Annex 68.
[51] Koldewey et al, above n. 34, p. 5.
[52] Koldewey et al, above n. 34, p. 5.
[53] NOC Report, above n. 37, p. 1.

It also contains an exceptional diversity of deepwater habitat types, 97% of which are unexplored.[54]

And a further scientific study published earlier this year has confirmed that the efficacy of MPAs is highly influenced by being no-take, large and isolated.[55]

The MPA also provides a crucial scientific reference site for Earth system science studies and regional conservation. It is one of the world's few remaining examples of what a pristine marine environment ought to be like and the world's biggest coral reef atoll system. Scientists all agree that it is an exceptional place. As such it provides a baseline, an unpolluted reference site for studies elsewhere in the world measuring the effects of pollution, the processes that collectively create climate change and managing the threats climate change poses. It is one of the few tropical locations where global climate change effects can be separated from those of pollution and exploitation[56].

Now, Mr. President, as I said, I have only very recently seen some of the great riches of the marine environment in the Indian Ocean, including a rather large shark at probably closer call than I might have necessarily have wished in the last few days, but the thing that strikes one when diving in the Maldives which in location and structure resembles the natural environment of the Chagos Archipelago is that, as good as it is, and despite the very great efforts to preserve it, the effects of human interference in the Maldives are very visible when one dives and also on the surface. The lack of serious adverse human interference in BIOT makes it quite exceptional not just in terms of conservation but also in terms of maintaining and restoring the fish stocks that may then be taken commercially elsewhere.

The BIOT MPA plays a key role as a regional stepping stone and re-seeding source for species in the Indian Ocean, and that stepping stone is critical to the viability of

[54] NOC Report, above n. 37, p. 4.

[55] Edgar et al, "Global conservation outcomes depend on marine protected areas with five key features", *Nature*, vol. 506, 13 February 2014, p. 216, UKR, Annex 80.

[56] Koldewey et al, above n. 34, p. 7; NOC Report, above n. 37, p. 1.

heavily-harvested fish populations elsewhere[57]. It is also the only place in 1000 miles of ocean for seabirds to roost and breed[58].

Results from the recent scientific research expeditions show it has the cleanest seas in the world.[59]

So, I don't apologize, Mr. President, for belabouring this a little bit because, in sum, the United Kingdom Government is extremely proud of the MPA. The BIOT is one of the very few remaining places on earth and the only remaining place in the Indian Ocean where it is practically possible to protect a large-scale, pristine marine environment for future generations, vital research into climate change, coral reefs and fisheries, and for fisheries conservation necessary to the food security of the people who live around the Indian Ocean, and that includes those who live on Mauritius.

Let me nevertheless emphasise this. The United Kingdom acknowledges the special interests of Mauritius and the Chagossian communities in the BIOT. It took them into account as part of its assessment and development of MPA policy. In particular, the MPA does no harm to Mauritius, to the contrary, it is an important regional and international asset from which it benefits. We have also said quite clearly in the Terms of Reference for the Chagossian resettlement Feasibility Study that the MPA is not a barrier to resettlement.

It is a matter of regret that Mauritius doesn't appear to recognise the importance of maintaining the pristine environment of the archipelago and has currently given no commitment to protecting the vulnerable eco-system around the British Indian Ocean Territory when the territory is ceded to Mauritius when it's no longer needed for defence purposes.

Mr. President, I will now set out the most important legal points which will be made by those representing the UK during the hearing:

[57] NOC Report, above n. 37, p. 5.
[58] DVD, Chagos Science in Action, II, around 7 mins 10 secs.
[59] DVD, Chagos Science in Action II, around 7 mins 48 secs.

The first – and we say determinative points – concern your jurisdiction. I have already touched on the absence of jurisdiction to determine the issues of sovereignty that have been raised by Mauritius. I have highlighted this already because of the radical and untenable nature of the jurisdiction that is asserted. But the United Kingdom's objection here also belongs up front because it is the Mauritian claim to sovereignty that is the real issue in and behind the current proceedings. The claim to sovereignty has been put forward here in the guise of a case under UNCLOS. But it is the same underlying claim as has been presented or mooted before other fora and in bilateral exchanges spanning three decades or more. And that dispute as to sovereignty, however it is cast or re-cast, is not a dispute concerning the interpretation or application of the Convention at all. Hence I've submitted this tribunal lacks jurisdiction to determine the issues, such as self-determination and territorial integrity, that are really fundamental to Mauritius' claim. That is, we say, a very unsurprising outcome – and Mauritius – I listened carefully to what was being said – has been unable to point to any provision of the Convention, or any judicial or other decision, or any State practice to suggest that we are wrong on this point.

You will be taken by Mauritius to views – including views of some of the members of this distinguished tribunal – on so-called "mixed disputes" and to the intricacies of article 298(1)(a) of the Convention. But those views have been expressed, I submit, in the very particular context of an incidental jurisdiction to determine disputed territorial matters, where this is necessary for, and incidental to, the resolution of a maritime delimitation case. But that's not this case here: indeed, the BIOT and Mauritius are many hundreds of miles apart and there can be no maritime delimitation between them at all. The territorial sovereignty issues plainly underlie and are fundamental – and are certainly not incidental – to the claims made by Mauritius. And ultimately article 298(1)(a) of the Convention, however interpreted, supports the United Kingdom's position. If there truly were the broad jurisdiction over disputes concerning

the sovereignty of the coastal state for which Mauritius contends, then there would surely be the same opt-out from compulsory jurisdiction as in article 298(1)(a). But there is no such opt -out; and that I would submit is because it's perfectly clear there is no such jurisdiction.

Second, even the most cursory analysis of Mauritius' claim to sovereignty over the BIOT confirms that this claim is not a matter falling for resolution under the Law of the Sea Convention. For example, you are asked to rule upon the precise contours of the principle of self-determination in 1965; when precisely the principle became part of customary international law; and when it became binding upon the United Kingdom. In this regard you are taken by Mauritius to resolutions of the UN Security Council and General Assembly, and to political declarations of various international groupings. You are asked to consider questions of duress. You are asked – or at least you were asked – to consider and apply the *uti possidetis juris* principle to the facts of this case, although it appears that Mauritius lost faith with this line of argument in its Reply. What you are not being asked to do, by contrast, is to really consider the actual provisions of the Convention – save by the sleight of hand of saying that somehow all these principles fit within any given reference in the Convention to the "coastal State".

And that, Mr. President, takes me to the next jurisdictional objection. Consistent with the real dispute being over sovereignty, the first time that the UK learned of the existence of the claim in respect of the MPA was when Mauritius lodged the Notice of Arbitration. Now, I do want to emphasise that the requirements of Article 283, in terms of the existence of a dispute and the obligation to exchange views, go to your jurisdiction. These are not mere formalities, waiting to be bypassed when issue is joined through an exchange of pleadings once an Annex VII proceeding is underway. The pre-conditions in Article 283 are an essential part of States' consent to jurisdiction when becoming parties to UNCLOS.

The recent jurisprudence of the International Tribunal for the Law of the Sea and the International Court of Justice strongly confirms, we say, our position in this respect, and the

particular claims of this case provide a very good illustration of why international tribunals must be right to insist on the fulfilment of all the pre-conditions to compulsory jurisdiction. For example, many of the claims before you go to alleged failures to consult. As such, the allegations could readily have been considered, and addressed as appropriate, if they had been brought to the United Kingdom's attention before the commencement of proceedings, as Article 283 requires. But that in fact never happened, and so we now litigate, at great public expense for both the Mauritian taxpayers and the United Kingdom's, alleged failures to consult that have now taken on a life of their own as claims in international arbitration.

The fourth and final jurisdictional objection concerns the non-sovereignty claims alone. Simply put, the MPA has been implemented through a ban on commercial fishing. This involves the exercise by the United Kingdom of its sovereign rights over conservation and management of living resources under article 56 of the 1982 Convention. Now, the exercise of those rights does not fall within your jurisdiction over environmental disputes under article 297(1) of the Convention. And it is expressly excluded from your jurisdiction over disputes relating to fisheries under article 297(3). Now, Mauritius seeks to get around these two provisions by some more re-packaging – this time, saying that its claim is that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment, and thus falls within article 297(1)(c). But I submit it can point to no such, or has not been able to point to any such specified international rules and standards that are relevant to its claim. That merely demonstrates the artificial nature of the attempt to fit the exercise of sovereign rights with respect to marine living resources, over which an Annex VII tribunal has no jurisdiction, within the strictly delimited confines of article 297(1)(c).

Mr. President, I do not want to say too much on the merits since we strongly believe that you should never reach that point, which you will appreciate from my submissions, but I will limit myself to three observations on the merits of this case.

Firstly, aside from the sovereignty issue, the claim comes down to a number of after-the-event complaints of a failure to consult and claims to exclusion from alleged fishing rights.

The complaints on consultation also, I think, should not detain the Tribunal very long. There were bilateral consultations in 2009, on that everybody is agreed. We say the United Kingdom wanted further consultations. Again there can be little debate about that, nor about the fact that Mauritius refused to participate in further bilaterals save on terms that the United Kingdom could not accept. It then comes down to a finger-pointing exercise before this tribunal as to who was responsible for the breakdown – we say we are firmly in the right, but this is scarcely a matter which an international tribunal should be troubled with. There is an assertion that a commitment was made by former British Prime Minister Gordon Brown that the MPA would be put on hold. That may be a misunderstanding, but we are quite clear that no such government to government commitment was given.

As to fishing rights, a great deal has now been written by Mauritius in the pleadings in this case, but some perspective I think is called for. Mauritian fishing in the maritime area now within the MPA has, over the past almost 50 years, been on the spectrum from very low to non-existent. When a licence regime was first introduced by BIOT, there was no complaint by Mauritius that this breached alleged fishing rights. Likewise, when the number of available licences was cut from six to four in 1999, there was no complaint that this breached fishing rights. In many of the years, Mauritian-flagged vessels did not apply for any licences at all, or just one. And I should interject here that, in fact, no application by a Mauritian-flagged vessel has ever been turned down when licences were being granted. You have before you a table – and I hope it's in your Arbitrators' folder – a table from the UK Counter-Memorial which demonstrates the very limited Mauritian fishing activity in BIOT waters. And it might,

Mr. President, just be worth looking at it very briefly, if you have it. I think it's now on screen as well.

The top table shows fishing licenses issued by BIOT from 1991 to 30th of March 2010, and the red and pink alongside it shows those taken up by vessels from Mauritius. So, the Tribunal will see how it all times it has been a tiny percentage share of the total fishing that has taken place in BIOT, and that, indeed, in 2002, 2005, 2006, 2007, and 2008 there was, in fact, no-takeup at all. And if one looks at the bottom, and it shows simply the Mauritian vessels and shows the same picture. So, the reality is probably due to the vast distance that actually exists between Mauritius and its other islands and the British Indian Ocean Territory, hundreds, if not actually over a thousand miles away certainly between the main island and over I think it's 1200 nautical miles, one of the reasons why, in fact, this offer that was being made in 1965 of free licensing has been only rarely taken up.

Against this unpromising backdrop, an elaborate case has been built in these proceedings by reference to an understanding on "fishing rights" reached in 1965, which I would have to say reached its greatest stridency in the Mauritian Reply, where the United Kingdom was accused of suppressing evidence by certain documents being redacted where the redactions are said to have been unhelpful to the United Kingdom. I can assure you that as the Minister responsible for the Government's Legal Service and indeed for propriety, to an extent, in the way government conducts litigation, I would not countenance such a thing. I'm grateful to the Tribunal for the way that the Tribunal has dealt with that aspect of the matter.

Now the nature, correct interpretation and scope of the 1965 understandings are all matters that, if our jurisdictional objections are surmounted, are indeed for the Tribunal to determine. Mauritius has picked from the disclosure in the domestic judicial review claim those documents that it considers as showing UK personnel taking the view that the 1965 understandings gave rise to binding obligations in respect of fishing rights. When the

documentation is looked at in its entirety - and we have a detailed appendix to our Rejoinder devoted to that - what one in fact sees is a broad range of views, none of which are backed up by considered or detailed legal advice, and none of which are relevant and material to the issue which you must now determine. The internal views of officials cannot, we submit, be material to the consideration by an international tribunal of the meaning and effect of a particular document. Were it otherwise, disclosure in state-to-state cases would have taken a markedly different course in arbitration proceedings, and indeed, I do note that Mauritius has disclosed only five internal documents.

Finally, there is the asserted claim by Mr. Sands, of bad faith on the substance – the claims that the MPA is an abuse of rights held under the Convention, ultimately as I said at the start apparently an elaborate charade to prevent the resettlement of BIOT by its former inhabitants. I have already touched on the United Kingdom's policy on resettlement. Issues of potential resettlement played no role whatsoever in the declaration of the MPA. Mauritius now suggests otherwise, and alleges breach of article 300 of the Convention. Yet it does so without any evidence to challenge the scientific basis for the MPA, which I touched on earlier. And I might add, without finding a single document in the UK's extensive disclosure in the domestic judicial review proceedings that suggests that the declaration of the MPA was motivated by anything other than scientific and conservational intent. The United Kingdom as I said is proud of the MPA. Mauritius was initially in favour, and quite rightly so. Its current litigation strategy cannot cut across that. And, in the longer term, it will be Mauritius in particular, as well as the broader global community more generally, that will benefit from this MPA and the preservation of a unique maritime area.

As the tribunal will be aware, the allegation of improper motive was also made in the domestic proceedings. The decision of the High Court is the subject of an appeal to the Court of Appeal, and although the hearing has taken place, the judgment has yet to be handed down.

Nevertheless, I would like to quote briefly from the High Court's judgment. It said this: "For the claimant's case on improper purpose to be right a truly remarkable set of circumstances would have to have existed. Somewhere deep in Government a long-term decision would have to have been taken to frustrate Chagossian ambitions by promoting the MPA. Both the administrator of the Territory in which it was to be declared, Ms. Yeadon, and the person who made the decision, the Foreign Secretary, would have to have been kept in ignorance of the true purpose. Someone – Mr. Roberts, [we have seen referred to in an American memo]? – would have been the only relevant official to have known the truth. He, and whoever was privy to the secret, must then have decided to promote a measure which could not achieve their purpose, for the reasons explained above, while explaining to all concerned that the MPA would have to be reconsidered in the light of an adverse judgment of the Strasbourg Court. Those circumstances would provide an unconvincing plot for a novel. They cannot found a finding for the claimant on this issue."

So, Mr. President, to conclude: the United Kingdom takes the strong view that the claims made by Mauritius are not within your jurisdiction and we urge you to dismiss them in their entirety.

Mr. President, Members of the Tribunal. You now will have several weeks of detailed legal argument before you, and I am afraid that I am not able to stay, as interesting as it would be for me to do so, but other government business claims me back. But I am very grateful to you to have given me the opportunity to make an opening speech and make these few points.

Thank you very much for your attention.

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

Now, is there a continuation?

ATTORNEY GENERAL GRIEVE: Just me.

PRESIDENT SHEARER: Very good. Thank you.

Well, in that case, we can adjourn until 9:30 tomorrow morning, and I hope in the meantime we would be able to do something about the temperature in this room and the extraneous noises, but I hope you bear with us. Thank you very much, and we adjourn until tomorrow morning. Thank you.

(Whereupon, at 4:58 p.m., the hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN

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