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 2

HEARING ON JURISDICTION AND THE MERITS

Wednesday, April 23, 2014

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

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

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Well, good morning, ladies and gentlemen.

My first announcement before I call upon counsel for Mauritius is that we appear to have fixed the air conditioning problem. Let's hope it remains that way for the rest of the day.

You will note that there is a somewhat amended schedule hearing this morning at the request of a Party, and we will, first of all, have a hearing of 80 minutes and then the break at 20 minutes. I think you are all aware of that.

There are a couple of other announcements I want to make briefly, and they are, first of all, that Judge Wolfrum has a number of questions to put to the Parties which have been formulated in writing, and they will be distributed to each side during the coffee break this morning. They are questions that go to the merits and do not – and are without prejudice to questions of jurisdiction, he wishes to emphasize. They may be answered in the course of the oral presentations – indeed, some of them may already be covered in what you propose to say in your oral submissions. They can be answered in writing because some of them may require some delay or reference to capitals as the case may be. But the Parties are free to answer them in whichever way they find convenient. This, of course, is without prejudice to the right of any other Member of the Tribunal to ask questions as we go along.

Now, I think that's all I wish to say at this stage.

Now I understand Ms. Macdonald will address the Tribunal first, so I give her the floor.

Thank you very much.

MAURITIUS v. UNITED KINGDOM

MERITS AND JURISDICTION HEARING

Speech 3: Pre-Excision

23 April 2014

Ms. Alison Macdonald

INTRODUCTION

1. Mr. President, Members of the Tribunal, it is an honour for me to appear before you on behalf of the Republic of Mauritius. May I start by thanking the President for his understanding with regard to this morning's schedule and for accommodating that, that shift of timing. We're very grateful. We hope that that will assist by making there be natural breaks after each speaker.

Yesterday afternoon Professor Sands described how Mauritius will set out its case. Today's presentations will address the facts, tomorrow we will address the merits, and on Friday we will deal with the UK's objections to jurisdiction.

2. My task this morning is, briefly, to set out the geographic setting and the historical background. And in particular, I will address the UK's surprising argument that the Chagos Archipelago was, in fact, never part of the territory of Mauritius. I will also give a brief overview of Mauritius' journey to independence, so far as it is relevant to these proceedings.

3. Before turning to my first point, allow me briefly to outline today's presentations. Following my submissions, Professor Crawford will address the excision of the Chagos Archipelago, and in particular the events of September 1965 during the final Constitutional Conference in London. Professor Crawford will demonstrate that the grant of independence to Mauritius was conditional on the Mauritian Ministers' purported "agreement" to detachment. This purported "agreement", as he will show you, was obtained under conditions amounting to duress, and in no way reflected a true expression of the wishes of the people of Mauritius.

4. Following Professor Crawford, Mr. Reichler will then address you on the specific undertakings given by the United Kingdom to Mauritius at that conference in September 1965, and on how the British Government interpreted, understood and complied with those

undertakings over the 45 years following until April 2010, when it unilaterally declared the "MPA".

5. The creation of the "MPA" is the subject of the final presentation this afternoon. At that point, I will describe the events leading to the establishment of the "MPA", including former Prime Minister Gordon Brown's undertakings to Prime Minister Ramgoolam that he would put the "MPA" on hold, and that it would only be discussed in the framework of bilateral talks between Mauritius and the UK. I will also look at the nature and the purpose of the "MPA", so far as one can tell from the scanty information which is available.

6. Mr. President, Members of the Tribunal, with that introduction, I turn now to my first point, the geographic setting.

I. GEOGRAPHIC SETTING

7. The Republic of Mauritius consists of a group of islands located in the Indian Ocean. We have shown this on the map at Figure 1 of Mauritius' Memorial, in volume 4, and we have reproduced for your convenience that map behind a new section of your folders from yesterday at Tab III, which I hope you have in front of you, green Tab III, which contains, save for one or two documents which were already referred to by Professor Sands, my documents for this speech are in clip 3 of your folders. So we should have a little index at the front or behind the green piece of plastic, and then behind that a Tab I which contains the plan. This may be useful to have to hand for the next minute or two as I give a simple summary of the geography.

The main Island of Mauritius is about 900 kilometres east of Madagascar, and 170 kilometres from the Island of Réunion. The other islands that form part of Mauritius, set out in Section 111 of the Constitution, include Cargados Carajos Shoals (about 400 kilometres to the north); Rodrigues (about 560 kilometres to the north-east); Agalega (about 930 kilometres to the north); Tromelin, which Professor Sands mentioned yesterday (located 580 kilometres north-west) and of course the Chagos Archipelago, including Diego Garcia, which is about 2200 kilometres to

the north-east.[1] And the total land area of the Republic of Mauritius is about 1,950 square kilometres.[2]

8. Turning to the Chagos Archipelago itself, this is made up, as you've seen, of a number of coral atolls and small islands. And these are shown in the next tab, Tab 2. There is a plan of the Archipelago. Again, all of these maps and a number of others which we hope are helpful are, in larger form, at Volume 4 to Mauritius' Memorial for your future reference, but we've put these two in the folders for today just so that there is a reference point for what I am going to be talking about. The largest island in the Chagos Archipelago, by some distance, is Diego Garcia in the south-west, which is about 27.2 square kilometres.[3]

9. By the 1960s, the population of the Archipelago was about 2000. They formed a community with a settled way of life, sustained themselves through fishing, raising chickens and pigs and maintaining vegetable gardens. They built their own homes. They passed land down through the generations. A Catholic priest who visited Diego Garcia in 1933 wrote that, at that time, about 60% of the population on Diego Garcia were, in the term, "children of the islands", meaning that they had been born and raised there.[4] This was the community which, as you will hear later on, the UK forcibly removed in the 1960s.

10. Now, in the Counter-Memorial, the UK makes much of the fact that the Chagos Archipelago is located, as I said, some 2,200 kilometres from the main Island of Mauritius. And this is picked up again in the Rejoinder, where the UK says that "BIOT is one of the most isolated island groups in the world."[5] Now, on the subject of geography and remoteness, while the UK has taken the trouble to calculate the distances between Diego Garcia and what it refers to as the other "major neighbouring population centres/capitals", it has omitted to calculate the

[1] MM, para. 2.3; 2.6.
[2] MM, para. 2.3.
[3] MM, para. 2.6.
[4] MM, paras. 2.24-2.28.
[5] UKR, para. 2.6.

distance between the Chagos Archipelago and London. We have done this, though, and for the record the distance from the northern edge of Diego Garcia to the base of Nelson's column in Trafalgar Square in central London is no less than 9,445 kilometres.

11. Mr. President, there is no dispute that the Republic of Mauritius is made up of a number of islands, some of which are very isolated. For example, Agalega and Rodrigues, both of which the UK accept are part of Mauritius, are themselves 1,245 kilometres away from each other. The fact that the Chagos Archipelago is an isolated island group does not, we say, preclude its inclusion within the Republic of Mauritius.

II. THE CHAGOS ARCHIPELAGO HAS ALWAYS BEEN AN INTEGRAL PART OF THE TERRITORY OF MAURITIUS

12. And this brings me to the second point: The Chagos Archipelago has always, as a matter of law and a matter of fact, been an integral part of the territory of Mauritius. Mr. President, we were somewhat surprised when the UK argued to the contrary in its Counter-Memorial;[6] claiming that the islands were only ever, I quote, "very loosely" administered from Mauritius, purely, I quote again, "as a matter of convenience".[7] This approach is surprising because it completely ignores, as I will show you, 200 years of historical and legal evidence to the contrary.

13. Now, in making this unhappily formalistic argument, the UK tries to get support from its own colonial practice, described in an Appendix to Chapter 2 of the Counter-Memorial, along with some passing references to the practice of France. The UK argues that its unilateral categorisation of the Chagos Archipelago as a "dependency" precludes it from being part of the territory of Mauritius. But the legal label which the colonial power applied to that territory does not help you to answer the question of how it should be treated for the purposes of this case. The label, we say, does not matter. Whether or not the Chagos Archipelago formed part of Mauritius

[6] UKCM, para. 2.16-2.32.
[7] UKCM, para. 2.19.

depends on the evidence. And as I will show you, the evidence is that Mauritius and the Archipelago formed an undivided factual and legal unit, such as to enjoy the right of self-determination. The mere fact that it was labelled a "dependency" by the UK does not rob it of that right. The principle of territorial integrity in international law applies to all parts of a territory, irrespective of what the colonial power chose to call them.

14. I should also add that while the UK's argument is surprising, it is not entirely new. This was one of a series of justifications and excuses concocted by the UK in the 1960s to sidestep international condemnation for the excision. The UK knew full well at the time that the Chagos Archipelago was part of Mauritius, but, as I will show you in a moment, it thought of ingenious ways to try to persuade the UN otherwise. The Attorney General told you yesterday that the UK, I quote, "made clear to the United Nations in 1965 that the islands were attached to Mauritius purely as a matter of administrative convenience." [Day 1, p. 42, line 24 to p. 43, line 1] But let's look at what exactly this "making clear to the UN" involved. In the next tab of your folder Tab 3 [MM Annex 31] we have a telegram from the Foreign Office – so to the Foreign Office from the UK Mission in New York dated the 8th November 1965 – the same day that the islands were detached from Mauritius. For the record, this is Mauritius's Memorial Annex 31. Lord Caradon, the British Ambassador to the United Nations, warns the Foreign Office, we see, unnumbered paragraph 1, that the detachment of the Chagos Archipelago "seems almost certain to be raised" at the UN. He goes on to consider, and we see at paragraphs 2, 3, and 4, possible ways of deflecting attention away from the residents of the Archipelago. You see at paragraph 2, a few lines down, he is referring to a previous telegram where the UK has stated that there are "virtually no permanent inhabitants." He is concerned that this statement, as you see, may well lead to "charges of failure to carry out our charter obligation to those who are permanent inhabitants. Moreover, our counterarguments will have to avoid giving ammunition to Argentina, which has chosen to proceed against the Falklands, i.e., we cannot argue that Indian

Ocean territory is not a non-self-governing territory in the sense of Chapter 11 of the Charter merely because there were no indigenous inhabitants originally or because only a few of the present inhabitants are permanent." He goes on at Paragraph 3 to think about what they might say about this. At paragraph 4, he says, "if we could say there are – repeat 'are' – no permanent inhabitants, many of these difficulties would not arise but use of 'virtually' – see Paragraph 2 above – seems to preclude this." So, what does he suggest? If we look over the page, Paragraph 7 – of course I invite you to read the document as a whole. I'm just, for reasons of time, taking you to what I would choose to emphasize at the moment – if we look at Paragraph 7, he suggests an alternative line may be against the alleged breach of Paragraph 6 of Resolution 1514 involved in detachment, and this may somewhat direct attention from the status of the new territory.

(Paragraph 6 of Resolution 1514, you will recall, provides that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[8])

So, Lord Caradon continues: "This is likely to attract wide support. We would reply that the Islands were administered under Mauritius and Seychelles only for convenience and that paragraph 6 is there-for irrelevant".[9]

15. Now, it is striking, we say, that almost 50 years after Lord Caradon's telegram, his words, that the islands were administered as part of Mauritius only "for convenience" have now found their way into the UK's Counter-Memorial[10]and indeed into the words of the Attorney General. The completely unsupported "alternative line" is now being recycled in the proceedings before you. And as you can see, this approach is taken directly from the bygone world of 1960's British colonialism, and it is no more justified now than it was then. Even at the time, as I will now

[8] MM, Annex 1, UNGA Resolution 1514(XV), para. 6.
[9] MM, Annex 31, para. 7.
[10] UKCM para, 2.19.

show you, the UK itself was well aware that the Chagos Archipelago was an integral part of Mauritius.

(a) Before the detachment of the Chagos Archipelago, the UK recognised that the Chagos Archipelago was an integral part of Mauritius

16. Pausing there for a moment, if we take the UK's case at face value, and imagine for a minute that the islands were not part of Mauritius before detachment, then a number of interesting questions arise. Why did the British Government go to such lengths to get the Mauritian Ministers to "agree" to the excision? Why did the UK give Mauritius £3 million in compensation, and undertakings, as you will hear, with regard to fishing, mineral and oil rights? Why did the UK promise that the islands would "revert" to Mauritius when they were no longer needed for defence purposes? Why were so many of the Archipelago's inhabitants resettled in Mauritius, and why did the UK make legal provision for them to become Mauritian citizens on independence?

17. Now, Mauritius is not alone in asking these questions. They were asked at the time. A representative from Tanzania in the Committee of 24 made a similar observation in 1966, noting that, I quote, "the United Kingdom Government would not have agreed to pay compensation to the inhabitants of the islands concerned if those islands were not an integral part of Mauritius and the Seychelles."[11]

18. The UK does not answer any of these questions in the Rejoinder. It resorts to bald assertions. It says that "[t]he payment of compensation to assist resettlement […] had no necessary connection with whether the islands were part of the territory of Mauritius" and "[n]or was the payment to Mauritius of compensation for resettlement of Chagossians in Mauritius any indication of the relations of the Chagos Archipelago to Mauritius." [UKR 2.24] Yet there is no

[11] MR, Annex 50, para. 176.

supporting footnote for this, and the UK does not produce any evidence in support: a regular feature of the UK's written arguments, as Professor Sands observed yesterday afternoon.

19. But one of the UK's own documents, Annex 2 to the Rejoinder, firmly supports Mauritius' position on this point. This is a document which Professor Sands showed you yesterday, and it's at Tab 2.2 of your folder, behind the blue heading to Professor Sands' materials yesterday afternoon. You will see that this is unfortunately not a terribly legible typed facsimile of a telegram, but I hope that we can make out what we need to see for present purposes. Now, this telegram is referred to by the UK to highlight the importance of securing the consent of the Mauritius Government to the detachment. The phrase quoted by the UK, for the record at footnote 119 on page 27 of the Rejoinder, is that, and you see this at the top in the first paragraph: "our view that willing acceptance in the two Colonies is essential for our object,". That starts three lines down in the, as I say, not terribly legible document that we have here, but you see the phrase "our view that willing acceptance in the two Colonies is essential to our object," – and they leave it at that. But let's just follow the sentence on. The rest of the sentence, omitted by the UK, says: "and that in order to secure this it will be necessary to compensate the two Governments <u>for their loss of territory</u>."[12] Now, obviously, a State can only lose territory that forms *part* of its territory.

20. The factual record demonstrates that when the British Government considered the question in 1965, they came to the conclusion that the Chagos Archipelago was part of Mauritius. Again, at footnote 53 of the Rejoinder, the UK points out that at a meeting on the 12th of April 1965, the Colonial Secretary said that "[a]lthough these islands were administered by Mauritius and the Seychelles it did not necessarily follow that they had legal sovereignty over them."[13]

[12] UKR, Annex 2, para. 1, emphasis added.
[13] UKR, p. 16, footnote 53, citing MR, Annex 30, p. 11.

21. This again, at first glance, might seem to support the UK's position. But again, it is, however, misleading, and there is a good reason why the statement is only mentioned by the UK in passing, in a footnote.

22. Now, the sentence immediately preceding, the quoted sentence states: "The legal position should be clarified."[14] And indeed, with bureaucratic efficiency, two weeks later, on the 27th of April 1965, the position was indeed clarified. If you look at Tab 3.4, so we're back to my documents, behind the green tab, 3.4, we have a note, helpfully entitled "Legal Status of Chagos, Aldabra, Desroches and Farquhar", note by the Secretary of State for the Colonies. And if we look at Paragraph 2 – well, first, perhaps, I think I should tell you what the UK says about the note.

Paragraph 2.22 of the Rejoinder says as follows: "The Colonial Secretary's note […] does no more than to cite the provision of the Mauritius (Constitution) Order 1964 and the Mauritius Interpretation and General Clauses Ordinance 1957. It adds nothing to these provisions."[15]

Mr. President, this description, as you will see, is not entirely accurate. The provisions in question are indeed cited in the note, but the UK has inexplicably ignored the covering letter, signed by the Colonial Secretary. And we see his initials A.G. (Anthony Greenwood) at the bottom of the page, and the cover letter states: "At the meeting of the Committee on the 12th April I was invited to circulate a report on the status of the Indian Ocean islands which it is proposed should be made available for joint U.K./U.S. defence developments. This I now circulate at Annex."[16]

But here is the critical point: "The islands in question are the Chagos Archipelago (i.e. Diego Garcia, Six Islands, Peros Banhos, Salamon Islands and Trois Freres, including Danger Island and Eagle Island), and Aldabra Group, Desroches and Farquhar and, as the annexed report makes

[14] MR, Annex 30, p. 11.
[15] UKR, para. 2.22.
[16] MR, Annex 31, p. 1, para. 1.

plain, they are all legally established as being parts of the Colonies of Mauritius or Seychelles. To separate them from Mauritius and Seychelles would require the making of amendments to existing constitutional instruments."[17]

23. So there we have it, and it is difficult to see how the UK can come to the conclusion that the Colonial Secretary's note "adds nothing". The Colonial Secretary, of course, was the Minister responsible for Mauritius, and this is only a few months before the detachment. He was asked to consider the legal position. He did so by reference to the relevant constitutional provisions, and he reached a clear and unequivocal view that the Chagos Archipelago was "part of the [Colony] of Mauritius".

24. His view is also, for the record, confirmed in a letter of the 30th July 1965 in which a Colonial Office official, writing to a colleague at the Treasury, explains: "We are all agreed that the Islands must be constitutionally separate from the Colonies of which at present they form a part."[18] We haven't put this in the binder, but it is at Annex 393 to Mauritius' Reply. And the UK's has no response to this letter in the Rejoinder. It merely asserts that it "adds nothing to the note of the 27th of April".[19]

Now, the Colonial Office's assessment was also shared by the Foreign Office. And if you turn on one tab further, you have the final document that I intend to show you this morning, which is Annex 9 of the Mauritius Memorial, Tab 5 behind the green heading for this morning in my clip. This is about the telegram sent to the UK Embassy in Washington, three days after the Colonial Secretary's note, on the 30th of April 1965. And in paragraph 2, the Foreign Office sets out which of the islands have been chosen for "defence facilities". This includes, as you see, "Diego Garcia and the rest of the Chagos Archipelago (Mauritius)".[20] Now, at paragraph 3, the Foreign Office helpfully explains that: "It is now clear that in each case the islands are legally part of the

[17] MR, Annex 31, p. 1, para. 2, emphasis added.
[18] MR, Annex 393 para. 3, emphasis added.
[19] UKR, para. 2.22.
[20] MR, Annex 9, para. 2.

territory of the colony concerned. Generous compensation will, therefore, be necessary to secure acceptance of the proposals by local Governments (which we regard as fundamental for the constitutional detachment of the islands concerned) in addition to the compensation for the inhabitants and commercial interests which will be displaced. The total may come to as much as £10 million. We should, therefore, like to discuss with the United States Government the possibility of a contribution to these costs from their side."[21]

25. So, looking at the evidence, it appears that the UK now disagrees with the Secretary of State for the Colonies and its own Foreign Office. They did not, as the UK tries to say, say that the Chagos Archipelago was administered as part of Mauritius, but was not part of Mauritius. The Foreign Office Telegram is clear: the islands were, in April 1965, "legally part of the territory" of the Colony of Mauritius.

26. And the UK responds to this. The Foreign Office note is limited to one sentence in the Rejoinder: at paragraph 2.22 it states that:

"The Foreign Office telegram […] gave a non-legal description of the position, with the evident aim of persuading the Americans to contribute to the generous compensation that was thought necessary."[22]

Two observations on this: firstly, it was clearly not a non-legal description. To say the islands are "legally part of the territory" of Mauritius is a legal description of the status of those islands. Second, what is meant by the UK's statement that the Foreign Office telegram had "the evident aim of persuading the Americans to contribute to the generous compensation that was thought necessary"? Is it the UK's position that the Foreign Office, in April 1965, instructed its Embassy in Washington to misrepresent the legal status of the Chagos Archipelago in order to obtain money from the United States? Surely not.

[21] MM, Annex 9, para. 3, emphasis added.
[22] UKR, para. 2.22.

27. The United States evidently shared the views of the Colonial Office and the Foreign Office. A 1975 paper by the Office of International Security Operations at the US State Department notes that "Mauritius was given 3.0 million pounds for loss of sovereignty over the Chagos Archipelago."[23] And you have that document at Annex 74 to Mauritius' Memorial. Another American official, in 1975, described the Chagos Archipelago as "ex-Mauritian islands".[24] That's Annex 76 to Mauritius' Memorial.

28. One has only to consider the language used by the British Government to see that it recognised the Chagos Archipelago as part of Mauritius. The British Government's frequently repeated undertaking to "return" the islands to Mauritius is instructive.[25] How could it "return" something to Mauritius that didn't belong to Mauritius in the first place? Other terms used by the UK include "reversion"[26], and references to the islands being "handed back"[27]. In a letter to the Mauritian High Commissioner in 1976, the British Parliamentary Undersecretary of State for Foreign and Commonwealth Affairs described the Chagos Archipelago as "former Mauritian islands".[28] That's at Annex 78 to Mauritius' Memorial. The UK's position in these proceedings, as we can see, directly contradicts all of these statements.

29. It is also telling that in November 1965, UK and US officials, I quote, "agreed […] that the term 'detachment' should be avoided in any public statements on this subject, and that some other phrase – e.g. the retention under the administration of Her Majesty's Government, should be devised in its place."[29] Annex 20 to Mauritius' Memorial. However, the term "detachment" continued to be used in confidential correspondence.

[23] MM, Annex 74, p. 2, para. 4, emphasis added.
[24] MM, Annex 76, p. 14.
[25] See for instance MM, Annex 72, p. 2. See also MM Annex 73, para. 4; MM Annex 74, paras 20, 23 and 24; MM Annex 75, para. 4; MM Annex 77, para. 3.
[26] See for instance MM, Annex 28, p. 1.
[27] See for instance MM, Annex 72, p. 2 and MM Annex 75, p. 2. See also MM Annex 73, p. 2 ("hand back")
[28] MM, Annex 78.
[29] MM Annex 20.

30. And the frequent references by British officials to the islands being "detached" of course show their awareness that they were part of Mauritius.[30] As Professor Sands noted yesterday afternoon, it was only in the early 1980's that the UK changed its linguistic practice and now refers to "ceding" the Archipelago to Mauritius. But the earlier terms – "return" and "revert" – express the true position, and the understanding of those involved at the time.

31. So to conclude on this point, Mauritius is firmly in agreement with the contemporaneous legal assessments made by the Colonial Secretary and the Foreign Office, shared by the US Government, that the Chagos Archipelago was legally part of the territory of Mauritius before it was excised by the UK on the 8th of November 1965. In spite of its cynical arguments in the UN, the UK acted consistently with its recognition that the Archipelago was part of Mauritius and that Mauritius' rights had to be compensated for.

(b) The international community recognised the Chagos Archipelago as part of the territory of Mauritius

Turning now to the international community, it also recognised that the Chagos Archipelago was and is part of the territory of Mauritius, and that Mauritius enjoys sovereignty over it. We've set out the international condemnation of the detachment at paragraphs 3.43-3.52 of the Memorial, and I don't go through all of that material here. It is voluminous, as you will have seen. It includes condemnation at the UN, particularly with the adoption of UN General Assembly Resolutions 2066, 2232 and 2357. Professor Crawford will deal further with these resolutions in due course. For present purposes, I simply note that General Assembly Resolution **2066**, adopted in December 1965, referred to the fact that the islands had been, I quote, "detach[ed] … from the Territory of Mauritius", and called on the UK "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".[31] General Assembly Resolution 2232, from December 1966, expressed deep concern about, I quote: "the continuation of policies which

[30] See for instance MM Annex 26, para. 9.
[31] MM, Annex 38.

aim, among other things, at the disruption of the territorial integrity of some of these Territories…."

And this was repeated in General Assembly Resolution 2357 in December 1967.

32. Similarly, numerous resolutions and declarations at the Non-Aligned Movement, the Africa-South America Summit, the Organisation of African Unity, later the African Union and the Group of 77 and China, are all premised on the understanding that the Archipelago has always been, and is, part of the territory of Mauritius and of course that its excision from Mauritius was unlawful.[32]

33. The UK is dismissive of these instruments: it says in the Counter-Memorial that "they were no doubt promoted by Mauritius"; they are of a "political nature"; they "have no effect on sovereignty"; they carry "little or no weight"; they "are without legal effect".[33] The view of third States as to the position is, according to the UK, "of no significance".[34]

34. Now, the legal effect of the large number of instruments to which we have referred is not the point for present purposes. What they reveal is that the UK stands alone in its characterisation of the Chagos Archipelago as not having been part of Mauritius. The claim in the Counter-Memorial that some of the resolutions and decisions are *res inter alios acta* is likewise unfounded – it plainly does not apply, for example, to the three UN General Assembly Resolutions to which I referred.

35. And the UK relies almost exclusively on "United Kingdom constitutional law" to determine the legal status of the Chagos Archipelago. But as I have already indicated, what matters is not the legal label which the UK placed on the territory at the time. A colonial power might call a territory anything it likes – what matters is the reality. And as I shall now show you, the evidence demonstrates that the Archipelago was, in reality, an integral part of Mauritius. So

[32] MM, paras. 3.109-3.110.
[33] UKCM, paras. 7.59-7.60.
[34] UKCM, para. 7.60.

let's look at the evidence about the connection between Mauritius, rest of Mauritius, and the Chagos Archipelago.

(c) Legal and practical ties

36. As we set out in the Memorial, France treated the Chagos Archipelago as part of Mauritius, and when Britain became the colonial power, it continued this arrangement undisturbed. The constitutional, legislative and administrative evidence presented by Mauritius, in particular in chapter 2 of its Memorial, which I won't rehearse here shows that the UK treated the Chagos Archipelago as forming part of Mauritius' territory.

37. Successive constitutions of Mauritius, adopted under British rule, defined Mauritius as including its dependencies. You can see this from the Letters Patent of 1885, the Mauritius (Legislative Council) Order in 1947 and the Mauritius (Constitution) Orders of 1958 and 1964.[35] The UK has no answer to this in its Rejoinder. It attempts to rebut the argument based on its own constitutional provisions by explaining that, although, I quote, "the islands were included for some purposes within the definition of the 'Colony of Mauritius', this was done expressly when it was intended that the provisions in question should extend to the Chagos Archipelago."[36] However, what the UK does not, and cannot, explain is why Mauritian constitutional law, and other detailed legal provisions, would be extended to the islands (expressly or otherwise) if these were not part of Mauritius in the first place.

38. A brief review of the relevant instruments reveals the close legal connection between Mauritius and the Chagos Archipelago. Article 8 of the 1814 Treaty of Paris, the instrument through which the UK acquired sovereignty over Mauritius, ceded "the Isle de France [i.e. Mauritius] and its Dependencies, especially Rodrigues and Les Séchelles..." to "His Britannic Majesty."[37] It refers collectively to Mauritius "and its Dependencies".

[35] MR Annexes 4, 8, 16 and 28. See also MR para. 2.11 and footnote 51.
[36] UKR, para. 2.17.
[37] UKCM, Annex 1, emphasis added.

39. And the Treaty of Paris is a good illustration of the fact that merely labelling an island as a "dependency" is immaterial to its status in international law. Rodrigues is a perfect example. While Article VII of the Treaty singles it out as one of Mauritius' dependencies, today it unquestionably forms part of Mauritius, as it has done at all times, before and after independence, and the UK acknowledges this in its Counter-Memorial at paragraph 213.[38] If islands labelled as dependencies of Mauritius were not inherently *part* of Mauritius, then, we ask, how did Rodrigues become part of Mauritius on independence without any declaration or legislation to that effect on the part of the United Kingdom? The Chagos Archipelago is in no different position.

40. And the fact that the British Governor in Mauritius had legislative authority over the Chagos Archipelago is also, we say, significant. There are numerous legislative instruments which originated in Mauritius and were applied in the Chagos Archipelago. And again, we set these out in our Memorial and I don't propose for reasons of time to go through them here.

ARBITRATOR GREENWOOD: Ms. Macdonald, I'm sorry to interrupt you.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: I wonder if you could help me with a matter of balance. I have read in the papers in the case that at the time of the Lancaster House Conference that led to independence, the inhabitants of the Chagos Islands did not have votes in the elections for the Mauritius Legislative Assembly; right?

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: What was the position of the inhabitants of Rodrigues? Were they part of one of the constituencies of Mauritius or not?

MS. MACDONALD: I have some information to give you on the suffrage position in the latter part of my speech, but I will have to check and give you a full answer to that, I think. I

[38] UKCM, para. 2.13

don't know off the top of my head, and I would be speculating. So, we will check about the position. There were initially very tightly defined suffrage conditions which meant that in effect until the very late days of Mauritius being under British rule, effectively only wealthy Franco-Mauritians had the vote. So, other than perhaps some Franco-Mauritians, none of the inhabitants of the Archipelago or some of the other outlying islands including Rodrigues would qualify for suffrage. And I have some information. Whether there was any specific provisions qualifying or disqualifying those from the Archipelago or Rodrigues, for example, from voting on geographical grounds as distinct from qualifications which in practice only the wealthy Franco-Mauritians would meet is a matter on which I will take instruction, and we will make sure to give you a full answer.

ARBITRATOR GREENWOOD: Thank you. I don't want to take you out of your sequence.

MS. MACDONALD: No, not at all.

ARBITRATOR GREENWOOD: I suspect the answer. I'm not interested in the early position when the suffrage was highly restricted.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: At the time of Lancaster House that I'm particularly concerned with for obvious reasons.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: And I suspect the answer may well be there were too few of them to constitute a constituency in their only rights and they were too far away to fit tidily into any of the constituencies in Mauritius, but I would just like to know what the position is, if possible. Thank you very much.

MS. MACDONALD: We will give you a definitive answer.

ARBITRATOR GREENWOOD: While I have the microphone, could you also

give me an answer about how many of the population of the islands in the period '65 to '68, which is the key period, how many of them had links with the Seychelles rather than Mauritius? Again, papers at various annexes seem to paint a different picture about this.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: I was curious as to how many of them went to the Seychelles when they were removed from the Chagos and how many went to Mauritius. Again, not exactly, just a rough indication.

MS. MACDONALD: Yes. That would of course depend really, that breakdown, as to the population of three of the islands in the Archipelago, which came from Seychelles and went back, subsequently went back to Seychelles. And population figures are slightly shady and rough and ready on this. But insofar as we can give you precise breakdown of the numbers who went – were Seychelles-connected as opposed to Mauritian-connected, then we will do so if that information is available or we will tell you if it isn't.

So we have look at the Treaty of Paris and dependencies. The British Government in Mauritius also had legislative authority over the Chagos Archipelago, and we say this is also significant. Numerous legislative instruments originated in Mauritius and were applied in the Archipelago. And again, these are in the Memorial, and I don't take you through them now. For example, there is an interesting debate in the pleadings about the significance of the fact that the Courts Ordinance 1945 provided that Mauritian Magistrates could exercise jurisdiction throughout Mauritius, including the Chagos Archipelago. You'll have seen that in the pleadings, maybe too esoteric to get into here, when we were just picking out the key points.

41. Now, we say that the total picture – and again I apologize for taking it briefly for matters of time but it is fully pleaded – shows that "administrative convenience" is no answer to the inextricable legal connection that existed between the two.

42. And backing that up, there are the close economic, cultural and social links between the Archipelago and the main Island of Mauritius which also contradict the position adopted by the UK. And Mauritius set out these close ties in its pleadings: (Memorial[39] and Reply[40]). The economy of the Chagos Archipelago was inextricably linked to the main Island of Mauritius. The copra, which was coconut flesh, coconut oil and other produce from the islands were shipped to Mauritius for sale.[41] These goods and produce, transported on British vessels to Mauritius, were admitted free of duty.[42]

43. As well as these close economic ties, there were close cultural and social links. These are detailed in the pleadings, and again I pick out simply a few examples. Mauritian entrepreneurs used the same agricultural technology in the Chagos Archipelago as that adopted in the sugar plantations in Mauritius. Chagossian workers were granted free passage to Mauritius. They spoke Creole – similar to that spoken on the main Island of Mauritius.[43] The Mauritian authorities provided services in the Archipelago as diverse as a meteorological station, schoolteachers and midwives, and sent police forces to quell disturbances.[44] And as I have already mentioned, the same magistrates sat in the Archipelago as on the other Mauritian islands.

44. Now, these points are left largely unanswered again by the UK. Its written pleadings on this point, we say, are whippet-thin. Ignoring the economic bonds entirely, the UK notes, and this is at paragraph 2.21 of its Rejoinder, that "[m]any places have close cultural and social ties, but this does not mean they come under the same territorial sovereignty."[45] Well, <u>of course</u> such ties are not enough in themselves, but they support and they help to explain the legal and historical unity of the islands and the mainland.

[39] MM, cparas. 2.12, 2.18-2.27.
[40] MR, para. 2.18-2.24.
[41] MR, para. 2.20.
[42] MR Annex 1, p. 46.
[43] MR, para. 2.22.
[44] MR, paras. 2.23-2.24.
[45] UKR, para. 2.21.

45. So, in summary, Mr. President, the evidence points in one direction and one direction only: the constitutional, legislative and administrative arrangements and the close economic, cultural and social ties between Mauritius and the Archipelago indicate that they are, and always were, part of the same territorial unit, and the UK's denial of this evident fact, we say, reflects a counsel of desperation.

III. THE STRUGGLE FOR INDEPENDENCE

46. Now, for the final part of my submission, I look briefly at the first part of Mauritius' struggle for independence from the United Kingdom, really in the late 50's and early 60's. Chapter 2 of the Memorial sets out the earlier history of Mauritius, and summarises the events before the cession of Mauritius to the UK in 1814.[46] And I am not going to go through the early history – the discovery of Mauritius by Portuguese explorers, French control in the 18th century, and the coconut plantation society established in the Archipelago. These are not matters which are in dispute between the Parties.

47. But what <u>is</u> in dispute is the way in which Mauritius achieved independence from the United Kingdom, and that is obviously critical to the case before you. In its written pleadings, the United Kingdom makes two arguments on independence. <u>Firstly</u>, it argues that that there was no British impediment to Mauritian independence, and that "[a]ny 'struggle for independence' of Sir Seewoosagur Ramgoolam and the Mauritian Labour Party was against the other Mauritian political parties, not the British Government."[47] That's at paragraph 231 of the Rejoinder. And, <u>secondly</u>, it argues that Mauritian independence was not conditional on agreement to detachment, but that independence and detachment were two entirely separate events.[48] Now, both assertions are wrong.

[46] MM, paras. 2.7-2.16.
[47] UKR, paras. 2.31. See also UKCM Chapter II, Part C, para. 2.61 and UKR paras. 2.31-2.32.
[48] See UKCM, paras. 2.54-2.66 and UKR, paras. 2.33-2.52

48. I will deal with the first point, and show you that, contrary to the UK's misleading account, Mauritius' independence from the UK was not assured when it came to the final Constitutional Conference in September 1965. Independence did *not* lie solely in the hands of Mauritian politicians. It lay in the hands of the British Government. The second point – the clear and unequivocal link between independence and excision – will be dealt with by Professor Crawford in the next presentation.

49. Britain was the colonial occupier in Mauritius for 158 years, from 1810 until the 12th of March 1968. The process that led to independence took place over two decades, and four Constitutional Conferences. This process began in the mid-1940's, with the first electoral and constitutional reforms.[49] And again, this is set out in our Memorial.

50. Against the background of growing anti-colonialist sentiment, the British Government drew up a new Constitution for Mauritius in 1947, granting the right to vote to those able to read and write simple sentences.[50] Previous elections had featured very limited suffrage. Under the terms of the 1947 Constitution, the Council of Government was replaced by two institutions: the Legislative Council and the Executive Council.[51]

51. The number of registered voters for the 1948 elections rose to over 71,000, and the Mauritius Labour Party won 12 of the 19 seats available in the Legislative Council. But, despite their success at the polls, because of the 12 members nominated by the Governor and the 3 *ex-officio* members, the Labour Party was still not in the majority in the Legislative Council. After elections in 1953, the Mauritius Labour Party publicly complained that the British Governor was exercising his right to nominate members to the Legislative Council, ignoring the overwhelming preference which electors had shown for Labour Party candidates, and instead

[49] UKCM, para. 2.41.
[50] MM, para. 2.31.
[51] MM, para. 2.31.

nominating members for the purpose of prolonging the domination of wealthy Franco-Mauritians.[52]

52. The first Constitutional Conference was held in London in July 1955. During the conference, the Mauritian Labour Party called for a number of reforms, including a greater degree of self-governance for Mauritius, universal suffrage, and a curtailment of the British Governor's extensive powers, which included control over the judiciary, the civil service and government finances.

53. By the time of the second Constitutional Conference in February 1957, the largely elected Legislative Council continued to have little real power, and its decisions could still be overridden by the British Governor.[53]

54. When the Mauritian Labour Party maintained its majority in the Legislative Council after the elections in 1959, it formally declared that it would seek independence from the United Kingdom by 1965.[54] At the third Constitutional Conference held in June 1961, it was agreed that Mauritius could achieve self-government, subject to the successful implementation of constitutional reforms in two stages. The first stage was fulfilled in 1962 when Dr. Seewoosagur Ramgoolam (as he then was) became Chief Minister. He complained that Mauritius still did not have a free and unfettered government, and that it remained, in his words, "a colony subject to colonial laws and subject to the control and direction of the Secretary of State through his officers."[55]

55. At the 1963 elections, the Labour Party (in coalition with the Muslim Committee of Action) won a majority of 23 out of 40 seats. The second stage of constitutional reforms was accomplished in March 1964. Chief Minister Ramgoolam became the Mauritian Premier; the

[52] MM, para. 2.32.
[53] MM, para. 2.34.
[54] MM, para. 2.35.
[55] MM, para. 2.36.

Legislative Council became the Legislative Assembly; and the Executive Council became the Council of Ministers.

56. But despite these developments, the British Colonial Secretary refused to fix any firm date for Mauritius' independence.[56] The British Governor and the Colonial Office retained wide-ranging powers over Mauritius' internal affairs. It was the British Governor who appointed the Premier, and the Governor presided over the Council of Ministers and could appoint up to 15 members of the Legislative Assembly.

57. Now, the critical fourth, and final, Constitutional Conference took place in London over the course of more than three weeks in September 1965. And on the last day of the Conference, the 24th of September, the British Government agreed to grant Mauritius independence. How that came about is of course of great relevance to these proceedings.

58. The UK's claim, at paragraph 2.61 of its Counter-Memorial, that "any concerns about moving forward to independence came from Mauritian politicians, not from the [UK] Government"[57] is inaccurate. British reservations about Mauritius' independence were expressed at the highest levels. When Mauritian Ministers, led by Sir Seewoosagur, went to London in September 1965 in pursuit of independence, there was a climate of uncertainty and hesitation among the British officials.

59. Mauritius of course does not deny that delegates from the *Parti Mauricien Social Démocrate* did not want independence. However, they represented a minority of Mauritians, and their opposition did not impede the Colonial Secretary's decision to grant independence. This point is evident from Annex 11 to the UK Rejoinder, which you can read at your leisure, the Official Report of the 1965 Constitutional Conference presented to Parliament by the Colonial Secretary. While the Report states that "a significant section of the population […] was opposed to independence", it recognises that "The Mauritius Labour Party and the Independent Forward

[56] MM, para. 2.38.
[57] UKCM, para. 2.61, fifth bullet point.

Bloc, which advocated independence had between them 26 out of the 40 seats in the legislature and the support at the 1963 election of 61.5 per cent of the voters."[58] It also recognises that the Muslim Committee of Action was "prepared to support independence."[59]

60. Now, in reality, as Professor Crawford will demonstrate, the only thing standing in the way of independence was the Mauritian Ministers' refusal to agree to the excision of the Chagos Archipelago. In the months leading up to the final Constitutional Conference in September 1965, Foreign Office and Colonial Office officials were openly sceptical about Mauritius' chances of achieving independence. To take two examples from the record, firstly from Mauritius' Reply, Annex 32:

In May 1965, a Foreign Office Telegram to Washington states that the outcome of the September Conference "is unlikely to take Mauritius further than full internal self-government." The telegrams adds that "It is impossible to estimate when or indeed if Mauritius will achieve full independence."[60] This is only a few months before the Conference.

Now, in similar fashion, at a meeting only two weeks before the Conference, a Colonial Officer expressed the view that "[t]he outcome of the Conference was uncertain and [the Colonial Secretary] had stated he was open to consider any kind of solution. The most likely course of events was that the Conference was unlikely to agree on full autonomy…".[61] This is Annex 38 of Mauritius' Reply.

61. The documents – and again, Professor Crawford will look at these in greater detail – show that the question of independence lay in the hands of the Colonial Secretary, guided by officials at the Foreign Office, the Colonial Office, the Ministry of Defence, and the UK Prime Minister. This is evident from a letter by a Mr Terrell to his colleague at the Ministry of Defence. We have that at Annex 37 to Mauritius' Reply. In the letter, he explains that the "chances of

[58] UKR, Annex 11, para. 15.
[59] *Ibid*.
[60] MR, Annex 32, para. 1, emphasis added.
[61] MR, Annex 38, p. 6.

success … will depend very largely on the firmness of the statements which the Secretary of State is able to make when crucial questions are put to him in the course of the conference."[62]

62. Even during the Conference itself, which started on the 7th September 1965, British doubts about independence persisted. A Colonial Office note dated the 16th of September 1965 concludes that "it seems that the strength of feeling against independence may make it impossible for the Conference to accept a programme by which Mauritius would proceed straightforwardly to independence."[63] This is Annex 44 of the Reply.

63. The United Kingdom challenges this document in the Rejoinder – well, sort of, and only in a footnote (footnote 78, page 78).[64] There it states that "[t]he official is not pessimistic about Mauritius achieving independence, but about whether it was possible for the Conference, i.e. British Government representatives together with Mauritian representatives, 'to accept a programme by which Mauritius would proceed straightforwardly to independence'".[65] Well, we say this is a completely artificial distinction.

64. Mauritius' point is, quite simply, that when the Mauritian delegates went to London in September 1965, independence was very far from guaranteed, and was subject to the sole discretion of the British Government. Whether or not the Mauritian delegates agreed on all the points discussed at the Conference does not change this fact. Whether British doubts related to independence, or to "whether the Constitutional Conference would result in an agreement to proceed to independence", as the UK says, is of no relevance and is really a distinction without a difference. What matters is that only the British Government could grant independence. This much is recognised by the UK in the Rejoinder. Quoting from the Official Report of the Conference, which is UK Counter-Memorial Annex 11, the UK explains that "it was clear during the Conference that it would fall to the British Government to make a decision as between

[62] MR, Annex 37, para. 6.
[63] MR, Annex 44.
[64] UKR, p. 78, footnote 78.
[65] UKR, p. 78, footnote 78. Emphasis in the original.

independence and association and on the question of popular consultation, without the benefit of unanimous advice from the parties at the Conference."[66]

65. However one characterises the very real doubts expressed by British officials and politicians about independence in the run-up to the Conference, independence was at their discretion, and their discretion alone, and it was very, very far from assured.

66. Mr. President, in conclusion, Mauritius rejects the UK's characterisation of its road to independence, and its untenable attempts to argue that the Chagos Archipelago was never part of Mauritius' territory.

67. To sum up firstly on the status of the Chagos Archipelago, the evidence, we say, shows beyond doubt that the Archipelago has historically formed part of the territory of Mauritius, and it formed part of it at the moment when the UK detached it in 1965. There is also overwhelming evidence as to the legal, administrative, legislative, social and economic connections between Mauritius and the Archipelago. The UK falls back on legal labels which have no power to suspend the principles of self-determination and territorial integrity. It has no real answer to the evidence, but it tries to resurrect arguments which did not fool the UN in 1965 and are just as untenable today.

68. Secondly, as I've dealt with in the latter part of my presentation, the UK tries to argue that the Mauritian Ministers could have resisted the excision of the Chagos Archipelago and still obtained independence. I have shown you how matters stood on the eve of the Constitutional Conference: independence hung in the balance, and it was explicitly connected in British minds to the excision of the Archipelago.

69. Professor Crawford will make this even clearer as he now continues the narrative, taking you through the events of September 1965 and what followed. Mr. President, Members of the

[66] UKR, para. 2.32, quoting UKCM, Annex 11.

Tribunal, I thank you for your kind attention, and I ask you to invite Professor Crawford after the break to take the floor.

PRESIDENT SHEARER: Thank you, Ms. Macdonald.

Sorry, there may be a question.

Judge Wolfrum.

ARBITRATOR WOLFRUM: Thank you for your information. I have a follow-up question to one of Judge Greenwood.

Could you inform us about the nationality, the former inhabitants of the Chagos Archipelago by now, according to the documents, as far as I remember, they mostly have dual nationality, Seychelles plus U.K. or something like that. Could you provide us, not necessarily now, with a break down on the nationality issue.

MS. MACDONALD: Yes. We can look into numbers. I can tell you now, and of course those behind me will tell me if there is anything to add to this, but I can tell you now that what happened was that the United Kingdom gave all residents of the Archipelago the option of British citizenship and quite a number of them took that up, and there is now a well-developed Chagossian community in the United Kingdom, and they also, as I understand it, residents of the, if you like, Mauritian islands were given the option of Mauritian citizenship and resident of the Seychelles islands were given the option of Seychelles citizenship. And, so as I understand it, they were all – of course they were forcibly removed, so they were all initially taken to the relevant respective islands. Some of them remained in those islands and exercised the right to take up citizenship. Of course there was the option of dual nationality in both cases, and we can see if we have any records on these actually who took out one, the other, or both. But everybody had the right to both Mauritius or Seychelles and British citizenship. A number of them stayed physically in Mauritius or the Seychelles and took up – or they may have taken up both citizenships but stayed physically there and a number came to the United Kingdom, but they were offered British

citizenship as well as the citizenship of the nation that they formed part of.

Does that answer your question? We will see if we can, following up on Judge Greenwood's question, we'll see if we can get an idea of numbers.

ARBITRATOR WOLFRUM: Yes.

MS. MACDONALD: I'm not sure that we are hampered in this because I'm not – there isn't even a definitive statement of the number of residents in the Archipelago, so we are – our hands are slightly tied by the limited recordkeeping that there was at the time, but if there is information to be known about this, those behind me will know it and have it. So if there is anything that we can add, we will do in due course.

ARBITRATOR WOLFRUM: Thank you.

PRESIDENT SHEARER: Yes, sir, Judge Greenwood.

MS. MACDONALD: I apologize.

ARBITRATOR GREENWOOD: Sorry.

MS. MACDONALD: No.

ARBITRATOR GREENWOOD: This is probably a simple one-liner and reflects my undue interest in memorabilia, but the comment you made about dual nationality.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: That, if memory serves me right, is most unusual through the independence process. Were the inhabitants of the main Mauritian islands, Mauritius itself and Rodrigues offered the choice of British nationality or Mauritian nationality on independence, or would they automatically become Mauritian?

MS. MACDONALD: I don't know the answer to that question, so I will check that. I know about the residents of the Archipelago, but I don't know about Mauritius itself. So we will check that.

ARBITRATOR GREENWOOD: The point of the question really is: Was the

nationality position of the inhabitants of the Archipelago in 1968 different from that of the inhabitants of the other Mauritian islands?

MS. MACDONALD: Yes. We will get you an answer to that.

ARBITRATOR GREENWOOD: Thank you.

PRESIDENT SHEARER: Thank you, Ms. Macdonald.

Now, I will give the floor to Professor Crawford. Thank you.

PROFESSOR CRAWFORD: Thank you, sir.

This presentation will span the coffee break. I will let you know when it would be a convenient moment to break. I'm not sure that I will follow the same timetable that was distributed yesterday, but I will do it as nearly as I can.

ARBITRATION UNDER ANNEX VII TO 1982 UNCLOS

Republic of Mauritius

v.

United Kingdom

Speech 4: Excision of the Chagos Archipelago from Mauritius

Professor James Crawford AC SC

Wednesday 23 April 2014

Mr. President, Members of the Tribunal, it's an honour to appear before you again on behalf of the Republic of Mauritius.

1. A. Introduction

1. Ms. Macdonald has just traced Mauritius' road to independence; in the course of doing so, she established, we say, that the Chagos Archipelago was an integral part of the territory of Mauritius under British colonial rule, whether or not it was described as a dependency. In my presentation I will continue the narrative by discussing the events that underlie the present dispute – namely, the events surrounding the excision of the Chagos Archipelago from Mauritius

by the UK on the 8th November 1965. I will take you through the relevant facts and the evidence provided by the parties with a view to establishing that the dismemberment of the territory of Mauritius – which the UK with some detachment calls detachment and which I will call excision – was imposed and was not a function of the wishes or welfare of the people of Mauritius. I will show, in particular, that the 'agreement' that the UK considered it had secured from the Mauritian Ministers was not a transaction freely reached by equal parties to fulfil some mutual interest. In short, the UK made it clear to Mauritius that its consent to excision was the price to be paid for independence, and that, in any event, the excision would be carried out with or without that consent. Tomorrow I will return, under the rubric of an analysis of the principle of self-determination, to draw the legal consequences of the factual conclusion that I reach today. There are questions of factual appreciation. There are questions of legal appreciation. And there is a little overlap between them, which may come out in questions.

2. This presentation is divided into four parts. I will briefly discuss the plans that were made and the preparatory acts which were taken to pave the way for the detachment of the Chagos Archipelago from Mauritius. Secondly, I will revisit the events surrounding the fourth Constitutional Conference held in London in September 1965, during which the United Kingdom extracted the purported 'agreement' from the Mauritian Ministers. Third, I will deal with the international response to the excision, notably at the United Nations. Finally, I will provide an account of the continuing protests by Mauritius to the United Kingdom's purported exercise of sovereignty over the Archipelago.

3. Mauritius' written pleadings set out in detail the events surrounding the excision of the Archipelago. I draw your attention to Chapters 2 and 3 of the Memorial and Chapter 2 of the Reply. During the course of this presentation, I propose to take you only through the key elements, but we maintain in full the factual account in the written pleadings.

I should say that the documents I'm taking you to are under Tab 4, major heading 4. I get to have the pink, I think it is, tab. But I'm going to have to take you back to some documents under Tab 2 because we didn't want to duplicate documents in the binder, so we'll be going backwards and forwards, and I'll give you enough time to go backwards and forwards, and I'll use the red page numbers at the bottom of the page and not the internal page numbers of the documents to avoid confusion.

2. B. The decision by the UK to excise the Chagos Archipelago from Mauritius[67]

Mr. President, Members of the Tribunal:

4. In October 1962, the United Kingdom and the United States engaged in talks concerning the establishment of military bases in the Indian Ocean to fulfil their mutual security interests. By April 1963, the focus of these talks was on the desirability of using for military purposes small islands strategically located and with small populations. A few months later, in August 1963, the US expressed a particular interest in building a military base in Diego Garcia, the largest island in the Chagos Archipelago.

5. It was at this point that the territory of Mauritius became a focus of interest. In January 1964, the US drafted a memorandum proposing the excision of the Archipelago by the UK, a proposal discussed in the first round of formal bilateral meetings in February of 1964. The US made it clear to the UK that the plan would be implemented only if Diego Garcia remained under UK sovereignty – that is, if the UK took steps to excise the island from the territory of Mauritius. On 6 May 1964, the two States approved the plans for the excision of the Chagos Archipelago by the UK, but they withheld this information from Mauritius. Mauritius and the Seychelles (from which three island groups were also detached) were to be informed at 'a suitable time'.[68]

[67] The chronology is well documented in: "British Indian Ocean Territory" 1964-1968, Chronological Summary of Events relating to the Establishment of the "B.I.O.T." in November, 1965 and subsequent agreement with the United States concerning the Availability of the Islands for Defence Purposes, FCO 32/484 (MM, Annex 3).

[68] *Ibid*.

I should say that the information I've been giving is to be found in a chronology which is in our Memorial, Annex 3, and which you are referred. I won't take you to it.

6. It was only in June 1964 that Sir Seewoosagur Ramgoolam, by now the Premier of Mauritius, was first consulted by the British Governor, John Shaw Rennie – and then only informally – about the plans to excise the Chagos Archipelago. The Premier expressed his uneasiness. In July 1964, Governor Rennie notified the Mauritius Council of Ministers of a proposed survey of the Chagos islands, 'but [did] not mention detachment'.[69] That comes from the chronology as well. The Governments of Mauritius and Seychelles 'would be consulted after the survey.'[70]

7. By mid-1964 the UK started taking steps to implement the excision plan. In July and August, the UK conducted a joint survey with the US of the Chagos Archipelago, but it did not disclose the real purpose to the Chagossians themselves.[71] The operation was portrayed as a scientific survey. The survey confirmed Diego Garcia's potential to harbour the military base, and the conclusion was reached that for that purpose the islands should be made, and I quote, 'direct dependencies of the British Crown',[72] found in Mauritius Memorial Annex 2(and of course there are footnotes to the relevant quotations in this text). The phrase 'direct dependencies of the British Crown' was itself a recognition that the islands were not at the time a direct dependency of the British Crown.

C. Implementation of the Excision Decision by the UK

(i) Conditions under which the UK extracted the 'agreement' of the representatives of Mauritius

Mr. President, Members of the Tribunal:

[69] "British Indian Ocean Territory" 1964-1968, Chronological Summary of Events relating to the Establishment of the "B.I.O.T." in November, 1965 and subsequent agreement with the United States concerning the Availability of the Islands for Defence Purposes, FCO 32/484, item no. 13 (MM, Annex 3).

[70] *Ibid*.

[71] The term "Chagossians" is used to describe Mauritian citizens who were residing in the Archipelago at the time of the excision and their descendants.

[72] Robert Newton, Report on the Anglo-American Survey in the Indian Ocean, 1964, CO 1036/1332, para. 60, (MM, Annex 2).

8. On the 15th of January 1965, the US made it clear that it wanted to establish a military base on Diego Garcia, and that it was for the UK to detach the Archipelago from Mauritius. It suggested, in a letter dated 10 February 1965, that detaching the entire archipelago, if though essential, was 'highly desirable'.[73] That's in Annex 7 of our Memorial. This was so because the detachment of the entire archipelago – rather than the main island of Diego Garcia only – would be more effective in diverting Mauritius' attention from Diego Garcia itself over the long run – not to mention that it could secure additional land areas for further military installations if necessary in the future. The United Kingdom – understandably given the relations at the time between the two States, which continued close – was keen to accede to the request. On 30 April 1965, Harold Wilson, the Prime Minister at the time, expressed his anxiety to close the deal as soon as possible.[74]

9. In June 1965, the US agreed to cover half the costs of compensation for which the UK would be liable as a result of the detachment. This was to be done off the record, however, as the US government did not expect that it could persuade Congress to support the expenditure.

10. It was only on 19 July 1965 – over a year after the first exchanges and less than four months before the excision itself took place – that Mauritius was actually included in the discussion. The UK was well aware that unilateral excision would be met with international condemnation and it considered that the consent of the authorities in Port Louis was desirable if not actually necessary. On 19 July, Governor Rennie was instructed to communicate the detachment proposals to the Mauritian authorities. And a few days later, on the 23rd July, the proposal was first put to the Mauritius Council of Ministers.

11. The reaction to the proposal by the Council of Ministers was similar to that which Premier Ramgoolam had expressed upon informally hearing of the plans – one of scepticism and

[73] Letter dated 10 February 1965 from the Counselor for Politico-Military Affairs at the US Embassy in London to the Head of the Permanent Under-Secretary's Department, UK Foreign Office (MM, Annex 7).
[74] Foreign Office Telegram No. 3582 to Washington, 30 April 1965, FO 371/184523.

apprehension. Mauritius was sympathetic to the plan of establishing a military base in Diego Garcia. You've heard that that position remains unchanged. It had opposed the notion of the exclusion of the Chagos Archipelago. From the earlier stages, the Council of Ministers proposed an alternative solution; that is a lease that would allow the US to exercise jurisdiction over Diego Garcia for a period of 99 years – that was the proposal – but without prejudice to Mauritius' title over the territory itself. On 30 July 1965, Governor Rennie reported to the UK on the Mauritian counterproposal.[75] But the UK and the US were and remained hostile to any notion of a lease. I should say that, following what Ms Macdonald has said this morning, it is difficult to see how you can argue that these islands were not part of Mauritius. The UK was opposed to the leasing of the islands not because the islands did not belong to Mauritius, but because they did, or at least were part of Mauritius, and the US wanted its base to be located in territory under direct British control. Steps had to be taken to ensure that – which would not have been the case if the Archipelago was not part of Mauritius.

12. An essential step in the process towards independence was the fourth and, it turned out, final Constitutional Conference held in London from the 7th to the 24th of September 1965, during which the political future of the colony was discussed. The proposal to detach the Archipelago from Mauritius was not on the agenda of that Constitutional Conference. It was decided instead by the UK that it would meet with Mauritian officials to discuss detachment in private, in parallel with the official meetings of the Conference.

13. And here we go to the documents, and I'd ask you to turn to Tab 4.1 [MR Annex 42], behind the pink major tab. It's at page 127 of the binder. Here you will see an internal document of the UK, Annex 42 of the Reply, setting out the plan. If you look at page 128, which is the second page of the document, at the first paragraph, you will find a reference to a discussion between a Mr. Trafford Smith with the Colonial Secretary and the Governor of

[75] Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965, FO 371/184526, (MM, Annex 13).

Mauritius 'regarding the tactics for the' Colonial 'Conference' and how to introduce the subject of 'support facilities'. Paragraph 2 sheds light on what 'the plan' was – 'to have the talks … in parallel (and in a smaller group) with the constitutional talks, the object being to link both up in a possible package deal at the end'.[76]

14. In the Rejoinder, the UK tries valiantly to re-package the package deal. At paragraph 2.39 of the Rejoinder, the UK quotes from the record of a meeting. Here, the Colonial Secretary opined that, and I quote:

'Minority guarantees would be a most important part of the conference and could probably only be satisfactorily resolved by an assurance that we would provide forces for internal security at the request of the Mauritius Government. At least we should therefore agree that a request from the Mauritius Government after independence for assistance in internal security would be sympathetically considered. [The UK Rejoinder leaves out the word "sympathetically". That's probably a slip] Mauritius Ministers would, on this basis, probably accept the detachment of the islands but to threaten to go ahead with this by Order in Council regardless of agreement would undoubtedly wreck the conference.'[77]

That was what the Colonial Secretary's expression of opinion was, as quoted by the United Kingdom in paragraph 2.39 of the Rejoinder.

What does the UK make of this passage? Well, I refer you to paragraphs 2.39 and 2.40 of the Rejoinder. "That is" the United Kingdom concludes "minorities would not agree to independence without satisfactory assurances of security."[78] And at paragraph 2.40:

'Thus, the reference in the minute of 3 September 1965' – which I've quoted – 'to "the object being to link up both [the constitutional talks and the talks on the defence facility] on a possible package deal at the end" is to a package including guarantees for the rights of minorities agreed

[76] Minute dated 3 September 1965 from E.H. Peck to Mr. Graham, FO 371/184527 (MR, Annex 42).
[77] MR, Annex 41.
[78] UKR, para. 2.39.

at the Constitutional Conference together with the assurance of a post-independence defence agreement covering external defence and internal security, to be agreed in the context of the talks on the defence facilities on the Chagos Islands dependency.'[79]

Now, that is a strained and, we would say, untenable interpretation of the documents. In fact, the UK has put some words in the Rejoinder in square brackets because they're not in the document they were quoting from. That document is Tab 4.1 [MR Annex 42], which I've already taken you to. It is the discussion between Mr. Trafford Smith, the Colonial Secretary and the Governor of Mauritius. What the document says, and this is at page 128 of the folder, beginning at paragraph 2: 'The plan is to have the talks on the 'support facilities' proceedings in parallel (and in a smaller group) with the constitutional talks, the object being to link both up in a possible package deal at the end.'[80]

The UK has substituted the words 'talks on the "support facilities"' in the Rejoinder with the words 'talks on the defence facility' – defence facilities. It prefers the word 'defence' over 'support' so as to make a link with 'the assurance of a post-independence defence agreement covering external defence and internal security'. The term internal security is simply not borne out from the relevant documents. The words 'talks on the "support facilities"' mean only one thing: talks on the military facilities envisaged by the US for the Archipelago. That was what the discussion was about. That's exactly how the US described the proposed installations in its correspondence in January 1965, explaining that it required Diego Garcia for 'the establishment of a communications station and supporting facilities'.[81]

15. At paragraph 2.40 of the Rejoinder, addressing the 'package deal', the UK refers to another document at footnote 107, which is Annex 43 of the Reply. Perhaps that document might support the United Kingdom's interpretation of the 'package deal'? It is a Minute dated 15

[79] UKR, para. 2.40.
[80] MM, Annex 42.
[81] MM, Annex 5, p. 1. See also MM, Annex 3, item no. 4.

September –which was during the Constitutional Conference – a minute that a Foreign Office official sent to the Secretary of State, and it's at Tab 4.2, Annex 43 of the Reply,[82] page 129 of the folder. In the first paragraph, the writer says:

'I learn from the Colonial Office that the defence facilities question is being treated in a small group consisting of the Colonial Secretary, the Governor and four of the principal Mauritian political leaders. Though the question has been mentioned in general terms, *I understand that it has not been grasped* [and I really quite stress that phrase: *I understand that it has not been grasped*] and various side issues such as an increased U.S. sugar and immigration quotas are being explored. It seems likely that the detachment of the islands may have to be arranged in a package deal at the conclusion of the Constitutional talks.'

Like the discussion in the document I already took you to at Tab 4.1, this document does not support the UK's contention that the 'package deal' referred to a defence agreement, internal security issues or minorities. It refers to 'defence facilities'. But what it means is 'joint defence facilities developed in conjunction with the Americans…'. That was the issue: 'the assurance of a post-independence defence agreement covering external defence and internal security' for Mauritius? No it does not – it refers to 'joint defence facilities developed in conjunction with the Americans…'

16. Three of these parallel meetings, the meetings held in parallel with the Constitutional Conference, show what this 'package deal' sought by the British authorities was and how exactly the "consent" of the Mauritian Ministers was obtained. It was not for the protection of minorities. The first relevant meeting took place on the 20th of September at the Colonial Office. It was attended by Premier Ramgoolam, the Colonial Secretary, Anthony Greenwood, three other Mauritian party leaders and Governor Rennie. You'll find this at Tab 4.3**,** page 131 of the folder. You'll see at the bottom of page 131 – the document starts at page 103 – you will see at

[82] Minute dated 15 September 1965 from E.H. Peck, UK Foreign Office to Secretary of State (MR, Annex 43).

the bottom of the next page, page 131, that Premier Ramgoolam restated the unequivocal position that the authorities in Port Louis had hitherto defended: 'the Mauritius Government was not interested in the excision of the islands and would stand out for a 99-year lease'.[83] The Premier dismissed the offer the UK had made of a lump sum of one million pounds to compensate Mauritius for the excision. He was offered that the UK would purchase the islands for a million pounds – and you can see the Premier telling Mr Greenwood on the next page that they regarded the offer as 'derisory and would rather make the transfer *gratis* than accept it.'

17. Premier Ramgoolam then pointed to another alternative. He said, at the end of the first paragraph, that Britain could 'concede independence to Mauritius and allow the Mauritius Government to negotiate thereafter with the British and United States Governments over Diego Garcia'.[84] And the rest of the meeting consisted of a heated debate regarding the terms that Mauritius expected the US would agree to or could agree to in return for such a lease. But the Colonial Secretary made it clear that the conditions Mauritius had envisaged for allowing the US to use its territory would not be accepted. And I refer you to page 134 of the folder, at the bottom of that page. He said, '[t]he United States Government had been so specific and categorical in insisting that British sovereignty must be retained over Chagos – in other words that Chagos should be made available on the basis of detachment – that he felt sure that a lease would not be acceptable'.

18. And towards the end of the meeting, at page 136 of the folder, Premier Ramgoolam suggested that at least his proposals be communicated – this is in the middle of page 136 – to the United States Government. Mr. Smith said that this was not possible because the United States Government was not directly involved in the negotiations. The Premier renewed the suggestion

[83] Record of a Meeting in the Colonial Office at 9.00 a.m. on Monday, 20th September, 1965, Mauritius – Defence Issues, FO 371/184528 (MM, Annex 16)
[84] Ibid.

that he had made earlier: 'it might be better if the whole matter were left until Mauritius were independent and were then negotiated with the independent Government'.

Mr. President, Members of the Tribunal:

19. At the meeting of 20 September, by proposing that the UK grant independence to Mauritius and let Mauritius negotiate the military base directly, Premier Ramgoolam touched upon a highly sensitive issue. Despite the claims by the UK, which was repeated in the pleadings, that the question of independence was separate from the question of excision – I'll come back to that – both were inextricably connected from the perspective of the British Government. It was essential for the British Government to detach the Archipelago before Mauritius became independent. The UK realised that if the outcome of the Conference was independence, that would radically diminish the chances to achieve excision: as an independent State, Mauritius would not agree to outright detachment. At the Constitutional Conference in September 1965, the UK proceeded on the basis that this was the only chance it had to excise the islands. The clock was ticking for the UK to obtain, one way or another, the consent of the Mauritian authorities and formalise the detachment, or take the risk of doing it unilaterally.

Mr. President, that would be a useful moment, I think, to break.

(Brief recess.)

Before the break, I was making the proposition that is was essential from a UK point of view to get Mauritian consent to excision prior to independence in the face of proposals by Mauritian leaders that it be done the other way and that Mauritius after independence should negotiate for terms of a lease or other arrangements with the United States. Now, this position is made clear by two documents in particular. The first, at Tab 4.4 of your binders at red page 142, it's Annex 35 of our Reply. It's a letter from an official in the Foreign Office to the Permanent Mission to the UN dated 26 July 1965. That was a couple of months before the Constitutional Conference. In the penultimate line in paragraph 2, the official says:

'[W]e believe that it will get progressively more difficult to detach the islands if Mauritius gets nearer to independence and impossible to do so if she becomes fully independent.'[85]

20. The second document is at Tab 4.5, the next document at pages 143 to 144. It's a Memorandum prepared by the Deputy Secretary of State for Defence who served as Parliamentary Under-Secretary of State for Foreign Affairs.[86] And he says in a paragraph which jumps over the page:

'[T]he line taken by the Colonial Secretary with Mauritius leaders at the Conference [that is, the forthcoming Constitutional Conference] on future defence arrangements will profoundly affect our chances of carrying them with us in the proposed detachment of Diego Garcia and the Chagos Archipelago. If we fail to persuade them now, we may never again be in a position to do so at an acceptable cost. Indeed, if Mauritius opts for independence at this conference, this will be our last chance to secure the Chagos Archipelago.'

21. This account that I have given of the background to the first parallel meeting during the Constitutional Conference, and of the meeting itself, shows two things. First, the Mauritian delegates strongly opposed excision. Second, the UK needed to proceed with excision before independence – because after that, Mauritius would be in a much better position, factually and legally, to resist attempts by the UK to dismember it.

22. Yet, as the UK emphasises again and again in the written pleadings, the Mauritian Ministers gave their 'consent' to the excision of the Archipelago on 23 September, only three days after the first meeting at which the position was as I've stated it. What happened over the course of those three days in September 1965?

[85] Letter dated 8 October 1965 from S. Falle, UK Foreign Office to F.D.W. Brown, UK Mission to the United Nations, New York, FO 371/184526 (MR, Annex 35).

[86] Memorandum by the Deputy Secretary of State for Defence and the Parliamentary Under-Secretary of State for Foreign Affairs to the Defence and Oversea Policy Committee, 'Defence Facilities in the in the Indian Ocean', 26 August 1965 (MR, Annex 39).

23. The turning point was the second meeting on defence arrangements, in the margins of the Constitutional Conference, which took place at 10 Downing Street on the morning of 23 September. This was a private meeting between Premier Ramgoolam and Prime Minister Wilson. At this meeting, Prime Minister Wilson conveyed two points to the Premier, which changed the course of the negotiations. First, Mauritius had no choice in the matter – the Archipelago would be excised with the consent of the Mauritian Ministers or without that consent. Second, if Mauritius wanted to achieve independence, the Mauritian Ministers would have to 'agree' to excision. It was a case of take it or leave it – perhaps more accurately, Her Majesty's Government insisted that it would take the Archipelago as a condition of leaving the rest of Mauritius!

24. Before turning to the record of the meeting of 23 September, I should first draw your attention to a note prepared by the Colonial Office for the Prime Minister, introduced by a most revealing covering note signed by Mr Wilson's Private Secretary. Mr. Sands has already taken you to that document but it's important enough to do it again. It's at Tab 2.5 and it's Annex 17 of the Mauritian Memorial, Page 15 in the red numbering. And you have heard the opening words:

"Prime Minister

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."[87]

25. The covering note directs Mr. Wilson to a 'key sentence' in the Colonial Office's note which is attached– it's at Page 19 of the folder, the sentence. The note expresses a position with which 'the Ministry of Defence and the Foreign Office [were] on the whole content'. We're

[87] Colonial Office, Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, 22 September 1965, PREM 13/3320 (MM, Annex 17)

not clear what the 'on the whole' refers to –it no doubt covers a multitude of views. The 'key sentence' which is at the bottom of red Page 19 reads as follows:

'The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach Chagos by Order in Council, without Mauritius consent, but this would be a grave step.' (By 'legal right' the reference is obviously to the legal right under United Kingdom law.)

26. It would be a grave step indeed. What does the UK say about this note? It says that Mauritius 'makes much' of it. It says that it's an 'internal briefing' that 'may or may not have been followed by the Prime Minister'. According to the UK – this is at Paragraph 2.42 to 2.44 of the Rejoinder –'[A] Private Secretary's covering note is not usually intended to summarise (still less supersede) considered policy advice'.[88]Well, that's not very convincing.

27. Before we turn to the record of the actual meeting, which is Tab 2.6, there is another point to make about Tab 2.5, the Preparatory Note. At Page 16 of that Preparatory Note which we were on before, the Colonial Secretary told Mr Wilson that he hoped 'we should be as generous as possible' and 'we should not seem to be trading Independence for detachment of the Islands'.[89] At least appearances should be maintained: Britain would not 'seem' to be procuring consent under duress, even if the reality was different. And indeed, Prime Minister Wilson did not go so far as to tell Premier Ramgoolam that he was frightening him with independence, at least so far as the record of the meeting indicates. But it was clear what was on the table. We now turn to Tab 2.6 – as Judge Greenwood correctly observes, the minutes of the meeting itself or the conversation. It's at Page 20 and following of the folder. The record of the meeting shows that Mr Wilson was careful enough to describe the question of the excision or detachment as a 'completely separate matter and not bound up with the question of

[88] UKR, paras. 2.42-2.44.

[89] Colonial Office, Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, 22 September 1965, PREM 13/3320 (MM, Annex 17).

Independence'.[90] Completely separate matter and not bound up with the question of Independence.

28. But despite that emollient statement – Harold Wilson was pretty good at emollient – the message that the Prime Minister conveyed had an altogether different implication. Towards the end of the meeting, at page 22 of the folder, he said there were, in theory, 'a number of possibilities':

'The Premier and his colleagues could return to Mauritius either with Independence or without it. [It's Page 22 of the binder towards the bottom of the page.] 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 he could not of course commit the Colonial Secretary on this point.'[91]

How excision could be presented as 'not bound up with the question of Independence' when it was presented by the Prime Minister in these terms defeats me.

29. The reality was perfectly clear: there was nothing the Premier and his Mauritian colleagues could do to prevent the UK from excising the Archipelago and doing so by Order in Council. Premier Ramgoolam's hands were tied. Prime Minister Wilson said: '[t]he best solution of all might be Independence **and** detachment by agreement' and the two were connected hip and shoulder. The first, independence, was in truth conditional upon excision.

30. The private meeting between Prime Minister Wilson and Premier Ramgoolam, at which the cards were finally put on the table, set the tone for the third parallel meeting during the Constitutional Conference. This was the meeting at which the 'agreement' of the Mauritian Ministers was purportedly secured. It happened on the afternoon of 23 September 1965 – only a few hours later than the meeting where Mr Wilson was not frightening Premier Ramgoolam

[90] Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No. 10, Downing Street, at 10 a.m. on Thursday, 23 September 1965, FO 371/184528 (MM, Annex 18).

[91] Ibid.

with the hope of independence, according to the UK. It was attended by Colonial Secretary Greenwood, Governor Rennie and the Mauritian Ministers (except for one Mauritian Party Leader that had walked out).[92]

31. The meeting started at 2.30 p.m., with Colonial Secretary Greenwood putting immense pressure on the Mauritian delegates. I refer you to Tab 2.3 of the bundle, Page 7.[93] He announced that he was 'required to inform his colleagues of the outcome of his talks with Mauritian Ministers about the detachment of the Chagos Archipelago at 4 p.m. that afternoon'. In other words: you have ninety minutes to say 'yes'. He lists the undertakings very hopefully in Paragraph 2, red Pages 7 and 8. He lists the undertakings that the UK offered to make in return for excision, and reiterates the point that Prime Minister Wilson had made that morning – whether or not the Mauritians said 'yes' was ultimately irrelevant. 'It would be possible for the British Government to detach [the islands] from Mauritius by Order in Council'. This was the key point and there was no disagreement between the Prime Minister's Private Secretary's note and the Colonial Secretary's position taken at this meeting.

32. On Page 8, you see Premier Ramgoolam rolling the dice one last time, and asking again 'whether the Archipelago could not be leased'. But he knew by then that this was hopeless, and the Colonial Secretary shot down his proposal promptly – it 'was not acceptable'. The participants then proceeded to discuss the terms of the detachment, in particular the undertaking that the Archipelago revert to Mauritius when no longer needed for defence purposes, as well as the other undertakings to which Mr Reichler will refer.

33. Whatever the status of the agreement was, a matter of which I will discuss tomorrow from a legal point of view, it's quite clear that those undertakings were given as part of the arrangement. They are not to be disowned, they are not to be severed. Mr. Reichler will say

[92] See MM para. 3.35.

[93] Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253 (MM, Annex 19).

more about that. In paragraph 22, at pages 10 to 11, the Colonial Secretary summarised the debate and set out a final list of undertakings the UK could accept, again suggesting that the Mauritian Ministers needed to make up their minds immediately. Premier Ramgoolam said (in paragraph 23) that 'this was acceptable' to him and to two of his colleagues 'in principle', but he expressed the wish 'to discuss it with his other ministerial colleagues'. The Colonial Secretary replied (in paragraph 24) that 'he had to leave almost immediately to convey the decision to his own colleagues', evidently gathered around breathlessly waiting. Lord Taylor joined in – he was the UK Joint Parliamentary Under-Secretary to the Conference – urging the Mauritians 'not to risk losing the substantial sum offered and the important assurance of a friendly military presence nearby'.

34. Mr. President, Members of the Tribunal, Mauritius at the time was highly dependent upon the United Kingdom. In 1965 and for years after, it was an extreme form of mono-crop economy based on sugar production. The main priority of the Government after independence would have to be the economic and social development of the country. The UK was the major source of foreign exchange earnings: trade with the UK accounted for more than 70% of export earnings.

35. Faced with this situation, the Mauritian Ministers capitulated, as you can see on the next page(Page 12), paragraph 29 – with the notable exception of Mr Paturau, one of the independent Ministers. In that rushed meeting, with the clock ticking, they fully understood that disagreeing was not an option – it would not save the Archipelago from excision, it could only impede independence. The colonial parent made it clear that it had the authority under domestic law to detach the Archipelago, an authority it bluntly threatened to use. There is no reason to believe that the UK would not have done so had the Mauritian Ministers turned down independence and continued to resist excision. The UK concedes that in its Rejoinder when it says in Paragraph

2.47, '[t]he more likely outcome of a failure to secure agreement of the Council of Ministers was that detachment would have been made without its agreement'.[94]

36. In short, the choice presented for the Mauritian Ministers was either to withhold their consent and leave the meeting without independence and the undertakings, or give their consent and help the UK save face with public opinion and the international community and at least secure independence and the undertakings. Mauritius was caught between a rock and a hard place – neither choice included retaining the Archipelago!

37. Following the Conference, the UK needed to secure from the Council of Ministers a formal confirmation of the 'agreement' that it had extracted in London. Governor Rennie received instructions to do so as soon as possible because the UK wanted to manage the criticism that – it well knew – would be forthcoming at the General Assembly later that year by presenting the United Nations with a *fait accompli*.

38. The Mauritian Council of Ministers confirmed the 'agreement' on 5 November. Mr Trafford Smith at the Colonial Office, writing to Mr Peck at the Foreign Office explained that 'in the event, this was not a very easy proceeding, and we had to agree to the stipulations recorded in paragraph 22, some of which are perhaps rather tiresome – though by no means so much so as in the wording originally suggested by the Mauritians'.[95] That's Annex 22 in the Memorial.

39. Three days later, on 8 November 1965, the Privy Council adopted an Order in Council which had the effect, as a matter of British domestic law, of detaching the Archipelago from Mauritius and creating the British Indian Ocean Territory, "BIOT". The Order amended section 90(1) of the 1964 Mauritius Constitution so as to exclude the Archipelago from the definition of 'Mauritius'. It formalised one of the sadder events in the history of Mauritius.

[94] UKR, para. 2.47.

[95] Letter dated 8 October 1965 from the UK Colonial Office to the UK Foreign Office, FO 371/184529, (MM, Annex 22).

40. Mr. President, Members of the Tribunal, Mauritius does not dispute that there was an 'agreement' on the part of the Mauritian Ministers to the excision of the Archipelago. But as I have shown, that 'agreement' was obtained under conditions amounting to duress. These are the questions before you: was the 'agreement' a genuine expression of the wishes of the Mauritian people? Did the UK, by presenting the Mauritian Ministers with a choice between a rock and a hard place, fulfil the international obligations it had as administering power of Mauritius? I return to these questions in my presentation on the law tomorrow.

(ii) The implausibility of the UK's reading of the facts

Mr. President, Members of the Tribunal:

41. Ms Macdonald has already established that, contrary to what our opponents argue, the independence of Mauritius was not a given at the time of the Constitutional Conference, and that the UK has overplayed the influence of Mauritius' domestic politics on the process. I am rather going to focus on the UK's reliance on exchanges that took place in the Mauritius' Legislative Assembly between 1974 and 1982, when the question of the excision was the subject matter of parliamentary debates and even an inquiry in Mauritius.

42. In fairness to our opponents, they do not deny that the Mauritian Ministers were given an ultimatum – that is, that they were told that the excision would be carried out by Order-in-Council with or without their consent. Nor do they suggest there was anything that the Council of Ministers could have done to preserve the integrity of the territory of Mauritius.

43. But the UK denies that the questions of independence and detachment or excision were connected during the parallel talks at the Constitutional Conference. It tries to cast doubt on the remarkable covering note suggesting that Prime Minister Wilson 'frightened' Premier Ramgoolam with independence by referring to the ranking of its author (who was 'Private Secretary' to the Prime Minister). This is probably the only challenge the UK could make against a document which is most explicit in revealing the British position. This is the 'yes

Prime Minister' moment in which the suppliant premier is told that the question of excision was 'not bound up with the question of Independence' – I can imagine Sir Humphrey saying that, thereby conveying precisely the opposite message.

44. In this context, I must take you to another document which, reporting on the parallel meetings during the Constitutional Conference, corroborates Mauritius' account of the facts. This is a 'top secret' extract from minutes of a meeting of the Defence and Oversea Policy Committee held on 25 May 1967. It's Annex 59 to our Reply and it's at Tab 4.6, so we go back to major Tab 4 at Page 147.[96] And I refer you within that document to page 151, where at the top, the Commonwealth Secretary says:

'At the time when the agreement for the detachment of BIOT was signed in 1965, Mauritian Ministers were unaware of our negotiations with the United States Government for a contribution by them towards the cost of compensation for detachment. They were further told there was no question of a further contribution to them by the United States Government since this was a matter between ourselves [that is, the UK] and Mauritius, that the £3 million was the maximum we could afford, and <u>that unless they accepted our proposals we should not proceed with the arrangements for the grant to them of independence</u>.'

45. 'Unless they accepted our proposals we should not proceed with the arrangements for the grant to them of independence'. *Res ipsa loquitur*. In its Rejoinder, the United Kingdom refrains from commenting on this document, which is Annex 59 to our Reply.

Mr. President, Members of the Tribunal:

46. It is puzzling that in light of the overwhelming contemporaneous evidence in the documents prepared by British authorities and labelled 'top secret', the UK now seeks to deny the connection between independence and excision by relying on public speeches made by Mauritian politicians before the Legislative Assembly many years later. None of these

[96] Extract from Minutes of 20th Meeting of Defence and Oversea Policy Committee held on 25 May 1967 (MR, Annex 59).

exchanges, read in their proper context, supports the argument that the Mauritian authorities had given free and genuine consent to the excision.

47. Let me refer you to three of the speeches that the UK seeks to rely on. The first is a speech by Prime Minister Ramgoolam in June 1974, an excerpt of which is at Tab 4.7**,** Page 153 of the Memorial [Annex 71].[97] The UK relies on what the Prime Minister said under column 1947, at the end of the first sentence, when he says 'we gave our consent to it'. But the UK fails to point out that in the same paragraph Sir Seewoosagur says, '[e]ven if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper'. In other words, while consent was given, it was given against the will of the Ministers because, after all, there was nothing that they could do to prevent the UK from detaching the islands by Order-in-Council.

48. Secondly, the UK refers to the answers given by Prime Minister Ramgoolam in oral questions in a session of the Legislative Assembly in November 1980.[98] This is at Tab 4.8 Page 154 [MM Annex 96]. You will notice that the Prime Minister was asked (under column 4223 of the Parliamentary Report), whether excision had been a precondition for the independence of Mauritius. What follows has to be understood in its context. The debate was geared towards assigning blame and political responsibility for the excision. Unsurprisingly, in that context, the Prime Minister says: 'not exactly'. He then added that the matter had been negotiated, that Mauritius had got advantages and undertakings and that they had 'agreed'. But the question that comes next is revealing. Mr. Berenger asked whether it was true that the Prime Minister had said to a media outlet that there was a noose around his neck, that he had to say 'yes' or else 'the noose would have tightened'. The Prime Minister did not reply to that question.[99]

[97] Mauritius Legislative Assembly, 26 June 1974, Committee of Supply (MM, Annex 71).
[98] Mauritius Legislative Assembly, 25 November 1980, Reply to PQ No. B/1141 (MM, Annex 96).
[99] UKR, p. 31, footnote 145.

49. Moreover, the UK conveniently overlooks what Prime Minister Ramgoolam said at the beginning of the session in question, this is again at Page 154.

'Agreement was not necessary. We were a colony and Great Britain could have excised the Chagos Archipelago.'

50. That's the bottom line: we were a colony, and the UK made it clear that not agreeing would not change the outcome. What he did then, which most politicians would have done, was to 'negotiate' and try to 'get some advantage'.

51. Third, the United Kingdom relies on a speech by Sir Harold Walter before the Assembly also in June 1980, which is at Tab 4.9, Page 156 [MM Annex 92].[100] It points to the excerpt in column 3414, in which Sir Harold said that 'it was by consent that [the Archipelago] was excised', and on the next page at column 3415, where he recognised that the contemporaneous exercise by the UK of sovereignty over the Archipelago was a fact. What was the fact? But the UK ignores the excerpt in which Sir Harold explained how the consent was given, a passage which supports unequivocally Mauritius' versions of the events. This is under column 3413, in the second paragraph, and I quote:

'What the Prime Minister has been saying all along is that at the moment that Britain excised Diego Garcia from Mauritius, it was by an Order in Council! The Order in Council was made by the masters at the time! What choice did we have? We had no choice! We had to consent because we were fighting alone for independence! There was nobody else supporting us on this issue! We bore the brunt!'

Sir Harold was fond of exclamation marks.

52. One could not hope for a clearer or more candid description under which the 'agreement' was secured

Mr President, Members of the Tribunal:

[100] Mauritius Legislative Assembly, 26 June 1980, Interpretation and General Clauses (Amendment) Bill (No. XIX of 1980), Committee Stage, Statement by Sir Harold Walter (MM, Annex 92).

53. Apart from these speeches, the United Kingdom seeks to rely on Annex 25 of the Rejoinder. The telegram from the Foreign Office dated 29 October 1980, in which Prime Minister Ramgoolam is reported to have 'assured' the UK 'once again that Diego Garcia is not an issue' between the two States and that '[h]e felt obliged to make public statements on the matter from time to time because the Mauritian opposition is making an election issue out of it.'[101]What the UK seems to have overlooked is the context of the telegram. In the next paragraph, it is explained that '[i]n view of this we would not wish to initiate any counter to Ramgoolam's statement in Delhi.'[102]Two points can be made about the telegram: first, it appears to reveal that Prime Minister Ramgoolam had in fact made a statement to the contrary prior to that date (i.e. that there was an 'issue' between Parties). Secondly, that the replacement of the words 'revert' or 'return' in favour of 'cede', was taken for 'legal reasons'. This not-so-subtle change in the language contradicts the argument before this Tribunal that the islands were not part of Mauritius prior to excision.

54. The United Kingdom also seeks to rely on the Report of the Select Committee on the Excision of the Chagos Archipelago, set up by the Legislative Assembly to investigate the circumstances of the detachment.[103] You will find excerpts of that Report at Tab 4.10 of the Memorial [Annex 97] at Page 158. The UK draws your attention to what is said at page 10 of the Report (which is page 159 of the Folder). Obviously you should read the Report and I won't go over it in detail. First, Sir Seewoosagur is reported as having underestimated the strategic importance of the Archipelago and having pointed to the distance between its islands and Mauritius. We have already addressed that geographic situation through Ms. Macdonald. Secondly, in the third paragraph on the same page, Sir Seewoosagur notes that Mauritius would have had more leverage in the negotiations with the UK had all the Mauritian parties favoured

[101] UKR, para. 2.51, citing UKR Annex 25.
[102] UKR, Annex 25, para. 2.
[103] Extracts from the Mauritius Legislative Assembly, Report of the Select Committee on the Excision of the Chagos Archipelago, June 1983 (MM, Annex 97).

independence. None of this helps the UK's case. What is telling is that the UK refrains from drawing your attention to the first explanation that he offered for his 'acceptance' of excision. This is the second line of the first paragraph, at page 159, and I quote:

'he felt he had no legal instrument to prohibit the United Kingdom Government from exercising the powers conferred upon it by the Colonial Boundaries Act, which powers could not be resisted even by India when the partition of this country took place before its independence.'

55. Again, he stresses the point that he emphasised in every single document the UK has invoked – there was never really a choice for Mauritian Ministers to make.

56. The UK also refers to the 1983 Report Tab 4.10 [MM Annex 97], first paragraph of Section E, Page 161, for the proposition that Sir Seewoosagur refused to describe the private meetings in London in 1965 as involving blackmail. But it fails to note the conclusion that the Select Committee itself reached, on the basis of the evidence available to it, which was exactly the opposite. I should say that more evidence is available today. This is at Page 161, and I quote:

'What is of deeper concern to the Select Committee is the indisputable fact that a choice was offered through Sir Seewoosagur to the majority of delegates supporting independence and which attitude cannot fall outside the most elementary definition of blackmailing.'

Well, that's an expression of view.

57. Overall, the materials the UK relies on in its Rejoinder do not disprove that in truth the UK conditioned Mauritius' independence on the excision of the Archipelago.

3. D. The international community's condemnation of the excision of the Chagos Archipelago

Mr. President, Members of the Tribunal:

58. I turn to the third element of my presentation this morning, which concerns the international community's condemnation of the excision. The UK anticipated that the

international community would condemn the dismemberment of the territory of a colony under its administration in creation of a new colony, the 'B.I.O.T.' The UK was perfectly aware that they would be accused of breaching the right of self-determination of the people of Mauritius and the territorial integrity to which Mauritius was entitled at that time under international law. As to whether there was such an entitlement, I will come back to this tomorrow. The UK's strategy to manage the criticism it knew would come was to present the United Nations with a *fait accompli*.

59. Had the issue of excision been implemented at a later time, the criticism could have had the effect of stopping the process. The local authorities of Mauritius might have objected further, the UK's leverage over the colony might have been less significant. Thus, on 27 October 1965, the FCO sent a telegram to the Permanent Mission to the United Nations, which is at Tab 4.11 [MM Annex 23] of the Memorial, Page 163. There it said, and I quote:

'We are concerned lest any hostile reference to these proposals in the Fourth Committee might jeopardize final discussions in the Mauritius Council of Ministers, which it would be difficult for local reasons to hold before 5 November.'[104]

So there were suggestions as to how to deal with that from a strategic Parliamentary point of view, so to speak.

60. A Minute that Colonial Secretary Greenwood sent to the Prime Minister on 5 November provides an even more illuminating snapshot of the strategy. This is at Tab 2.1 [MM Annex 26] of the folder. At paragraph 5 Mr Greenwood says:

'It is essential that the arrangements for detachment of these islands should be completed as soon as possible.'[105]

[104] Foreign Office Telegram No. 4104 to the UK Mission to the United Nations, New York, 27 October 1965, FO 371/184 (MM, Annex 23).

[105] Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529 (MM, Annex 26).

On the next page he explains why. Take for example paragraph 6. The Colonial Secretary believes that:

'From the United Nations point of view the timing [of the excision] is particularly awkward. We are already under attack over Aden and Rhodesia, and whilst it is 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. We shall be accused of creating a new colony in a period of decolonization and of establishing new military bases when we should be getting out of the old ones.'[106]

61. The bottom line is, as Mr Greenwood notes in the second sentence of paragraph 7, that if the Fourth Committee of the General Assembly raises:

'the question of defence arrangements on the Indian Ocean Islands before we have detached them, the Mauritius Government will be under considerable pressure to withdraw their agreement to our proposals. [By which he presumably means the Mauritius Government might be given a real choice whether or not to agree to their colonial masters' proposals!]. Moreover we should lay ourselves open to an additional charge of dishonesty if we evaded the defence issue in the Fourth Committee and then made the Order in Council immediately afterwards. It is therefore important that we should be able to present the UN with a *fait accompli*.'[107]

62. At the UN, the UK feared that it would be subjected to the obligations under Article 73(e) of the Charter, requiring reports to be transmitted with regard to the Chagossians – the former inhabitants of the Chagos Archipelago. The UK was 'most anxious […] not to have to do this.'[108] By this time, it had already been decided by the UK that the Chagossians would be forcibly removed. All of the Chagossians were forcibly removed between 1968 and 1973.

[106] Ibid.
[107] Ibid.
[108] Foreign Office Telegram No. 4361 to the UK Mission to the United Nations, New York, 10 November 1965, para. 5 (MM, Annex 33).

63. The Tribunal will note the silence from the other side on this matter. In the Counter-Memorial the UK indicated that it 'does not intend to respond, in the course of the present proceedings, to the various allegations concerning the treatment of the Chagossians.'[109] Mr President, that said, we did notice that there was some acknowledgement of the expulsion in one of the videos submitted by the UK with its Rejoinder – if one can even call it that. As the camera pans across the lush islands of Archipelago, and with a rather cheery and upbeat tune playing in the background, the narrator explains that: 'The reserve is twice the size of the UK, with 57 of 58 islands entirely unpopulated since being controversially evacuated in the 1960's'. 'Evacuated' might not quite be the right word, but 'controversially' is spot on.

64. Of course, the UK had its way. The Order in Council detaching the Chagos Archipelago was made on 8 November before the General Assembly had had the chance to discuss Mauritius. But this does not mean that the UK was able to evade adverse international judgments. The excision commanded a powerful reaction at the international level. Third world States challenged the legality of the creation of a new colony at the expense of the dismemberment of another colony that was about to exercise the right to self-determination. This adverse reaction is best exemplified by three General Assembly resolutions contemporaneous with, or adopted shortly after, the excision. It is also apparent in several resolutions and declarations by other international and regional forums. I will come back to some of these documents in my presentation on the wrongfulness of the excision of the Chagos Archipelago tomorrow. Today, my task is to give you an overview.

65. Just over a week after the UK passed the Order in Council, the UN General Assembly adopted Resolution 2066(XX) – a Resolution to which Ms Macdonald drew your attention earlier. It is at Tab 4.12 [MM Annex 38] of the folder. The Resolution is a straightforward

[109] UKCM, para. 1.17.

condemnation of the excision of the Chagos Archipelago. Entitled 'Question of Mauritius', it notes, in the last preambular clause:

'*with deep concern* that any step taken by the administering Power to the detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the [Declaration on the Granting of Independence to Colonial Countries and People].

The second operative clause of the Resolution '*reaffirms* the inalienable right of the people of the Territory of Mauritius to freedom and independence'. The fourth operative clause '*invites* the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity'. Not even the UK voted against Resolution 2066(XX) – it abstained, together with 17 other States. Resolution 2066 passed with the solid majority of 89 votes in favour and no votes against. It shows that States were far from persuaded that the UK had obtained a genuine agreement on behalf of the people of Mauritius.

66. Subsequently, Resolution 2232 (XXI) of 20 December 1966 and Resolution 2357 (XXII) of 19 December 1967, which are reproduced respectively at Tabs 4.13 and 4.14 [MM Annexes 45 and 51] of the folder, reiterated the position of the General Assembly as to the excision. They deal with a number of Chapter XI territories, as compared with Resolution 2066, but they do refer to Mauritius in their title and they do relate to the measures taken by the UK to dismember the territory of Mauritius. If you take a look at Tab 4.13 of the folder, at the fourth preambular clause of Resolution 2232, you will see that the General Assembly expressed its deep concern at:

'policies which aim, among other things, at the disruption of the territorial integrity of [the non-self-governing territories in question] and at the creation by the administering Powers of military bases and installations in contravention of the relevant resolutions of the General Assembly.'

In operative clause 4, the General Assembly reiterated:

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

67. The message is clear. The General Assembly was firmly of the view that the dismemberment of colonies by metropolitan States, even if effected on the basis of so-called 'agreement', was incompatible with the right of self-determination and thus with international law. Resolution 2357 contains identical clauses.

68. The point is echoed in declarations adopted by States in other international and regional forums. For example, you will find at Tab 4.15 [MM Annex 4] of the folder the extract of a declaration of the Non Aligned Movement, which then comprised 120 States. The Movement condemned – and continues to this day to condemn – the excision of the Chagos Archipelago. In the excerpted declaration in the folder – one of the earliest, dated 1983 – the Heads of States expressed:

'their full support for Mauritian sovereignty over the Chagos archipelago, including Diego Garcia, which was detached from the territory of Mauritius by the former colonial power in 1965 in contravention of United Nations General Assembly resolutions 1514(XV) and 2066(XX). The establishment and strengthening of the military base at Diego Garcia has endangered the sovereignty, territorial integrity and peaceful development of Mauritius and other States. They called for the early return of Diego Garcia to Mauritius.'[110]

69. The African Union has also repeatedly expressed its recognition of Mauritius' sovereignty over the Chagos Archipelago as a result of the unlawfulness of the excision. So much that, on 26 May 2013, in its 50th Anniversary Solemn Declaration, a document of great

[110] MM, Annex 4, page 83 from Volume 2.

significance, it reaffirmed its 'call to end expeditiously the unlawful occupation of the Chagos Archipelago'.[111] Ms Macdonald has already told you of the UK's misguided attempt to dismiss these instruments. These statements underline the international community's collective understanding that the detachment of the Chagos Archipelago was unlawful.

70. The numerous declarations adopted in international and regional forums are all cited and excerpted in Mauritius' written pleadings, and there is no need for me to go through each of them with you today – the point that they make is univocal. Though the UK did its best to present the international community with a *fait accompli*, this is not how the international community received the excision of the Chagos Archipelago. It condemned it, recognised its illegality and asked for the immediate return of the Archipelago to Mauritius. I will discuss the legal significance of the international reaction to Mauritius' case tomorrow.

4. E. The Protests by Mauritius to the Exercise by the UK of Sovereignty over the Chagos Archipelago

Mr. President, Members of the Tribunal:

71. I turn to the fourth and last part of my presentation today, which discusses the protests of Mauritius to the excision of the Chagos Archipelago. Since 1980, Mauritius has been consistently voicing, in international forums, its position as to the illegality of the exercise of sovereignty by the UK over the Archipelago.

72. Before I take you through the record, I must briefly deal with the question of the period immediately after Mauritius' independence and the beginning of its active protest in international forums. In its written pleadings, the UK makes much of the fact that, from 1968 to 1980, Mauritius did not publicly voice its opposition to the excision of the Archipelago. Relatedly, the UK also makes reference to the fact that "the definition of 'Mauritius' in the law of Mauritius

[111] African Union Assembly of Heads of State and Government, 50th Anniversary Solemn Declaration, 26 May 2013, Addis Ababa, p. 3: MR, Annex 175.

was only amended in 1982 so as to include the Chagos Archipelago".[112] Similar to its account of the 'agreement' of the Mauritian Ministers to the excision, the UK's account of Mauritius' protests ignores the context in which the relevant events took place. In its first years as an independent State Mauritius was hardly in a position to challenge the UK, the formal colonial master on which Mauritius was still heavily dependent.

73. As I have said, upon independence, Mauritius remained heavily dependent on the support of the UK. It was a new State, a developing nation with a weak economy based on exports of sugar, a high rate of unemployment and few natural resources. In the early discussions on compensation for the use by the US of the Chagos Archipelago, when Mauritius was pushing for a lease of Diego Garcia, the authorities in Port Louis did the most that they could to negotiate terms that would allow them to bridge the development gap required to get its economy on its feet. But Mauritius was only able to secure £3 million from the UK. Mauritius had to rely on the UK for capital grants and other forms of financing to compose its national budget in the later 1960s and 1970s. And this dependence continued for many years: when Prime Minister Jugnauth protested against British policy towards the Chagos Archipelago at the Commonwealth Heads of Government Meeting in 1991 and threatened to take the matter to the UN, the UK in response 'postponed scheduled bilateral aid talks and cancelled signature on three aid projects'.[113]

74. Mauritius also depended on the UK to secure its preferential access and a guaranteed market for its sugar exports to the European Economic Community after the UK joined the EEC in 1973.

75. It was scarcely to be expected from the Government of a newly-independent Mauritius that it would launch a full-blown challenge to the United Kingdom. This would have entailed

[112] UKR, para. 2.9.
[113] MR, para. 5.31.

serious consequences, as indeed it did at CHOGM in 1991.[114] One can only imagine what would have been the reaction of Her Majesty's Government to the articulation of similar views at a time when Mauritius was deeply dependent on the UK.

76. That does not mean, however, that Her Majesty's Government was not aware of Mauritius' legal position concerning the Archipelago in the years from 1968 to 1980. In this regard, the exchanges between the US and the UK in relation to the independence of the Seychelles are illuminating. When the UK created the "BIOT" in 1965, it combined the Chagos Archipelago with the islands of Aldabra, Farquhar and Desroches, which had been detached from the Seychelles. In 1975, as the Constitutional Conference for the Seychelles approached, the UK and the US engaged in extensive consultation to decide whether or not the three islands should be returned to Seychelles prior to independence. The US had come to the conclusion that the three islands were not needed for defence purposes in the Indian Ocean, and no military facilities would be built on them in the foreseeable future. It thus became unjustifiable – politically, strategically and legally – for the UK not to allow the Seychelles to exercise self-determination with respect to its entire territory.

77. But the greatest obstacle that the UK faced to returning the islands was fear of the reaction of Mauritius. The UK and the US were afraid that by respecting the territorial integrity of the Seychelles they would be providing Mauritius with a strong incentive to support its parallel claim to the Chagos Archipelago. This is clear in a succession of documents attached to Mauritius' Memorial in Annexes 72 to 79.

78. For example, I refer you to Tab 4.16 [MM Annex 74] a memorandum prepared by the US Department of State (and we omitted the relevant page of that memorandum which has been added as page 172a in your folders; at least it should be there). The document says, and I quote:

[114] UK Foreign and Commonwealth Office, African Research Group, Research Analysts Paper, 'BIOT/Mauritius: Fishing Rights', 11 October 1996: MR, Annex 101, para. 16.

'In Mauritius, Ramgoolam maintains close ties with the UK, and closer ones with India. At least in his public statements, he sides with India and other littoral countries in opposing the development of military facilities on Diego Garcia. He can be counted on to keep a sharp eye out for Mauritians interests [and these are the crucial words] and to keep active the underlying Mauritian claim to the Chagos Islands.'[115]

That was the view of the United States in 1975.

79. Mauritius retained an 'underlying claim' to the Chagos islands based on what had happened in 1965, and the same is true *a fortiori* for the United Kingdom. You'll see from Tab 4.17 [MM Annex 75] where there was a Brief recording of the US-UK Consultations on the Indian Ocean dated November 1975.

On page 175 of the folder, the two governments conclude, in analysing the case against returning the three islands to the Seychelles:

'It is arguable that there is a continuing obligation on Seychelles to respect the agreement setting up the BIOT and they received generous compensation for loss of sovereignty. In fact, the compensation amounted to £7.3 million in contrast to the £3 million that Mauritius received for the detachment of the Chagos. The trouble is that it is all too easy to win sympathy for the claim that we took advantage of the 'colonial' status of Seychelles in the 1960's.'[116]

And what is true of Seychelles is true for Mauritius.

80. And I refer you to page 174 of the same document where it says 'The amputation of parts of the BIOT might encourage Mauritius, supported by the OAU and the Afro-Asian majority in the UN, to press for the return of the Chagos Archipelago'. The High Commissioner in Port Louis had recently advised that if the ex-Seychelles islands were returned and the Mauritian opposition parties mounted a strong campaign for the return of the Chagos Archipelago,

[115] Office of International Security Operations Bureau, Politico-Military Affairs, United States Department of State, "Disposition of the Seychelles Islands of the BIOT", 31 October 1975 (MM, Annex 74).

[116] Anglo/US Consultations on the Indian Ocean: November 1975, Agenda Item III, Brief No. 4: Future of Aldabra, Farquhar and Desroches, November 1975 (MM, Annex 75)

Ramgoolam would be in a very awkward position.[117] Again, you could read the whole document for yourself.

81. At Tab 4.18 [MM Annex 77], you will find the record of a conversation between the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs and the Mauritian High Commissioner in London in March 1976. This provides another snapshot of the relations between the UK and Mauritius and of the United Kingdom's awareness of Mauritius' claim at the time, before 1980. On page 178, paragraph 4, the British High Commissioner remarked:

'Diego Garcia was always a problem for the Mauritians but they had been careful not to make difficulties for HMG.'

82. In the event the UK was not able to neutralise Mauritius' legal claim for long. Prime Minister Ramgoolam and his government may have been 'careful not to make difficulties for HMG', and they had other irons in the fire, but soon enough Mauritius found itself in a position to take action to retrieve the portion of its territory that had been excised. The process started, internally, in 1977 – nine years after independence. The date of the first formal protest was in 1980, before the General Assembly, where Sir Seewoosagur Ramgoolam said it was time 'to go further and disband the British Indian Ocean Territory and allow Mauritius to come into its natural heritage as before its independence'.[118]

83. Ever since that date, Mauritius has been consistent in asserting its sovereignty over the Chagos Archipelago before the General Assembly; in bilateral communications; and in protesting against the exercise of rights over the maritime zones accruing from the Chagos Archipelago. These protests are well documented: they are annexed to the written pleadings, and there is no need for me to go through them.

[117] Ibid.
[118] Ibid.

84. Mauritius is a small island developing State with limited human resources. It is therefore a considerable challenge for it to keep track of all signatures and ratifications, and accessions to, multilateral conventions and their territorial limits by other States. This explains why it has not always protested at the extension by the UK of multilateral conventions to the 'BIOT'. I am instructed to say that Mauritius does not accept that the United Kingdom is entitled to extend the territorial scope of its treaty obligations to the Archipelago. Whenever Mauritius has noted that a multilateral convention has been so extended, it has not failed to protest. It did so, for example, with respect to the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

5. F. Conclusion

Mr. President, Members of the Tribunal:

85. I will return to deal with the legal implications of these facts tomorrow. But the facts themselves are clear enough and I would list six:

1. The United Kingdom had irrevocably decided on excision for external political reasons before any discussions were held with the Mauritian authorities.

2. The agreement of those authorities was extracted by threats of unilateral excision and even the outright denial of independence.

3. The Mauritian representatives were acutely aware that they had no real choice in the matter.

4. Excision was forced through so as to present the United Nations with a *fait accompli*, on the timetable of days and weeks, not months and years.

5. Excision was criticised at the time on legal grounds, notably in GA Resolution 2066, as a breach of the Colonial Declaration.

6. Although the United Kingdom was aware there was a problem well before 1980, from 1980 onwards, Mauritius was vocal in its opposition to the excision and in its call for the restoration of territorial integrity.

Mr. President, Members of the Tribunal, thank you for your attention. That concludes our presentations of this morning unless, of course, there are questions from the Tribunal. After the break, Mr. President, I would now ask you to call on Mr. Reichler.

PRESIDENT SHEARER: No, I think that will be all, Professor Crawford. Thank you very much.

And I think we adjourn for lunch at this time, and return at 2 o'clock p.m.

Thank you.

(Whereupon, at 12:20 p.m., the hearing was adjourned until 2 o'clock p.m. the same day.)

AFTERNOON SESSION

PRESIDENT SHEARER: Yes, Mr. Reichler.

THE UNITED KINGDOM'S UNDERTAKINGS TO MAURITIUS, AND ITS UNDERSTANDING OF THOSE UNDERTAKINGS

Paul S. Reichler

23 April 2014

Mr. President, Members of the Tribunal: Good afternoon. It's a privilege for me to appear before all of you, and an honor to speak on behalf of the Republic of Mauritius.

I will continue with Mauritius' presentation of the facts. In particular, and first, I will present the evidence on the specific undertakings given by the United Kingdom to Mauritius at Lancaster House in September 1965, to which Professor Crawford made reference before the break; second, by taking you through the contemporaneous documentary evidence, I will show how the British government interpreted, understood and complied with these undertakings over a 45-year period from September 1965 until April 2010, when it unilaterally declared an MPA.

From this review of the evidence, it will be clear that the United Kingdom believed at the time it first made the undertakings to Mauritius in 1965, and during the four and a half decades that it spent fulfilling them, that it had made binding legal commitments to Mauritius, and that by virtue of these undertakings it considered that Mauritius had legal rights, including, among others, fishing rights in the waters of the Chagos Archipelago, mineral and oil rights in the seabed and subsoil, and the right to reversion of the Archipelago to Mauritian sovereignty after the UK determined that it was no longer needed for defence purposes. These undertakings, and the UK's recognition of the legal rights of Mauritius thereunder, were reiterated, renewed and reconfirmed repeatedly by responsible British officials, continuously until April 2010, and in some cases even beyond.

In the third part of my presentation, I will address the United Kingdom's treatment of this voluminous body of evidence in its Rejoinder. Because it is unable to reconcile the blatant contradiction between, on the one hand, its undertakings, official statements and actions over a 45-year period, and, on the other, its sudden reversal of position upon adoption of the "MPA", the UK attempts to sweep away all of the contemporaneous, documentary evidence as "irrelevant," "lacking in clarity," reflecting only the unconsidered views of junior officials, and internally contradictory. This, of course, is the standard laundry list of attacks that counsel make in respect of documents that completely undermine their case, and for which they have no countervailing evidence. That, as you will see, is the case here. The 30 contemporaneous British documents I will review with you this afternoon are perfectly clear in setting forth the UK's undertakings, its view that they were legally binding, and its recognition and understanding of Mauritius' legal rights. Most of the documents were authored by senior British officials: they include Cabinet Secretaries, Colonial Governors, High Commissioners, Legal Advisers and Foreign Office Department Heads. And, notwithstanding the numerous authors and long time period that they span, they are remarkably consistent with one another. They are not merely "relevant." They are, we would submit, dispositive on the nature and content of the undertakings that the UK gave to Mauritius.

Today, I will simply lay out the factual record for you. Tomorrow, I will address the legal implications of the United Kingdom's undertakings and its actions in fulfillment of them during this 45-year period.

Let us begin with the document that is titled, "Record of a Meeting Held in Lancaster House at 2:30 p.m. on Thursday, 23rd September." (MM-Annex 19) This is at Tab 2.3 of your folder. You have already heard what took place at the meeting from Professor Sands and Professor Crawford. The British Government, represented by the Secretary of State for Colonies, was

anxious to obtain the agreement of the Premier of Mauritius and other Mauritian Ministers to the detachment of the Chagos Archipelago from Mauritius. Britain's interest was made manifest. It wanted to retain the Archipelago so that it could be leased to the United States and used for defence purposes. I would like to focus your attention on the specific language of the document. At paragraph 2, this again is at Tab 2.3, at paragraph 2 on page 7, it is recorded that the Secretary of State, "expressed his anxiety that Mauritius should *agree* to the establishment of the proposed facilities, which beside their usefulness for the defence of the free world, would be valuable to Mauritius itself by assuring a British presence in the area." This was the UK's only interest in retaining the Archipelago: defence. The UK had no other interest. In particular, as it made clear at Lancaster House and on many subsequent occasions, it had no desire or intention to exploit for itself any of the Archipelago's natural resources.

Further along in paragraph 2, you can read that, according to the Secretary of State: "[h]e had throughout done his best to ensure that whatever arrangements were *agreed upon* should secure the maximum benefit for Mauritius." To that end, "he was prepared to recommend to his colleagues if Mauritius *agreed* to the detachment of the Chagos Archipelago" the following inducements: (i) negotiations for a defence agreement between Britain and Mauritius; (ii) the two governments would consult about internal security in Mauritius; (iii) the UK would use its good offices to secure concessions for Mauritius from the US in regard to wheat and other commodities; and (iv) compensation of 3 million pounds to the Government of Mauritius. At the end of this paragraph, on page 8, the next page, it is recorded that, "This was the furthest the British Government could go. They were anxious to settle this matter by *agreement*" with Mauritius.

Now, the Mauritian Ministers were, as you have heard, unwilling to give their consent to detachment on this basis. They resisted, as far as they could, consenting to detachment under any circumstances, but once the U.K. made clear that detachment was going forward with or without

their consent and that independence could be imperiled, they felt they had no choice but to acquiesce. All they could do was insist on more for Mauritius in return.

At the time, as you know, Mauritius was a very poor colony, unable to feed itself, with an economy entirely dependent on sugar production. For Mauritius, the Chagos Archipelago was a potentially rich source of natural resources, including, especially, fish and mineral resources. Unlike the United Kingdom, Mauritius was keen on access to those resources, including as a potential food source to support a growing population. Thus, at the insistence of the Premier of Mauritius, the UK expanded the list of inducements for Mauritius to agree to the detachment of the Archipelago, beyond the Secretary of State's initial offer. As recorded in paragraph 22 of the document, at pages 10 and 11, to which I would ask you please now to turn, these additional inducements were, *inter alia*: (vi) that the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable; and you will see under that item: (b), which is Fishing Rights; further, item (vii) that if the need for the facilities on the islands disappeared, the islands should be returned to Mauritius; and (viii), that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.

The record of the meeting concludes with paragraph 29, at page 12: "At this point the Secretary of State left for 10, Downing Street, after receiving authority from [the Mauritian Ministers] to report their acceptance in principle of the proposals outlined above subject to the subsequent negotiation of details." This official record and the documents that follow make clear that, for the United Kingdom, the parties had reached an *agreement* on the terms for detachment of the Chagos Archipelago from Mauritius, and, for the U.K., each side had obligated itself to perform as agreed.

This is demonstrated beyond any doubt in the UK's subsequent statements and conduct. I apologize in advance for the strain I am unhappily going to put on your fingers, as you spend the next hour or so turning pages with me, but I can think of no better way to take you through the evidence, let you see it for yourselves and come to your own conclusions about it. Please turn to Tab 5.1. On 6 October 1965, two weeks after the Lancaster House meeting, the Colonial Office sent a copy of the official record of that meeting to the Governor of Mauritius. I call your attention to paragraph 2: "I should be grateful for your early confirmation that the Mauritius Government is willing to *agree* that Britain should now take the necessary legal steps to detach the Chagos Archipelago on the *conditions* enumerated in items (i) – (viii) in paragraph 22 of the enclosed record." (MM-Annex 21) Moving ahead to paragraphs 5 and 6: "As regards points (iv), (v) and (vi) the British Government will make the appropriate representations to the American Government as soon as possible." It continues with: "The Chagos Archipelago will remain under British sovereignty, and Her Majesty's Government will have taken careful note of points (vii) and (viii)." As you can see, in this and some of the other documents, I have taken the liberty of enclosing in red the portions of the text from which I am quoting. This is to make it easier for you to follow my presentation about so many documents. I do not suggest that any of these red lines were in the original document, but the originals can be found, un-highlighted, in the annexes to the pleadings whose numbers are indicated on the first page of these documents.

The Governor of Mauritius reported back to the Colonial Office on 5 November 1965. The document is at Tab 5.2. The Governor wrote that: "Council of Ministers today confirmed *agreement* to the detachment of Chagos Archipelago *on the conditions enumerated*, on the understanding that (1) statement in paragraph 6 of your dispatch 'H.M.G. have taken careful note of points (vii) and (viii)' means H.M.G. have in fact *agreed* to them….[then, moving ahead to point (3)] In item (viii) 'on or near' means within the area within which Mauritius would be able to

derive benefit but for change of sovereignty. I should be grateful if you would confirm this understanding is *agreed*." (UKCM-Annex 14).

For Mauritius, the Council of Ministers' "agreement" to the excision of the Chagos Archipelago, "on the conditions enumerated," was, despite these concessions, nevertheless made under duress. As Professor Crawford explained, Mauritius does not regard as a lawful "agreement" what the U.K. pressured it to "accept" at Lancaster House, in disregard of the obligation to respect Mauritius' territorial integrity, and the right of its people to self-determination, upon threat of not granting Mauritius its independence. But for the U.K., as its statements and actions in September 1965 and as you will see for 45 years thereafter demonstrate, what took place at Lancaster House and in these ensuing exchanges, was an *agreement*, plain and simple.

Between September 1965 and April 2010, British officials responsible for policy toward Mauritius and the Chagos Archipelago, consistently referred to the conditions the UK had agreed to at Lancaster House, in exchange for what they regarded as the consent of Mauritian Ministers to the detachment of the Archipelago, as "undertakings," which the Government was obliged to fulfill. An early example is the Colonial Office Minute to the Governor of Mauritius of 15 March 1966. This is at Tab 5.3. It refers in the first sentence of paragraph 2 at page 182 to "the *undertaking* given to Mauritian Ministers in the course of discussions on the separation of Chagos from Mauritius, that we would use our good offices with the U.S. Government to ensure that fishing rights remained available to the Mauritius Government as far as practicable in the Chagos Archipelago." (UKCM-Annex 16) The last sentence of the paragraph reads, and I will be moving around, and I understand and expect that you will be reading these documents in their entirety, but for the purpose of finishing on time I will be moving around in this presentation. The last sentence of that same paragraph states: "The best way of dealing with the matter and at the same time *fulfilling* our Ministers' *undertaking* to Mauritius Ministers may well be that during the

period before defence installations are introduced into any of the islands of the Chagos Archipelago, an attempt should be made to clarify with the Americans the arrangements which would govern access by fishing vessels once any of the islands of the Archipelago are actually taken for defence use."

There follows, in paragraph 3, immediately below, a specific proposal to be made to the Americans: It is laid out in subparagraph B, items (i) through (iii): "(i) Mauritius fishing vessels would, of course, have unrestricted access to the high seas within the Archipelago (of which it seems from such maps as we have there must be a considerable amount). (ii) They would likewise have unrestricted access to islands not specifically excluded for defence reasons and also to the territorial waters surrounding them. (iii) The possibility of limited access for fishing in the waters surrounding those islands excluded for defence use would be considered as and when the situation arises by the British and U.S. Governments, but would, of course, have to be subject to their overriding defence needs." The Governor of Mauritius is then asked: "Would you think that a proposition on these lines…would be acceptable to your Ministers and regarded by them as an adequate *fulfillment* of the *undertaking* given by British Ministers on this point?"

As this document makes clear, the British intended to fulfill their undertaking in regard to fishing rights by using their good offices with the United States to assure the maximum possible fishing rights for Mauritius, over the maximum possible area, limited only by specific defence needs at particular islands. Quite obviously this was not intended merely to preserve *traditional* fishing rights, which Mauritians had historically exercised in the waters of the Chagos Archipelago, but to ensure for Mauritius fishing rights throughout the Archipelago's waters in conformity with the undertaking, "as far as practicable," consistent with defence needs. Subsequent documents show that this is precisely what the U.K. proposed to the U.S., and what the U.S. agreed to.

Please turn to Tab 5.4. On 12 July 1967, the Commonwealth Office wrote to the Governor of Mauritius repeating the same broad interpretation of Mauritius' fishing rights that was expressed in the correspondence of 15 March 1966, which we just reviewed. Paragraph 2, on the first page, in the first sentence, refers to, "the *undertaking* given to Mauritius Ministers in the course of our discussions on the separation of the Chagos from Mauritius, that we would use our good offices with the U.S. Government to assure that fishing rights remained available to the Mauritius Government as far as practicable in the Chagos Archipelago." Paragraph 6, which is on page 185, the next page, if you will, states that: "before entering into further discussions here, we are very much concerned to keep in mind the importance of the fishing grounds to Mauritius, for instance, the possible importance of fishing in Chagos as a source of food, in view of the rapidly increasing population." (MM-Annex 50) If you will turn to the next page, 186, you can see that this document was signed on behalf of the Commonwealth Office by Mr. C.A. Seller.

Please turn now to Tab 5.5. On 24 April 1968, the General and Migration Department of the U.K.'s Commonwealth Office wrote to the Administrator of the "B.I.O.T.". On the first page of this document, last paragraph, it is reported, in the second sentence: "The United States Government have agreed the basis on which arrangements might be made as you are aware from Seller's letter of reference QC 7/1 of 12 July 1967." That is the document we just reviewed, at Tab 5.4, which spelled out the broad nature of the fishing rights of Mauritius whose recognition by the U.S. the U.K. had committed to use its good offices to obtain, and in fact, as you can see here did obtain. The next paragraph, on the following page, addresses the subject of what concessions should be granted to foreign governments in regard to fishing in the Chagos waters. Let me take you for the sake of efficiency directly to the third sentence of that paragraph: "When the position is indefinite as it is here, it is the opinion of the Legal Adviser of the General Department of the Foreign Office that provision should be made for a reasonable phasing out period for all foreign

fishing." Then, skipping ahead one sentence: "In the loosest term 'foreign vessels' would include those of Seychelles and Mauritius, but as you are aware, an *undertaking* was given to Mauritius Ministers to ensure that fishing rights remain available to Mauritius in the Chagos Archipelago as far as is practicable." (MR-66)

Now, following the agreement between the U.K. and the U.S., the B.I.O.T. was commissioned from London to adopt a fishing ordinance that would assure Mauritius' fishing rights in the waters of the Chagos Archipelago while at the same time safeguarding defence interests. In that regard, please turn to Tab 5.6, there you will find that on 5 June 1970, the British Defence Department advised that the High Commission in Port Louis, "should forewarn the United States and Mauritius Government about the new B.I.O.T. fishing regime, particularly the latter, that is the Mauritius Government, as we *undertook* at the Lancaster House Conference in September 1965 to use our good offices to protect Mauritian fishing interests in Chagos waters." (MM-Annex 59) The B.I.O.T. fishing ordinance was adopted on 17 April 1971. As the U.K. agrees in its written pleadings at paragraph 8.15(c) of the Rejoinder, the ordinance prohibited fishing within 12 miles of the Chagos Archipelago, but – for the benefit of Mauritius – it allowed the "BIOT" Commissioner to designate any country for the purpose of allowing fishing traditionally carried on in the area; under this provision, in fulfillment of the U.K.'s undertaking of September 1965, licences were issued to Mauritian flagged vessels free of charge. (cite to either UKCM or UKR)

The contemporaneous documentary evidence confirms that the U.K. considered itself legally obligated to assure Mauritius' fishing rights in the Chagos Archipelago as far as practicable. This is shown, for example, in a memorandum of 26 February 1971 by one of the Foreign Office's legal advisers, Mr. A. I. Aust. (MR-Annex 73) This is at Tab 5.7. If you will turn to the fourth page of this document, page 194 in your folder, you will see, just above paragraph 7,

the heading, "The British Government's *Undertakings* to the Mauritius Government in 1965." I apologize for the quality of the photocopy, but this is the way we received it. In the first sentence of paragraph 7, Mr. Aust addressed, "our *undertakings* to the Mauritius Government and in particular our *undertakings* regarding resettlement," of the Chagossian people. If I may ask you please to turn to the last page of this document, which is page 196 in your folder, in paragraph 11, you will see that Mr. Aust gave his view that: "Failure of the Mauritius Government to agree to the resettlement of persons of Mauritian origin in Mauritius would entitle us to treat our other *undertakings* (e.g. as to oil and *fishing rights*) as *no longer binding* on us, because the undertaking on resettlement is only part of a package deal and must be viewed as such." (id.) Clearly, in Mr. Aust's opinion, the U.K.'s undertakings in regard to oil and fishing rights *were* binding, as long as Mauritius upheld what the U.K. considered to be the commitments it made in the "package deal" at Lancaster House. Please turn next to Tab 5.8. On 3 May 1973, Mr. P.A. Carter, the British High Commissioner, wrote to the Prime Minister of Mauritius, as he says at the request of his Government, to give, "an assurance that there is no change in the *undertakings*, given on behalf of the British Government and set out in the record, as then agreed, of the meeting at Lancaster House on 23 September 1965." (UKCM-Annex 24)

Similar views were expressed in a memo from the FCO's Legal Advisers to the East Africa Department on 1 July 1977. This is at Tab 5.9. The Legal Advisers' memo confirms that the British Government considered itself obligated to fulfill the undertakings it made to Mauritius at Lancaster House, including in regard to fishing rights as you will see at the bottom of the page: "Assuming that Mauritius has not reserved to itself fishing rights, we have to interpret what paragraph 22(vi) means. First of all, it seems to me that the *obligation* was to ensure that fishing rights remained available. In order to remain available, I do not think all or any part of such rights can be handed to a third party. In my opinion, we are bound not to give the rights or any part of

them to a third party. However, that *obligation* was weakened by the words 'as far as practicable.'" (MR-Annex 79) Now, as we have seen, that qualification on Mauritius' fishing rights meant only that they could be restricted as necessary to accommodate defence needs, and, in practice, this amounted to only a modest restriction on fishing rights in the near vicinity of Diego Garcia Island. As you can see on the following page, page 199, the name of the author of this memorandum has been redacted by the UK, and his signature or her signature is illegible. But that the memo was written by the office of "Legal Advisers" is clearly indicated.

The next document is at Tab 5.10. This is a 29 September 1980, note from the East Africa Department to the Private Secretary for Mr. Luce, who was Under Secretary of State for Foreign Affairs. As shown in paragraph 1, the note replies to an enquiry, "whether we are now in a position to clarify to the Mauritian Government our view of their fishing rights in the Chagos Archipelago." (UKCM-Annex 41) The note then rehearses that, in 1965, in an effort "to elicit Mauritian Ministers' consent to the 'excision' of the Chagos islands, the following terms relating to fishing and mineral rights were *agreed.*" This is followed by a direct quote from paragraph 22(vi) of the official record of the 23 September 1965 meeting in regard to fishing rights, inter alia, and a statement that, "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government." To the same effect is the next document at Tab 5.11. This is a telegram of 18 September 1981 from the U.K. Foreign and Commonwealth Office to the British High Commission in Port Louis. It states: "As part of the 1965 *agreement* with Mauritius on the detachment of the Chagos Islands, we gave an *undertaking* that their traditional fishing rights in the Chagos Archipelago would be upheld as far as is practicable." (MR-Annex 82)

The following month, on 13 October 1981, one A.D. Watts of the Legal Advisers (later known as Sir Arthur, and editor of *Oppenheim's International Law*) reconfirmed that Mauritius had fishing rights in the Chagos Archipelago as a result of an agreement reached with the United

Kingdom in 1965. The Watts memo is at Tab 5.12. I will read from paragraph 2: "You are right in thinking that Mauritius has a distinct interest in anything we do regarding fishing rights in the waters of the BIOT. An *agreement* was reached with Mauritius in 1965 on this matter, but it was not an Agreement in a tidy and formal sense. According to the papers which I have, the terms of the *agreement* are to be found in a Colonial Office letter of 6 October 1965 [which we reviewed earlier at Tab 5.1], read together with an extract from debates in the Mauritius Legislative Assembly on 21 December 1965 and a statement by the Mauritius Government of 10 November 1965." (MR-Annex 83) Please turn next to Tab 5.13. On 13 July 1983, Mr. Watts, who was by then Deputy Legal Adviser, received a memo from the East Africa Department which stated: "At a meeting on 23 September 1965 between the then-Colonial Secretary (Mr. Greenwood) and Sir Seewoosagur Ramgoolam, the Mauritius PM, the Colonial Secretary gave an oral and confidential *undertaking* that the British Government would use their good offices to ensure that certain facilities, including fishing rights in the Chagos Archipelago, would remain available to the Mauritius Government as far as possible." (MR-Annex 86)

A new fishing ordinance was adopted by the "BIOT" on 12 August 1984. The UK agrees as at paragraph 2.97 of its Counter-Memorial, that, like the 1971 ordinance, the 1984 ordinance prohibited foreign fishing vessels from fishing within the 12 mile zone around the Chagos Archipelago, but, pursuant to the ordinance, Mauritius was specially designated by the "BIOT" Commissioner as a country whose vessels could be issued licenses to fish in those waters. As before, licences were issued to Mauritian fishing vessels free of charge, pursuant to the U.K.'s understanding of the undertakings it made to Mauritius in 1965.

In 1990, the U.K. considered extension of the fishery limits to 200 miles. A memorandum on this subject, which recommended such an extension, was widely circulated by the East Africa Department on 17 September 1990. (MR-Annex 97) This is at Tab 5.14. The names of most of its

recipients have been redacted by the UK, as you can see on page 205, but it is still possible to tell that it was sent to the Private Secretary to Mr. Waldegrave, a Minister, and to at least two Legal Advisers. I refer you to paragraph 4 on page 206, beginning with the third sentence of that paragraph, the memo recalls that: "Fishing within,"—that is in the third line of the paragraph—"fishing within the twelve mile fisheries zone is limited to Mauritian fishermen who have access following an understanding with the Mauritians in 1965, whereby the UK *undertook* to permit access to Mauritians who had traditionally fished in the area, so far as was practicable. No fishing is undertaken around Diego Garcia itself"

The memo goes on to discuss the extension of the fishery zone to 200 miles. And I would ask you, please, to turn to paragraph 12 on page 210. I will begin reading at the second full sentence on the fourth line from the top: "It would be prudent to continue to licence Mauritian fishermen on the same basis as hitherto; i.e., without costs, and to extend their access to BIOT waters in the new 200 mile limit." Near the bottom of the page and continuing on to the next, in paragraph 14, the memo reports that the United States was already consulted about the extension to 200 miles, and had no objection: "The Americans have since confirmed at the meeting of the Diego Garcia Sub-Group of the Pol-Mil Talks, held in Norfolk, Virginia, on 23-24 May, that they do not object to the declaration of a 200 mile limit, nor any consequential licenses fishing beyond the twelve mile limit. Access to areas near Diego Garcia brought under control by the 200 mile limit would be excluded from any licensing."

In fact, less than two weeks after this memo was circulated, on 1 October 1991, the U.K. proceeded to extend the fishery zone of the "BIOT" to 200 miles, and to recognize Mauritius' fishing rights in the entire zone. Please turn next to Tab 5.15. This is a telegram of 3 April 1992 from R.G. Wells of the East Africa Department to the British High Commissioner in Port Louis. It states: "I can confirm that we have decided that we will not (repeat not) charge for fishing licences

issued to Mauritian vessels. We have accepted that our *undertakings* in the past preclude us from doing so, in spirit if not strictly in law." (UKR-Annex 40). At Tab 5.16 you will find correspondence from the British High Commissioner to the Prime Minister of Mauritius. This is dated 1 July 1992. And I would ask you first to turn to the second page, which is page 215. I direct your attention to the last three sentences of the carryover paragraph: "The British Government has honoured the *commitments* entered into in 1965 to use its good offices with the United States Government to ensure that fishing rights would remain available to Mauritius as far as practicable. It has issued free licences for Mauritius fishing vessels to enter both the original 12 mile fishing zone of the territory and now the wider waters of the exclusive fishing zone. It will continue to do so, provided that the Mauritian vessels respect the licence conditions laid down to ensure proper conservation of local fishing resources." If you will now follow me to the previous page, 214, you will see that the last paragraph states: "The British Government has always acknowledged, however, that Mauritius has a legitimate interest in the future of these islands and recognizes the Government of the Republic of Mauritius as the only State which has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty. The British Government has therefore given an *undertaking* to the Government of the Republic of Mauritius that, when these islands are no longer needed for the defence purposes of the United Kingdom and the United States, they will be ceded to Mauritius." (MM-Annex 103)

On 11 October 1996, the Research Analysts of the Africa Research Group within the FCO produced a paper reviewing the history of "BIOT/Mauritius Fishing Rights". (MR-Annex 101) This is at Tab 5.17. The first section, on page 217, is captioned: "HMG's 1965 *undertaking*." It begins by recalling in paragraph 1, second sentence, that on 23 September 1965 at Lancaster House: "the Colonial Secretary (Mr. Greenwood) gave a confidential *undertaking* that the HMG would use their good offices with the US Government to ensure that certain facilities, including

fishing rights in the Archipelago, would remain available to the Mauritius Government as far as was practicable; that was written into the agreed record of the meeting." Let me take you now, with your permission, to paragraphs 14 and 15 of this document,, at page 221. To summarize, these paragraphs recall an internal discussion about whether Mauritius' fishing rights under the 1965 undertaking should be recognized out to 200 miles. The decision, as we saw in earlier documents, was that they should. In the middle of paragraph 14, in the third sentence, and I apologize that this has not been highlighted for your convenience, this report states: "A necessary concession would be to continue to issue free licences to Mauritian fishermen and to extend their existing access to BIOT waters in the new 200 mile limit." The Research Analysts explained why, at the end of paragraph 15, just before the quoted language at the bottom of the page: "In the event, though, re-examination of HMG's 1965 *undertaking* on fishing rights ruled out any alternative. The BIOT Commissioner (Tom Harris) later confirmed in writing…that free licences would be extended to Mauritian tuna fishing vessels." Please turn to paragraph 26 of this document at page 225: "The system of free licensing of Mauritian boats to fish in Chagos waters has never been abused by them in pursuit of their sovereignty dispute (e.g., by seeking to infiltrate Ilois, or attract publicity by causing incidents on the islands). Therefore, HMG's interpretation of its 1965 undertaking on fishing has tended toward a liberal, or permissive, interpretation…"

Please turn next to Tab 5.18. On 12 December 2003, the U.K. Minister responsible for Overseas Territories, Mr. Bill Rammell, wrote to the Mauritian Minister of Foreign Affairs. I call your attention to the second page, second paragraph: "The British Government has always acknowledged that Mauritius has a legitimate interest in the future of the Chagos Islands and recognizes Mauritius as the only state which has a right to assert a claim of sovereignty over them when the United Kingdom relinquishes its own sovereignty. *Successive* British Governments have given *undertakings* to the Government of Mauritius that the Territory will be ceded when no

longer required for defence purposes subject to the requirements of international law. This remains the case." (MM- Annex 124)

The United Kingdom also continued to recognize its obligations to Mauritius specifically in regard to fishing rights. The next document is at Tab 5.19. This is a note of 2 July 2004 prepared by attorney Henry Steel. In the first two lines, it refers to the official record of the 23 September 1965 Lancaster House meeting as the "written record of an *agreement*." (MR-Annex 109). Pursuant to that agreement Mr. Steel writes: "Mauritian Ministers gave their consent to the detachment of the Chagos Archipelago from Mauritius for the purpose of their incorporation into the proposed BIOT. The record shows that, in return for that consent, the British Government *agreed to accept a number of obligations*, one of which was the following." Mr. Steel then quotes paragraph 22(vi) of the official record of the 23 September 1965 meeting and particularly in regard to fishing rights. He goes on to explain, on the following page, which is page 230, that when the fishery zone was expanded from 12 to 200 miles in 1991: "the practice eventually adopted (after some confusion or uncertainty) was to extend the existing system (i.e. to require licences for Mauritian vessels but to issue them free) to cover all Mauritian vessels seeking to fish in the zone, including those engaged in tuna-fishing. That remains the practice."

And that was still the practice in April 2008, when U.K. officials began meeting with representatives of the Pew Charitable Trust about the establishment of a 200 mile "no fishing zone" around the Chagos Archipelago. In an e-mail of 22 April 2008, which Professor Sands showed you yesterday and is at Tab 5.20, to which I respectfully direct your attention, Joanne Yeadon, then the Head of the FCO's "BIOT" and Pitcairn Section, reported on a meeting of that date with Pew. (MR-Annex 120) According to Ms. Yeadon, it was the Pew representatives who proposed "the creation of a no fishing zone." The U.K. officials in attendance responded, as recorded in the third paragraph of her e-mail, third sentence, that "there were obstacles: the first

being: Mauritius." Mauritius "wanted the islands back," and eventually would get them. Thus, "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." If you turn the page, you will see that Ms. Yeadon also identified as an obstacle Mauritian fishing rights. "[W]e explained that Mauritius did have some rights but had not exercised them recently. But this was a loophole that would need looking at." Six days later, on 28 April 2008, Ms. Yeadon wrote a report about the meeting with Pew to Meg Munn, Parliamentary Under-Secretary of State for Foreign Affairs. (MR-Annex 121)This report was not shown yesterday. It is at Tab 5.21. You will see that Ms. Yeadon wrote, in the first paragraph, second sentence that the proposal: "would effectively mean a total fishing ban in the 200 mile Fisheries and Conservation Management Zone of the British Indian Ocean Territory." On the following page, at paragraph 4, Ms. Yeadon wrote just above the highlighted text that: "There are, however, two big obstacles for HMG to consider. First, in the highlighted text, "We could expect a high level of opposition to any environmental plan for BIOT from Mauritius….Mauritius wants the islands back and would probably wish to exploit them for tourism and fishing. As we have promised the islands to Mauritius once we 'no longer need them for defence purposes,' the UK Government is in effect a *temporary freeholder*." Again, a temporary freeholder. The repetition of the phrase suggests Ms. Yeadon did not misspeak the first time she uttered it a week earlier.

Please turn next to Tab 5.22. One year later, in an e-mail of 21 April 2009, Ms. Yeadon wrote to Colin Roberts and Andrew Allen to "flag[ed] up in the context of the proposed Chagos Marine Park - the Mauritians have got historic fishing rights…" (MR- Annex 130) According to her, Mauritius had used them for "the first time in years," which is both wrong and immaterial. The evidence of Mauritius' exercise of its fishing rights, which I will describe soon, shows extensive fishing in Chagos waters continuously over several decades, including in 2009. But, more

centrally, Mauritius' legal rights in regard to fishing, which the U.K. had undertaken to ensure and respect as far as practicable since 1965, were not conditioned on their exercise, but only on defence needs. The point here is that Ms. Yeadon, as her predecessors and colleagues had done consistently since 1965, expressly recognized that Mauritius "have got" fishing rights.

The next document is at Tab 5.23. On 3 July 2009, Ms. Yeadon received an e-mail from Colin Roberts, Director of the Overseas Territories Directorate, regarding "Marine Reserve: dialogues with Mauritius and US." Mr. Roberts requested that Ms. Yeadon provide him "an authoritative statement of what we think are Mauritius' rights today to fish in BIOT waters." (MR-Annex 138) Ms. Yeadon in turn requested a report on the subject from Chris Mees of MRAG Ltd., which had managed the "BIOT" fisheries since 1991 because, according to a statement by Ms. Yeadon attached to the Rejoinder, "we did not have the capacity or the expertise in-house." (UKR- Annex 73, para. 11) According to the same statement, MRAG reported directly to Ms. Yeadon, in her capacity as "BIOT" Administrator and Director of Fisheries. (id.) MRAG furnished the report to Ms. Yeadon on 9 July 2009. (MR- Annex 137) This at Tab 5.25. At Tab 5.25 please turn to page 246, I refer you to item 4 just below the middle of the page. Legal and historical obligations may pose a constraint on declaring the whole FCMZ as a closed area. UNCLOS requires that coastal States make provision for access to its EEZ by foreign fishers. Mauritius has historical agreements to fish inside the "BIOT"'s FCMZ. And then if you then turn to page 247, under the heading, "Mauritian historical fishing rights," the report states: "In addition to UNCLOS Article 62 which refers to States whose nationals have habitually fished in the zone, the right of Mauritians to fish in "BIOT" waters was enshrined in the agreements made between the UK and Mauritius in 1965.

On 14 July 2009, Ms. Yeadon sent the MRAG report to Mr. Roberts, along with her own message, which is at Tab 5.24: "Mauritian fishing rights were never defined in the Lancaster

House side meetings, but what it boils down to is free access to BIOT waters. Free access to BIOT waters. This has translated over the years, to the Mauritians being obliged to apply for a permit but getting it free. You have already seen the Research Analyst 1996 paper on the history of fishing [which we reviewed a few minutes ago at Tab 5.17]," and she continues, "and now Chris Mees has provided a snapshot in his recent paper on the marine park, which, of course, we just reviewed (at Tab 5.24)." (MR- Annex 138)

Now, even *after* the declaration of the "MPA" on 1 April 2010, Ms. Yeadon continued to reaffirm Mauritius' fishing rights throughout the 200 mile Chagos fishing zone. Let us turn to her memo of 19 July 2010, addressed to the Private Secretary to Mr. Henry Bellingham, the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, which is at Tab 5.26. I refer you to the fifth page of the document, on page 253 of your folder, and the heading "Fishing Rights". "Mauritius (not Chagossians) has got historical fishing rights in BIOT. Negotiations in 1965 to get Mauritian Ministers' consent to the excision of the Chagos Archipelago took place in side meetings during constitutional talks at Lancaster House. HMG gave an *undertaking* to assure that certain facilities, including fishing rights, would remain available to the Mauritian government as far as was practicable. This was written into the agreed record of the meeting." (MR- Annex 162)

In the same vein, at Tab 5.27, you will see that Ms. Yeadon made a similar statement in her memo to Colin Roberts of 1 September 2010, five months after the declaration of the "MPA". I will simply refer you to paragraph 11, at page 260 of your folder for you to read at your convenience.

Mr. President, we have now covered 28 of the contemporaneous British documents I said we would review this afternoon, and I can give your fingers a brief respite. All 28 of these documents were authored by or for responsible British officials. They cover the period from 23

September 1965 to 1 September 2010. Given the number of different authors and the time period covered, their consistency can only be described as remarkable. What they show is beyond doubt or dispute. In September 1965, the U.K. deliberately gave certain undertakings to Mauritius in exchange for what it regarded as Mauritian consent to the detachment of the Chagos Archipelago. Among those undertakings was an assurance that Mauritius' fishing rights in the Chagos waters would be preserved and respected as far as practicable, which meant to the parties, as demonstrated by their subsequent practice, to the maximum extent possible without impinging on defence needs. From September 1965 on, and for 45 years, the United Kingdom considered itself obligated to fulfill its undertakings to Mauritius, which it regarded as legally binding. Pursuant to these undertakings, Mauritius had legal rights to fish in the Chagos waters, and the United Kingdom recognized these rights, first in the territorial waters of the Archipelago, then in the 12 mile fishery zone established formally in 1971, and then in the 200 mile zone established in 1991. This was the consistent legal position of the United Kingdom for 45 years.

The Rejoinder takes issue with this. And that is hardly surprising. If the U.K. had admitted this, their case on the merits would be over. They would have conceded that the establishment of the "MPA" not only put an abrupt end to 45 years of recognized Mauritian fishing rights in Chagos waters, but, just as egregiously, that the "MPA" violated the undertakings given by the U.K. which it treated as binding in law continuously for four and a half decades. What evidence does the Rejoinder cite to avoid these conclusions?

Principally, the United Kingdom relies on two witness statements prepared for purposes of litigation in March 2013; that is, not only after these arbitration proceedings had commenced, but more than six months after Mauritius filed its Memorial. Timing is not the only reason to regard these statements with suspicion. More troubling is that they blatantly contradict the statements made repeatedly by the same witnesses in their own contemporaneous writings prior to litigation,

and they employ language that is obviously not their own but that of counsel. The Rejoinder relies most heavily on what it calls the "third witness statement" of Joanne Yeadon, dated 8 March 2013. (UKR- Annex 73) This is an artifice that strives mightily to distinguish and explain away Ms. Yeadon's six contemporaneous statements, six contemporaneous statements of 22 April 2008, 28 April 2008, 21 April 2009, 14 July 2009, 19 July 2010, and 1 September 2010, all of which we reviewed today. The gist of the newly-minted statement, which is at Annex 73 to the Rejoinder, is that what Ms. Yeadon now calls the "understandings" reached at Lancaster House did not create legally enforceable rights. The Tribunal will note that what Ms. Yeadon herself described as "undertakings" in her pre-litigation correspondence, have suddenly morphed into mere "understandings," as in, at paragraph 8 of her statement: "I could not see how the understanding on fishing rights and other facilities could legally oblige the U.K. to allow Mauritius to fish in BIOT waters." (UKR-Annex 73, para. 8) The fact that she had previously referred to Mauritius as having got "fishing *rights*" is blithely explained away as nothing more than a "simpl[e] refer[ence] to the fact that Mauritian-flagged vessels obtained free licences to fish in BIOT waters." (ibid. Para. 8) According to her new statement: "[T]he 1965 understandings [were] of a political not legal nature." (ibid., para. 25)

With similar nonchalance, Ms. Yeadon dismisses not only her own prior inconsistent statements, but also the MRAG report of 9 July 2009 which she herself commissioned and approvingly passed up the chain of command to her superiors, which affirmed that, "the right of Mauritius to fish in BIOT waters was enshrined in the agreements made between the UK and Mauritius in 1965."

PRESIDENT SHEARER: Mr. Reichler, we have gone considerably past the time for a break. How much longer will you be here, would you say?

MR. REICHLER: Well, this would be an appropriate time to take the break. I will be continuing for another 30 minutes.

PRESIDENT SHEARER: We will take the 15-minute break now.

MR. REICHLER: That would be perfectly acceptable.

PRESIDENT SHEARER: We adjourn until 3:30.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Mr. Reichler. I'm sorry I cut you off so early before.

MR. REICHLER: Thank you, Mr. President. I needed the break. I appreciate the opportunity to refresh myself.

When we did break, I was addressing the post-litigation witness statements offered by the United Kingdom as annexes to their Rejoinder, Annexes 73 and 74, and I was referring, in particular, to the post-litigation statement submitted by Ms. Yeadon.

The Tribunal will note that Ms. Yeadon repeatedly refers in her post-litigation statement to the undertakings given by the U.K. at Lancaster House as "the 1965 understandings." This phrase, "the 1965 understandings," appears no less than 19 times in her March 2013 witness statement. Yet none of her contemporaneous statements employ this terminology. How does she explain this change of language? She does not. Where does it come from? The Tribunal may find it interesting that the UK Counter-Memorial uses the phrase "the 1965 understandings" more than 30 times and the U.K. Rejoinder uses the phrase "the 1965 understandings" more than 130 times to refer to the commitments made by the U.K. at Lancaster House. This may tell us where Ms. Yeadon drew inspiration for the post-litigation statement that she provided.

One might say this rather obvious attempt to convert solemn "undertakings" into nonbinding political "understandings" by using the same prefix but changing the root is most "underwhelming." But that would be a huge "understatement." In any event, this is simply unpersuasive. Nor do I believe this Tribunal will find persuasive the other witness statement

attached to the U.K. Rejoinder, that of Colin Roberts, at annex 74 of the Rejoinder. This statement has neither a signature nor a date; it exists only in draft. But it *does* have the phrase "the 1965 understandings," as in: "It appeared to me at the time [in 2008/2009] that the fishing aspects of the 1965 understandings had never really been resolved, but that the UK Government had chosen to accord Mauritius certain privileges in BIOT waters nonetheless." He employs that phrase "the 1965 understandings" no less than 15 times. His unsigned draft statement is not evidence of anything.

In the circumstances, Mauritius submits that these two post-litigation witness statements are entitled to no weight. They certainly fail to rebut the contemporaneous documentary evidence we have reviewed today, which completely contradicts them. Indeed, they fail to rebut their own contemporaneous statements with which they are entirely contradictory. The International Court of Justice has addressed the issue of reliability of witness statements on at least three occasions.

In *Nicaragua v. Honduras*, Honduras submitted affidavits, prepared after the case had commenced, to establish its *efectivites* in regard to certain small islands whose sovereignty was disputed. The Court gave no weight to the affidavits. Quoting from paragraph 244 of the judgment: "The Court notes that in some cases evidence which is *contemporaneous* with the period concerned may be of special value. Affidavits sworn *later* by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred." (para. 244)

In *Democratic Republic of Congo v. Uganda*, the Court explained that it will: "prefer *contemporaneous* evidence from persons with direct knowledge," and "give particular attention to reliable evidence acknowledging facts or conduct *unfavourable* to the State represented by the person making them." That is at paragraph 61 from the judgment. The Court cited, especially, the *Nicaragua v. US* case, in which it pointed out: "In the general practice of courts,

two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness - one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is *against* its own interest." And that is at paragraph 69.

This contrasts sharply with the treatment the Court gave to self-serving witness statements by government officials *after* litigation had been commenced in the *Nicaragua v. US* case: "A member of the government of a State engaged…in international litigation… will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as *contrary* to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted (para. 70).

Because the U.K. is unable to offer either credible testimony or contemporaneous documentary evidence to contradict or refute the evidence relied on by Mauritius, including the 28 documents we have reviewed thus far this afternoon, it attempts to diminish the weight of this evidence. The Rejoinder calls all of these documents "irrelevant" because, in the U.K.'s words, at paragraph 3.62, they "do not set out an officially adopted view." (UKR, para. 3.62) That is simply incorrect, as the documents themselves demonstrate. They are replete with statements of, and about, and explaining, the U.K.'s official views on the undertakings it made to Mauritius in 1965, their nature and content, and the legal obligations they imposed, the rights of Mauritius, and the U.K.'s fulfillment of its obligations and respect for Mauritius' rights. The Rejoinder also argues, at paragraph 3.63, that the contemporaneous documents are contradictory, offering different interpretations of the undertakings and Mauritius' rights resulting from them. (UKR, para. 3.63) That, too, is incorrect. Despite the number of different authors, and the length of the

period covered, they consistently offer the same interpretation of the undertakings to Mauritius made by the U.K. in 1965, and the rights promised to Mauritius, including fishing rights.

And the U.K. is equally wrong, at paragraphs 3.63 and 3.70 of the Rejoinder, in criticizing the documents for "lack of clarity" in their description of Mauritius' fishing rights, which the U.K. calls "self-evidently vague". (UKR, paras. 3.63 and 3.70) There was no vagueness in the U.K.'s understanding of the fishing rights it undertook to ensure for Mauritius in 1965. As Ms. Yeadon wrote in July 2009, these boiled down to "free access to BIOT waters." The Rejoinder confirms this, at paragraph 8.15c: "The UK communications with the USA show that what was intended by the reference to 'fishing rights' in the 1965 understanding was access to fish, so far as practicable." (UKR, para. 8.15c) As various UK officials explained, in practice the U.K.'s undertakings translated into Mauritius' right to have its vessels fish anywhere in the Chagos waters except in the immediate vicinity of Diego Garcia Island, and for any species, subject only to the requirement that they obtain fishing licences, which were issued freely and without charge. Thus, when the U.K. declared a fisheries zone out to 12 M, beyond what was then a three-mile territorial sea, Mauritian fishing rights were extended into that zone. And, likewise, when the U.K. later declared a 200 M fishing zone, again, Mauritian vessels were freely licensed to fish throughout the expanded zone. There is nothing vague about this.

The Rejoinder then retreats to a fallback position that Mauritius did have fishing rights, but then it supplies its own, unique interpretation of what those fishing rights were. According to the U.K., at paragraph 8.15e, Mauritius had fishing rights, but only to enjoy a "preference" over other States in the event fishing licences were issued by the "BIOT" administration. According to this theory, if the "BIOT" administration decided to issue no fishing licences to anyone, as would be the case with the establishment of a no fishing zone, Mauritius' preferential fishing rights would not be violated. There is no support whatever for this extremely narrow interpretation of

Mauritius' fishing rights in any of the contemporaneous documentation spanning the 45-year period between 1965 and 2010. There is no evidence that the U.K. ever held such a view of Mauritius' fishing rights, prior to the institution of these proceedings.

In fact, the documentary evidence shows that even when the recommendation was made to stop giving fishing licences to foreign-flagged vessels in the 12 M Chagos fishing zone, the exception made for Mauritian vessels was acknowledged and respected because of the undertakings given to Mauritius in 1965. I refer you back to two documents we have already reviewed, at Tabs 5.5 and 5.14 (MR-Annex 66) and (MR-Annex 97). There was not, therefore, a mere preference for Mauritius over other States; this was, the recognition of fishing rights for Mauritius even when no one else was allowed to fish.

The Rejoinder's argument is based on an extremely thin reed. I ask you, please, to turn next to Tab 5.28. On 30 July 1965, two months before the Lancaster House meeting, the British Governor of Mauritius reported that the Premier had expressed interest in retaining preferential fishing rights for Mauritius as part of a settlement over the Chagos Archipelago. (MM-Annex 13) But, as the document itself makes clear, on the first page, paragraph 2, this was as part of an entirely different package of conditions. At the time, the Premier and his fellow Ministers were insisting on retaining Mauritian sovereignty over the Archipelago, and they were resisting detachment; they were proposing instead what the Governor described as a "long-term lease, e.g. for 99 years". At Lancaster House, the U.K. made clear that such a lease was out of the question and that only detachment from Mauritius was acceptable. Fishing rights were not initially on offer in exchange for the Mauritians' consent. These were expressly insisted upon by the Premier of Mauritius. His contemporaneous handwritten note to Mr. Trafford-Smith, which you can see at U.K. Counter-Memorial, Annex 9, spells out "Fishing Rights," not preferential treatment in comparison with licences issued to third States. (UKCM-Annex 9)

And of course the official, agreed record of the Lancaster House meeting uses the same term: "Fishing Rights." For 45 years the U.K. consistently interpreted these to mean the right to fish in all the Chagos waters, save those in close proximity to a defence facility, even when fishing was denied to nationals of all other States.

Finally, the Rejoinder argues that fishing rights were never important to Mauritius, that Mauritius rarely if ever exercised them, and so that regardless of the U.K.'s undertakings at Lancaster House, it was free to disregard them and ban all fishing, including by Mauritius, in the Chagos waters. This idea that Mauritius neither cared about nor exercised its fishing rights is a rather late-blooming one, and it seems to have blossomed after U.K. officials began meeting with Pew to discuss the establishment of an MPA in 2008, and they sought what Ms. Yeadon called a "loophole" in their undertakings.

But this was not the attitude of British officials when the Lancaster House undertakings were made, or during the next four decades prior to the declaration of the "MPA". You will recall particularly the Commonwealth Office's note of 12 July 1967, at Tab 5.4, that I quote: "we are very much concerned to keep in mind the importance of the fishing grounds to Mauritius, for instance the possible importance of the fishing in Chagos as a source of food, in view of the rapidly increasing population." The 1996 study by the FCO's Africa Research Group, which we reviewed at Tab 5.17, in addressing the fishing resources of the Archipelago, pointed to "the Mauritian interest in their exploitation arising from our 1965 undertaking."

The Rejoinder attempts to minimize Mauritius' actual exercise of these rights by emphasizing the number of licences issued to Mauritian-flagged vessels. The same chart that appears as Figure 3-6 in the Rejoinder was displayed by the Attorney General yesterday. The biggest problem with it is that it only gives you the number of licenses issued, and says nothing about the tonnage of fish actually caught by Mauritian vessels. Mauritius supplied that evidence in

its Reply, at paragraph 2.124. It's on the screen now, and you will see that, although records do not exist for all years, and none exist prior to 1977, the evidence shows that the mean annual catch in the Chagos waters for the period covered through 2009 was 164 tonnes. In 2009, the last year before the "MPA" was declared, the tonnage caught was 161 tonnes. The U.K. has not offered anything into evidence to contradict these figures.

PRESIDENT SHEARER: Just on that point, Mr. Reichler, I notice there is no figure for the Years 2005 and 2008. Does that mean there wasn't a record of it or that there was no catch at all?

MR. REICHLER: My understanding, Mr. President is there was no record, but I would like the opportunity to consult with my client and confirm that so that I do not inadvertently give you erroneous information, and I will get back to you with an answer.

Now, Mr. President, Members of the Tribunal, if you would be so kind, I will invite you to take another look at the chart presented yesterday by the Attorney General., which is now displayed on the screen. I would ask you to take note that it covers the period beginning in 1991, although this may be difficult to see give the small size of the print, and that would be after the U.K. expanded the fishery zone from 12 M to 200 M. Since it starts in 1991, it excludes the earlier years in which would show that only Mauritian vessels were licenced to fish within the 12 M zone. But let us focus on what *is* shown in the chart. Everything in blue represents licences issued to fishing vessels flying the flag of a third State. If the U.K. says the "MPA" is necessary to prevent overfishing – which, for the record, Mauritius does not accept – then all that is required is for the U.K. to stop giving licences to the vessels of third States. The Attorney General's chart makes this perfectly clear. Unlike Mauritius, none of those third States can claim to be the "coastal State" in respect of the Chagos Archipelago. None can claim to be the beneficiary of binding undertakings made by the U.K. to ensure Mauritian fishing rights in the Chagos waters as far as

practicable. Surely, if the U.K.'s evidence is taken at face value, there would be no overfishing if fishing licences were issued only to Mauritian vessels, in fulfillment of the U.K.'s 1965 undertaking.

Mauritius has always placed great importance on its fishing rights. If you turn to Tab 5.30, at the bottom of the first page, you will find that, on 13 December 2007, the Prime Minister of Mauritius wrote to Prime Minister Gordon Brown, recalling a discussion between the two Prime Ministers at a recent Commonwealth Heads of Government meeting in Kampala. The Mauritian Prime Minister wrote: "During our meeting I also raised with you the question of our fishing rights in the waters of the Chagos Archipelago excluding of course the immediate vicinity of Diego Garcia for obvious security reasons. Mauritius has historically exercised such rights over the waters of the Chagos Archipelago." (MM-Annex 135) This was not the first time the Mauritian Prime Minister invoked Mauritius' fishing rights in a communication with the U.K. Prime Minister. At Tab 5.31 is a letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the U.K. On the last page, page 272 of your folder, the Prime Minister refers to Mauritius' plans to establish itself as a "seafood hub", in reliance on its "fishing rights in the Chagos waters." (MM-Annex 132) So much for the Rejoinder's contention that fishing rights were unimportant to Mauritius or rarely exercised.

Equally important to Mauritius were the undertakings of the United Kingdom, also given at Lancaster House in 1965, that the benefits of oil and mineral exploitation in the Chagos Archipelago and its adjacent waters would be reserved exclusively for Mauritius, and that sovereignty over the Archipelago would revert to Mauritius at such time as facilities were no longer required for defence purposes. As you have already seen at Tab 5.18, the U.K. Minister for Overseas Territories renewed these undertakings in correspondence with the Mauritian Foreign Minister in December 2003, recalling that "[s]uccessive British Governments" have given such

"undertakings" to Mauritius. (MM-Annex 124) The U.K. even in this case does not back away from these undertakings or complain about their purported "vagueness." I will have more to say about these undertakings, and their particular legal implications, tomorrow.

I will also reserve for tomorrow a discussion of the legal implications of Mauritius' reliance on these undertakings, and its entitlements based thereon, to protect its long-term economic and sovereign interests in the extended continental shelf appurtenant to the Chagos Archipelago, by submitting preliminary information on the outer limits of the continental shelf in that area to the U.N. CLCS. In keeping with its undertakings to Mauritius, as Professor Sands told you yesterday, the U.K. did not object, formally or informally, to Mauritius' submission. To the contrary, in bilateral talks held in January 2009, which we will examine in greater detail tomorrow, the United Kingdom advised Mauritius that it did not intend to make a submission to the CLCS in relation to the Chagos Archipelago. When Mauritius pointed out that the 10-year deadline for Mauritius to make a submission would expire on 13 May 2009, the U.K. encouraged Mauritius to file preliminary information before that date to stop the clock, and Mauritius indicated it would do so. Of course, under Article 76(7) and 76(8) only a coastal State may delineate the outer limits of its continental shelf and submit information on the limits of the shelf to the Commission.

Mauritius timely filed the preliminary information on 9 May 2009. Not only did the U.K. not object, but, at bilateral talks in July 2009, it proposed to support Mauritius by joining forces with it in a joint full submission by both States to the Commission, with the assistance of the U.K.'s technical experts. Again, such submissions can only be made by coastal States.

I will return to these events and their legal implications tomorrow. For now, I will conclude by stating that the Rejoinder fails entirely to rebut or discredit the evidence established by the contemporaneous documentation produced by British officials continuously over the 45-year period between the Lancaster House undertakings in 1965, and the U.K.'s unilateral

declaration of the "MPA" in 2010. There are seven inescapable conclusions to be drawn from this evidence. They are:

1. In September 1965, the U.K. knowingly and intentionally gave certain undertakings to Mauritius for the purpose of obtaining Mauritian consent to the detachment of the Chagos Archipelago. Among those undertakings was that Mauritius' fishing rights in the Chagos waters would be preserved and respected as far as practicable, which the parties understood to mean that Mauritius would enjoy fishing rights throughout the Chagos waters, subject only to limitations imposed for defence needs.

2. The United Kingdom also gave undertakings to Mauritius in regard to mineral and oil rights, the benefits of which were promised to Mauritius; and in regard to the reversion to Mauritius of sovereignty over the Chagos Archipelago, when it was no longer required for defence needs.

3. The United Kingdom regarded its 1965 undertakings to Mauritius as an integral part of an agreement, which imposed legally binding obligations.

4. From September 1965 on, and over the next 45 years, the United Kingdom repeatedly renewed and reconfirmed its undertakings to Mauritius, and considered itself legally obligated to fulfill them.

5. Pursuant to these undertakings, the United Kingdom recognized that Mauritius' fishing rights in the waters of the Chagos Archipelago, first in the 3-mile territorial sea, then in the 12 M fishery zone established formally in 1971, and then in the 200 M zone established in 1991. Under the United Kingdom's interpretation of its obligations and Mauritius' rights, each time the U.K. expanded the fisheries zone, it was required to respect Mauritian rights in that zone, because its undertaking was to ensure Mauritian fishing rights "as far as practicable." In practice, this meant that Mauritian fishing vessels were freely given licences to fish in the Chagos waters

without charge. As the Attorney General helpfully stated yesterday, no Mauritian-flagged vessel was ever been denied or charged for a fishing licence to fish anywhere within the 200 M fishery zone.

6. Pursuant to its undertakings, the United Kingdom repeatedly reconfirmed to Mauritius that all benefits derived from oil or minerals in the Chagos Archipelago or the adjacent seabed and subsoil would be reserved for Mauritius, and that sovereignty over the Archipelago would revert to Mauritius when it was no longer needed for defence purposes.

7. This was the consistent position of the United Kingdom for 45 years, until the unilateral declaration of an MPA in 2010.

Mr. President, these are the facts. Tomorrow, I will discuss the legal implications of these facts, in relation to the claims of Mauritius, and the defences of the United Kingdom. I thank you, Mr. President and Members of the Tribunal, for your patience and your courteous attention to these rather lengthy remarks this afternoon. I promise not to speak as long tomorrow, and I ask that you call my esteemed colleague Ms. Macdonald to the podium.

PRESIDENT SHEARER: Thank you, Mr. Reichler.

Before you leave the podium, I think that we have a question from Judge Greenwood for you.

ARBITRATOR GREENWOOD: Thank you very much.

Mr. Reichler, I realize that this may be something that you are planning on dealing with tomorrow, and it almost certainly is, so it's perhaps most helpful if I put the question to you now so you could reflect on it overnight.

Could you help me with two things, please, about the nature and content of the undertakings you have been referring to. The first is the legal basis on which Mauritius says these

undertakings are binding, because, of course, whatever form they took – and I'm not going to enter into that or pre-judge it – they were given at a time when Mauritius was still a colony.

So, is Mauritius' case that they are a treaty or that they are otherwise binding for some form of international law agreement, or are you looking to another legal system? Or are you saying that the nature changed over the years? Maybe something else altogether. So, I would like some help with that.

The second point is some help with the way in which the content of what was said about fishing is described in several different ways because, in the handwritten note from Sir Seewoosagur Ramgoolam to Trafford Smith, rather, there is simply a reference to fishing rights. Then that appears in the amended version of the Minutes of the Meeting under the rubric of "good offices," and it reads slightly oddly because it talks about good offices in respect to facilities regarding, amongst other things, fishing rights. What I want to know is how do you get from that reference to "good offices" to what you described as an obligation to ensure and respect fishing rights of Mauritius?

Again, I'm not pre-judging whether you could do it. I just want to know how that journey is undertaken.

MR. REICHLER: Thank you very much, Judge Greenwood. You have been very clear; and, as you anticipated, I will be addressing these very issues tomorrow when I discuss the legal aspects and legal implications of the undertakings.

So, with respect, if you will allow me to answer tomorrow, I'm quite sure I will be able to give the answers that you have requested.

ARBITRATOR GREENWOOD: I'm sorry, I thought I made clear that you should answer tomorrow and not now.

MR. REICHLER: Yes, you did.

PRESIDENT SHEARER: Mr. Reichler, there is another question from Judge Wolfrum.

ARBITRATOR WOLFRUM: Thank you, Mr. President.

Mr. Reichler, I understood that you will give us tomorrow an assessment of a certain period being referred to as "undertakings" or "understanding" – that is fine with me – but could you also give us the qualification of the consent given by the Ministers of Mauritius to separate – I will try to put in a different word – the Chagos Archipelago. Was that a legal commitment, or how would you qualify it? It may not come directly into what you intend to do tomorrow, but I would very much appreciate a legal assessment of that.

Thank you.

MR. REICHLER: Thank you very much, Judge Wolfrum, and that is also a subject that I intend to cover tomorrow.

PRESIDENT SHEARER: Thank you, Mr. Reichler.

And I now call upon Ms. Macdonald. Thank you.

Mauritius v United Kingdom

SPEECH 6

Facts 4:

The Creation of the "MPA"

Alison Macdonald

Introduction

MS. MACDONALD: Mr. President, may I start by looking at timing for the rest of the day. We have scheduled a break about every hour, not least because of the shorthand writers. I see him smiling. By my watch, Mr. Reichler started at about 3:35, and so I would propose at about 4:30, 4:35 to take that short break. Then, of course, we close at 5:30 and, if necessary, there's a little bit of time, I've been told by my colleagues, so I can, if necessary, run

over a little overnight. So you may be left on a cliffhanger at some point in the creation of the "MPA", but we'll see how we go.

PRESIDENT SHEARER: Well, Ms. Macdonald, thank you very much for your understanding. We'll leave it to you to indicate the appropriate place in your argument where we could take the short break. And if you need to go a bit beyond 5:30, that would be understood. It would also mean that any extra time that your side has been afforded would also be allowed to the United Kingdom next week if they require it.

MS. MACDONALD: Of course.

Well, in the English courts we call this the "graveyard slot," so I wouldn't push my luck much beyond 5:30 although we appreciate the understanding on timing.

Now, by way of introduction on the facts concerning the "MPA", Mauritius would emphasise, and this picks up on Professor Sands' remarks yesterday afternoon, that this is *not* a dispute about which State cares more about the environment of the Chagos Archipelago. This is a dispute about *entitlement*; a dispute about which State has the *right* to decide what should and should not be done with the land and the waters of the Archipelago. The question before you is, was the UK entitled *unilaterally* to declare the "MPA"? Or in doing so, as we say, did it violate the requirements of the Convention?

Mauritius considers that this measure was imposed upon it, without adequate consultation, in complete disregard of its rights over the Archipelago. I will shortly take you to the key documents, including the materials which demonstrate the divisions inside the Foreign Office itself as this controversial measure was rushed through. And I will show you that, as one Foreign Office adviser put it, this was policy making "on the hoof", adopted in the clear knowledge that it would provoke legal proceedings on the part of Mauritius, as of course it did.

Now, before turning to the facts, a few words on the environment. The UK would have you believe that it is the sole guardian of the waters of the Archipelago. Yesterday the Attorney

General went so far as to say, I quote, "Mauritius doesn't appear to recognise the importance of maintaining the pristine environment of the Archipelago." [Day 1 p. 51 lines 18-19]

Mr. President, that comment was not only condescending, but plain wrong. Mauritius is a party to every one of the Conventions which the UK lists at paragraph 3.7 of its Rejoinder. Mauritius has an active commitment to environmental protection, which it sees as going hand in hand with sustainable development. At Annex 177 of the Reply, we have provided you with the summary of its environmental work, which Mauritius has reported in advance of the Third International Conference on Small Island Developing States, due to take place in September this year. We have not burdened your judges' folders with this detailed report, but I would invite you to read through it if you have the opportunity in due course.

The issue of biodiversity, which has been raised by Judge Wolfrum, is an important strand of the report, and the report gives a number of pieces of information about Mauritius' practical steps to ensure biodiversity. It refers, among other measures, to the National Biodiversity Strategy and Action Plan – this is at page 16 – which runs from 2006 to 2015. There's a number of other pieces of information which we haven't currently supplied with the pleadings, but we will provide that and further written information by way of further answer to that question from Judge Wolfrum.

Now, the report at Annex 177 sets out, not only Mauritius' staunch commitment to the protection of the environment, but also the wide range of concrete steps which it is taking, and has taken over many years, in order to translate this commitment into reality.

Of particular relevance in the context of this case, you will also see from the report that Mauritius has, over the last twenty years, established a series of marine protected areas in the waters around Mauritius and Rodrigues: it has created six Fishing Reserves and two Marine Parks in Mauritius and four Marine Reserves, one Marine Park and three fisheries reserved areas

in Rodrigues. Among many other measures, it has also introduced a National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

And in this context, a word about Tromelin. Professor Sands showed you yesterday, and this is at tab 2.10 of your folder – I don't ask you to go back to it – but we have the Framework Agreement that Mauritius concluded with France concerning economic, scientific and environmental co-management of the Island of Tromelin and its surrounding waters. [Folder 2.10] Professor Sands took you to this yesterday, and in response, the Attorney General stated that, I quote, "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." [Day 1 p. 41, lines 14-16] He appeared to contrast this with what he tried to portray as Mauritius' refusal to engage with the UK over the management of the Chagos Archipelago. But, as you will see when you look at that action plan, France has handled the Tromelin situation completely differently. We would invite you to read that document [Tab 2.10]. And what it shows, we say, is two States working together as equals to take joint decisions, neither imposing decisions on the other, about how to manage a particular area, including whether or not to declare an MPA. As you will see later on in my presentation, the UK has treated Mauritius throughout this process as anything but an equal. So we say the two situations are not comparable but we say that the conduct of France in this regard is a perfect illustration of how to do it properly.

So, when the UK says to you how pristine the waters of the Archipelago are, and how important they are for the Indian Ocean, and when you watch the glossy films which it filed with its Rejoinder, we ask you to bear in mind that this case is not, as I said, about which State cares more about those waters. Mauritius yields to nobody in its concern for the Archipelago, its land and its waters. Rather, this is about whether the UK, a former colonial power which knows very well that is just a 'temporary freeholder', is entitled to do what it has done.

What is the "MPA"?

With that introduction, I now ask the question, what exactly *is* the "MPA"? The first striking thing is that, more than four years after the "MPA" was declared, there are still no regulations implementing it. Judge Wolfrum has asked about this, has asked about the reason for this, and we await the answer with interest. You will find a lot of interesting material in the "BIOT" Gazette, including designs for a commemorative coin which the so-called "BIOT" issued for a British Royal Wedding, but nothing to hint at any legal framework for the "MPA". All that the UK has done so far, four years on, is not to renew existing fishing licences. Nothing else. The UK simply says at paragraph 3.3 of its Counter-Memorial that 'A comprehensive MPA Ordinance is in the course of being prepared.' [UKCM 3.3] It offers no reasons at all for the delay. And the omission is, we say, inexplicable, particularly in light of what the Attorney General told you yesterday about how proud the UK is of the "MPA". If there was a clear, well thought-out purpose behind the "MPA" when it was declared, why hasn't that purpose been articulated in some straightforward regulations at some point in the last four years? It certainly didn't take four years for the UK to make regulations implementing the previous maritime zones in the Archipelago. What, we ask, is so different about this one?

Now, the question of what exactly the "MPA" *is* becomes important when one turns to questions of jurisdiction, which will be dealt with in a later part of Mauritius's submissions. Professor Sands will show you tomorrow that the "MPA" was plainly announced and adopted as an environmental measure and not as the U.K. now seeks to repackage it, merely a fisheries conservation measure.

Also by way of introduction, a word about pollution. Here, you've seen the press reports and Professor Sheppard's report of March 2013, which Mr. Sands referred you to yesterday – for your notes, these are at tab 2.11 and 2.12 of your judges' folders – and these show, as you saw, that Professor Sheppard, a scientific adviser to the administration of the

so-called "BIOT", raised serious concerns about the pollution of the Archipelago by both US Navy vessels and, it seems, also the "MPA" patrol vessel itself, the Pacific Marlin.

The UK was initially reluctant to disclose Professor Sheppard's report under the Environmental Information Regulations, which deal with freedom of information as it relates to the environment in the United Kingdom, but it finally had to do so. And these revelations prompted a public statement by the Foreign Office Minister, Mark Simmonds, that yes, indeed, the US Navy had been discharging waste into the lagoon since the 1980s, and that this could indeed be harmful to the coral and had to be stopped.

These revelations underline the bizarre situation where the UK is publicly emphasizing the pristine nature of the Archipelago while in fact in the middle of it is a huge military installation which has, it seems, been polluting it for decades, but which is now excluded from the "MPA". As we will see later on, the anomaly of having a massive military base in the middle of an area of supposed environmental protection was not lost on those within the Foreign Office when the MPA proposal was under discussion.

In this regard also, Mauritius has taken note of the written questions provided by Judge Wolfrum. Where they relate to matters on which Mauritius can assist the Tribunal, as I've said, we will do so. But on the questions relating to conditions within the Archipelago and threats to it from matters such as pollution and also the hydroblasting of ships, the UK has been notably reluctant to make information public. And we hope that it will respond in detail to the Tribunal's questions and we invite it to provide the Tribunal and Mauritius with the documentation which underpins its answers.

Science

Finally by way of introduction, a word on the science. At paragraph 3.46 of its Rejoinder, the UK claims that, because Mauritius has not adduced its own scientific evidence on the "MPA", it is to be taken as agreeing that the "MPA" is scientifically justified. But we say, Mr.

President, this fails to take account of the real nature of the dispute between the parties. *Neither party* is asking you to decide whether or not the "MPA" is scientifically justified. And in this respect, of course, the case is very different from the recent Australia/Japan dispute, central to which was the question of the scientific justification of whaling. The question, as I said before, is which State is *entitled* to take decisions on these matters on whether the UK violated the Convention in acting as it did.

But that does not mean, however, that Mauritius concedes that the scientific case for a no-take MPA has yet been made out. As I noted at the start of my presentation, at the July 2009 bilateral talks, the parties agreed that the scientific issues should be carefully reviewed by a team of scientists from both sides, and I'll take you in due course to the Joint Communiqué from that meeting. But because of the breakdown in talks caused by the UK's subsequent unilateral actions, which again we'll see later, this never happened. And this is something which I will touch on to some extent later in this presentation but also later in the week in the context of Article 283 of the Convention.

The UK tries to portray the scientific community as united in its approval of the idea of a no-take MPA. But there are a few problems with that. One thing to which it did not draw your attention in the Counter-Memorial, but which came into the public domain through the domestic judicial review proceedings brought by members of the Chagossian community, is the concern expressed by MRAG, the company which administered the fishing licence scheme in the Archipelago on behalf of the administration of the so-called "BIOT".

The UK has sought to portray – this is in its Rejoinder – MRAG as biased, since they had a vested interest in the continuation of the licensing scheme. But we consider that their response which is at Mauritius' Reply, Annex 137 and also at tab 5.25 of your folders, which Mr. Reichler has taken you to already, cannot be dismissed so lightly. In their response – I don't ask you to turn it up again but we ask you to read it; it's not particularly long document; it's about ten pages

or so and we ask you to read it in full when you have the opportunity – in it, MRAG sets out detailed scientific criticisms of the proposal, from the standpoint of those who have actually been in the Archipelago and are familiar with its waters and the reality of the fishing regime which was being administered there. It concludes that, and I quote, 'Closure of the BIOT FCMZ – that's the Fisheries Conservation and Management Zone – will not address all conservation concerns; after the initial political impact, the conservation outcomes of the closure are likely to fall short of expectations and may be negative in some cases.' [p.3] It goes on to say there are alternatives to declaring the entirety of "BIOT's" exclusive economic zone and no-take MPA but can achieve similar environmental and political benefits, could have a more beneficial economic outcome and would be consistent with international law. [MR 3.40]

And on this issue, Mauritius also draws attention to the report of the National Oceanography Centre workshop which took place in August 2009, on which the UK places considerable emphasis. This is at Annex 102 to the U.K.'s Counter-Memorial [UKCM Annex 102] The UK argues, I quote, that 'the scientific arguments were strongly in favour of a large scale marine protected area covering the BIOT's entire 200 nm FCMZ / EPPZ.' [3.54] But, as well as overlooking MRAG's criticisms, this overlooks the conclusion of the workshop itself that, and I quote, 'Ultimately the decision on the extent of the open ocean no-take zone within a potential BIOT MPA will be a political one. […] The issue of Mauritian fishing rights was also considered to be a political one, that could only be resolved by negotiation and international agreement.' [MR 3.51] So, in other words, even the most enthusiastic scientists were not suggesting that, whatever the scientific arguments in favor of some form basis of MPA, it could or should simply be *imposed* on Mauritius.

The "MPA" process

Turning now to the main part of my submissions, this requires me to take you through the process by which the measure came about. You will have read the chronological accounts

presented in the Mauritian Memorial and then its Reply, the latter account being considerably fuller in light of the illuminating documents which the UK chose not to make available to this Tribunal, but which came into the public domain between the filing of those two pleadings. I do not propose simply to take you back through every document and every event in the process, but instead I will try to focus on the evidence which we hope will be of the greatest assistance to you.

Origins of the "MPA" proposal

Turning to the origins of the "MPA" proposal, the UK has made much of the fact that various environmental groups promoted the idea, and notably Pew. But despite the enthusiasm of those groups, the decision to declare the "MPA", we must remember, is the sole responsibility of the UK. And the full factual record shows the way, we say, when you look at it, in which those groups' proposals were taken up by the UK without adequate or genuine consultation with Mauritius, without any transparency, in the face of what the Foreign Office knew to be Mauritius' rights over the Archipelago, taking full account of the UK's own political and diplomatic objectives.

Mr. Reichler has shown you the note of the first meeting between Pew and the "BIOT" officials on the 22nd of April 2008 and this is at tab 5.20 of the bundle, [UKCM Annex 87], in which Ms. Yeadon describes the UK as a "temporary freeholder".

Now, after that, the meetings and discussions with Pew and the other NGOs carried on without the UK making any attempt to inform Mauritius, which finally learned about the project when reports surfaced in the English press in February 2009. The UK states in its Counter-Memorial that, from July 2008, it engaged in "discussions with interested stakeholders" – this is paragraph 3.35 – about the MPA proposal. Well, these clearly did not include Mauritius, despite its well-known claims, and indeed its well-recognised rights over the Archipelago. The UK argues in its Rejoinder that Mauritius was not consulted along with these "interested

stakeholders", which it does not name, because "Officials would not have engaged in formal consultations with third States, such as Mauritius and the United States, until the decision to pursue the MPA proposal had been adopted as policy by the Foreign Secretary." [3.5] What the UK is saying, in effect, is that there was a full year of consultations with these "interested stakeholders" while Mauritius was kept in the dark. Mauritius was to learn of the proposal only with the rest of the world, when the decision to consult publicly was a *fait accompli*.

Mr. President, that may be a natural break in which we can take the final break of the afternoon.

PRESIDENT SHEARER: Thank you very much, Ms. Macdonald.

We'll reassemble at a quarter to five.

(Brief recess.)

The background to the talks in 2009

Mr. President, Members of the Tribunal, in the final session of today, I have reached the point of looking at the first round of bilateral talks that took place in 2009. Now, of course, they took place against a background and a context of the previous decades of exchanges between the Parties, and Mr. Reichler has set the scene for those by looking at, over the years, including the period running up to and, indeed, through 2009, the specific references to Mauritius' rights over the Archipelago. So, we ask you to bear those in mind when I focus more closely, partly today and then partly on Friday in the context of Article 283, again, on the Parties' discussions in January and then in July 2009.

The January 2009 talks

Now, the UK deals very briefly with the January 2009 talks in its Counter-Memorial. Buried in a footnote to paragraph 3.40 [fn 223 p. 74, 3.40], it says in relevant part that 'The agenda of the first meeting, at the United Kingdom's suggestion, included matters on which the United Kingdom considered there might be fruitful co-operation between the two countries:

co-operation over fishing rights – and here I emphasize – in the form of a revived British-Mauritian Fisheries Commission or something similar.' The UK provided you with no documents to support its version of events, or its argument that the inclusion of "fishing rights" on the agenda should be understood in some limited sense or tied to the revival of the British-Mauritian Fisheries Commission. The UK also goes on to argue in its Rejoinder that, because Mauritius was not consulted about the MPA proposal until July 2009, the January 2009 talks are not relevant to the question of whether Mauritius was adequately consulted. [UKR 3.5]

But this rather circular argument, we say, begs the question. Of course the parties agree that the matter was not in fact mentioned in January 2009. Mauritius' point on this issue is precisely that it should have been. Mauritius knew nothing of it, yet the proposal had been under active consideration for more than six months at that point, including, as I've said, consultations with what the UK terms "interested stakeholders". Mauritius' position is that the failure to mention this well-developed proposal as it was by then in January 2009, even informally at the talks, is itself highly relevant as a failure to consult. And we will deal with that more fully at a subsequent point in our submissions. For present purposes, I just note that the UK cannot argue back from its own delay in starting consultations to ask you to ignore any events before that date.

Fortunately, internal FCO correspondence which the UK didn't disclose sheds more light on the FCO's preparations for the talks. There are a number of emails from Ms. Yeadon which are worth looking at, and which we have included in your folders:

31 October 2008 [MR Annex 122]

5 November 2008 [MR Annex 123]

21 November 2008 [MR Annex 124]

31 December 2008 [MR Annex 125]

My documents for this presentation are behind the blue Tab 6, which I hope is in your binders, and I ask you to turn to the first tab, Tab 1, behind that binder. I've put four e-mails for

ease of reference behind the one tab. They're each stamped in the corner so you could see where they come from. There are four e-mails from Ms. Yeadon, the first being a message from her to some redacted recipients, but then John Murton, the British High Commissioner in Port Louis, and Andrew Allen, who we understand is the head of the Southern Ocean Team at the Foreign Office, and I say again there are a number of interesting matters in these e-mails, and I'm not suggesting you shouldn't read them in full, but I would just take you quickly for the purposes of time to the passages that I want to highlight just for this point. So, I would take you to the paragraph which starts halfway down, "As discussed briefly yesterday," where she says: "As discussed briefly yesterday, the agenda is not going to live up to Mauritian expectations. What we are willing to discuss are fishing rights and potential treaty, potential formal treaty, on sovereignty." So, again, no mention of the British-Mauritian Fisheries Commission there. And if we flick over to Page 275 of the bundle – again, I apologize for taking these quickly – I'm just going to the bits that we need just to set the scene on the narrow issue of how fishing rights came to be on the agenda for the talks. If we go over the page to 276, that's a second page of an e-mail from Ms. Yeadon on the 5th of November 2008, again to Mr. Murton, Mr. Allen, and Mr. Roberts, the Commissioner. If we go over the page, the final paragraph on Page 276 between the redactions is: "Subject we can talk about are again fishing rights and the possibility of drawing up of a treaty confirming our commitment to cede the Territory to Mauritius when it is no longer needed for defense purposes." I don't take you to the next two e-mails in that tab. There are comments to very similar effect using very similar language, and we invite you to look at those in due course. So, one sees there fishing rights really as a free-standing agenda item. And we say that the repeated, in the correspondence, clearly free-standing references to fishing rights cannot be confined, as the U.K. now attempts to do, on the basis of no evidence, to a proposal to revive the British-Mauritian Fisheries Commission.

And now we come to the January 2009 meeting itself. The internal FCO record of the meeting is at MR Annex 128. We haven't put this in your folder, but it shows that there was, among other issues, detailed discussion of fishing rights (at section 6 of the minute) and of the continental shelf (at section 7). Section 6 includes the following: "The Mauritians explained that their lack of interest in taking up fishing rights (free licences) & continuing with the British Mauritian Fisheries Commission was that they felt this impacted on their position on sovereignty."

This makes it clear, as Mauritius has consistently done, that it considers the issue of fishing rights – along with all its other rights – in the Chagos Archipelago to be intertwined with the question of sovereignty. It also shows, we say, that the UK officials were aware at the time that Mauritius' overarching position on sovereignty accounted for its unwillingness to pursue fishing rights as a separate issue on the agenda, detached from its position on sovereignty. And as I've said, I will return briefly to these talks on Friday in the context of Article 283 and the Parties' exchanges of views.

Events following the January 2009 talks

Moving on in 2009, as I have noted, the UK has said that "It was not until 6 May 2009 that the Secretary of State for Foreign and Commonwealth Affairs adopted a policy of giving consideration to the possibility of creating a large-scale BIOT MPA." Now, again, the UK did not provide you with any documents to shed light on how this policy came to be adopted. But the judicial review documents which came into the public domain do take us behind the scenes at the Foreign Office.

On the 5th of May 2009, Mr. Roberts, the Commissioner of the so-called "BIOT," presented a briefing paper to the Foreign Secretary entitled "British Indian Ocean Territory: The World's Largest Marine Reserve," and we've included this in the next tab, Tab 2, of your folder. We can see that it's addressed to the Private Secretary to the Foreign Secretary. There's a cover

letter. And then if we turn forward – and again, we invite you to read the report in full in due course, but for present purposes, I would direct your attention to Page 284. This is again always going by the red numbering in the bottom corner, so if we turn on to Page 284, there is a heading about the middle of the page, "The Chagossian Movements," and there is a summary there of what they call "The Chagossian Movements," and we go down a little about the level of the second hole punch to the paragraph, "assuming we win in Strasbourg – and, of course, this refers to the claim brought in the European Court of Human Rights by a number of former residents the Archipelago, so "Assuming we win in Strasbourg – contingency for losing the case is dealt with in our earlier submissions – we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement."

And then we see a number of suggestions there. This could include presenting new evidence about the precariousness of any settlement, climate change, rising sea levels, known coastal defense costs in Diego Garcia, activating the environmental lobby, contributing to the establishment of community and institutions in the U.K. and possibly elsewhere, and then a number of other concrete suggestions.

At the hearing of the domestic judicial review which you've already heard about, the Court took the unusual step of allowing Mr. Roberts to be cross-examined. As you may be aware in English judicial review proceedings, by far the more common course is for a written witness statement to stand as the witness's evidence, so it's extremely unusual to have a witness appear and be cross-examined in the course of such proceedings. Mr. Roberts was asked about this part of the briefing paper. He described his "raft of measures" remarks as "speculative and hypothetical", and he stated that "it is suggesting that in a situation where the government has won its case in Strasbourg, we might want to present some evidence to help convince the supporters of resettlement that there is still a major problem." Mr. Roberts went on to say – and I

just add that Professor Sands has included this passage of the transcript in your folders for yesterday at Tab 214, so you have it available. I don't ask you to go back to it now. Mr. Roberts went on to say that "We recognised that the government was in a very difficult public position. Not only was there a great deal of political pressure relating to the Chagossian movement but we were also 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 specifically but also other territories."

Now, we say that Mr. Roberts' frank admission during cross-examination (which forms, as you will hear from Professor Crawford, part of our case on Article 300) makes it clear that the "MPA" decision was a highly political one, taking into account factors such as security benefits and the need to restore Britain's reputation in light of matters such as the political scandal about rendition to torture. And I should add for completeness that Mr. Roberts himself is a defendant in his capacity as Commissioner of the so-called "BIOT" in a civil damages claim brought by a Libyan national who claims to have been a subject of rendition by the U.K. to torture in Libya.

Now, it appears that Mr. Roberts' paper, including his observation about the "raft of measures designed to weaken the movement" was presented to the Foreign Secretary at a meeting on 6 May 2009, the date on which as you will recall the Foreign Secretary adopted the policy of consulting on the MPA proposal. If you go to the next tab in the bundle, Tab 3, we have an email from Mr. Roberts on 7 May [MR Annex 134] recording the next steps, and the email chain appears in reverse order and starts at the lower portion of the page, Colin Roberts to Matthew Gould – we understand that that is a person in the Foreign Secretary's office – "Matthew, many thanks for delivering Foreign Secretary yesterday. On the basis of the Foreign Secretary's comments, I propose, one, to continue our private bilateral engagement with stakeholders; two, to develop and implement a communications strategy public diplomacy to build support for a reserve; and, three, to devise a public consultation process which takes

account of the key legal and political risks identified but is not dependent on resolution of all issues. I would aim to launch a consultation process in the second half of this year; and, four" – over the page – "to develop an overall delivery plan with timelines." So, we then have from Mr. Gould an interesting e-mail about the reaction of the Foreign Secretary. "Colin, this looks right and good. The Foreign Secretary was really fired up about this after the meeting and was so enthusiastic we pressed ahead with this. So, do press ahead as you suggest, but my advice would be to keep the timelines taut to keep him involved and to ensure that the creation / announcement of the reserve is scheduled within a reasonable time scale."

It's striking, we say, that the Foreign Secretary's office was pressing for the "creation / announcement of the reserve" to take place "within a reasonable timescale" at the point when the public position of the UK was simply that this was the start of a process which would consult and would review all options. And the UK's claim to have consulted with an open mind does not sit well, we say – and you can see for yourselves – with a document which shows that the UK had already decided to announce the reserve, or at last the Foreign Secretary was fired up and keen to announce the reserve "within a reasonable timescale." Again, we say this makes the consultation look very much like yet another *fait accompli*.

Now, as to the ongoing political negotiations, on 12 May 2009 Mr. Roberts met with US officials at the American Embassy in London, and Professor Sands has already taken you to the leaked cable which the official sent back to Washington following that meeting. I don't ask you to go back to it now. It's at Tab 2.13 of our folder. And you have seen the US official's report of Mr. Roberts' words that "there would be 'no human footprints' or 'Man Fridays' on the "BIOT"'s uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents." Again, we say that this is striking evidence of the UK's motivations which were political rather than environmental.

If we turn to the next tab in your bundle, Tab 4, we see the summary starting at Page 291. Again, the e-mail chain works back from the bottom, so we see Ms. Yeadon's summary to a person called Ian, whose surname and title have been redacted, summarizing the meeting. But then the interest, really, is the response which starts at Page 290, which is the e-mail starting at the bottom of the page from the redacted individual to Ms. Yeadon, "Joanne, many thanks for this comprehensive response, very useful in light of my forthcoming chat with State and I will be certain to ask the questions you need answers to." The author then, if we turn the page, asks some questions about the Chagossians, but the passage to which I would draw your attention at the moment is the paragraph starting, "Separately, and I ask this as a complete novice, but doesn't a marine park enjoy some sort of environmental protections? In which case there seems to me to be some inconsistency in saying that military vessels can trundle in and out (presumably polluting as they go)." Well, the reference to pollution, we say, was prescient in light of the recent reports indicating, as I have already mentioned, that US military vessels do indeed pollute the waters of the Archipelago, and have done so for decades, as they trundle in and out – though of course, as you will recall, as long as they just pollute the three miles around Diego Garcia, then they can avoid the "MPA".

The July 2009 talks

We now come on to the second round of talks in July 2009.

Now, the UK makes a curious claim in its Counter-Memorial Paragraph 340 that "by the time the United Kingdom delegation arrived in Mauritius for the second round of bilateral talks their understanding was that Mauritius did not have legal rights to fish in BIOT waters, whether as a result of the 1965 understanding or otherwise, that prevented the United Kingdom from establishing a MPA, including a no-take MPA." [3.40]

Now, you will have noticed when you read the pleadings that the UK again did not disclose any documents to substantiate this assertion. And you will also notice that this sentence,

when you read it carefully, is entirely ambiguous. It is unclear whether it means that the UK considered that Mauritius had *no* legal rights at all to fish in the waters of the Archipelago, or that Mauritius *did* have legal rights to fish in the waters of the Chagos Archipelago, but that those rights were not such as to prevent the UK from establishing an MPA, including a no-fishing MPA.

Logically, I think, the sentence must mean the former, since it is difficult to understand how the existence of *any* Mauritian fishing rights in the area proposed to be subject to the "MPA" would be compatible with a no-take regime. To state the obvious, where a State has fishing rights over a particular area, it cannot be compatible with those rights for another State to ban that State entirely from fishing in that area.

But whatever that sentence is supposed to mean, Mauritius considers that it is misleading, in light of the internal documents which Mr. Reichler has shown you in some detail, which show a clear recognition by the UK of Mauritius' rights over the Archipelago. The UK tries to play down the relevance of the state of mind of those involved in the talks, by saying that "The relevance of the understanding of the BIOT officials involved in the MPA proposal process is simply that they were conscious of the issue and would have picked up on any remarks from Mauritian officials related to it." [3.40] However, it is submitted that the materials summarised above indicate that those concerned were more than "conscious of the issue" of Mauritius' rights over the Chagos Archipelago: they were fully aware that those rights existed. And those rights had been consistently asserted and accepted in bilateral communications by the two States, as Mr. Reichler has made clear, and we will build on that tomorrow in our submissions.

Now, looking at the meeting itself, the Foreign Office's record – this is at Annex 143 of Mauritius' Reply – this includes, at section 12, a paragraph headed "Access to Fishing Rights". And it says, I quote: "There was a short discussion about access to fishing rights. The Mauritians wanted to manage jointly the resources. This was simply put on the table for the UK to consider.

Comment" – this is all still within the quotation – "this all seemed a bit surreal when we'd spent the last half hour discussing the possible ban on any fishing in the territory but the Mauritians had warned us that this would remain an agenda item. We agreed to consider the idea but would need to take into consideration the implications of a proposed marine protected area." [MR Annex 143].

The UK tries to explain the fact that, like at the January meeting, fishing rights were clearly discussed by the delegations. The explanation it gives is that "Mauritius wanted the BIOT to consider jointly issuing fishing licences to third countries, but this was not understood by the BIOT delegation as relating to any Mauritius 'fishing rights' under the 1965 understanding and the free licensing arrangements (the discussion was not about fishing but the licensing process) but to Mauritius' wish to establish a sovereignty 'win'."

But the UK provides no evidence of the understanding of the UK delegation that the discussion of fishing rights could be constrained in that way. And the internal records, which I have just mentioned – and we'd invite you again to look at them carefully – do not support such a narrow understanding of the nature of Mauritius' rights, especially since they had been asserted in unqualified terms in bilateral communications, including those at Prime Ministerial level in 2007, and recognised by the UK after that in the internal emails which Mr. Reichler has shown you.

Now, the UK goes on to argue that "If any one of the Mauritian representatives who met with on 21 July 2009 thought Mauritius had fishing rights or other rights under UNCLOS that would be interfered with by a possible MPA, including a complete no-take marine reserve, it is strange that they did not raise these points in the bilateral talks or during either of the meetings held earlier that day, which were an obvious opportunity for them to do so." But you will recall that at the first round of talks in January, Mauritius had referred specifically to the inducements offered to the Mauritian delegates, and you'll see this in the record, at the Lancaster House

meeting of the 23rd of September 1965 and pointed out that these inducements included fishing rights. Now, as Mauritius had referred to these matters at the first round of talks, it was hardly necessary to specifically refer to the undertaking again when the issue of fishing rights was discussed at the July talks. You don't simply take a snapshot or a slice of bilateral relations between States on a matter of this complexity. You have to look at everything in its context, and talks would never end and go late into the night if everybody had to reiterate everything that they said in every previous round of talks.

Now, it is worth looking, though, at the Joint Communiqué of this meeting, just so we can see how the parties jointly summarized the results of that meeting. We have that in the next tab of your file, behind Tab 5. [MR Annex 142] Again I skip over, just for the sake of efficiency, to the final paragraph on page 293. That's that the first page behind flag 5. "The British delegation proposed that consideration be given to preserving the biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region. The Mauritian side – and this is what we emphasized – the Mauritian side welcomed in principle the proposal for environmental protection (And I interpose: so much for Mauritius being obstructive or non-cooperative about environmental protection) and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with the view to informing the next round of talks. The UK delegation made it clear that any proposal for the establishment of a marine protected area would be without prejudice to the outcome of the proceedings in the European Court of Human Rights.

So, as I said before, this makes very clear that Mauritius was supportive in principle of the idea of environmental protection in the Chagos Archipelago, and as you have seen, it fully agreed that a team of officials and marine scientists from both sides should meet in order to think the proposal through in an orderly fashion. That was something which was fully expected would be fully discussed at the third round of talks. But this did not, and the language of the

Communiqué cannot be twisted into Mauritian support for a unilaterally-imposed no-take MPA. Since the UK had said during the talks that "not many details [of the "MPA" proposal] were available" (not necessarily strictly accurate in light of the detailed talks that have been going on for some time by that point, over a year):anyway the UK said that not many details were available, so that was what Mauritius understood at the time, and since it was agreed that a joint team would explore the proposal further, the Mauritius delegation would hardly think it appropriate to engage in further discussions on the matter. It was considered more appropriate to raise issues such as fishing, mineral and oil rights at the meeting of officials and marine scientists. However, this meeting and the third round of talks never took place because, as Mauritius has made clear in its pleadings, the UK cut across the ongoing bilateral talks by launching a public consultation on the MPA proposal over Mauritius' strong objections.

Now, the UK denies that the launch of the public consultation cut across those talks. It claims that there was no agreement in the July talks that the MPA proposal would only, it says, be pursued through the ongoing talks, and it appears to argue that Mauritius did not ask for the consultation to be withdrawn. Well, we say this is a baffling interpretation of the evidence. In its Rejoinder – this is at paragraph 3.12 – the UK states that 'During the telephone call with the Foreign Secretary on 10 November 2009, Prime Minister Ramgoolam said he 'did not want the consultation to take place outside of the bilateral talks between the UK and Mauritius on Chagos.' [UKR 3.12] The UK tries to interpret this in the following paragraph as meaning that Prime Minister Ramgoolam was not saying that the public consultation should be withdrawn. And it goes on to argue that 'The Prime Minister did not suggest that Mauritius would only consult through the bilateral process if the public consultation was withdrawn.' [3.13] But we say this just twists the plain meaning of what the Prime Minister was saying. He said, and the UK accepts, that he did not want the consultation to take place outside the bilateral talks. Now, there were, by definition, only two parties to those talks – Mauritius and the UK. No consultation

outside the bilateral talks therefore must mean no consultation of anyone other than Mauritius. It means no public consultation. And it is impossible, we say, to read the Prime Minister's very clear comments in any other light.

The consultation exercise

But the UK pressed ahead, so we come on to the purported consultation exercise.

Now, on 10 November 2009, as you've seen in the pleadings, a copy of a Foreign Office document entitled "Consultation on whether to establish a marine protected area in the British Indian Ocean Territory" was sent to the Mauritian authorities. [MM Annex 152] Given the background and the ongoing talks, this obviously caused some surprise to Mauritius. On the same day, and you have this at Mauritius' Memorial Annex 153, the Mauritian government asked the Foreign Office to amend the document on the basis that it did not accurately reflect the outcome of the second round of talks. [MM Annex 153]

Now, the damage which the consultation exercise did to bilateral relations between the parties is plain from the communications which followed, and which I will take up when we come to look on Friday at the requirements of Article 283 of the Convention. For now I would simply note that Mauritius did not simply walk away from the talks, as the UK has tried to portray. As we will see on Friday, Mauritius made genuine and determined efforts to keep the talks going, despite what it considered to be high-handed behaviour of the UK.

The meeting between the Mauritius and UK Prime Ministers on 27 November 2009

Mr. President, then on 27 November 2009, there was an important meeting between Prime Minister Ramgoolam and Prime Minister Brown, and there has been a witness statement provided about this. I think that what I would suggest, because this is a matter of some significance to Mauritius' case and we are very late in the day, and I would suggest I have not much to cover after that, I would suggest that we take, if it is convenient for the Tribunal, the evening break now, and I will turn to the Prime Minister's witness statement in the morning.

PRESIDENT SHEARER: Very good, Ms. Macdonald.

Are there any questions?

Well, thank you very much for that, and we will meet again at 9:30 tomorrow morning. Thank you.

(Whereupon, at 5:16 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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