CHAGOS MARINE PROTECTED AREA ARBITRATION

(MAURITIUS V. UNITED KINGDOM)

DISSENTING AND CONCURRING OPINION

Judge James Kateka and Judge Rüdiger Wolfrum

1. To our regret we are not able to agree with the reasoning and the findings of the Tribunal on Mauritius' Submissions Nos. 1 and 2; we, however, concur with the findings on Submissions Nos. 3 and 4, although not with all the relevant reasoning.

2. This Opinion will concentrate on the areas of disagreement, namely the characterization of the legal dispute between the Parties and the jurisdiction of the Tribunal concerning Submissions Nos. 1 and 2 of Mauritius. It will also deal with some issues concerning the merits of the case.

A. CHARACTERIZATION OF THE DISPUTE

1. Final Submission No. 1 of Mauritius[1]

3. The Parties differ on the characterization of the dispute. Mauritius states that its case is that the MPA is unlawful under the Convention. The United Kingdom, for its part, argues that the dispute is one about sovereignty over the Chagos Archipelago. In its Final Submission No. 1, Mauritius requested the Tribunal to adjudge and declare that the United Kingdom is not entitled to declare an "MPA" or other maritime zones because it is not the "coastal State within the meaning of *inter alia* Articles 2, 55, 56 and 76 of the Convention." During the oral hearing, Mauritius put it this way: "[t]he central question before this Tribunal is not whether the United Kingdom has sovereignty, it is whether the United Kingdom for the purposes of the Convention is 'the coastal State' and was, as such, entitled to act as it does".[2] This statement was made without prejudice to the fact that there exists a longstanding dispute between the parties about sovereignty over the Chagos Archipelago.

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1 Final Submission No. 1 reads: "the United Kingdom is not entitled to declare an 'MPA' or other maritime zones because it is not the 'coastal State' within the meaning of *inter alia* Articles 2, 55, 56 and 76 of the Convention".

2 Final Transcript, 999:16-18.

4. We agree with the Award that it is for the Tribunal to characterize the dispute (*see* Award, para. 208). However, we differ from the approach taken in the Award in characterizing the dispute. Two different issues have to be decided in this context: namely, (a) whether the dispute between Mauritius and the United Kingdom is a dispute about the interpretation and the application of the Convention or a dispute on the sovereignty over the Chagos Archipelago, and (b) whether the Tribunal has jurisdiction over the dispute however defined. Logically one has to turn to the characterization of the dispute first and to other issues concerning jurisdiction second. We note that the Award, without consequently separating these two issues (*see* Award, para. 209), touches upon both of them while concentrating on the United Kingdom's argument as to whether the First Submission is to be considered an artificial re-characterization of the long-standing sovereignty dispute (*see* Award, para. 207).

5. We disagree with the approach taken by the Tribunal, which does not fully reflect the established jurisprudence of the ICJ in its *Fisheries Jurisdiction* case (*(Spain v. Canada), Judgment of 4 December 1998, ICJ Reports 1998*, p. 432 at p. 447, paras. 29 *et seq.*), to which the Award briefly refers in its paragraph 208. This judgment refers to several other cases, in particular to *Nuclear Tests* (*(Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 at p. 260, para. 24). This jurisprudence may be summarized as follows.

   (a) that it is for the Court itself to determine the dispute dividing the parties, (*Fisheries Jurisdiction (Spain v. Canada), Judgment of 4 December 1998, ICJ Reports 1998*, p. 432 at p. 449, paras. 30-31);

   (b) to do so on an objective basis while giving particular attention to the formulation of the dispute chosen by the Applicant by examining the position of both parties, (*ibid.*); and

   (c) to distinguish between the dispute itself and the arguments advanced by the parties, (*ibid.* at para. 32).

6. The above jurisprudence of the ICJ[3] has to be seen in its context. It focuses on the interpretation of a declaration made by Canada. Nevertheless, some of the principles expressed in this judgment are of relevance for the issue to be decided here, in particular since they are based upon previous rulings of the ICJ. These principles are, first, that the decision on the characterization of the legal dispute has to be made by the Tribunal on objective grounds "giving particular attention to the formulation of the dispute chosen by the Applicant" (*ibid.* at

[3] See the cases set out in paragraph 5 above.

para. 30), and, second, that it is necessary to distinguish between the dispute itself and the arguments advanced by the parties.

7. Considering the jurisprudence of the ICJ,[4] the question raised in paragraph 209 of the Award is not formulated appropriately.

8. Mauritius centres its case in Submission No. 1 on the meaning of the term "coastal State" and accordingly qualifies it as a case on the interpretation and application of the Convention within the jurisdiction of the Tribunal (Article 288 of the Convention). It argues that the meaning of the words "coastal State" and the issues of sovereignty are interwoven in the present case. We are sympathetic with this reasoning, but at the same time we emphasize that the case is not only a sovereignty claim as the United Kingdom qualifies it.

9. The following are the factual and legal grounds why we believe that the dispute cannot be qualified as a dispute about the sovereignty of the Chagos Archipelago:

10. First, it has to be noted that in its Submission No. 1, Mauritius only questioned the competence of the United Kingdom to be the coastal State in respect of establishing the MPA. This was emphasized and re-emphasized in the written, as well as in the oral, proceedings. From the very wording of Submission No. 1, it is clear that the claim advanced by Mauritius is not on the territorial sovereignty of the United Kingdom over the Chagos Archipelago but only covers an aspect thereof: namely, the establishment of the MPA ("The United Kingdom is not entitled to declare an "MPA" or any other maritime zone"). It is evident that territorial sovereignty encompasses more than the establishment of an MPA.

11. Second, it is undisputed that the issue concerning the sovereignty of the Chagos Archipelago was raised in general at some stage before the arbitral proceedings were initiated, but there was no indication that third party dispute settlement was sought. The United Kingdom criticized this within the context of Article 283 of the Convention. It is worth noting in this regard that, although Mauritius maintained its claim concerning its sovereignty over the Chagos Archipelago, it was satisfied with the assurance by the United Kingdom that the Archipelago would be returned at a future date. Mauritius did not even seek an agreement with the United Kingdom to that extent. The United Kingdom offered to conclude an agreement, but Mauritius declined. This indicates that, while Mauritius maintained its claim to sovereignty over the Chagos Archipelago, this was not its primary concern in the context of the claim now before the Tribunal.

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4 *Ibid.*

12. Third, Mauritius initiated these proceedings against the United Kingdom only after the establishment of the MPA. It was clear right from the beginning that without this development Mauritius would not have initiated a dispute settlement procedure.

13. Fourth, Mauritius does not advance in its Submission No. 1 any argument concerning the exercise of territorial sovereignty over the islands. Its Submission No. 1 is clearly limited.

14. Fifth, account has to be taken of the limited scope of Submission No. 1 of Mauritius and that this has an impact upon the jurisdiction of the Tribunal. Under this submission, the Tribunal could not decide on the sovereignty of the United Kingdom over the Chagos Archipelago as such—even if it had the competence to do so—since the submission limits the jurisdiction of the Tribunal in this respect. It would be illogical if the Tribunal declared that this dispute was on the sovereignty over the Chagos Archipelago while being aware that, due to the limited scope of Submission No. 1, it was unable to decide on a dispute with such a broad scope.

15. We have noted that in some instances statements by counsel for Mauritius referred to the territorial sovereignty of Mauritius over the Chagos Archipelago. These are arguments, in the words of the ICJ (*Fisheries Jurisdiction (Spain v. Canada), Judgment of 4 December 1998, ICJ Reports 1998*, p. 432 at p. 449, para. 35), to be clearly separated from the case. Apart from that, in our view an overstatement by counsel for Mauritius of the Applicant's case should not dilute the thrust of the argument about the unlawfulness of the establishment of the MPA.

16. The United Kingdom emphasized that questions of sovereignty lie "at the heart of the current claim"[5] and that the issue of sovereignty over the Chagos Archipelago is a longstanding point of contention. It considers the claim an "artificial re-characterization of a long-standing sovereignty dispute."[6]

17. The Tribunal comes to the same conclusion as the United Kingdom by emphasizing the references to the sovereignty dispute "across a range of fora and instruments" (Award, para. 211), without, however, considering in detail the wording of Mauritius' Submission No. 1. This is to be regretted. The wording of paragraph 212 of the Award is quite telling. It states ". . . that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago. The Parties' differing views on the "coastal State" for the purposes of the Convention are simply one aspect of this larger dispute". On the basis of Mauritius' Submission No. 1, it is exactly the other way around. The differing

5 Final Transcript, 666:18-19.

6 Final Transcript, 660:19-20.

views on the coastal State are the dispute before the Tribunal and the issue of sovereignty over the Chagos Archipelago is merely an element in the reasoning of Mauritius and not to be decided by the Tribunal.

2. Final Submission No. 2 of Mauritius[7]

18. As far as Submission No. 2 is concerned, we disagree with the Tribunal's qualification in paragraph 229 of the Award that the Second Submission ". . . must be viewed against the backdrop of the Parties' dispute regarding sovereignty over the Chagos Archipelago." Here again, no distinction is being made between the submission and the reasoning. The submission states: "having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an 'MPA' or other maritime zone because . . .". We consider that the remaining part is reasoning.

19. We disagree that this is a dispute on the sovereignty over the Chagos Archipelago. In our view, this is a dispute as to whether the United Kingdom has ceded one or more rights as a coastal State in the commitments made in the Lancaster House Undertakings. Submission No. 2 is the opposite of a claim questioning the sovereignty of the United Kingdom over the Chagos Archipelago since it proceeds from the assumption that the United Kingdom had territorial sovereignty and had ceded certain rights as the sovereign.

B. JURISDICTION

20. The relevant provisions on jurisdiction are Articles 286, 287(5) and 288(1) of the Convention.

21. Mauritius ratified the Convention on 4 November 1994 and has made no declaration. The United Kingdom acceded to the Convention on 25 July 1997 and in a declaration of the same date extended the Convention to, amongst others, the BIOT. Another declaration of the United Kingdom excludes disputes under Article 298(1)(b) and (c) of the Convention from compulsory dispute settlement. These declarations are not of direct relevance for this case.

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[7] Final Submission No. 2 reads: "having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an 'MPA' or other maritime zones because Mauritius has rights as a 'coastal State' within the meaning of *inter alia* Articles 56(1)(b)(iii) and 76(8) of the Convention".

1. Final Submission No. 1

22. In considering this submission, it may be noted that for jurisdictional purposes, the Tribunal does not have to determine that the United Kingdom has violated the provisions relied upon by Mauritius. The Tribunal merely has to establish whether the provisions relied on apply to the Applicant's claims. In determining whether it has jurisdiction, the Tribunal must establish a link between the facts advanced by the Applicant and a particular provision to show that this provision can sustain the claim (*M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4 at para. 99; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 810, para. 16). The Award refers to this principle in paragraph 296.

23. Article 288(1) of the Convention sets out when international courts or tribunals under Part XV of the Convention have jurisdiction. They have jurisdiction over "any dispute concerning the interpretation or application of the Convention". Although this provision is broadly phrased, it contains a limitation: namely, the dispute must be on the interpretation or application of the Convention. It is crucial to establish whether Mauritius advances such a claim.

24. Mauritius invokes in its Submission No. 1 Articles 2, 55, 56 and 76 of the Convention. These provisions refer to the status and competences of coastal States. Mauritius argues that Article 288(1) of the Convention does not say that disputes concerning the interpretation or application of the words "coastal State" are excluded from the jurisdiction of a court or tribunal referred to in Article 287 of the Convention. Mauritius also disagrees with the United Kingdom's argument that the words "coastal State" are to be determined as a matter of fact[8] and do not require the interpretation or application of the Convention. For Mauritius, it is a legal question. Linked with its consideration of Article 288(1) is Mauritius' consideration of the limitations and exceptions in section 3 of Part XV, namely Articles 297 and 298. It argues that jurisdiction is not excluded by section 3. Mauritius argues that Article 297 has nothing to say about the entitlement of a State to be able to claim that it is the "coastal State".

25. We raise these details of Mauritius' arguments on jurisdiction because we feel that the Tribunal has neglected some of Mauritius' arguments due to its focusing its attention on the question ". . . of the extent to which Article 288(1) accords the Tribunal jurisdiction in respect of a dispute over land sovereignty when, as here, that dispute touches in some ancillary manner on

[8] Counsel for the United Kingdom dismissively said that the term "coastal State" should detain the Tribunal no more than ten seconds as it means the State with the coast adjacent to the maritime zone with which the given provision of the Convention is concerned. *See* Final Transcript, 665:14-16.

matters regulated by the Convention" (Award, para. 213). This approach narrows the issue of jurisdiction and prevents the Tribunal from considering the issue from a broader perspective, as required by Article 288(1) of the Convention.

26. But apart from that, we consider the subsequent reasoning of the Tribunal (*see* Award, paras. 214–221) not convincing; in particular, it does not sufficiently deal with the arguments advanced by both Parties concerning the "*a contrario* argument". The Tribunal merely states that "much of this argumentation misses the point" (Award, para. 215). Instead the Tribunal emphasizes that the negotiation records of the Convention provide no firm answer regarding jurisdiction over territorial sovereignty. With this we would agree. But as will be demonstrated below, we draw a different conclusion therefrom.

27. Furthermore, the reasoning of the Tribunal is not fully coherent. How is it possible to state in paragraph 215 of the Award that the negotiating records of the Convention provide no firm answer regarding jurisdiction over territorial sovereignty and to assume in paragraphs 216 and 217, on the basis of Articles 297 and 298(1) of the Convention, that if the drafters had anticipated the possibility of territorial disputes they would have provided an opt-out facility? That the drafters did not foresee the possibility does not in itself justify reading a limitation into the jurisdiction of the international courts and tribunals acting under Part XV of the Convention.

28. There is no reasoning by the Tribunal concerning the argument put forward by Mauritius. According to Mauritius, sovereignty disputes are not necessarily excluded by Article 298(1)(a) of the Convention; they may be resolved under Part XV when they form a necessary part or have a "genuine link" to a dispute concerning the interpretation and application of any provision of the Convention. This, according to Mauritius, does not mean every dispute touching on sovereignty automatically falls within the Convention. The Tribunal does not take into account this argument since it considered the sovereignty issue the "real issue in the case" and the "object of the claim" (Award, para. 220), a statement we already have dealt with and do not consider sustainable. In the following paragraphs we will set out our position on the jurisdiction of this Tribunal on the basis of a comprehensive analysis of Articles 297, 298 and 288 of the Convention.

2. Limitations to jurisdiction

29. As stated above, Article 288(1) establishes that an international court or tribunal has jurisdiction over any dispute "concerning the interpretation or application of this Convention". It is evident that the jurisdiction of international courts and tribunals is thus limited. Exceptions to the

jurisdiction of international courts and tribunals under Part XV of the Convention are contained in Articles 297 and 298 of the Convention.

30. We shall first establish whether the dispute between Mauritius and the United Kingdom is excluded by the exceptions as contained in Articles 297 and 298 of the Convention. Thereafter, we shall return to Article 288(1) of the Convention, dealing with the question as to whether that provision excludes the jurisdiction over disputes which necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory.

31. Apart from the wording of Articles 297 and 298 of the Convention, their relationship to each other has to be taken into account, as well as the system of exceptions in the Convention seen as a whole and their legislative history. It is also relevant in this context that the Geneva Conventions on the Law of the Sea only provided for an Optional Protocol on dispute settlement, whereas under the Convention a mandatory dispute settlement system exists in spite of the exceptions provided under Articles 297 and 298 of the Convention.

32. On the basis of a purely textual analysis of Article 297 of the Convention, it is evident that its exclusion of the jurisdiction of international courts and tribunals under Part XV of the Convention does not embrace the exclusion of disputes for the reason that the decision on them would involve the consideration of any unsettled dispute concerning continental or insular land territory.

33. Article 298(1)(a) of the Convention provides that any State Party when signing, ratifying or acceding to the Convention may declare that it does not accept the third party dispute settlement procedures provided for in section 2 of Part XV of the Convention with respect to one or more of the three categories of disputes referred to in Article 298(1)(a)(i) to (iii) of the Convention. The first category deals with sea boundary delimitation. The relevant paragraph (1)(a)(i) contains the following clause:

> . . . at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

34. Since the United Kingdom has not submitted such a declaration and since the present dispute is not a dispute on sea boundaries, this exception clause cannot be applied to the case before the Tribunal.

35. It has been argued by the United Kingdom, though, that this clause should be read into Article 297 of the Convention on exceptions to the jurisdiction of international courts and tribunals under Part XV of the Convention. This view is not supported by the legislative history of Articles 297 and 298 of the Convention as will be set out below.

36. The clause ". . . that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission" was introduced in part into Article 297 of the ICNT[9] (today Article 298 of the Convention) to avoid the possibility of using the dispute settlement system of the Convention on the Law of the Sea for deciding territorial claims. Attempts were made to have this clause transferred to Article 297 of the Convention containing the automatic exceptions but no majority was found to that extent.[10] This is explained by the President of the Third UN Conference on the Law of the Sea in his Report on the work of the informal plenary meeting of the Conference on the settlement of disputes of 23 August 1980.[11] He stated:

> 6. The course of the negotiations conducted in the informal plenary meetings may be summarized as follows. Informal suggestions were made by some of the participants in the course of their interventions. These included suggestions regarding both drafting and substance. In particular, two suggestions were made which touched upon questions of delimitation, which were firstly, that a cross-reference to article 298bis of document SD/3 be made in article 298.1(a) (ii); secondly, the exclusion of past or existing delimitation disputes as well as disputes relating to sovereignty over land or insular territories from the compulsory dispute settlement procedures and from compulsory submission to conciliation procedures as provided in article 298, paragraph 1(a). These should be included in article 296 with the other exceptions in that article. The exclusion of future delimitation disputes by declaration would remain in article 298. Where no settlement had been reached, such disputes would be submitted to conciliation at the request of any party and the other party would be obliged to accept this procedure.

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9 *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text, Art. 296, UN Doc. A/CONF.62/WP.10 (15 July 1977); *see also* S. Rosenne & L. Sohn, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V at p. 112 (M. Norquist, gen. ed., 1989). The idea of conciliation was introduced in *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 1, Art. 296, UN Doc. A/CONF.62/WP.10/Rev.1 (28 April 1979).

10 *See* P.C. Irwin, "Settlement of Marine Boundary Disputes: An Analysis of the Law of the Sea Negotiations," *Ocean Development & International Law*, Vol. 8(2) at p. 105 (1980).

11 *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Ninth Session (28 July to 29 August 1980))*, Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, UN Doc. A/CONF.62/L.59 (23 August 1980).

> 7. The President had stressed, both in document SD/3 and at the commencements of these negotiations, that changes of substance should be avoided, in particular, any changes to the text of article 296, paragraph 2 and 3. Since delicate compromises that had been very carefully negotiated are contained in that article, any attempt to raise these questions should be avoided. He pointed out that article 298, paragraph 1 (a) was closely linked to the delimitation issue. The president further stressed that attention should be concentrated on the structural changes alone to the exclusion of substantive changes. So far as paragraph 1 (a) was concerned even structural changes should be avoided.

37. The negotiating history of Articles 297 and 298 of the Convention shows clearly several issues. First, that the "exclusion of past or existing delimitation disputes as well as disputes relating to sovereignty over land or insular territories from compulsory dispute settlement procedures . . ." was touched upon. Second, that this issue was taken up in Article 298(1)(a) of the Convention, which provides for the possibility of making optional exemptions in the context of delimitation disputes. Third, that the initiative to make such (or a similar) exception a general one under Article 297 of the Convention did not prevail. In particular, this means that one cannot read an additional exception into Article 297 of the Convention.

38. On the basis of what we have stated in paragraph 37 above, contrary to what the United Kingdom asserts, a dispute which necessarily involves the concurrent consideration of an unsettled dispute concerning sovereignty or other rights over continental or insular land territory is not excluded from the jurisdiction of international courts or tribunals under Part XV by Article 298 of the Convention. Therefore it is necessary to return to Article 288(1) of the Convention. It has to be considered whether the reference in Article 288(1) of the Convention to disputes concerning the interpretation or application of the Convention excludes disputes which require sovereignty over continental or insular land territory.

39. In our view, there are several reasons why a clause such as is contained in Article 298(1)(a) of the Convention cannot be read into Article 288(1) of the Convention.

40. If such an inherent restriction for the jurisdiction of international courts and tribunals under Part XV of the Convention existed, it would not have been necessary to include it in Article 298(1)(a) of the Convention.

41. It is equally not sustainable to argue, as the United Kingdom does, that the clause in Article 298(1)(a) of the Convention is of a declaratory nature only.[12] The legislative history of this provision proves that there existed some concern in that respect and for that reason this clause

[12] Final Transcript, 693:15-20.

was introduced into Article 298(1) of the Convention. When the initiative was launched to transfer such clause to Article 297 of the Convention, the President of the Conference argued against changes, pointing out that the delimitation issue was negotiated intensively and should not be touched. This does not point in the direction of this clause being of a declaratory nature. On the contrary, such change was considered to be substantial.

42. In our view, there are many situations referred to in the Convention in which, when it comes to a legal dispute, it is necessary to establish whether the State taking action is competent to do so. In many instances these disputes require a decision on the existence of competences or their scope and thus on the sovereignty of the State concerned. So far, the issue has come up only in connection with delimitation and flag State issues. The particularity of the present case is that the issue of sovereignty comes up not in the delimitation context but in the context of the application of Article 56 of the Convention. It is to be noted that the issue of sovereignty will be a crucial factor in the reasoning.

43. As to the argument by the United Kingdom that allowing decisions under Part XV of the Convention touching on sovereignty issues would provide for a too broad jurisdictional power of the dispute settlement institutions referred to in Part XV,[13] one has to bear in mind that such a limitation does not apply to the ICJ, which has a broader mandate unless it decides under Part XV of the Convention. This means such a possibility already exists, albeit under a different dispute settlement regime.

44. In our view, the limitations on the exercise of jurisdiction under Part XV rest in Article 288(1) of the Convention (disputes "concerning the interpretation or application of the Convention") and the exceptions provided for in Articles 297 and 298 of the Convention. This ensures that a required nexus between the claim and the law of the sea exists, but there is in our view no justification to create another jurisdictional limitation beyond the ones of the Convention. It has been stated that Part XV constitutes a well-negotiated text. But exactly that puts into question the introduction of limitations to the jurisdiction of international courts and tribunals acting under Part XV beyond those explicitly provided for.

45. To conclude, according to Article 288(1) of the Convention, a nexus between the case in question and the Convention has to exist. Such a nexus exists in this case through Article 56 of the Convention. In that respect we disagree with the Tribunal's finding in paragraph 220 of the Award which states: "Where the 'real issue in the case' and the 'object of the claim' do not relate to the interpretation or application of the Convention, however, an incidental connection

[13] Final Transcript, 648:10-13.

between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)" on two grounds. We differ in respect of the qualification of the dispute, which is for us a dispute about the interpretation of Article 56 of the Convention, and we consider it permissible to decide incidentally about sovereignty issues. That it will be necessary to consider the sovereignty issue by having recourse to general international law or specific international agreements is anticipated in the Convention. To introduce a new limitation to the jurisdiction of international courts and tribunals acting under Part XV of the Convention would change the balance achieved at the Third UN Conference on the Law of the Sea in respect of the dispute settlement system. The Tribunal lacks the competence do so.

3. Final Submission No. 2

46. As far as the jurisdiction of the Tribunal is concerned, this claim requires the Tribunal to analyse the commitments made by the United Kingdom. The United Kingdom argued that the Tribunal lacks the competence to do so.

47. The Tribunal does not deal with the arguments advanced by both Parties, due to its qualification of the dispute as sovereignty related. The Tribunal should have considered further whether the dispute under Submission No. 2 was one on the competences of the coastal State and whether the undertakings in the Lancaster House Understanding were to be considered as rights under Article 56(2) of the Convention. We regret the fact that the Tribunal did not do so.

4. Final Submission No. 3[14]

48. As far as Mauritius' Submission No. 3 (alleged violation of Article 76(8) of the Convention) is concerned, we agree with the Tribunal that this submission is different from the above two submissions. The United Kingdom did not object to Mauritius' submission of preliminary information to the CLCS. In fact the United Kingdom encouraged Mauritius to file the preliminary information at the January 2009 meeting. It was only at the stage of its *Rejoinder* that the United Kingdom seemed to have had a second thought. During the oral hearing the United Kingdom suggested a possible joint full submission with Mauritius. In any case, the

[14] Final Submission No. 3 reads: "the United Kingdom shall take no steps that may prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention".

United Kingdom says it has no interest in the development of mineral resources in the outer continental shelf.

49. We agree with the extensive review of the record with the view to determining whether a separate dispute between the Parties has come into existence regarding the subject-matter of Mauritius's Submission No.3. We agree that there was no such dispute at the time when the *Application*, *Memorial* and *Counter-Memorial* were filed. Considering the exchange of views between the Parties at the hearing, we agree that there is no dispute between the Parties regarding this issue. We also agree that accordingly the Tribunal is not required to rule on whether it has jurisdiction over Mauritius' Submission No. 3 (*see* Award, paras. 348-350).

5. Final Submission No. 4[15]

50. As far as the fourth submission is concerned, it deals with the violation of Articles 2(3), 55, 56, 63, 64, 194 and 300 of the Convention. We agree with the Tribunal that jurisdiction over Mauritius's Submission No. 4 depends upon the characterization of the Parties' dispute and on the interpretation and application of Article 297 of the Convention (*see* Award, para. 283).

51. Mauritius argues that the MPA deals with the protection of the marine environment and accordingly any dispute would come under Article 297(1)(c) of the Convention in connection with Article 194. The United Kingdom advances several counter-arguments, including that the MPA does not—at least not yet—regulate marine pollution, but deals with fishing. It points out that Article 297(1)(c) covers—by pointing to Part XII to the Convention—pollution only. Therefore the Tribunal's jurisdiction would not cover the establishment of the MPA. In response thereto Mauritius argues that the declarations made by the United Kingdom at the occasion of the establishment of the MPA indicated that the MPA was devoted to protect the marine environment at large, as well as the territorial environment (except Diego Garcia). The implementation regulations announced are meant to replace the BIOT legislation protecting the environment, flora and fauna of the islands and their waters. Only later did the United Kingdom state that implementing legislation was not necessary since the relevant rules were in place. The Award sets out quite in detail that the MPA was designed by the United Kingdom as a means

[15] Final Submission No. 4 reads: "The United Kingdom's purported 'MPA' is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 63, 64, 194 and 300, as well as Article 7 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995."

for the protection of the marine environment (*see* Award, paras. 286-291); we agree with this assessment of the background for the establishment of the MPA.

52. As far as the jurisdiction of the Tribunal is concerned, the starting point has to be the wording of Article 297(1)(c) of the Convention which refers to the protection of the marine environment (". . . acted in contravention of specified international rules and standards for the protection and preservation of the marine environment . . ."). Article 297(1)(c) of the Convention has to be read together with Article 56(1)(b)(iii) and Part XII of the Convention, which specifies the competences of the coastal Sates under that article (*see M/V "Virginia G" (Panama/Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014*; *ibid., Joint Declaration of Judges Kelly and Attard*). The coastal State must have violated those rules (or standards), which may have been established by the Convention or through a competent international organization or diplomatic conference.

53. The Award provides a detailed description and assessment of the relationship between Articles 288 and 297 of the Convention based upon the legislative history of these provisions (see Award, paras. 307-317) which we share. The plain reading seems to indicate that the language of Article 297(1)(c) of the Convention covers a rather narrow scope of disputes; it would not cover every activity undertaken by the coastal State under Article 56(1)(b)(iii) of the Convention. We are not convinced by that argument of the United Kingdom.[16] One has to look closely at Part XII since Article 297(1)(c) of the Convention does not only refer to rules and standards established through an international organization, but also to rules established by the Convention.

54. As far as the competences of the coastal States in respect of the EEZ are concerned, Article 211(5) of the Convention (also dealing with pollution) is of relevance. Part XII of the Convention does not provide a general competence for coastal States to issue rules on the protection of the marine environment. This is of relevance. Taking this into consideration, T. Mensah says: "For example, disputes could arise where it is alleged that a coastal state has exceeded the powers given to it by the Convention to take measures for environmental protection against a foreign vessel . . .".[17] This means cases where the coastal State has exceeded its regulatory powers concerning the protection of the marine environment come under the clause of Article 297(1)(c) of the Convention. As Mensah points out, the jurisdiction

16 Final Transcript, 802:21 to 803:2.

17 T. Mensah, "Protection and Preservation of the Marine Environment and the Dispute Settlement Regime in the United Nations Convention on the Law of the Sea," *in* A. Kirchner, ed., *International Marine Environmental Law: Institutions, Implementation and Innovations*, p. 9 at p. 11 (2003).

of any court or tribunal is not subject to any of the limitations on jurisdiction specified in Article 297 or the optional exceptions to jurisdiction under Article 298 of the Convention.

55. What Mauritius in fact alleges is that the United Kingdom had no competence under the Convention to establish an MPA and thus is in breach of the Convention. Therefore, we agree with the Award that the Tribunal has jurisdiction to decide on alleged breaches of the rules of the Convention on the protection of the marine environment.

56. The United Kingdom further argues that the MPA was established in the exercise of its sovereign rights under Article 56(1)(a) of the Convention and refers to the exception clause of Article 297(3)(a) of the Convention.[18] As far as Article 297(3)(a) of the Convention is concerned, the United Kingdom accords that provision a rather broad scope which would include the protection of biodiversity under ". . . its sovereign rights with respect to living resources in the exclusive economic zone . . .". In our view this goes clearly beyond the meaning of Article 56(1) of the Convention. The protection of the biodiversity does not come under the sovereign rights concerning the protection and management of living resources. It is a matter of the protection of the environment.

57. Considering that this is a decision on an MPA, rather than a decision on fishing, Article 297(3)(a) of the Convention does not apply.

58. But if that provision is considered to be applicable, it has to be taken into account that Article 297(3)(a) of the Convention contains two parts. The first part says that disputes concerning fisheries shall be settled in accordance with section 2 of Part XV. That is a confirmation of jurisdiction and not a limitation. The limitation starts with the word "except". If the first part of this clause—the confirmation of jurisdiction—is to retain some meaning, not all disputes on fisheries can be interpreted as ". . . any dispute relating to its sovereign rights with respect to living resources . . .". The second part of the clause must be narrower in scope than the scope of the first part. This is not taken into account by the United Kingdom. On the basis of its approach, all disputes on fisheries would be excluded from the jurisdiction of the Tribunal, which means this interpretation would deprive Article 297(3)(a) of the Convention (first part) of its meaning. Apart from that, the United Kingdom expands upon the scope of the exception by including the protection of biodiversity. This is not sustained by Articles 61 and 62 of the Convention which should be correlated to Article 297(3)(a) of the Convention.

[18] The United Kingdom's Preliminary Objections, paras. 5.15-5.30.

59. In this context, it is essential to note that the United Kingdom only later in the proceedings emphasized the fisheries aspect, whereas at the time of declaring the MPA it stressed the environmental aspect. Further, up to the conclusion of the oral proceedings, the United Kingdom was vague as to whether implementing rules were necessary and would follow. The fact that so far only the prohibition of fishing has been proclaimed does not turn this zone into a measure concerning fishing. Otherwise this would give the United Kingdom the right, by not issuing the necessary implementation legislation, or by doing so only selectively, to determine the scope of the dispute.

60. Finally, in our view it is doubtful whether a total ban on fishing is covered by the exception clause under Article 297(3)(a) of the Convention. The second part of Article 297(3)(a) of the Convention focuses on utilizing living resources, including their proper management and conservation, rather than banning fishing completely without a conservation objective. That fishing and management of living resources is to be seen from the perspective of their utilization is confirmed by the object and purpose of the Convention. One of the goals of the Convention, as stated in its preamble, is to establish ". . . a legal order for the seas and the oceans which . . . will promote . . . the equitable and efficient utilization of their resources, the conservation of their living resources . . . and preservation of the marine environment." As provided in article 31(1) of the Vienna Convention on the Law of Treaties, treaties should be interpreted in the light of their object and purpose.

61. To sum up, we share the conclusion of the Tribunal that it has jurisdiction pursuant to Article 288(1) and Article 297(1)(c) of the Convention to consider Mauritius's Submission No. 4 (*see* Award, para. 323).

6. Article 283 of the Convention

62. The "implicit legal disagreement between the Parties [concerning Article 283 of the Convention] relates to the need to refer to a specific treaty or its provisions" as counsel for Mauritius put it.[19]

63. The United Kingdom argues[20] that Mauritius should have indicated in its consultations with the United Kingdom which provisions in the Convention it considered had been violated.

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19 Final Transcript, 949:19-20.

20 Final Transcript, 739:14-19.

64. This interpretation of Article 283 of the Convention is sustained neither by the wording of this provision, nor by the relevant jurisprudence in this respect. One should rely on the jurisprudence of the ICJ on compromissory clauses (*see, e.g., Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011*, p. 70) with caution. Article 283 of the Convention is particular. Further, the jurisprudence of ITLOS is not fully coherent and mostly the result of deciding provisional measures (*see, e.g., Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order of 8 October 2003, ITLOS Reports 2003*, p. 10).

65. In the present case, the dispute—or rather the dissatisfaction—with respect to the sovereignty over the Chagos Archipelago was expressed by Mauritius over a long time. The situation took a new turn with the establishment of the MPA. The opposition of Mauritius thereto was evident and clearly expressed. Apart from that, account has to be taken of the fact that Mauritius was informed rather late about the establishment of the MPA. When the public consultation process ended—a process against which Mauritius had protested—the United Kingdom acted (for domestic reasons) very quickly in the establishment of the MPA. Thereafter there was, from the point of view of Mauritius, no point in engaging in further consultations.

66. We agree with the statement in paragraph 378 of the Award that ". . . Article 283 cannot be understood as an obligation to negotiate the substance of the dispute" and that Mauritius has met the requirement of Article 283 concerning its Submission No. 4 (*see* Award, para. 386).

C. MERITS

67. By declining jurisdiction in respect of Submissions Nos. 1 and 2, the Tribunal missed the opportunity to deal with the separation of the Chagos Islands from Mauritius and the circumstances surrounding this separation. These issues are at the basis of what the Tribunal qualifies as the "real dispute" between Mauritius and the United Kingdom.

68. The United Kingdom emphasized that the Chagos Archipelago was a dependency of Mauritius, only attached to the latter for administrative purposes.[21] The intensive discussion of this point—the fine points of colonial constitutional law[22]—shows that the notion of dependency was used to describe situations which differed significantly. In this case it seems to be of relevance that the extension of the European Convention of Human Rights was interpreted to cover the Chagos

[21] The United Kingdom's Counter-Memorial, para. A2.5; Mauritius' Reply, paras. 2.1-2.135.

[22] *See* Final Transcript, 640:23-25.

Archipelago although the notification only referred to Mauritius. Also the Mauritius (Constitution) Order of 1964 by definition included the dependencies of Mauritius (section 90). This indicates that the Chagos Archipelago was more closely linked to Mauritius than is conceded by the United Kingdom.

69. For that reason, it is not appropriate to consider the Archipelago as an entity, somewhat on its own, which the United Kingdom could decide on without taking into account the views and interests of Mauritius. The way the detachment was executed in reality proves this view to be correct. In particular, the instructions given to the Governor of Mauritius on 6 October 1965 are a clear indication that the United Kingdom considered consent by the cabinet of Mauritius to be essential.[23]

70. This brings us to a central question: namely, as to whether the excision of the Chagos Archipelago was contrary to the legal principles of decolonization as referred to in UN General Assembly Resolution 1514 and/or contrary to the principle of self-determination.[24]

71. The United Kingdom argues that the principle of self-determination developed only in 1970 (*Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (24 October 1970)). In our view, the principle of self-determination developed earlier. Counsel for the United Kingdom to some extent provided information which may be taken to prove this point. Counsel rightly pointed out that between 1945 and 1965 already more than 50 States gained independence in the process of decolonization.

72. It is clearly stated in General Assembly Resolution 1514 that the detachment of a part of a colony (which in this case includes the dependency of the Chagos Archipelago) is contrary to international law. However, it is worth noting (without going into detail) that in many cases referred to by counsel for the United Kingdom, all parts of the former colonies became independent, whereas here a new colony was established.[25] The list provided by the United Kingdom does not sufficiently distinguish between cases where the detached parts of a colony became independent and cases where a new colony was established.

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23 Mauritius' Memorial, para. 3.36.

24 *See generally* Final Transcript, 231:22 to 242:12. On the violation of the principle by detaching the Chagos Archipelago, see Final Transcript 245:11 to 247:9.

25 On self-determination, see Mauritius' Memorial, paras. 6.10-6.22. On *uti possidetis*, see *ibid*., paras. 6.23-6.24.

73. There is no bar to having recourse to international law in this respect. According to Article 293 of the Convention, the Tribunal may have recourse to international law which is not incompatible with the Convention. There is no indication that the Convention would not allow a court or tribunal acting under Part XV of the Convention to consider the international law rules concerning decolonization. We consider it appropriate to refer in this respect to Article 305 of the Convention and Resolution III of the Third UN Conference on the Law of the Sea, which clearly indicate the awareness of the Conference of the decolonization process.

74. This brings us to the consent given by the Mauritian Ministers. Two arguments are advanced in this respect by Mauritius: namely, that the consent given was contrary to the rules on self-determination since the ministers did not represent the population and that the consent was given under pressure.[26]

75. As far as "pressure" is concerned, the United Kingdom argues that negotiations can be tough. This is countered by counsel for Mauritius that, in relations between a colonial entity and the metropolitan State, the latter has some responsibility towards the former. This point was not elaborated upon, but meant that the United Kingdom, being the colonial power as well as the guardian of the colony, was under an obligation not to use pressure that could be acceptable in the relationship between two sovereign States, but not between a metropolitan State and a colony.

76. It was further pointed out—correctly—that Mauritius had no choice.[27] The detachment of the Chagos Archipelago was already decided whether Mauritius gave its consent or not.

77. A look at the discussion between Prime Minister Harold Wilson and Premier Sir Seewoosagur Ramgoolam suggests that the Wilson's threat that Ramgoolam could return home without independence amounts to duress. The Private Secretary of Wilson used the language of "frighten[ing]" the Premier "with hope".[28] The Colonial Secretary equally resorted to the language of intimidation. Furthermore, Mauritius was a colony of the United Kingdom when the 1965 agreement was reached. The Council of Ministers of Mauritius was presided over by the British Governor who could nominate some of the members of the Council. Thus there was a clear situation of inequality between the two sides. As Mauritius states, if the Mauritian people, through their Government, had made a free choice without coercion, they could have given

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26 Final Transcript, 248:24 to 251:21; 972:16-24.

27 Final Transcript, 145:22 to 146:2.

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

valid consent in the pre-independence period to the excision of the Chagos Archipelago. This was not the case.

78. If it is accepted that the consent given is invalid on either of the two grounds mentioned above, the question is to be raised why it took Mauritius so long to make this point. Reference was made in this context to the fact that Mauritius was economically dependent upon the United Kingdom.[29] It was argued that this has to be taken into consideration by referring to a statement made by the ICJ in *Certain Phosphate Lands in Nauru* (*(Nauru v. Australia) Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240).[30]

79. Even if the view is taken that the consent was valid and/or that Mauritius acquiesced in the detachment (with which we would disagree) one may argue that the "agreement" reached in the Lancaster House Conference has been terminated by the United Kingdom *ex nunc* by establishing the MPA unilaterally and thus depriving Mauritius of some of the actual benefits it was meant to receive from that agreement.

80. This leads us to the conclusion that Submission No. 1 of Mauritius is well founded in fact and law on the merits.

81. According to its Submission No. 2, Mauritius claims that ". . . having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an 'MPA' or other maritime zones because Mauritius has rights as a 'coastal State' within the meaning of *inter alia* Articles 56(1)(b)(iii) and 76(8) of the Convention".

82. This submission requires dealing on the merits with two issues: whether legally binding commitments existed and whether they existed on the level of international law. The Parties seem to agree that the undertakings of the Lancaster House meeting in 1965 did not constitute a treaty under international law. This was explained by counsel for the United Kingdom and confirmed by counsel for Mauritius.[31] According to the United Kingdom, this undertaking was not an agreement between equals. Whether or not it was meant to be binding remains somewhat unclear.[32]

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29 Trade with the United Kingdom accounted for more than 70 percent of export earnings. *See* Final Transcript, 123:11-16.

30 Final Transcript, 250:22 to 251:2; 976:11-15.

31 *See* Final Transcript, 983:10-22.

32 *See* Final Transcript, 982:10 to 984:12.

83. In our view the facts are in favour of the position that the commitments exchanged were meant to be binding. According to counsel for Mauritius: "It was an arrangement made in the context of negotiations for independence . . . . At the very second of independence, when the excision was affirmed by the continued presence of the United Kingdom in the Archipelago, the United Kingdom disabled itself from denying the conditions attached to its presence."[33]

84. The style of the negotiations, the report on the negotiations and the subsequent practice confirm this. This resulted in a package binding under national law which upon the independence of Mauritius devolved upon the international law level. Being part of international law, it may be read into the Convention to the extent the latter refers to international law.[34]

85. What do the commitments entail? Good offices concerning navigational and meteorological facilities; in respect of fishing rights; landing rights on an airstrip still to be built; benefits from mineral resource activities and right to have the islands returned.[35]

86. This leads to the conclusion that the United Kingdom, by establishing the MPA, violated its prior commitments *vis-à-vis* Mauritius and thus violated Article 56(2) of the Convention. As a consequence thereof the MPA is legally invalid.

87. Concerning Submission No. 4, we agree with the findings of the Tribunal that the establishment of the MPA violated Mauritius' rights under Articles 2(3), 56(2) and 194(4) of the Convention (*see* Award, paras. 536, 541).

88. We would, however, have preferred that the Tribunal had considered the promise of Prime Minister Gordon Brown to Prime Minister Navichandra Ramgoolam at the CHOGM at Port of Spain in 2009. This issue of the promise goes to the heart of the matter of Mauritius' reliance on this United Kingdom undertaking to put the MPA on hold. The United Kingdom's unilateral assurance may not be an Ihlen declaration, but it is a commitment which Mauritius relied upon to its detriment. When Prime Minister Ramgoolam went back to Port Louis after CHOGM, he called a press conference and addressed Parliament to state that the United Kingdom had promised at the highest level of Government to put the MPA on hold. In his witness statement,

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33 Final Transcript, 982:11-22.

34 *See* Mauritius' Memorial, paras. 3.95-3.98; *see also* Despatch dated 2 July 1971 from M. Elliott, UK Foreign and Commonwealth Office to R. G. Giddens, British High Commission, Port Louis, FCO 31/2763 (**Annex MM-63**).

35 Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253 (**Annex MM-19**); Minutes of a Meeting held at 10 Downing Street, S.W.1, on Thursday, 23rd September, 1965, at 4 p.m. (**Mauritius Arbitrator's Folder, Round 2, Tab 5.1**); Manuscript letter of 1 October 1965 (**Annex UKCM-9**).

which was not challenged by the United Kingdom, the Prime Minister repeated the Brown assurance.

89. In this regard, we note that the Tribunal has concluded that it sees no need to comment further on Article 300 or the abuse of rights (*see* Award, para 543). We disagree with this conclusion. We feel that the Tribunal, having found that the 1965 commitments are legally valid and that the United Kingdom in establishing an MPA breached its obligations under several articles of UNCLOS including Article 56(2), should have examined the issue of good faith on the part of the United Kingdom. For we are of the view that the manner in which the United Kingdom proclaimed the MPA did not take into account the rights and interests of Mauritius, in particular under Article 56 of the Convention. Furthermore, having held that "the United Kingdom is estopped from denying the binding effect of [the 1965] commitments", (Award, para. 448) it is surprising that the Tribunal did not examine the matter further, especially when it is recalled that estoppel rests on the principle of good faith.

90. The Tribunal states that the internal United Kingdom documents in the record do not suggest any ulterior motive. While we do not completely share this observation, we are of the view that the way in which the MPA was established and the negotiations leading up to the MPA leave a lot to be desired on the part of the United Kingdom. As the ICJ stated in the *Nuclear Tests* case, "[t]rust and confidence are inherent in international co-operation" (*Nuclear Tests* (*(Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 253 at p. 269, para 46). In the case of the MPA, Mauritius learnt of the MPA proposal from the London newspaper, *The Independent,* on 9 February 2009 (*see* Award, para. 126). The United Kingdom went ahead with a public consultation on the MPA in spite of Mauritius' opposition and its demand that the matter should be discussed in the bilateral framework. Indeed in its written evidence to the UK House of Commons Select Committee on Foreign Affairs in respect of the MPA, Mauritius complains that "[t]he manner in which the MPA is being dealt with makes us feel that it is being imposed on Mauritius with a predetermined agenda" (*see* Award, para. 144). Even British senior officials, including the British High Commissioner (*see* Award, para. 150) warned that "to declare the MPA today could have very significant negative consequences for the bilateral relationship". However, the British Government hastily went ahead and declared the MPA on 1 April 2010.

91. We complete this argument on good faith by noting disturbing similarities between the establishment of the BIOT in 1965 and the proclamation of the MPA in 2010. Although these two events are 45 years apart, they show a certain common pattern. This is the disregard of the rights and interests of Mauritius. The 1965 excision of the Chagos Archipelago from Mauritius

shows a complete disregard for the territorial integrity of Mauritius by the United Kingdom which was the colonial power. British and American defence interests were put above Mauritius' rights. Fast forward to 2010 and one finds a similar disregard of Mauritius' rights, such as the total ban on fishing in the MPA. These are not accidental happenings. We further note the observation of the arbitral tribunal in *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., and ConocoPhillips Company v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, para. 275 (3 September 2010)) on ". . . how rarely courts and tribunals have held that a good faith or other related standards is breached. The standard is a high one." We take the view that, for the reasons as set out above, the United Kingdom did violate the standard of good faith.

92. We disagree with some of the reasoning of the Tribunal on Article 2(3) of the Convention (*see* Award, paras. 514-516). We read the legislative history of that provision differently.

93. In interpreting Article 2(3) of the Convention and thus determining the limits imposed upon the exercise of the costal States' sovereignty over the territorial sea it is necessary to distinguish between the reference to the Convention and "to other rules of international law". The starting point of the ILC deliberations on the law of the sea was as to whether the limits to the exercise of sovereignty by coastal States in its territorial sea set out in article 1(2) of the 1956 ILC Draft Articles are exhaustive. The ILC commentaries on that provision confirm that "the limitations imposed by international law on the exercise of sovereignty in the territorial sea" which "are set forth in the present articles" cannot "be regarded as exhaustive."[36] For this reason, "'other rules of international law' are mentioned in addition to the provisions contained in the present articles."[37] Moreover, as the ILC emphasised, draft Article 1(2) encompasses both obligations founded in general international law and specific arrangements entered into by the States: The ILC commentary stated:

> (5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.[38]

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36 Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, Doc. A/3159, *YILC*, Vol. II, 253 at 265 (para. 4).

37 *Ibid*.

38 International Law Commission, Articles concerning the Law of the Sea with Commentaries, *Report of the International Law Commission on the Work of its Eighth Session, 23 April to 4 July 1956*, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, UN Doc. A/3159 at p. 265.

94. The first sentence in paragraph 5 of the commentary to article 1(2) of the ILC Draft makes it quite plain that the draft encompasses obligations that may arise from a "special relationship, geographical or other," where one State recognises or grants the other State rights in the territorial sea.[39] This has the consequence that the reference to 'other rules of international law' not only refers to general international law but has a broader scope. This interpretation is confirmed by *Birnie, Boyle and Redgwell,* who observe that "UNCLOS establishes a twelve-mile limit for the territorial sea, over which the coastal state has sovereignty, subject to any requirements of the Convention and other rules of international law, including any conservatory conventions to which that state is party and which by their terms apply within that area."[40] Taking the ILC Commentary into account means, in our view, that the reference to "other rules of international law" encompasses obligations arising from commitments by the coastal State bilaterally or even unilaterally, as well as commitments based upon customary international law or the binding decisions of an international organization. For these reasons the undertakings of the United Kingdom in the Lancaster House Understanding have to be read directly into Article 2(3) of the Convention.

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[39] See also the Annex VII tribunal decision in *Guyana v Suriname,* interpreting terms in Article 293 "other rules of international law" as encompassing both general international law and international treaties, at para. 406.

[40] P. Birnie, A. Boyle & C. Redgwell, *International Law & the Environment*, p. 716 (3rd ed., 2009).

Dated: 18 March 2015

Judge Rüdiger Wolfrum

Judge James Kateka