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

MAURITIUS

v.

UNITED KINGDOM

PRELIMINARY OBJECTIONS TO JURISDICTION

SUBMITTED BY

THE UNITED KINGDOM

31 October 2012

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CHAPTER I

I. INTRODUCTION

1.1 In accordance with Article 11 of the Rules of Procedure adopted by the Arbitral Tribunal on 29 March 2012, the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') submits these Preliminary Objections, in which it requests the Tribunal to find that it is without jurisdiction in respect of the dispute submitted to the Tribunal by the Republic of Mauritius ('Mauritius').

1.2 Article 11 of the Rules of Procedure reads as follows:

> "**Preliminary Objections**
>
> Article 11
>
> 1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of the Notification or of any claim made in the proceedings.
>
> 2. A submission that the Arbitral Tribunal does not have jurisdiction or that the Notification or a claim made in the pleadings is inadmissible shall be raised either:
>
> (a) where the United Kingdom requests that the submissions be dealt with as a preliminary issue, as soon as possible but not later than three months from the time of the filing of the Memorial; or
>
> (b) in all other circumstances, in the Counter-Memorial or, with respect to the Reply, in the Rejoinder.
>
> 3. The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award. If either Party so requests, the Arbitral Tribunal shall hold hearings prior to ruling on any objection to jurisdiction or admissibility.
>
> 4. Should the United Kingdom request that any objection to jurisdiction or admissibility be dealt with as a preliminary matter, such request shall state whether the United Kingdom seeks a separate hearing on the question of bifurcating objections to jurisdiction or admissibility from the Tribunal's consideration of the merits. Within three weeks from the receipt of the United Kingdom's objections, Mauritius shall provide any comments it may have on the question of bifurcation. Within two weeks from the receipt of such comments, the United Kingdom may submit a reply to any views expressed by Mauritius on the question of bifurcation.
>
> 5. In the interest of efficient scheduling – and without prejudice to any determination that the Tribunal may make as to the appropriateness of such a hearing, if requested – the Tribunal has reserved the following alternative dates for a possible one-day hearing on the question of bifurcation:

(a) In the event that the United Kingdom's objections to jurisdiction or admissibility and request for a hearing are made on or before 14 September 2012: any hearing will be held on Friday, 9 November 2012;

(b) In the event that the United Kingdom's objections to jurisdiction or admissibility and request for a hearing are made after 14 September 2012: any hearing will be held on Friday, 11 January 2013."

1.3 The United Kingdom submits that the Tribunal is without jurisdiction in respect of the dispute brought before the Tribunal by the Republic of Mauritius ('Mauritius') in its Notification and Statement of Claim.

1.4 In accordance with article 11, paragraph 2(a) of the Rules of Procedure, the United Kingdom requests that its Preliminary Objections be dealt with as a preliminary matter.

1.5 In accordance with article 11, paragraph 4, and unless the request in the preceding paragraph is accepted by Mauritius, the United Kingdom seeks a separate hearing on the issue of the procedure to be followed in dealing with its Preliminary Objections.

A. Summary of the proceedings

1.6 On 20 December 2010, Mauritius instituted proceedings against the United Kingdom under Part XV of the United Nations Convention on the Law of the Sea ('UNCLOS', 'Convention'), by addressing to the United Kingdom a *Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of the Claim and grounds on which it is based.* On 27 January 2012 the Agent of Mauritius wrote to the Agent of the United Kingdom, copied to the Deputy Secretary-General of the Permanent Court of Arbitration, informing him that it had "come to the attention of the Government of Mauritius that a number of minor factual matters required correction in Mauritius' Notification and Statement of Claim of 20 December 2010." The Agent attached to his letter "a revised version of that document, highlighting the changes which have been made", adding that the changes were "not intended to have any substantive consequences for the claims".

1.7 The Members of the Tribunal were appointed in accordance with article 3 of Annex VII of UNCLOS, and the Tribunal was fully constituted as of 25 March 2011.

1.8 On 23 May 2011 Mauritius stated its intention to challenge the appointment of one of the arbitrators. Following an exchange of written pleadings and an oral hearing, on 30

November 2011 the other four Members of the Arbitral Tribunal dismissed the challenge and deferred any decision regarding costs[1].

1.9 On 29 March 2012 the Tribunal adopted its Rules of Procedure, and fixed 1 August 2012 as the time-limit for the communication by Mauritius of a Memorial, which was duly communicated on that date.

B. Subject-matter of the proceedings

1.10 The subject-matter of the proceedings was defined by Mauritius in its Statement of Claim. According to Mauritius, the dispute concerned the establishment in 2010, by the United Kingdom, of a Marine Protected Area ('MPA') around the British Indian Ocean Territory[2]. Mauritius claimed that the establishment of the MPA violated UNCLOS and other rules of international law not incompatible with UNCLOS. Under the heading 'Relief Sought', Mauritius requested the Tribunal -

> "to declare, in accordance with the provisions of UNCLOS and the applicable rules of international law not incompatible with the Convention that, in respect of the Chagos Archipelago[3]:
>
> (1) the 'MPA' is not compatible with the 1982 Convention and is without legal effect; and/or
>
> (2) the United Kingdom is not a 'coastal state' within the meaning of the 1982 Convention and is not competent to establish the 'MPA'; and/or
>
> (3) only Mauritius is entitled to declare an exclusive zone under Part V of the 1982 Convention within which a marine protected area might be declared".[4]

1.11 In the Memorial, Mauritius requested the Tribunal -

> "to declare, in accordance with the provisions of the Convention and the applicable rules of international law not incompatible with the Convention that, in respect of the Chagos Archipelago:
>
> (1) 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 and 76 of the Convention; and/or

[1] Reasoned Decision on Challenge dated 30 November 2011.
[2] Notification and Statement of Claim, para. 1.
[3] The official name of the Chagos Islands (or Chagos Archipelago) is the British Indian Ocean Territory ('BIOT').
[4] Notification and Statement of Claim, para. 11.

(2) 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 2, 55 and 76 of the Convention; and/or

(3) The United Kingdom's purported "MPA" is incompatible with the obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 62, 63, 64, 194, 300, as well as under Article 7 of the 1995 Agreement."

C. Organisation of the Preliminary Objections

1.12 These Preliminary Objections are organized as follows. **Chapter II** sets out the factual background in so far as it may be relevant to the Preliminary Objections. **Chapters III, IV and V** set out, in turn, the United Kingdom's reasons for objecting to the jurisdiction of the Tribunal over the dispute submitted to it by Mauritius:

- **Chapter III** explains that Mauritius is seeking to have the Tribunal determine questions of sovereignty over land territory under guise of a dispute concerning the interpretation or application of UNCLOS. Such a claim by Mauritius is not within the jurisdiction of a Part XV tribunal, and moreover has obvious and far-reaching implications for the future acceptability of UNCLOS to existing and potential States Parties.

- **Chapter IV** explains that Mauritius has not met the requirements of section 1 of Part XV of UNCLOS that have to be met before a dispute may be submitted under article 286.

- **Chapter V** explains that the claims of Mauritius concerning the content of the Marine Protected Area are beyond the jurisdiction of the Tribunal by virtue of the limitations on that jurisdiction set forth in articles 288 and 297 of UNCLOS.

Chapter VI explains why the Preliminary Objections should be dealt with as a preliminary matter.

1.13 The Preliminary Objections conclude with the United Kingdom's formal **Submissions.**

CHAPTER II

FACTUAL BACKGROUND

2.1 The present Chapter summarises the factual background that may be relevant for the consideration of these Preliminary Objections. The Chapter does not seek to respond in detail to the account of the facts and law given in Mauritius' Memorial. That is neither necessary nor appropriate in the context of Preliminary Objections. For the avoidance of doubt, however, the United Kingdom hereby affirms that it should not, through its silence, be taken as having accepted any particular elements of the facts or law as set out in the Memorial.

2.2 The Chapter is divided into six sections, dealing respectively with the geographical setting of the British Indian Ocean Territory (BIOT) and of Mauritius (**Section A**); BIOT's constitutional position (**Section B**); contacts relating to BIOT that have taken place between the United Kingdom and Mauritius since 1965 **(Section C)**; past and on-going litigation concerning BIOT (**Section D**); Mauritius' preliminary information submitted to the Commission on the Limits of the Continental Shelf (**Section E**); and a brief description of the BIOT Marine Protected Area ('MPA') and the events leading to its establishment (**Section F**).

A. Geography

2.3 BIOT and Mauritius are each located in the Indian Ocean, but are a considerable distance from each other.

(i) The British Indian Ocean Territory

2.4 BIOT comprises a group of islands, also referred to as the Chagos Archipelago, located in the middle of the Indian Ocean. The largest island is Diego Garcia, which accounts for more than half BIOT's total land area of approximately 60 square kilometres. Other main islands include Peros Banhos and Salomon.

2.5 BIOT is one of the most isolated island groups in the world. The distance from Diego Garcia to major neighbouring population centres/capitals are as follows:

Malé, Maldives: 950 miles (1,513 kilometres)

Colombo, Sri Lanka: 1,106 miles (1,780 kilometres)

Thiruvanathapuram, India: 1,132 miles (1,822 kilometres)

Victoria, Seychelles: 1,179 miles (1,899 kilometres)

Port Louis, Mauritius: 1,333 miles (2,146 kilometres)

Diego Garcia lies some 1,096 miles (1,755 kilometres) from Agalega, the nearest (isolated) island of the Republic of Mauritius.

(ii) The Republic of Mauritius

2.6 The Island of Mauritius lies some 1,375 miles (2,200 kilometres) south-west of BIOT, and some 141 miles (226 kilometres) from the French territory of Réunion. Mauritius consists of one main island, the Island of Mauritius, and certain other widely scattered islands, including Rodrigues Island 350 miles (560 kilometres) to the east; Cargados Carojos Shoals and Agalega to the north (at a distance from Mauritius of 250 and 582 miles (402 and 933 kilometres) respectively); and Tromelin Island some 360 miles (580 kilometres) to the north-west[5].

B. The Constitutional Position of the British Indian Ocean Territory

2.7 The islands now comprising BIOT were administered by France as a Dependency of Mauritius (*Ile de France*) until they were ceded to Great Britain by the Treaty of Paris of 1814[6].

2.8 Until 1965 the Chagos Archipelago was administered as a Dependency of Mauritius[7]. In November 1965, an Order in Council was made under which the Chagos Archipelago ("being islands which immediately before the date of this Order were included in the Dependencies of Mauritius"), together with the Farquhar Islands, the Aldabra Group and the Island of Desrosches ("being islands which immediately before the date of this Order were part of the Colony of Seychelles"), formed a separate colony (British overseas territory) known as the British Indian Ocean Territory (BIOT)[8].

[5] Tromelin is also claimed by France. In 2010, France and Mauritius signed a co-management treaty.
[6] Mauritius' Memorial (MM), paras. 2.16, 2.17.
[7] MM, para. 2.22. It was not uncommon for isolated territories to be administered as dependencies of other colonies. This was the position, for example, of the Cayman Islands, which "[u]nlike the Turks and Caicos Islands, … were never annexed to, and made part of, Jamaica, but were instead a dependency of it" (I. Hendry, S. Dickson, *British Overseas Territory Law* (2011), p. 311), and of Ascension Island and Tristan da Cunha, which were dependencies of St Helena (*ibid*., p. 333) (UKPO, annex 1).
[8] The British Indian Ocean Territory Order 1965 (SI 1965 No. 1920) (MM, annex 32).

2.9 As a British overseas territory, BIOT has a constitution and government separate from that of the United Kingdom. The current BIOT Constitution is set out in the British Indian Ocean Territory (Constitution) Order 2004[9]. There is a Commissioner, appointed by the Queen, who exercises executive authority and who may make laws (Ordinances) for the peace, order and good government of the Territory. The Territory has a Supreme Court and a Magistrates' Court established by Ordinance. There is also a Court of Appeal established by Order in Council. Final appeal lies to the Judicial Committee of the Privy Council.

2.10 The BIOT Administration consists of the Commissioner, who reports to Her Majesty the Queen through the Secretary of State for Foreign and Commonwealth Affairs, the Deputy Commissioner, an Administrator (who is also the Director of Fisheries), Deputy and Assistant Administrators, a BIOT Government Legal Adviser and the Environmental Adviser to the BIOT Commissioner. There is a British Representative of the BIOT Administration resident on Diego Garcia, who also acts as Magistrate, and who reports to the BIOT Commissioner and Administrator. The British Representative has a staff of 40 on Diego Garcia covering policing, customs and immigration functions.

C. Contacts between the United Kingdom and Mauritius since 1965 relating to BIOT

2.11 In Chapter 3 of its Memorial, Mauritius gives its account of developments between 1965, the year in which the BIOT was established, and 2010, when the present proceedings commenced. The account is heavily slanted, and replete with legal conclusions that have no foundation in law or fact. It is largely irrelevant since it deals with many matters far removed from Mauritius' claims in the present proceedings, which seem to have been included merely for their supposed prejudicial effect. The present pleading, concerned with Preliminary Objections, is not the place to respond in detail. Nevertheless, the following remarks are appropriate.

2.12 There have been extensive contacts between the United Kingdom and Mauritius over BIOT, going back to the time of the constitutional conference in 1965. The following are some salient points that emerge from those contacts:

- Despite the gloss that Mauritius tries to put on the facts in its Memorial, the United Kingdom Government sought to keep the two issues of eventual independence and the detachment of the Chagos Archipelago from Mauritius quite separate from each other.

[9] For a description of the constitution of BIOT, and the text of the British Indian Ocean Territory (Constitution) Order 2004, see I. Hendry, S. Dickson, *British Overseas Territory Law* (2011), pp. 301-310 (UKPO, annex 1).

- Again, notwithstanding Mauritius' gloss, Mauritian politicians - indeed the Government of Mauritius - did in fact agree to the detachment of the Chagos Archipelago from Mauritius.

- The United Kingdom's undertaking to cede the Chagos Archipelago to Mauritius when it is no longer needed for defence purposes carried no implication that, pending cession, BIOT remained under the sovereignty of Mauritius, or that Mauritius had any sovereign rights in relation to BIOT.

- The United Kingdom's "undertakings" to the Mauritians concerning fishing and other resource matters, in 1965 and thereafter, were not such as to create rights for Mauritius under international law or to impose obligations on the United Kingdom vis-à-vis Mauritius. This is clear from a plain reading of the documents on which Mauritius relies[10].

D. Litigation concerning BIOT

2.13 It is important to distinguish between the present Annex VII proceedings, which have been instituted by Mauritius on its own behalf in order to uphold what it considers to be its own rights under international law, on the one hand, and the various domestic and European proceedings brought by individuals (Chagossians) to uphold their individual rights under domestic law, on the other.

2.14 There is a great deal of litigation, past and present, in the English courts relating to BIOT[11], as well as a case pending before the European Court of Human Rights[12]. This domestic and European litigation has mostly concerned the right of abode/right to enter of Chagossians and their claims for compensation. In addition, a Chagossian has brought

[10] The documents referred to and annexed by Mauritius in paras. 3.85-3.105 of its Memorial.

[11] Court proceedings were first brought against the United Kingdom Government in the 1970s by a Chagossian, Mr Michael Vencatessen. These were withdrawn on the conclusion of the settlement agreement in March 1982 between the United Kingdom, Mauritius, and those representing Chagossian interests. The next set of proceedings, *R* v. *Secretary of State for Foreign and Commonwealth Office, ex parte Bancoult* [2001] QB 1067 (Admin) ("*Bancoult I*") challenged BIOT's 1971 Immigration Ordinance. Fresh proceedings claiming compensation on the basis of *Bancoult I* were brought in *Chagos Islanders* v. *The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB), [2004] EWCA Civ 997 (CA). A fourth set of proceedings, *R (on the application of Louis Olivier Bancoult)* v. *the Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin), [2006] ACD 81 (Admin), [2008] QB 365 (CA), [2009] 1 AC 453 (HL) ("*Bancoult II*"), challenged BIOT's 2004 Immigration and Constitution Orders.

[12] *Chagos Islanders* v. *United Kingdom* (Application No. 35622/04).

judicial review proceedings, which are ongoing, in which he seeks to challenge the decision to establish the MPA on the ground that the domestic consultation process was flawed[13].

2.15 None of this domestic or European litigation is directly relevant to the dispute that Mauritius has submitted to the present Tribunal. The litigation was brought against British authorities on behalf of individual Chagossians and did not raise the issues of sovereignty and conformity of the MPA with UNCLOS that Mauritius seeks to raise in the present proceedings. In particular, the domestic and European litigation brought by individuals did not raise the international law issues of sovereignty and conformity of the MPA with UNCLOS. The cases concerned rights asserted by individual Chagossians under domestic law or the European Convention on Human Rights, not rights asserted on the international plane by Mauritius. It is not only the rights of the Chagossians but also their interests that may differ from those of the Republic of Mauritius.

2.16 The present proceedings are by no means the only ones that Mauritius has threatened or sought to bring concerning its claim to sovereignty over BIOT. For example, in 2004 its Prime Minister indicated that Mauritius was going to leave the Commonwealth in order to bring proceedings against the United Kingdom at the International Court of Justice under the Optional Clause (both States at that time having a 'Member of the Commonwealth' exception in their Declarations under Article 36(2) of the ICJ Statute). Then there was talk of requesting the UN General Assembly to seek an Advisory Opinion concerning BIOT. And, even after commencing the present proceedings, Mauritius has written to the United Kingdom referring to the dispute settlement provision in Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Mauritius has also employed lobbyists to press its sovereignty claims in Washington, and continues to raise its sovereignty claim in international forums. For example, it objected to the use of the term "BIOT/Chagos" at the Indian Ocean Tuna Commission; and it claimed that BIOT was part of Mauritius at the International Mobile Satellite Organisation (INMARSAT).

E. Mauritius' Preliminary Information to the Commission on the Limits of the Continental Shelf

2.17 Mauritius refers at various places in its Memorial to its 22 May 2009 submission to the Commission on the Limits of the Continental Shelf (CLCS) of "Preliminary Information concerning the Extended Continental Shelf in the Chagos Islands Region"[14]. Mauritius further refers to the facts that the United Kingdom has not objected to the submission of such

[13] *R (on the application of Louis Olivier Bancoult)* v. *the Secretary of State for Foreign and Commonwealth Affairs ("Bancoult III")*.
[14] MM, paras. 1.8, 1.24, 4.32-4.33; annex 144; and figure 8 in MM, Vol. 4.

Preliminary Information, and has not itself made any submission to the CLCS in respect of BIOT.

2.18 Mauritius' Preliminary Information is not a submission to the CLCS under article 4 of Annex II of UNCLOS. It is merely a preliminary indication, pursuant to a Decision of the Meeting of States Parties[15], indicative of the outer limits and a description of the state of preparation and of the date of making a submission. Moreover, in paragraph 6 of the 'Preliminary Information' Mauritius informed the CLCS that "a dispute exists between the Republic of Mauritius and the United Kingdom over the Chagos Archipelago"[16]. Mauritius also appears to overlook the fact that, following the 'Preliminary Information' the matter was discussed at the bilateral talks held in Port Louis on 21 July 2009, where both delegations were of the view that it would be desirable to have a coordinated submission to the CLCS[17].

2.19 There was no call for the United Kingdom to react to Mauritius' 'Preliminary Information'. The United Kingdom has not itself made a submission to the CLCS in respect of BIOT; there is nothing in UNCLOS that places an obligation on a coastal State to make such a submission.

F. The BIOT Marine Protected Area

2.20 The BIOT MPA declared on 1 April 2010[18] is a "no-take" marine reserve[19]. Commercial fishing is prohibited[20] and strict limits are placed on fishing for personal consumption by people on yachts mooring temporarily on the outer islands, as prescribed in their fishing permits. The MPA covers all of BIOT's internal waters, territorial sea and its Environment (Protection and Preservation) Zone (EPPZ)[21] (the zone that extends from BIOT's territorial sea out to 200 nautical miles from its baselines), except for Diego Garcia's

[15] SPLOS/183, 20 June 2008, in which the Meeting of States Parties decided that "[i]t is understood that the time period referred to in article 4 of annex II to the Convention and the decision contained in SPLOS/72, paragraph (a), may be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission in accordance with the requirements of article 76 of the Convention and with the Rules of Procedure and the Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf" (UKPO, annex 2).

[16] MM, annex 144, p.11.

[17] MM, annex 148.

[18] Proclamation No. 1 of 2010 (MM, annex 166).

[19] There is no one accepted scientific or legal definition of the term "marine protected area". Some marine protected areas are designed as strictly "no-take" protected areas, while others are restricted-take areas or adopt a "zonal" approach which combines no-take and restricted take areas and/or multiple use zones: S. Gubbay ed., *Marine Protected Areas: Principles and techniques for management* (1995) 5; J. Claudet ed., *Marine Protected Areas* (2011), p. 3. A "marine reserve" is a specific type of marine protected area where all extractive uses are forbidden (*ibid*.).

[20] Press Release, United Kingdom Foreign and Commonwealth Office, 1 April 2010, "New protection for marine life" (MM, annex 165).

[21] Proclamation No. 1 of 2003 (MM, annex 121).

3 nautical mile territorial sea and internal waters. It covers an area of approximately 640,000 square kilometres. Commercial fishing is also prohibited within the territorial sea and internal waters around Diego Garcia, and strict limits are placed on recreational fishing.

(i) Policies and legislative measures protecting fisheries and the environment prior to the MPA

2.21 Since BIOT's establishment in 1965, a wide range of measures have been enacted to protect and conserve its fisheries, terrestrial and marine environments and wildlife. A substantial legislative and policy framework was already in place when the MPA was established in April 2010, enabling the implementation of the ban on commercial fishing[22].

2.22 A fisheries zone was proclaimed around BIOT in 1969, extending from the 3 nautical mile territorial sea to 12 nautical miles[23]. It was followed in 1971 by the Fisheries Limits Ordinance prohibiting all fishing and taking of marine products within the fisheries limits (which included the fisheries zone and the territorial sea) by foreign fishing boats other than - within the fisheries zone - by vessels flagged to a foreign country designated by the Commissioner[24]. The 1969 Proclamation and 1971 Ordinance were repealed and replaced by new fisheries legislation in 1984 establishing a licensing system[25]. In 1991 the outer limit of the BIOT fisheries zone was extended from 12 nautical miles to 200 nautical miles and it was renamed the Fisheries Conservation and Management Zone (FCMZ)[26].

2.23 The reasons for declaring the FCMZ, as explained in Notes Verbales to various interested governments, included protecting tuna stocks migrating through the 200 nautical mile zone around BIOT and "conserving the stock position to protect the future fishing interests of the Chagos group"[27]. Additional special fisheries measures have been taken as necessary, e.g., the reduction of inshore fishing licences from six to four in response to the

[22] As explained in paras. 2.24 and 2.43 below.
[23] Proclamation No. 1 of 1969 (MM, annex 53).
[24] MM, annex 60.
[25] Proclamation No. 8 of 1984, 15 November 1984, *Official Gazette* [1984] (UKPO, annex 3), and The British Indian Ocean Territory, Ordinance No. 11 of 1984, *Official Gazette* [1984] (UKPO, annex 4).
[26] See Proclamation No. 1 of 1991, 1 October 1991 (MM, annex 101) and Fisheries (Conservation and Management) Ordinance 1991, No. 1 of 1991, (MM, annex 102), as amended by BIOT Ordinance No 1 of 1993 (UKPO, annex 5), Ordinance No. 5 of 1993 (UKPO, annex 6), Ordinance No. 2 of 1995 (UKPO, annex 7), Ordinance No. 4 of 1995 (UKPO, annex 8), Ordinance No. 2 of 1997 (UKPO, annex 9), and Ordinance No. 5 of 2007 (UKPO, annex 10). The 1991 Ordinance and its amendments were consolidated in Ordinance No. 4 of 1998, *Official Gazette* [1998 issues 2 & 3] (UKPO, annex 11). Fisheries Regulations under s. 21 of the Ordinance were passed in 1993 (SI No. 3 of 1993) (UKPO, annex 12), and later replaced by the Fishing Regulations 2007 (SI No. 4 of 2007), *Official Gazette* [2008 issues 1 & 2] (UKPO, annex 13).
[27] See, e.g., Note Verbale dated 23 July 1991 from the British High Commission, Port Louis to the Government of Mauritius, No 043/91 (MM, annex 99). Notes were also sent to the United States, Seychelles and Maldives and the United Kingdom's European Community partners.

1998 coral bleaching event which caused the mortality of most reefs in the Indian Ocean, including 80-100% of BIOT's reefs[28].

2.24 The current fisheries legislation is the Fisheries Ordinance 2007, which incorporates and consolidates the 1991 legislation and subsequent amendments, and the Fisheries Regulations 2007. Fishing is prohibited unless it is in accordance with a licence issued by the BIOT authorities. The Ordinance and Regulations will be repealed and replaced when specific legislation is enacted for the MPA. Until then, the ban on commercial fishing in the MPA is implemented by not issuing fishing licences.

2.25 Multilateral and bilateral arrangements concerning fisheries have been concluded with other States. Bilateral fisheries commissions and joint observer programmes were established in the early 1990s with Mauritius (the British-Mauritian Fisheries Commission) and Seychelles (the British-Seychelles Fisheries Commission), with the objective of long-term conservation and management of fisheries stock[29]. The United Kingdom, in right of BIOT, is a Member of the Indian Ocean Tuna Commission (IOTC).

2.26 BIOT's wildlife and terrestrial and marine environments are conserved and protected under the Protection and Preservation of Wild Life Ordinance 1970, which empowers the BIOT Commissioner to designate Strict Nature Reserves and Special Reserves, together with the Strict Nature Reserve Regulations 1998 and the Diego Garcia Conservation (Protected Area) Ordinance 1994. Strict Nature Reserves were established on Peros Banhos, Nelson Island, The Three Brothers and Resurgent Islands, Cow Island and Danger Island in 1998. Diego Garcia has a Nature Reserve Area in the lagoon area, and Special Conservation Areas at Barton Point, East Island, Middle Island and West Island. An area of Diego Garcia was designated in 2001 as a Wetland of International Importance under RAMSAR[30]. The BIOT Administration has, since 1997, treated BIOT in accordance with the requirements of the World Heritage Convention 1972, subject only to defence requirements[31]. The Environment (Protection and Preservation) Zone (EPPZ), covering an area coextensive with the FCMZ, was proclaimed in September 2003 as a zone within which "Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United

[28] See Note Verbale, 13 April 1999, from the British High Commission, Port Louis, to the Ministry of Foreign Affairs and International Trade, Mauritius, No. 15/99 and Speaking Notes, "Chagos – Inshore Fishing Licences" (MM, annex 107). Prior to the creation of the BIOT MPA in April 2010, and the expiry of the licences granted in 2009 on 31 October 2010, two types of fishing licences were issued by the BIOT authorities, inshore licences for fishing in the shallower waters by hooks and lines and licences for deep water fishing by long line and purse seine.

[29] See the letter from the United Kingdom Secretary of the State for Foreign and Commonwealth Affairs to the Prime Minister of Mauritius, dated 10 November 1997 (MM, annex 105).

[30] See the RAMSAR Information Sheet for the wetland "Diego Garcia" dated February 2001, available at http://ramsar.wetlands.org/Database/Searchforsites/tabid/765/Default.aspx (UKPO, annex 14)

[31] *Ibid*.

Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the zone"[32].

2.27 Marine protected areas in BIOT waters had been considered by the BIOT authorities well before the initiative that led to the MPA in 2010. A closed marine protected area was established in July 2003 to protect spawning grouper[33]. Closed area management marine protected areas were one of the regular agenda items of the British-Mauritian Fisheries Commission, which met between 1994 and 1999[34], and the British-Seychelles Fisheries Commission. And the 2003 Chagos Conservation Management Plan recommended the establishment of fully protected areas covering at least one third of BIOT waters[35].

2.28 The development of the policy which led to the establishment of the MPA should also be viewed in the context of wider United Kingdom Government policy on environmental protection and biodiversity in the overseas territories, including BIOT, recently affirmed in the 2012 White Paper on the Overseas Territories[36]. The territories have long been recognised as of exceptional environmental and biodiversity importance, and there is a long history of engagement on environmental issues between the United Kingdom Government, the Governments of the Territories and international environmental and scientific experts.

(ii) Establishment of the BIOT MPA

2.29 The idea of a large-scale marine reserve in BIOT waters originated with a private environmental charity, the Pew Environment Group (Pew), based in the United States. Pew identified BIOT as a candidate for its Global Ocean Legacy project, which aims to establish at least three to five large, world-class, "no-take" marine reserves to provide "ocean-scale ecosystem benefits and help conserve our global marine heritage"[37]. Pew approached Professor Charles Sheppard, the Environmental Adviser to the BIOT Commissioner, in July 2007 to indicate its interest, and he in turn referred it to the Chagos Conservation Trust

[32] Proclamation No. 1 of 2003 (MM, annex 121). See also the letter from the Minister for Overseas Territories, Foreign and Commonwealth Office of the UK, to the Minister of Foreign Affairs and Regional Cooperation of Mauritius, dated 12 December 2003 (MM, annex 124), in which the Minister explains that purpose of the zone is "to help protect and preserve the environment in the Great Chagos Bank… [which] is an exceptional example of a submerged coral atoll which provides a valuable contribution to the marine ecology of the Indian Ocean".
[33] As explained in the letter from Charles Hamilton, FCO Overseas Territory Department to the Mauritian High Commissioner, London, dated 8 July 2003 (MM, annex 119).
[34] MM, annex 119.
[35] Chagos Conservation Management Plan, for BIOT Administration, FCO, by Dr Charles Sheppard & Dr Mark Spalding, October 2003, available at http://www.chagos-trust.org/sites/default/files/images/chagos_management_plan_2003.pdf (UKPO, annex 15)
[36] *The Overseas Territories: Security, Success and Sustainability*, Cm 8374, pp. 5 (Forward by the Prime Minister), 6-7 (Forward by the Secretary of State), 8 (Executive Summary), 39-46 (Chapter 3: Cherishing the Environment), available at http://www.fco.gov.uk/resources/en/pdf/publications/overseas-territories-white-paper-0612/ot-wp-0612 (UKPO, annex 16)
[37] As described on Pew's website, at http://www.pewtrusts.org/our_work_detail.aspx?id=136.

(CCT)[38]. After discussion at its conference on "The Future Conservation of the Chagos" in October 2007, the CCT prepared a discussion paper on creating a framework for a world class Chagos national park. The CCT outlined this to the BIOT Administration in January 2008. Thereafter Pew and the CCT continued to lobby the BIOT Administration, joining forces in April 2008 to form the Chagos Environment Network (CEN) with the aim of promoting a robust long-term conservation framework for the BIOT. On 9 March 2009, the CEN and CCT formally launched their proposal for the creation of one of the world's largest conservation zones in the BIOT.

2.30 The BIOT Administration's initial response to the efforts of CCT and Pew was cautious. It was explained to Pew at a meeting in April 2008 that, while there was real appeal in the proposal, there was a commitment to cede the territory to Mauritius when it was no longer required for defence purposes and that no commitment could be made before the House of Lords had given its opinion in *R (on the application of Louis Olivier Bancoult)* v. *the Secretary of State for Foreign and Commonwealth Affairs* ("*Bancoult II*")[39].

2.31 From July 2008 the BIOT Administration engaged in discussions with interested stakeholders to scope out the options for strengthening the environmental protection regime in BIOT, in line with Government policy on environmental protection in the overseas territories. This included looking at the options for the kind of large-scale marine protected area advocated by CCT and CEN, and drew on the work being carried out at the same time by the Polar Regions Unit of the Overseas Territory Department on the establishment of the world's first high seas marine protected area under the Antarctic Treaty system[40].

2.32 Articles about the CCT and Pew began appearing in the press in early 2009. *The Independent*, amongst others, reported on 9 February 2009 that a giant marine park was planned for the Chagos Islands[41]. As Mauritius has said in its Memorial, *The Independent's* article caused it to send a Note Verbale to the United Kingdom on 5 March 2009, reiterating its sovereignty claim and asserting that the creation of any marine park would require its consent[42]. As explained by the Foreign and Commonwealth Office ('FCO') in its response to Mauritius dated 13 March 2009,

[38] The CCT is a charity registered in the United Kingdom set up in 1992 to promote the protection and conservation of the pristine natural environment of the BIOT and to raise awareness of environmental issues affecting it.
[39] See above, para. 2.14. The House of Lords' decision in *Bancoult II* was handed down on 22 October 2008. Overturning the Court of Appeal decision, it upheld the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004.
[40] The South Orkneys MPA, which became effective in May 2010.
[41] MM, annex 138.
[42] MM, annex 139.

> "the proposal for a marine park in the Chagos Archipelago (BIOT) is the initiative of the Chagos Environment Network and not of the Government of the United Kingdom of Great Britain and Northern Ireland. However, the Government of the United Kingdom of Great Britain and Northern Ireland welcomes and encourages recognition of the global importance of the British Indian Ocean Territory… [and]… has already signalled its desire to work with the international environmental and scientific community to develop further the preservation of the unique environment of the British Indian Ocean Territory"[43].

Contrary to Mauritius' assertion at paragraph 7.55 of its Memorial, the content of this letter is entirely consistent with the facts at that time.

2.33 It was not until 6 May 2009 that the Secretary of State for Foreign and Commonwealth Affairs decided that consideration should be given to the possibility of creating a large-scale BIOT MPA. This decision was based on a briefing by the BIOT Administration prepared at the end of April from the scoping work carried out since July the previous year. The type of marine protected area – full no-take marine reserve or a zonal approach combining no-take and limited take areas – was one of the issues for consideration.

2.34 The BIOT Administration then entered into informal consultations with interested third parties, including the United States and Mauritius. The possibility of a large-scale marine protected area in the BIOT, which might be a full no-take marine reserve, was tabled with Mauritius by the United Kingdom at their second round of bilateral talks on the BIOT/Chagos Islands in Port Louis on 21 July 2009. The Government of Mauritius confirmed that it welcomed in principle the United Kingdom's proposal for environmental protection, as is recorded in the Joint Communiqué[44].

2.35 The matter was officially tabled with the United States during the annual politico-military talks on BIOT in Washington in September 2009, but had also been discussed informally earlier in May. The United States Embassy – which, like Mauritius, had been alerted to the possibility of a large-scale marine protected area in BIOT by the press – had raised the issue at a meeting on 12 May 2009, held at the United States' request to brief a senior member of the Embassy. This was a long, open discussion in which the United States side raised concerns about the MPA proposal and the United Kingdom side sought to explain and reassure. The United States expressed concerns that establishing a marine protected area might weaken the integrity of immigration controls and so facilitate resettlement and otherwise compromise the security of their military installations. It was also concerned that the legislative and regulatory framework governing a marine protected area might constrain military operations and manoeuvres, and that over time these regulations might, through the

[43] MM, annex 140.
[44] MM, annex 148.

pressure of the environmental lobby, become more restrictive. The issues were discussed from a number of perspectives, including, as is normal, from the perspective of public and media reaction. As a matter of policy it was clear that any form of entrenchment of the marine protected area would be unacceptable to the United Kingdom and United States Governments on operational security grounds and that the establishment of the MPA would and should have no impact on the question of resettlement.

2.36 The BIOT Administration also sought independent advice on the scientific justification for a large scale BIOT marine protected area from the National Oceanography Centre based at the University of Southampton ("NOC"). The NOC held a workshop on the topic on 5-6 August 2009[45]. The executive summary of the report was as follows[46]:

> "i) There is sufficient scientific information to make a very convincing case for designating all the potential Exclusive Economic Zone of the British Indian Ocean Territory (BIOT, Chagos Archipelago) as a Marine Protected Area (MPA), to include strengthened conservation of its land area.
>
> ii) The justification for MPA designation is primarily based on the size, location, biodiversity, near-pristine nature and health of the Chagos coral reefs, likely to make a significant contribution to the wider biological productivity of the Indian Ocean. The potential BIOT MPA would also include a wide diversity of unstudied deepwater habitats.
>
> iii) There is very high value in having a minimally perturbed scientific reference site, both for Earth system science studies and for regional conservation management.
>
> iv) Whilst recognising that there is already relatively strong *de facto* environmental protection, MPA designation would greatly increase the coherence and overall value of existing BIOT conservation policies, providing a very cost-effective demonstration of UK government's commitment to environmental stewardship and halting biodiversity loss.
>
> v) MPA designation for the BIOT area would safeguard around half the high quality coral reefs in the Indian Ocean whilst substantially increasing the total global coverage of MPAs. If all the BIOT area were a no-take MPA it would be the world's largest site with that status, more than doubling the global coverage with full protection. If multi-use internal zoning were applied, a BIOT MPA could still be the world's second largest single site.

[45] *Marine conservation in the British Indian Ocean Territory: science issues and opportunities*, Report of workshop held 5-6 August 2009, Southampton, UK, available at http://www.oceans2025.org/PDFs/SOFI%20Workshop%20Reports/SOFI_Workshop_Report_10_BIOT_Brochure_revised.pdf (UKPO, annex 17)

[46] *Ibid*., p. 3.

vi) Phasing-out of the current commercial tuna fisheries would be expected. Nevertheless, this issue would benefit from additional research attention to avoid unintended consequences.

vii) Climate change, ocean acidification and sea-level rise jeopardise the longterm sustainability of the proposed MPA. They also increase its value, since coral reef areas elsewhere (that are mostly reduced in diversity and productivity) seem likely to be more vulnerable to such impacts.

viii) To safeguard and improve the current condition of the coral reefs, human activities need to continue to be very carefully regulated. Novel approaches to wider sharing of the benefits and beauty of the MPA would need to be developed, primarily through 'virtual tourism'.

ix) Many important scientific knowledge gaps and opportunities have been identified, with implications both for BIOT MPA management and for advancing our wider understanding of ecosystem functioning, connectivity, and the sustained delivery of environmental goods and services.

x) Further consideration of the practicalities of MPA designation would require increased attention to *inter alia* site boundary issues, possible zoning, and socio-economic considerations, with wider engagement and consultations expected to involve other UK government departments; neighbouring nations (e.g. Mauritius, Seychelles and Maldives); NGOs with interests; and other stakeholder groups (including Chagossian representatives)."

2.37 Based on the outcome of the NOC workshop and informal consultations with stakeholders, the decision was made at the end of October to launch a formal public consultation process under the Government's *Code of Practice on Consultation*[47].

2.38 The consultation, opened on 10 November 2009, asked for a response to four questions:

"1. Do you believe we should create a marine protected area in the British Indian Ocean Territory?

If yes, from consultations with scientific/environmental and fishery experts, there appear to us to be 3 broad options for a possible framework:

(i) Declare a full no-take marine reserve for the whole of the territorial waters and Environmental Preservation and Protection Zone (EPPZ)/Fisheries Conservation and Management Zone (FCMZ); or

[47] The BIOT Administration is not bound by the Code, but due to anticipated international and public interest in the MPA proposal it was concluded that a formal consultation was appropriate to help "assess whether a marine protected area is the right option for the future environmental protection of the British Indian Ocean Territory": "FCO consultation document: Consultation on whether to establish a marine protected area in the British Indian Ocean Territory", p. 2 (MM, annex 152).

(ii) Declare a no-take marine reserve for the whole of the territorial waters and EPPZ/FCMZ with exceptions for certain forms of pelagic fishery (e.g., tuna) in certain zones at certain times of the year.

(iii) Declare a no-take marine reserve for the vulnerable reef systems only.

2. Which do you consider the best way ahead? Can you identify other options?

3. Do you have any views on the benefits listed at page 11? What importance do you attach to them?

4. Finally, beyond marine protection, should other measures be taken to protect the environment in BIOT?"

2.39 It was made clear in the consultation document that any decision to establish a marine protected area would be taken in the context of the current position under the law of BIOT that there is no right of abode in BIOT and that all visitors need a permit, would not affect the commitment to cede BIOT to Mauritius when no longer needed for defence purposes, and would be without prejudice to the outcome of the proceedings pending before the European Court of Human Rights in *Chagos Islanders* v. *United Kingdom*[48].

2.40 The consultation was advertised by the FCO and reported widely in the press in the United Kingdom, Mauritius and the Seychelles. The Mauritius Government was given a copy of the consultation document in advance of the announcement of the consultation, and the Foreign Secretary telephoned the Mauritian Prime Minister on 10 November 2009.

2.41 The consultation ran until 5 March 2010 and was carried out by an independent facilitator. Over a quarter of a million people responded. Most of those numbers came through petitions, but included 450 written responses, 225 statements of support, over 250 responses to an alternative questionnaire submitted by the Diego Garcian Society (representing Chagossians resident in the United Kingdom), the outcomes of oral discussions held with people representing the Chagossian community in Mauritius[49], Seychelles[50] and the United Kingdom[51], as well as Seychelles-based environmental and fishing bodies. The responses included those of a large number of representatives from the scientific and academic community, 50 environmental organisations and networks, a number of fishing bodies from Europe and Japan and the Seychelles Fishing Authority and Indian Ocean Tuna Commission. Of those who supported one of the three listed options for a marine protected area, the great majority supported option (i), i.e., a full no-take marine reserve[52].

[48] *Ibid*., pp. 12-13.
[49] By video conference, on 4 March 2010.
[50] At meetings on 24-27 January 2010.
[51] At a meeting on 6 February 2010.
[52] MM, annex 165.

2.42 The Foreign Secretary decided to go ahead with option (i), instructing the BIOT Commissioner to declare a marine protected area accordingly on 1 April 2010[53] and advising the Prime Minister of Mauritius of the decision by telephone. The FCO's press release of the same date reiterated that creation of the MPA would not change the United Kingdom's commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes and that it was without prejudice to the outcome of the proceedings before the European Court of Human Rights[54].

(iii) Implementation of the BIOT MPA

2.43 The MPA was formally declared by the BIOT Commissioner's Proclamation No. 1 of 2010 dated 1 April 2010[55]. Detailed legislation implementing the MPA is being prepared. In the meantime, the ban on commercial fishing in the MPA is implemented under the existing fisheries legislation[56]. Commercial fishing licences have not been granted since 2009. Permits continue to be issued for non-commercial fishing, i.e., for personal consumption by people on yachts mooring temporarily at specified areas in the outer islands. Recreational fishing in the area outside the MPA in the waters around Diego Garcia continues to be permitted and monitored under rules already in place. The prohibition on fishing without a licence in BIOT waters continues to be enforced by the BIOT patrol vessel and protection officers.

2.44 The funding of the MPA is by a public-private partnership between the BIOT Administration and private sector NGOs, including Pew and the Bertarelli Foundation. The BIOT Administration, with the support of the United Kingdom Government and the National Environment Research Council, has established a Scientific Advisory Group to advise the BIOT Administration on the scientific aspects of managing the MPA. The core of this work is to establish research baselines and to prioritise proposals for research. The United Kingdom Government (through its Department for the Environment, Food and Rural Affairs (DEFRA)) has awarded a grant for further research in the BIOT which will fund three more scientific surveys of the BIOT marine environment over the next two and a half years in addition to the two which have already taken place since the MPA was established. The BIOT Administration funds the Chagossian Community Environment Project, a programme set up by the London Zoological Society and the CCT, which aims to work with Chagossian communities to raise awareness of environmental issues and provide opportunities in the field

[53] *Ibid*.
[54] *Ibid*.
[55] MM, annex 166.
[56] See para. 2.24 above.

of conservation[57], and funded Chagossian participation in a habitat restoration project on Diego Garcia in June and July 2011.

2.45 The 2012 White Paper on the Overseas Territories summarised the environmental protection policy relating to BIOT in the following terms:

> "Within the British Indian Ocean Territory we are committed to similarly high standards of environmental protection. The Administration of the British Indian Ocean Territory has developed a legislative framework which underpins the protection of sites and species of particular importance, and has also designated special reserves. These include an area of Diego Garcia which has been designated as a Wetland of International Importance under the Ramsar Convention on Wetlands. This work, together with the establishment of the no-take marine protected area in 2010, has contributed to the very high levels of nature conservation achieved in the Territory and highlights the UK's intention to ensure the on-going protection of this unique environment. We will work with the newly established, multidisciplinary Science Advisory Group and other relevant stakeholders to take forward this work and deliver effective management measures."[58]

2.46 In light of the above, Mauritius' suggestion that the "true purpose of the 'MPA' is not conservation"[59] is simply not credible.

[57] As reported in the *Chagos News*, Periodical Letter of the Chagos Conservation Trust and Chagos Conservation Trust US, No 40 July 2012, pp. 15-17, available at http://www.chagos-trust.org/sites/default/files/images/Chagos%20News%2040.pdf. (UKPO, annex 18)

[58] *The Overseas Territories: Security, Success and Sustainability*, Cm 8374, p. 46, available at http://www.fco.gov.uk/resources/en/pdf/publications/overseas-territories-white-paper-0612/ot-wp-0612 (UKPO, annex 16).

[59] Statement of Claim, para. 4. See also MM, paras. 7.98. See also the references in the Memorial to a "purported conservation measure" (para. 1.15) and "the rhetoric of environmental protection" (para. 1.18).

CHAPTER III

THE TRIBUNAL HAS NO JURISDICTION OVER MAURITIUS' SOVEREIGNTY CLAIM

A. Introduction: the Real Issue in Dispute

3.1 As the Court held in *Nuclear Tests*: "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim.[60]" To similar effect, the Court held in *Fisheries Jurisdiction (Spain* v. *Canada),* referring to its past jurisprudence:

> "The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262-263)."[61]

3.2 The identification of the real issue in dispute is of particular importance given that, as is considered further in Sections B and C below, it is for Mauritius to establish that there is a "dispute concerning the interpretation or application of this Convention", as is required by article 288(1) of UNCLOS.

3.3 It is of course the case that Mauritius has sought to present its claims – in particular in its Memorial – as claims made within article 288(1) of UNCLOS; but as explained in Chapter II above, the present proceedings form part of a broader picture in which Mauritius seeks to raise its sovereignty claims in as many fora as possible.

3.4 Indeed, although at paragraphs 2 to 5 of its Notification and Statement of Claim, Mauritius purports to introduce the "MPA dispute", the central features of this purported dispute are –

a. The so-called 'dismemberment' of Mauritius in 1965 by the UK's establishment of BIOT (Notification, paragraph 2);

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[60] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30.

[61] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 31.

b. Mauritius' claim to the Chagos Islands, now reflected in Section 111 (Interpretation) of its Constitution, but also various related claims to an exclusive economic zone and continental shelf that includes the Chagos Islands (Notification, paragraph 3);

c. Complaints as to the UK's assertions of sovereignty over the Chagos Archipelago, and the assertion that the "United Kingdom is not (in regard to the Chagos Archipelago) a "coastal state" within the meaning of the 1982 Convention" (Notification, paragraph 4);

d. Finally, the alleged dispute, described as including, but not limited to "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention, under which the 'MPA' has purportedly been established, and the interpretation and application of the term "coastal State" in Part V of the 1982 Convention" (Notification, paragraph 5).

3.5 It is not difficult to unpick this. The question of "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention" turns on the question of which State has sovereignty over BIOT. The question of "the interpretation and application of the term "coastal State" in Part V", i.e. of whether the UK is the coastal State[62], again turns on the question of who has sovereignty over BIOT.

3.6 The first and principal part to the argument now outlined by Mauritius at paragraph 1.3 of its Memorial is that: "The UK does not have sovereignty over the Chagos Archipelago, is not "the coastal State" for the purposes of the Convention, and cannot declare an "MPA" or other maritime zones in this area." The determination that the Tribunal is invited to reach here and elsewhere in the Memorial is that Mauritius has "retained sovereignty over the Chagos Archipelago at all times"[63].

3.7 It is this issue of sovereignty that is "the real issue in the case" (see *Nuclear Weapons* above), and that has been the subject of extended exchanges and other forms of claim over many years (see further Chapter IV below).

3.8 While Mauritius has made reference to the Annex VII Tribunal's Award in *Guyana* v. *Suriname*, and the application there of provisions of the UN Charter and principles of customary international law[64], the reasoning in that case serves only to identify the

[62] See Notification, para. 11(2).
[63] See e.g. MM, para. 6.35.
[64] MM, para. 5.33.

unsustainable nature of the position that Mauritius is now taking. As the *Guyana* v. *Suriname* Tribunal explained with respect to the maritime delimitation case then before it:

> "This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties."[65]

3.9 By contrast, the dispute before this Tribunal has as its principal concern the long-standing question of territorial sovereignty over BIOT. There is a reversal of the position considered in *Guyana* v. *Suriname* above. It is the (artificial) claims which Mauritius seeks to bring before this Tribunal as to the "respective rights to declare and delimit an exclusive zone under Part V of the 1982 Convention" and "the interpretation and application of the term "coastal state" in Part V"[66] that are incidental to the real dispute between the Parties, i.e. the dispute concerning sovereignty over BIOT.

3.10 The question for the Tribunal is whether it has jurisdiction under article 288(1) UNCLOS to determine that real dispute (sovereignty). As detailed further in Sections B and C below, the United Kingdom's position is that it does not. In arguing otherwise, Mauritius seeks an expansion of jurisdiction that is inconsistent with the plain wording of article 288(1) UNCLOS and unsupported by jurisprudence. Such an expansion could have potential and serious implications so far as concerns accession to UNCLOS (and indeed denunciation thereof). The States Parties to the Convention did not agree to the extensive "ancillary" jurisdiction on which Mauritius relies, and the fact that a series of highly contentious territorial disputes would, on Mauritius' analysis, inevitably also be susceptible to compulsory dispute resolution under Part XV serves as a powerful illustration of the radical, but also misconceived, nature of its contentions.

B. The Basis of the Tribunal's Jurisdiction under Part XV UNCLOS

(i) Articles 286-288 UNCLOS determine the scope of jurisdiction under Part XV

3.11 Mauritius contends by reference to article 286 of UNCLOS that 'the scope of jurisdiction under Part XV is intended to be broad'[67]. The contention is incorrect. The scope of jurisdiction under Part XV is neither broad nor narrow; it is what it is, and the question is

[65] *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits*, Award of 17 September 2007 (2008) 47 ILM 166, at para. 401.
[66] See Notification, para. 5.
[67] MM, para. 5.10.

not one of characterisation, but merely whether a given claim fits within a jurisdiction established in straightforward language. In this respect, article 286 establishes three important limitations on the jurisdiction of a court or tribunal under Part XV.

3.12 First, the rule on compulsory dispute settlement that is established by article 286 applies "[s]ubject to section 3", i.e. subject to the "Limitations and Exceptions to Applicability of Section 2" that are set out in section 3 of Part XV. Mauritius asserts that these limitations and exceptions "should not be expansively interpreted, and in particular should not be interpreted in such a way as to deny practical effect to Part XV"[68]. That assertion is not supported in any way. The provisions of section 3 of Part XV fall to be interpreted in accordance with the rules on interpretation set forth in the Vienna Convention on the Law of Treaties. The existence of limitations and exceptions as are now to be found in section 3 was of central importance to the agreement of many States Parties to compulsory dispute settlement under UNCLOS[69].

3.13 Secondly, article 286 only applies where no settlement has been reached by recourse to section 1 of Part XV, a matter dealt with in Chapter IV below.

3.14 Finally, and most important for the objection to jurisdiction over Mauritius' sovereignty claim, article 286 only establishes a right to submit disputes "concerning the interpretation or application of this Convention". To similar effect, article 287 provides that States shall be free to choose any of the means of settlement prescribed in that article for "disputes concerning the interpretation or application of this Convention". Article 288(1) of UNCLOS in turn provides:

> "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

3.15 By using, on each occasion, the expression "dispute(s) concerning the interpretation or application of this Convention" the States Parties established a fundamental limitation on the scope of jurisdiction under Part XV[70].

3.16 Article 288(2) makes this all the more clear. It provides for a court or tribunal to have jurisdiction over a dispute concerning the interpretation or application of any other international agreement related to the purposes of UNCLOS, but only where the dispute is

[68] MM, para. 5.14.
[69] See e.g. M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary (Virginia Commentary)*, Vol. V, Commentary to art. 297, at 297.1 (and see under para. 3.40 below).
[70] See also e.g. arts. 279, 280, 281, 282, 283, 284; also art. 187(a).

submitted in accordance with that separate agreement:

> "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."[71]

3.17 Only if the other rules of international law that Mauritius asserts in Chapter 6 of its Memorial were contained in an agreement that provides for UNCLOS dispute settlement would a Part XV court or tribunal have the enlarged jurisdiction contemplated by article 288(2).

3.18 The rules of international law that Mauritius asserts in Chapter 6 of its Memorial are said to be derived from the Charter of the United Nations and United Nations General Assembly resolutions 1514(XV) and 2066(XX). They comprise:

a. The principle of self-determination[72], to be exercised in accordance with the free will of the people concerned as opposed to under duress[73];

b. The principle of territorial integrity stated in General Assembly resolution 1514(XV), paragraph 6[74], as supported by the principle of *uti possidetis*[75];

c. The competence of the General Assembly to pronounce on rights to self-determination, and specific pronouncements in respect of Mauritius[76].

3.19 Disputes as to the interpretation or application of these rules (including as to whether they establish binding obligations on States) are not disputes concerning the interpretation or application of UNCLOS within article 288(1). As none of them falls within the terms of article 288(2) (see above), they are beyond the jurisdiction of the present Tribunal. The same applies with respect to the series of alleged undertakings on which Mauritius relies[77]. Mauritius's contentions to the contrary are addressed in Section C below.

(ii) Jurisdiction under Part XV is not expanded by article 293(1)

3.20 This outcome cannot be avoided, and the jurisdiction of the Tribunal enlarged,

[71] See also Annex VI, arts. 21-22.
[72] MM, paras. 6.10-6.14.
[73] MM, paras. 6.25-6.28.
[74] MM, paras. 6.15-6.18.
[75] MM, paras. 6.23-6.24.
[76] MM, paras. 6.19-6.22.
[77] MM, paras. 6.37-6.52.

through reliance on article 293(1) UNCLOS, which in no sense expands the scope of the Tribunal's jurisdiction under article 288(1)[78]. Arguments to that effect were run by Ireland in cases against the UK concerning the MOX Plant facility at Sellafield, and were correctly rejected.

3.21 In the Order of 24 June 2003 in the *MOX Plant* case[79], the Annex VII tribunal stated as follows:

> "The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible."[80]

3.22 The above passage was cited with approval in the Partial Award in the *Eurotunnel* case, the Tribunal noting that "this distinction between the scope of the rights and obligations which an international tribunal has jurisdiction to enforce and the law which it will have to apply in doing so is a familiar one"[81]. The Tribunal in *Eurotunnel* decided that its function was limited to deciding claims falling within the instruments establishing its jurisdiction (the Concession Agreement of 14 March 1986 and the UK/France Treaty to which it referred)[82]. Thus, it rejected the claimants' case to the effect that it could apply, and determine breach of,

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[78] Cf. Notification, para. 9, and MM, paras. 5.29, 5.33 and 6.4.

[79] *MOX Plant Case (Ireland* v *United Kingdom), Procedural Order No. 3, of 24 June 2003*. The Tribunal may recall that, pursuant to this Order, the proceedings in the *MOX Plant* case were suspended pending further possible (and then actual) proceedings before the European Court of Justice, which subsequently found that Ireland had breached obligations under the EC Treaty by commencing the UNCLOS claim. In its judgment of 30 May 2006, the European Court of Justice found that, by instituting the proceedings before the Annex VII Tribunal, Ireland had failed to fulfil its obligations under Articles 10EC and 292EC and under Articles 192EA and 193EA: Case C-459/03, *Commission* v *Ireland* [2006] ECR I-4635. The UNCLOS claim was subsequently withdrawn by Ireland (on 15 February 2007).

[80] *Ibid*., at para. 19, emphasis added. Consistent with this "cardinal distinction", see also *Fisheries Jurisdiction (Spain* v. *Canada) Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432 at p. 456, para. 55: "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits after having established its jurisdiction and having heard full legal argument by both parties."

[81] *Eurotunnel (Channel Tunnel Group and France-Manche* v. *UK and France)*, Partial Award of 30 January 2007, ILR 132, 1, at para. 152.

[82] See clause 40.1 of the Concession Agreement of 14 March 1986, providing: "Any dispute between the Concessionaires or either of them and the Principals or either of them relating to this Agreement shall be submitted to arbitration in accordance with the provisions of Article 19 of the Treaty at the request of any party." *Ibid*., at para. 97.

exterior agreements by reference to the applicable law clause[83].

3.23 To similar effect to both the *MOX Plant* and *Eurotunnel* cases, the Tribunal constituted in respect of the second of Ireland's two claims with respect to the MOX Plant facility at Sellafield found that the broad applicable law provision in the OSPAR Convention did not "transform it [the OSPAR Convention] into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention"[84]. This determination was made against the backdrop of Article 32(1) of the OSPAR Convention, which is substantially similar to article 288(1) UNCLOS in terms of conferring jurisdiction on an arbitral tribunal in respect of "Any disputes between Contracting Parties relating to the interpretation or application of the Convention …"[85].

3.24 A similar approach may also be discerned in the *Bosnian Genocide* case (merits phase), where the International Court of Justice held:

> "The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. ... It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*."[86]

3.25 It was not then open to Bosnia and Herzegovina to seek to expand jurisdiction by reference to Article 38(1) of the Court's Statute.

3.26 In respect of jurisdiction founded on Article 36(1) of the Statute, i.e. jurisdiction based on a compromissory clause in a treaty (as in the *Bosnian Genocide* case and as in the present case), the scope of jurisdiction will be controlling of the law applicable to the dispute.

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[83] See clause 40.4 of the Concession Agreement of 14 March 1986, providing: "In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those rules is necessary for the implementation of particular obligations under English law or French law. In general [En outre], recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity." *Ibid*., at para. 99.

[84] *Case concerning the OSPAR Convention*, Award of 2 July 2003, XXIII *RIAA* 59, paras. 84-85.

[85] As to the applicable law provision, a tribunal constituted under the OSPAR Convention is mandated to decide disputes "according to the rules of international law and, in particular, those of the Convention" (Article 32(6)(a)).

[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J.Reports 2007*, p. 43, at p. 104, para. 147.

The matter is addressed by Rosenne, in respect of Article 36 of the Court's Statute, in the following terms:

> "There is another major difference between jurisdiction under paragraph 1 and jurisdiction under paragraph 2. That relates to the 'sources' of the law to be applied by the Court. Where the jurisdiction is based on paragraph 1, the Court is empowered only to apply that treaty. Where it is based on paragraph 2, the Court's jurisdiction may allow it and even require it to have recourse to rules of customary international law which resemble the rules of a treaty but which exist independently of the treaty, if for any reason that treaty is excluded from the scope of the jurisdiction of the Court in that particular case."[87]

3.27 Thus, Article 38(1) of the Court's Statute, setting out the sources of international law, cannot be used to extend the jurisdiction of the Court under Article 36(1) of the Statute[88].

3.28 As all this makes plain, the jurisdiction of a court or tribunal seised of a dispute on the basis of a compromissory clause akin to that relied upon in the present case extends only to matters that come within the scope of that clause, and does not include the interpretation or application of other international agreements or of customary international law.

3.29 That does not, of course, mean that Article 38 of the ICJ Statute, or any applicable law provision in a given treaty such as article 293(1) UNCLOS, becomes redundant. As the Court further explained in the *Bosnian Genocide* case:

> "The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts."[89]

3.30 The Tribunal in the *Eurotunnel* case explained the purpose of the applicable law provision before it (clause 40.4 of the 1986 Concession Agreement) in similar terms:

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[87] *The Law and Procedure of the International Court, 1920-1996*, Volume II, at p. 668.

[88] See also *Mavrommatis Palestine Concessions* case, where jurisdiction was founded on a provision conferring jurisdiction in respect of disputes relating to "the interpretation or application of the provisions of the Mandate". The PCIJ concluded: "The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible ...; but in every case it must relate to the interpretation or application of the provisions of the Mandate." *PCIJ Reports*, Series A No.2 (1924), pp.15-16. See also Louis Sohn in his Hague lectures on *The Settlement of Disputes Relating to the Interpretation and Application of Treaties*: 1976 II Hague Recueil, at pp. 237-272.

[89] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 105, para. 149.),

> "The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement (and the Treaty as given effect by the Concession Agreement) does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. But it is the relationship between the Principals and the Concessionaires as defined in Clause 41.1 on which the Tribunal is called to pronounce."[90]

3.31 It is submitted that this approach applies equally with respect to the intended interplay between articles 288(1) and 293(1) UNCLOS, it being recalled that article 293(1) established that the question of applicable law is predicated on the prior existence of jurisdiction: "A court or tribunal *having jurisdiction under this section* shall apply this Convention and other rules of international law not incompatible with this Convention" (emphasis added).

3.32 So far as concerns the role of article 293(1) UNCLOS, other rules of international law may be relevant to the court or tribunal's decision as regards a dispute concerning the interpretation or application of UNCLOS where the specific provisions of UNCLOS that form the basis of the complaint themselves expressly require that other non-UNCLOS rules of international law be taken into account or applied. Clear examples of such an approach are articles 74 and 83 UNCLOS, which respectively address delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts. Paragraph 1 of these articles provides that delimitation "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice". In each of these articles, paragraph 4 provides that "[w]here there is an agreement in force between the States concerned, questions relating to the delimitation of the [exclusive economic zone] [continental shelf] shall be determined in accordance with the provisions of that agreement"[91].

3.33 In the absence of any such *renvoi*, and assuming that article 288(2) does not apply in the given case, the "other rules of international law" to which article 293(1) refers will only be relevant to a dispute within the jurisdiction of a Part XV court or tribunal:

a. Where such rules arises incidentally in the course of a dispute, principally in the form of secondary rules of international law, such as those relating to State

[90] See n. 80 above, para. 151.

[91] See e.g. *Barbados* v. *Trinidad and Tobago*, Award of 11 April 2006, para. 222: "This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules."

responsibility or the law of treaties;

b. Where they are to be taken into account, together with the context, in interpreting a treaty in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. This permits, in article 31(3), account to be taken for purposes of interpretation of a treaty *inter alia* of (a) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", (b) "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and (c) "any relevant rules of international law applicable in the relations between the parties".

3.34 This interpretation is consistent with the object and purpose of the 1982 Convention as recorded in the very first paragraph of its preamble. There, the States Parties in agreeing to the Convention were: "*Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea ..." (emphasis added). It is likewise consistent with the *travaux* relating to article 293(1), where there is nothing to suggest an intention in respect of any broader application of laws external to the Convention in the context of dispute settlement[92].

C. The Absence of Jurisdiction over Mauritius' Sovereignty Claim

(i) The issues that the Tribunal is called upon to determine

3.35 When it comes to the application of article 288(1) in the instant case, it is useful to set out first the list of issues that the Tribunal would have to determine before it could (even on Mauritius' case) find breaches of the specific provisions of UNCLOS on which Mauritius relies in relation to its sovereignty claim. These are:

a. That the detachment of the Chagos Archipelago was contrary to a right of self-determination that Mauritius is entitled to assert[93], which in turn comprises a series of findings as to (i) the relevant unit of self-determination (by reference to resolutions of the General Assembly and the principle of *uti possidetis*), and (ii) the competence of the General Assembly to interpret the right of self-

[92] While the *travaux* provide little guidance as to the rationale for the words "and other rules of international law not incompatible with the Convention", the *Virginia Commentary* at Vol. V, p. 73 states that "with respect to international law there was insistence that some of its rules might become obsolete after the adoption of the Convention, and that the Convention must take precedence over them. Consequently, … it was made clear that other rules of international law would not be applied in case of their incompatibility with the Convention." This does not suggest that article 293(1) was intended to establish some form of unlimited jurisdiction, subject only to absence of incompatibility with the Convention.

[93] MM, paras. 6.10-6.24.

determination;

b. That there was no valid agreement to the detachment of the Chagos Archipelago[94];

c. That Mauritius has continuously asserted its sovereignty over the Chagos Archipelago and that the United Kingdom has recognised that sovereignty in certain respects[95];

d. That Mauritius thus has retained sovereignty over the Chagos Archipelago and is the (or a) coastal State for the purposes of the Chagos Archipelago[96];

e. That the United Kingdom has in any event given a series of enforceable undertakings that deny to the United Kingdom the entitlement to act as the coastal State within the meaning of the Convention, and that Mauritius is on this separate ground entitled to avail of itself of the rights of a coastal State[97].

3.36 It is recalled that this is not a case where jurisdiction can be established over these matters by reference to article 288(2).

(ii) Application of article 288(1)

3.37 The question then is whether disputes in relation to the above matters constitute disputes concerning the interpretation or application of the Convention. The answer is clear: they do not.

3.38 Mauritius seeks to avoid this straightforward conclusion by asserting that (i) the dispute placed before the Tribunal turns on the interpretation or application of the words 'the coastal State' in articles 2(1), 55, 76 and/or 77 and/or 81 of the Convention, and is not excluded by article 297(1)[98]; (ii) with particular reference to article 298(1), issues of sovereignty or other rights over continental or insular land territory which are 'closely linked or ancillary to maritime delimitation and to other issues raised under the Convention' self-evidently concern the interpretation or application of the Convention[99]; and (iii) in the light of article 293(1), an Annex VII tribunal can exercise jurisdiction over alleged violations of the

[94] MM, paras. 6.25-6.30.
[95] MM, paras. 6.31-6.34.
[96] MM, paras. 6.34-6.36.
[97] MM, paras. 6.37-6.52.
[98] MM, para. 5.25.
[99] MM, paras. 5.26-5.31.

UN Charter and obligations derived from General Assembly resolution 1514(XV)[100]. These three lines of argument are dealt with in turn below.

3.39 The ***first line of argument*** comes down to no more than the assertion that, because various (in fact, many) provisions of UNCLOS use the term 'coastal State', one or more of which provisions is relied on in the context of a given claim, a court or tribunal has jurisdiction under Part XV to resolve all or any disputes over sovereignty to determine whether State A or State B (or indeed State C) is indeed the 'coastal State'. On this argument, UNCLOS has indeed created a broad jurisdiction, one that is unparalleled in international law in terms of determining issues of the most central importance to States, i.e. the extent of territorial sovereignty.

3.40 However, there is nothing in the text of UNCLOS, or in the *travaux*, to suggest that this is an intention reflected in Part XV. In this respect:

a. The States Parties expressly and materially restricted the types of disputes concerning the exercise by a coastal State of its sovereign rights under the Convention: see article 297(1). It would have been bizarre to agree to such a restriction on settlement of disputes concerning the exercise of rights, and yet to agree at the same time to jurisdiction over the anterior and more fundamental question as to whether there was any entitlement to such sovereign rights in the first place, i.e. whether the given State asserting sovereign rights was the coastal State. Neither the wording of article 297(1), nor any other provision of Part XV, nor indeed any of the substantive provisions of the Convention, suggest that such an agreement was reached.

b. As to the negotiating history of the Convention, the *Virginia Commentary* explains that –

> "The acceptance of many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned upon the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision. There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision. When Ambassador Reynaldo Galindo Pohl (El Salvador) introduced the first general draft on the settlement of disputes at

[100] MM, paras. 5.32-5.33.

> the second session of the Law of the Sea Conference (1974), he immediately highlighted the need for exceptions from obligatory jurisdiction with respect to 'questions directly related to the territorial integrity of States.' Otherwise, a number of States might have been dissuaded from ratifying the Convention or even signing it"[101].

Even assuming in Mauritius' favour that article 298(1)(a) were correctly interpreted as implying that, where there is no article 298(1)(a) declaration, a court or tribunal may rule on matters of territorial sovereignty that arise incidentally where there is a maritime delimitation dispute under article 15, 74 or 83, it is inconceivable that States Parties to the Convention would have agreed to the determination of matters of territorial sovereignty that arose in other contexts without an equivalent opt out provision. The absence of any such provision is a very obvious indicator that no "broad" jurisdiction over such matters was intended or established.

3.41 The ***second line of argument*** of Mauritius is that a court or tribunal has an unlimited jurisdiction to decide matters "closely linked or ancillary to maritime delimitation and to other issues raised under the Convention"[102].

3.42 The Tribunal will be well aware of the debate with respect to jurisdiction over so-called "mixed disputes". However, the Tribunal need not enter into the detail of that debate, which concerns whether a court or tribunal under Part XV of the Convention can decide both maritime boundaries and incidental territorial issues, as Mauritius is in fact seeking an unwarranted and unsupported extension of the underlying (if controversial) principle from the discrete area of maritime delimitation so as to apply in respect of any "other issues raised under the Convention"[103].

3.43 In this respect, it is useful to set out in full the statement of Judge Hoffmann to which reference is made at paragraph 5.26 of the Memorial. Judge Hoffman said (referring to the statement of Judge Wolfrum before the sixty-first session of the General Assembly):

> "The Tribunal has noted that its jurisdiction over maritime delimitation disputes also include those which involve issues of land or islands. In his Statement before the 61st Session of the General Assembly, President Wolfrum stated that (and I quote)
>
> > 'This approach is in line with the principle of effectiveness and enables the adjudicative body in question to truly fulfill its function. Maritime boundaries cannot be determined in isolation without reference to territory. Moreover, several provisions of the Convention deal with issues of sovereignty and the inter-relation between land and sea. Accordingly, issues of sovereignty or

[101] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol. V, pp. 87-88, para. 297.1.
[102] MM, para. 5.26.
[103] *Ibid*.

other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope.' (end of quote)."[104]

3.44 There is nothing here to suggest that a court or tribunal under Part XV enjoys broad jurisdiction over issues of sovereignty or other rights over continental or insular land territory, i.e. other than where these are closely linked or ancillary to maritime delimitation.

3.45 Precisely the same point applies so far as concerns the statement of Judge Wolfrum to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, in New York, on 23 October 2006. He said:

> "It is apparent that maritime boundaries cannot be determined in isolation without reference to territory. Moreover, sea boundaries are associated with issues of sovereignty, such as the determination of entitlements over maritime areas, the treatment of islands, the identification of the relevant basepoints – whether they are located at sea, in river mouths or on terra firma – or the fixing of baselines including archipelagic baselines. Such issues of sovereignty and the inter-relation between land and sea are addressed in several provisions of the Convention, for instance, those concerning internal waters, the territorial sea, baselines, archipelagic States and the continental shelf. The presence of islands is a frequent factor in maritime delimitation and the regime of islands is provided in article 121 of the Convention.
>
> Issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope. This may be evidenced by a reading *a contrario* of article 298, paragraph 1(a), namely, in the absence of a declaration under article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal."[105]

3.46 It appears self-evident that this statement is predicated on an inter-relationship between land and maritime boundaries. That inter-relationship is reinforced through the reference to article 298(1)(a), which establishes an opt-out with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles". There is a debate as to the strength

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[104] Statement by Judge Hoffman, 46th Session of the AALCO, Cape Town, 2-6 July 2007, available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/hoffmann_aalco_050707_eng..pdf (UKPO, annex 19)

[105] R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006 http://www.itlos.org/news/statements/news_president.wolfrum.shtml (UKPO, annex 20). See also T. Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?" in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77.

of that inter-relationship[106], and whether it could extend the scope of matters falling within the 1982 Convention as Judge Wolfrum suggests (see further below); but there appears to be no underlying suggestion in the above statement to the effect that the Convention is intended to establish a roving jurisdiction over issues of territorial sovereignty wherever a State is characterised as a coastal State or otherwise as sovereign over land areas.

3.47 If it were otherwise, participation in UNCLOS would lead to the potential jurisdiction of a court or tribunal under Part XV in any of the myriad of cases where a coastal State exercises rights under the Convention wherever another State Party contested the territorial sovereignty of that State, and without that State being able to make any declaration excluding jurisdiction such as that provided for by article 298(1)(a) with respect to articles 15, 74 and 83. Thus, wherever a coastal State purported to exercise rights under e.g. articles 2-3, 19, 21-22, 24-26, 27-28, 30, 33 (and so on, to include rights under Part V of the Convention), or wherever an archipelagic State purported to exercise rights under Part IV of the Convention, a claimant contesting the underlying territorial sovereignty could bring a claim of breach of the relevant article, and (subject always to article 297) require the court or tribunal under Part XV to decide the issue of territorial sovereignty in order to establish whether rights under the Convention had or had not been validly exercised. And, as emphasised above, there would be no opt out available to the respondent State such as that contained in the specific circumstances envisaged by article 298(1)(a).

3.48 Part XV does not establish any such extended – and compulsory – jurisdiction over disputes concerning territorial sovereignty, and Mauritius' case to the contrary is misconceived, contrived and dangerous. Mauritius seeks to portray this case as *sui generis*[107], as it is evidently aware of the potential ramifications of the precedent it seeks to set. No doubt potential claimants – and there being a large number which may spring to mind – in any attempt to bring within Part XV territorial disputes would make the same submission as to their claims being *sui generis*. However, the reality is that Mauritius seeks to push the dispute settlement provisions of the Convention beyond the limits intended by the States Parties and, indeed, beyond the limits suggested by commentators in the context of the debate over "mixed disputes". This finds no support in the text of UNCLOS, whether in Part XV or elsewhere. A correct as opposed to innovative application of the provisions of Part XV could be crucial for universal participation in UNCLOS.

3.49 Insofar as it is appropriate to look further into the general debate over "mixed disputes", there are three points to make.

[106] See, e.g., P. Weil, *Perspectives du droit de la délimitation maritime* (1988), 99-102.
[107] See e.g., MM, para. 1.7.

3.50 First, the debate over "mixed disputes" should be left to be decided as and when (or if) it arises in the maritime delimitation context in which the debate has taken place. As matters stand, the proposition that issues of territorial sovereignty can be decided under Part XV in the context of maritime delimitation is very controversial, and it is noted that in *Guyana* v. *Suriname* the Annex VII tribunal did not address this controversy[108].

3.51 Secondly, the proviso to article 298(1)(a)(i) does no more than clarify that the general exclusion of consideration of unsettled territorial sovereignty disputes from compulsory dispute settlement also applies in the context of conciliation[109]. There is nothing in the (hard fought over) wording of articles 15, 74 and 83 that suggests any intention on States Parties to extend the scope of disputes concerning the interpretation or application of UNCLOS to matters of territorial sovereignty.

3.52 Thirdly, even where it is suggested that there may be jurisdiction over mixed disputes, it is recognised that there must be a limit to that jurisdiction. In this respect, the following potential criteria put forward by Judge Treves are of obvious importance:

> "It may be discussed whether this argument [on the *a contrario sensu* interpretation of article 298(1)(a)] is sufficient to support the view that all "mixed" boundary disputes, involving land sovereignty issues as well as maritime boundaries fall – in lack of a declaration under Article 298, paragraph 1(a) – within compulsory jurisdiction. Whether such jurisdiction can be considered as existing in this case may well depend on the way the case is presented by the plaintiff party, on which aspects are the prevailing ones, and on whether certain aspects can be separated from others, on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention."[110]

3.53 Thus a distinction would be drawn between cases where (i) an issue of territorial sovereignty arises incidentally to the central issue of maritime delimitation and (ii) the central thrust of the claim is to seek determination of a long-standing dispute over territorial sovereignty, but there is also an issue of maritime delimitation. Jurisdiction might be

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[108] *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits,* Award of 17 September 2007, (2008) 47 ILM 166, at para. 308, where it was stated: "The Tribunal recalls that Suriname argued that it does not have jurisdiction to determine any question relating to the land boundary between the Parties. The Tribunal's findings have no consequence for any land boundary that might exist between the Parties, and therefore, in light of Suriname's statement at the hearing discussed in Chapter IV, this jurisdictional objection does not arise."

[109] See, e.g., B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session" (1981) 75 AJIL 211, 233 fn. 109; P.C. Irwin, "Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations" (1980) 8 ODIL 105, 114-15, 138-39; K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (1987) 140; L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (1984) 244; L.B. Sohn, "Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?" (1983) 46 LCP 195.

[110] T. Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?" in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77.

established in respect of all aspects of (i), but evidently not in respect of the territorial sovereignty issues of (ii). If the mixed disputes analogy were somehow applicable in the current case, the obvious answer would be that, as outlined in Section A above, the current dispute falls clearly into the second of these two categories: it has as its principal object the question of territorial sovereignty over BIOT.

3.54 With respect to Mauritius' ***third line of argument***, which is dependent on a mis-application of article 293(1) UNCLOS, the United Kingdom refers to Section B above. Article 293(1) cannot be used to expand the limits of jurisdiction established by articles 286 and 288(1). As follows from Section B, whether non-UNCLOS rules of international law are to be taken into account and applied within the framework of UNCLOS will hinge on the terms of the provisions of UNCLOS which form the basis of the case in issue. None of the provisions on which Mauritius relies (articles 2(1), 55, 76 and/or 77 and/or 81) contains a *renvoi* to the principles on which Mauritius' case on the territorial issue depends, and likewise there is no basis for asserting jurisdiction over the alleged undertakings on which it relies. There is no other permitted basis for asserting jurisdiction over and applying such principles or the alleged binding undertakings.

3.55 By way of example, article 55 UNCLOS introduces the specific legal regime of the EEZ "under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention". There is no reference to principles of international law external to UNCLOS in that provision, and there is no other form of *renvoi*. To the contrary, the rights and jurisdiction in respect of the EEZ are expressly defined by reference to the Convention.

3.56 The term "coastal State" is used in specific articles of UNCLOS to address the jurisdiction, rights and duties of certain States in particular contexts. However, neither in article 55 nor elsewhere in the Convention is there any suggestion that the mere reference to the term "coastal State" in a disputed context would establish jurisdiction on the part of a court or tribunal under article 288(1) to rule on whether the State has the underlying territorial or any other form of sovereignty with respect to the relevant coast.

3.57 The wider context within which these provisions are found – UNCLOS as a whole – also militates against this view. As is illustrated by articles 74 and 83 of UNCLOS, where the drafters of the treaty wished to incorporate other rules of international law and require their application within the framework of UNCLOS, they did so expressly. This is not the position with those articles which form the basis of Mauritius' claim to sovereignty. By reference to the plain language of the provisions on which Mauritius relies, there is no basis for the Tribunal to apply other non-UNCLOS rules of international law to determine that claim.

D. Conclusion

3.58 As indicated above, it is for the Tribunal to identify the real issues in dispute. The real issue in dispute in this case is Mauritius' long-standing claim to sovereignty over the British Indian Ocean Territory. That is not a dispute "concerning the interpretation or application of this Convention", as is required by article 288(1) of UNCLOS.

3.59 Mauritius' attempts to transform the real issue in dispute into a dispute under the provisions of UNCLOS are unsustainable. Further, article 293(1), on applicable law, cannot be invoked to expand the jurisdiction under article 288(1) of a Part XV court or tribunal.

3.60 To borrow the words of Judge Koroma in the *Georgia* v. *Russia* case before the International Court of Justice: "a link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court"[111]. In the instant case, Mauritius is indeed seeking to use Part XV of UNCLOS as a vehicle for forcing the sovereignty dispute over BIOT before this Tribunal.

3.61 The Tribunal should not countenance that inappropriate attempt. The compulsory dispute settlement provisions in Part XV of UNCLOS were never intended to extend to issues of sovereignty over land territory, as is asserted by Mauritius in this case. Any expansion of their scope to cover such issues would, moreover, have serious consequences for the future of the Convention.

3.62 In the United Kingdom's submission, all of the claims in Mauritius' Notification and Statement of Claim concern or stem from Mauritius' claim to sovereignty over BIOT, which is the real issue in dispute. For the reasons given in the present Chapter, the Tribunal therefore has no jurisdiction over the dispute submitted by Mauritius (i.e., all the claims as now formulated). In the alternative, the Tribunal has no jurisdiction over Mauritius's claims to sovereignty made by reference to articles 2(1), 55, 76 and/or 77 and/or 81 of the Convention, and no jurisdiction over the other claims for the reasons given in Chapters IV and V below.

[111] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011: Separate Opinion of Judge Koroma, para 7.

CHAPTER IV

THE TRIBUNAL HAS NO JURISDICTION OVER MAURITIUS' OTHER CLAIMS BECAUSE THE REQUIREMENTS OF ARTICLE 283 HAVE NOT BEEN MET

A. Introduction

4.1 A court or tribunal only has jurisdiction under article 288(1) of the Convention if a 'dispute' concerning the interpretation or application of the Convention has been "submitted to it in accordance with" Part XV. Under article 286, a dispute concerning the interpretation or application of the Convention may be submitted to a court or tribunal having jurisdiction under section 2 only "if no settlement has been reached by recourse to section 1" of Part XV. The *renvoi* to section 1 takes in, *inter alia*, article 283(1), which requires the parties, when a dispute arises between them, to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". Thus, a tribunal has no jurisdiction under article 286, Part XV, section 2 unless (a) there is a dispute between the parties concerning the interpretation or application of the Convention; and (b) there has been recourse to section 1 and such recourse has not led to a settlement. Neither of these requirements has been met as regards Mauritius' other (non-sovereignty) claims in the present case, and so the Tribunal is without jurisdiction over those claims.

4.2 These claims are, in outline: that the MPA is unlawful because it is inconsistent with "certain specific rights" Mauritius has in respect of the British Indian Ocean Territory's ("BIOT") fisheries and minerals resources[112], and that the MPA "*qua* MPA" is unlawful because it is in breach of various obligations under the Convention, namely article 2(3) (because of Mauritius' alleged "certain specific rights"), articles 55 and 56(2) read in conjunction with article 297(1)(c), article 56(2) (again because of the alleged "certain specific rights"), articles 62(5), 63(1), 63(2), 64(1), 194(1) and 300, and article 7 of the "1995 Agreement" (referring to the United Nations Fish Stocks Agreement)[113].

4.3 However, Mauritius cannot demonstrate that a dispute existed between Mauritius and the United Kingdom with regard to the interpretation and application of the Convention in respect of any of these claims at the date of its Notification and Statement of Claim, for the simple reason that Mauritius never raised these claims with the United Kingdom before that

[112] MM, para. 5.2(i), second sentence and chapter 6(II).

[113] 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, New York, 4 August 1995: MM, para. 5.2(ii), as elaborated in para. 5.35, and chapter 7. It should be noted that the Tribunal is not a court or tribunal to which a dispute has been submitted under Part VIII of the UNFS Agreement.

date. Nor, *a fortiori*, can Mauritius demonstrate that it has met the requirement under article 283(1) to exchange views regarding the settlement of a dispute prior to the submission of its claims to the Tribunal.

B. Article 283(1)

4.4 Article 283 is entitled 'Obligation to exchange views'. Article 283, paragraph 1 reads as follows:

> "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

4.5 Article 283(1) means what it says: it requires, first, that "a dispute arises between States Parties concerning the interpretation or application of this Convention"[114] and, second, that the parties to the dispute then "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".

4.6 The importance of such requirements is emphasised in the recent jurisprudence of the International Court of Justice. In *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal)*[115], the Court concluded that it had no jurisdiction over Belgium's claim of a breach of customary international law because, in light of the diplomatic exchanges between the parties, no such dispute existed on the date of the application[116]:

> "54…The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention Against Torture. It is noteworthy that even in a Note Verbale handed over to Senegal on 16 November 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to 'the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the Convention Against Torture', without mentioning the prosecution or extradition in respect of other crimes… Under these circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr Habré under customary international law…

[114] As confirmed in the jurisprudence under UNCLOS, e.g., *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 36; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, Separate Opinion of Judge Nelson, para. 5 (speaking generally of the steps that must be taken before the mandatory procedures in Part XV, section 2, can be utilised).
[115] Judgment, 20 July 2012.
[116] See also para. 46, summarising the ICJ's jurisprudence on the existence of a dispute.

> 55. The Court concludes that, at the time of filing of the Application, the dispute between the Parties did not relate to breaches of the obligation under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto."

4.7 It is not necessary that a State refer to a specific treaty in its exchanges with the other State in order to enable it later to invoke that instrument before the court or tribunal, but

> "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice[117]."

4.8 Considering the condition under article 30(1) of the Convention Against Torture that "the dispute cannot be settled through negotiation"[118] in *Belgium* v. *Senegal*, the Court said:

> "57. … the Court must begin by ascertaining whether there was, "at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute" *(Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections,* Judgment of 1 April 2011, para. 157). According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked" (*ibid.,* para. 159). The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345)."

4.9 As the following passage illustrates, the Court concluded that the obligation had been met because there had been "several exchanges" and Belgium expressly stated it was acting under the Convention Against Torture:

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[117] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011, para. 30. See also *Arbitration between Barbados and the Republic of Trinidad & Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them* 11 April 2006, XXVII *RIAA* 149, para. 198.

[118] Article 30(1) of the Convention against Torture reads: "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

> "58. Several exchanges of correspondence and various meetings were held between the Parties concerning the case of Mr. Habré, when Belgium insisted on Senegal's compliance with the obligation to judge or extradite him. Belgium expressly stated that it was acting within the framework of the negotiating process under article 30 of the Convention against Torture in Notes Verbales addressed to Senegal on 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006 (see paragraphs 25-26 above). The same approach results from a report sent by the Belgian Ambassador in Dakar on 21 June 2006 concerning a meeting with the Secretary-General of the Ministry of Foreign Affairs of Senegal (see paragraph 26 above). Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations."

4.10 Article 283(1) is an important precondition for the Tribunal's jurisdiction. As explained by Judge Nelson in his Separate Opinion in *MOX Plant Case (Ireland v United Kingdom) (Provisional Measures)*[119],

> "2. The whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention. That was the intent of the drafters of the Convention…
>
> 3. It is in this context that article 282… should be read…
>
> 4. This provision, in my view, constitutes a hurdle which ought to be crossed before the procedures in section 2 of Part XV can be invoked."

Although the *MOX Plant (Provisional Measures)* decision concerned article 282, Judge Nelson's comments apply equally to article 283(1).

4.11 The importance of provisions such as article 283 in compromissory clauses was affirmed by the International Court of Justice in *Georgia* v. *Russia*[120] in the following terms:

> "131. … it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that 'before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).
>
> In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.

[119] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95.
[120] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011.

In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States. The Court referred to this aspect reflecting the fundamental principle of consent in the Armed Activities case in the following terms:

> '[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting the limits thereon*.' (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p. 39, para. 88; emphasis added.)"

C. The Application of Article 283(1) in this Case

(i) Mauritius' claims in its Memorial

4.12 Mauritius' case is summarised in paragraph 1.3 and repeated in paragraph 5.2 of its Memorial. It turns on two main arguments[121]:

> "(i) The UK does not have sovereignty over the Chagos Archipelago, is not "the coastal State" for the purposes of the Convention, and cannot declare an "MPA" or other maritime zones in this area. Further, the UK has acknowledged the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago, such that the UK may not impose the purported "MPA", or establish any maritime zones over the objections of Mauritius; and
>
> (ii) Independently of the question of sovereignty, the "MPA" is fundamentally incompatible with the rights and obligations provided for by the Convention, which means that, even if the UK were entitled in principle to exercise the rights of a coastal State, the purported establishment of the "MPA" is unlawful under the Convention."

4.13 The particulars of Mauritius' claim in paragraph 5.2(ii) of the Memorial that the MPA is unlawful "independently of the question of sovereignty" under the Convention are then to be found at paragraph 5.35[122]. It is necessary to summarise these particulars, to show that not

[121] MM, para. 5.2.

[122] MM, para. 5.23 lists 13 'elements of the dispute' in the order in which they are to be found in the Convention, i.e., all the provisions of the Convention that relate to the "sovereignty claim" (MM, para. 5.2(i)), set out in detail in Chapter 6. All the provisions that relate to the claim that, independently of the question of sovereignty, the MPA is fundamentally incompatible with the rights and obligations provided in the Convention" (para. 5.2(ii)), are set out in detail in Chapter 7 and MM, para. 5.35 particularises the 10 'elements of the dispute' that fall within Chapter 7. Para 5.35 largely repeats the list in para. 5.23, except for the references to article 2(1) (para. 5.23(i)), the article 55 dispute over "whether the UK is "the coastal State" having

one of these points was raised by Mauritius with the United Kingdom prior to the submission of its Notification and Statement of Claim to the Tribunal.

4.14 Mauritius claims that the United Kingdom has failed to comply with the following provisions:

(i) The provision in article 2(3) that "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law", by failing to have due regard to Mauritius' fishing and related rights and mineral rights in the territorial sea[123] (which are such "other rules of international law")[124];

(ii) The provision in article 55 that the "rights and jurisdiction of the coastal State… are governed by the specific legal regime in this Part" and the requirement in article 56(2) that, in "exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have regard to the rights and duties of other States and shall act in a manner compatible with this Convention", because the United Kingdom "has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention"[125] (although Mauritius does not say what these "specified rules and standards" are)[126];

(iii) The requirement in article 56(2) that, in "exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have regard to the rights and duties of other States", by failing to have "due regard to the rights" of Mauritius in respect of non-living resources in the part of the "MPA" that is beyond the territorial sea" of the BIOT[127];

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rights and jurisdiction in "an area beyond and adjacent to the territorial sea" (para. 5.23(iii)) and articles 76, 77 and 81 (para. 5.23(xi)).

[123] That is, the alleged "certain specific rights" in relation to the BIOT maritime area referred to in paragraph 5.3 of the Memorial – "fisheries rights, rights in mineral resources, and rights in relation to the continental shelf".

[124] MM, para. 5.35(i).

[125] Here Mauritius invokes the wording of the compromissory provision in article 297(1)(c). For further discussion of this aspect of Mauritius' claim, see paras. 5.6-5.13 below.

[126] MM, para. 5.35(ii).

[127] MM, para. 5.35(iii).

(iv) The requirement in article 62(5) to "give due notice of conservation and management laws and regulations"[128];

(v) The obligation in article 63(1) to "seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development" of straddling stocks of tuna, by failing to deal directly with Mauritius or the Indian Ocean Tuna Commission (IOTC)[129];

(vi) The obligation in article 63(2) to "seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of [straddling] stocks in the adjacent area" to the MPA, by failing to deal directly with Mauritius or the IOTC[130];

(vii) The obligation in article 64(1) to "cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of [highly migratory] species throughout the region, both within and beyond the exclusive economic zones", by failing to cooperate with Mauritius or with other States or appropriate international organisations[131];

(viii) The obligation in article 7 of the 1995 United Nations Fish Stocks Agreement to "make every effort to agree on compatible conservation and management measures within a reasonable time"[132];

(ix) The obligation in article 194(1) to "endeavour to harmonize" its policies in connection with measures "necessary to prevent, reduce or control pollution of the marine environment from any source", by not harmonising its policy with Mauritius or other States in the region[133];

(x) Article 300, by exercising its rights in a manner which constitutes an abuse of rights[134].

4.15 What is immediately apparent from this list is that, for the most part, it concerns alleged breaches of obligations of communication and cooperation that appear particularly

[128] MM, para. 5.35(iv).
[129] MM, para. 5.35(v).
[130] MM, para. 5.35(vi).
[131] MM, para. 5.35(vii).
[132] MM, para. 5.35(viii).
[133] MM, para. 5.35(ix).
[134] MM, para. 5.35(x).

apt for early identification and attempt at settlement. Mauritius now raises issues that might well have been addressed had Mauritius actually sought, as required by article 283(1), to explain its views as to how articles 55, 56(2), 62(5), 63(1), 63(2), 64(1) and 194(1) of the Convention would be or were being breached by either the consideration of the proposal for an MPA or the MPA itself.[135]

(ii) Mauritius has not met the requirements of article 283(1)

4.16 Mauritius relies on diplomatic correspondence and exchanges in 2009 and 2010 (set out in Chapter 4 of its Memorial), as evidence of "a full exchange of views between Mauritius and the UK concerning the dispute in regard to the "MPA" and related matters"[136].

4.17 But the evidence on which Mauritius relies shows that Mauritius did not assert at any point in its communications with the United Kingdom that the MPA was unlawful because it was incompatible with the terms of the Convention. Rather, Mauritius' contentions focused exclusively on its claim to territorial sovereignty over the BIOT. This is immediately apparent from a survey of the relevant extracts from the documentary record Mauritius has annexed to its Memorial. The Convention is not once referred to; nor indeed is the law of the sea.

4.18 The protest in the Note Verbale of 5 March 2009 sent by the Mauritian Ministry of Foreign Affairs, Regional Integration and International Trade to the United Kingdom, in response to the article on the proposed MPA published in *The Independent* on 2 February 2009, was phrased as follows:

> "… both under Mauritian law and international law, the Chagos Archipelago is under the sovereignty of Mauritius and the denial of enjoyment of sovereignty to Mauritius is a clear breach of United Nations General Assembly Resolutions and international law. The creation of any Marine Park in the Chagos Archipelago will therefore require, on the part of all parties that have genuine respect for international law, the consent of Mauritius"[137].

4.19 Similarly, in its second Note Verbale protesting the MPA, dated 10 April 2009, Mauritius said it

> "wishes to reiterate that it has no doubt of its sovereignty over the Chagos Archipelago and does not recognize the existence of the so-called British Indian Ocean Territory…

[135] The claims that rest on alleged obligations owed to the IOTC or under the United Nations Fish Stocks Agreement are clearly outside the jurisdiction of this Tribunal, as explained in Chapter V below.
[136] MM, para. 5.38.
[137] See MM para. 4.40, MM, annex 139.

> … whilst also supportive of domestic and international initiatives for environmental protection, would like to stress that any party initiating proposals for promoting the protection of the marine and ecological environment of the Chagos Archipelago, should solicit and obtain the consent of the Government of Mauritius prior to implementing such proposals.
> …the Government of United Kingdom has an obligation under international law to return the Chagos Archipelago in its pristine state to enable Mauritius to exercise and enjoy effectively its sovereignty…"[138]

4.20 A general reference to United Nations General Assembly resolutions and international law in complaints which turn on a claim of territorial sovereignty can hardly be read as raising a dispute as to whether the MPA, on its own terms, breaches the obligations of the United Kingdom or the rights of Mauritius as States Parties to UNCLOS.

4.21 Nor did Mauritius refer to UNCLOS in subsequent discussions and communications with the United Kingdom. It did not raise any question of the compatibility of the MPA with UNCLOS or any one of the provisions of UNCLOS (as listed in paragraph 4.14 above) on which its claim now rests. Nor did it say that its alleged "certain specific rights" were breached by the MPA[139] or were rights which UNCLOS required the United Kingdom to have regard to when declaring an MPA:

(i) The Joint Communiqué issued on the second round of bilateral talks on 21 July 2009 on the Chagos Archipelago/BIOT records that, in response to the proposal of the British delegation that "consideration be given to preserving the marine biodiversity in the waters surrounding the Chagos Archipelago/British Indian Ocean Territory by establishing a marine protected area in the region"[140],

> "The Mauritian side welcomed, in principle, the proposal for environmental protection and agreed that a team of officials and marine scientists from both sides meet to examine the implications of the concept with a view to informing the next round of talks. The UK delegation made it clear that any proposal for the establishment of the marine protected area would be without prejudice to the outcome of the proceedings at the European Court of Human Rights.
>
> The Mauritian side reiterated the proposal it made in the first round of the talks for the setting up of a mechanism to look into the joint issuing of fishing licences in the region of the Chagos Archipelago/British Indian Ocean Territory. The UK delegation agreed to examine this proposal and stated that such examination would also include consideration of the implications of the proposed marine protected area."

[138] MM, annex 142.
[139] A claim which would, in any event, be outside the jurisdiction of this Tribunal for the reasons set out in Chapter V below.
[140] MM, annex 148.

There is nothing in the Joint Communiqué that indicates that Mauritius questioned the lawfulness of the MPA under UNCLOS. The fact that Mauritius welcomed the proposal in principle reinforces the conclusion that no such point was raised.

(ii) Mauritius' Note Verbale dated 10 November 2009 asking the FCO to amend the Consultation Document raised no question about the legality of the MPA under UNCLOS or its alleged "certain specific rights"[141].

(iii) The Note Verbale to the United Kingdom dated 23 November 2009, after the public consultation was launched, said

> "The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in the talks on, the sovereignty issue.
>
> The stand of the Government of Mauritius is that the existing framework for talks on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the consultation launched by the British Government on the proposed MPA."[142]

The text speaks for itself. The Convention was not mentioned and no question was raised of the MPA's unlawfulness under the provisions of the Convention.

(iv) Nor did Mauritius make any complaint that the MPA breached the Convention in its statement of 4 December 2009 to the Scientific Committee of the Indian Ocean Tuna Commission. The focus was, once again, exclusively on sovereignty:

> "The establishment of a Marine Protected Area in the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago. A Marine Protected Area project in the Chagos Archipelago should address the issues of resettlement (Chagossians), access to the resources and the economic development of the islands in a

[141] MM, annex 151. See also MM, annex 153.
[142] MM, annex 155.

manner which would not prejudice the effective exercise by Mauritius of its sovereignty over the Archipelago. A total ban on fisheries exploitation and omission of those issues from any Marine Protected Area project would not be compatible with the resolution of the sovereignty issue and progress in the ongoing talks."[143]

(v) Nor did Mauritius raise the question of whether the proposed MPA would comply with the Convention in the letter of 30 December 2009 from its Minister of Foreign Affairs, Regional Integration and International Trade to his UK counterpart. Instead, Mauritius said its problem with the substance of the proposal was sovereignty and refused to discuss the MPA at all unless its claim of sovereignty was included:

> "On the substance of the proposal… the Government of Mauritius considers that the establishment of a Marine Protected Area around the Chagos Archipelago should not be incompatible with the sovereignty of Mauritius over the Chagos Archipelago…
>
> Moreover, the issues of resettlement in the Chagos Archipelago, access to the fisheries resources and the economic development of the islands in a manner that would not prejudice the effective exercise by Mauritius of its sovereignty over the Chagos Archipelago are matters of high priority to the Government of Mauritius. The exclusion of such important issues in any discussion relating to the proposed establishment of a Marine Protected Area would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago and progress in the ongoing talks between Mauritius and the United Kingdom."[144]

(vi) Nor was the Convention or Mauritius' alleged "certain specific rights", or the proposed MPA's compliance with either, raised in the Note Verbale sent by Mauritius to the Foreign and Commonwealth Office on 30 December 2009[145].

(vii) Nor did the High Commissioner of Mauritius in London raise any allegation that the MPA was in breach of the Convention in his written evidence submitted to the House of Commons Select Committee on Foreign Affairs[146].

(viii) Nor did the letter from the Mauritian Secretary to Cabinet and Head of the Civil Service to the British High Commissioner, Port Louis, dated 19 February 2010 raise any allegation of breach of the Convention or Mauritius' alleged "certain specific rights". Instead it said that "any proposal for the protection of the marine environment … needs to be compatible with and meaningfully take on

[143] MM, para 4.65 and fn. 350.
[144] MM annex 157.
[145] MM annex 158.
[146] MM annex 160.

board the position of Mauritius on the sovereignty over the Chagos Archipelago and address the issue of resettlement and access by Mauritians to fisheries resources in that area."[147]

4.22 The stance adopted by Mauritius did not alter after the MPA was proclaimed on 1 April 2010. Mauritius' protest in the Note Verbale of 2 April 2010 was expressed wholly in terms of Mauritius' claim to sovereignty and the claimed right of return of Chagossians under consideration in the European Court of Human Rights[148]. There was no reference to the Convention, or to the legality of the MPA *qua* MPA under Convention. The UK received no further communication from Mauritius regarding the MPA until it received Mauritius' Notification and Statement of Claim dated 20 December 2010.

4.23 Mauritius did not in its communications allege that its "certain specific rights" would be breached, either before 1 April 2010 in respect of the proposed MPA or after 1 April 2010 in respect of the MPA. Nor, apart from one brief reference in the written submissions of the High Commissioner of Mauritius, London, to the United Kingdom's House of Commons Select Committee on Foreign Affairs[149], was any reference made to Mauritius' alleged rights in non-living resources. Even then, all that was said was that "the establishment of any MPA … should also address the benefits that Mauritius should derive from any mineral or oil that may be discovered … (as per the undertaking given in 1965)"[150]. Even if submitting written evidence to the House of Commons Foreign Affairs Committee were in principle sufficient to establish a dispute for the purposes of Part XV of the Convention, the High Commissioner's written evidence would not have done so: there is no reference to the Convention, nor any suggestion that that the MPA would breach the Convention or the law of the sea if there was a failure to address such benefits. It should also be noted that this is also the only reference to the "1965 undertaking" in all of Mauritius' communications over the MPA. Accordingly, Mauritius cannot make out that these aspects of its claim were subject to any exchange of views as required by article 283(1).

4.24 To sum up, in none of its dealings with the United Kingdom over the MPA did Mauritius refer to the subject-matter of the Convention or its alleged "certain specific rights" at all, let alone with sufficient clarity to enable the United Kingdom to identify that there was, or might be, a dispute with regard to that subject-matter[151].

4.25 The reality is that Mauritius sought to use invitations to discuss or consult over the

[147] MM, annex 162.
[148] MM, annex 167.
[149] MM, annex 160.
[150] *Ibid*., para. 8.
[151] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011, para. 133.

proposed MPA as a means by which to promote its claim to sovereignty and, furthermore, refused to participate further in the bilateral talks process[152] when the United Kingdom did not meet its demand to stop the public consultation process[153]. While withdrawal from any dialogue with the United Kingdom over the BIOT and/or the MPA may have been a legitimate tactical stance for Mauritius to adopt, it cannot now say that it raised the question of the unlawfulness of the MPA under UNCLOS. As a result, there was no such "dispute" in existence between the parties at the time of Mauritius' Notification and Statement of Claim, still less any exchange of views on that dispute.

4.26 Mauritius claims that "[b]y December 2010 it was plain that any further exchange of views would be futile, as the UK was fully committed to the establishment of the 'MPA'"[154]. This is pure assertion: there is nothing in the diplomatic record which supports or substantiates it. Mauritius, according to its own pleadings, had not even sought to communicate with the United Kingdom about the MPA for over eight months between 2 April 2010 and 20 December 2010 when it submitted its Notification and Statement of Claim, and had never raised the points it raises now as to the legality of the MPA *qua* MPA under the Convention or its alleged "certain specific rights".

4.27 References to *Southern Bluefin Tuna*, *MOX Plant* and *Land Reclamation*[155] do not assist Mauritius. The United Kingdom does not dispute the well-established principle that a party is not obliged to continue with an exchange of views when the possibilities of settlement have been exhausted. Its contention is that Mauritius cannot even establish that it raised the UNCLOS claims which it now raises, let alone that an exchange of views took place and that the possibilities of a settlement had been exhausted:

(i) The Arbitral Tribunal in *Southern Bluefin Tuna* found as a matter of fact that negotiations had been "prolonged, intense and serious" and that "in the course of those negotiations , the Applicants invoked UNCLOS and its provisions, while Japan denied the relevance of UNCLOS and its provisions". In the present case there have been no negotiations at all on the legality of the MPA under the Convention[156];

[152] Referred to in para. 4.21(i). The Joint Communiqué dated 21 July 2009 was the product of the second round of bilateral talks, the first of which was held in January 2009.
[153] MM, annex 162.
[154] MM, para. 5.38.
[155] MM, para. 5.39.
[156] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)("SBT")*, 4 August 2000, XXIII *RIAA*, p. 1, para. 55. Nor nine rounds of negotiations, as in *Barbados v Trinidad* & Tobago, Award, 11 April 2006, XXVII *RIAA*. p. 149, para 194 *ff.* Nor requests to the respondent and a Note Verbale objecting to specific actions as contrary to the international law, as in *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010,* p. 58, paras. 54-65.

(ii) ITLOS in *MOX Plant* accepted (on a *prima facie* basis) that the threshold had been met where Ireland had referred to a dispute under the Convention in a letter of 30 July 1999 and a further exchange of correspondence had taken place on the matter before to the submission of the dispute to arbitration[157]. By contrast, in the present case Mauritius has not drawn attention to a dispute under the Convention at all.

(iii) ITLOS in *Land Reclamation* accepted that the threshold had been met where Malaysia had, first, on several occasions prior to the institution of Annex VII proceedings, informed Singapore of its concerns about Singapore's land reclamation and had requested a meeting between senior officials on an urgent basis and Singapore had rejected the request unless Malaysia undertook to supply reports and studies. Then the parties had met to resolve the dispute amicably after the submission of the dispute by Malaysia (without prejudice to Malaysia's right to continue annex VII proceedings and request provisional measures), but Singapore had refused to suspend reclamation works as a precondition for further talks. ITLOS concluded that, in these circumstances, the parties were not able to settle the dispute or agree on a means to settle it[158]. In the present case Mauritius has not raised its concerns about the MPA *qua* MPA at all. In fact it is Mauritius, the applicant in the present proceedings, who acted like Singapore, the respondent in *Land Reclamation*, by refusing to discuss the proposed MPA at all unless the United Kingdom complied with its demands to withdraw the public consultation process.

4.28 If the Tribunal were to accept jurisdiction over Mauritius' claim that the MPA *qua* MPA is incompatible with the Convention or its alleged "certain specific rights" in the circumstances of this case, it would be tantamount to rendering the important precondition to jurisdiction in article 283(1) a nullity. This would be contrary to the accepted principle of treaty interpretation that such a provision "must be given effect[159]."

4.29 Moreover, accepting jurisdiction over Mauritius' claims in the circumstances of this case would undermine the first two, eminently practical functions which provisions such as article 283(1) fulfil, as explained by the International Court of Justice in *Georgia* v. *Russia*[160]:

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[157] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, paras. 58-60.

[158] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, paras. 33-51.

[159] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)(Preliminary Objections)*, Judgment, 1 April 2011, para. 133, and the cases referred to therein.

[160] Quoted in full in para. 4.11 above.

delimiting the scope of the dispute and its subject-matter and encouraging the parties to settle their dispute and thus avoid resorting to binding third-party adjudication. The United Kingdom, as respondent in proceedings submitted under article 286 of the Convention, is now being required to respond to claims about the legality of the MPA based on specific provisions of the Convention and alleged "certain specific rights" which could have and should have been raised earlier by Mauritius, and which could have resulted in settlement attempts before and after the MPA was proclaimed and before Mauritius submitted its Notification and Statement of Claim.

4.30 As explained by the International Court of Justice in *Georgia* v. *Russia*, the third function of compromissory clauses like article 283(1) is to indicate the limit of consent given by States: The United Kingdom did not consent to submit to compulsory third party adjudication under the Convention in circumstances such as these.

D. Conclusion

4.31 Mauritius has not and cannot establish that the requirements of articles 283(1) and 286 have been met:

(i) First, there was no dispute over Mauritius' claims (other than its sovereignty claim) at time of the Notification and Statement of Claim. The claims Mauritius did raise with the United Kingdom regarding the MPA in 2009 and 2010, before it filed its Notification under the Convention, turned on its claim to sovereignty over the BIOT. As explained in Chapter III, that claim is outside the jurisdiction of the Tribunal.

(ii) Second, Mauritius' claim that the MPA *qua* MPA is unlawful because it is in breach of various provisions of the Convention[161] is being made for the first time, was not in existence at the time of the application, and no exchange of views as required by article 283(1) took place.

(iii) Third, insofar as the dispute or disputes now asserted rest on alleged "certain specific rights", obligations owed under IOTC Convention or the United Nations Fish Stocks Agreement, they are also outside the jurisdiction of this Tribunal for the reasons given in Chapter V. In addition, these disputes too were not in existence at the time of the Notification and Statement of Claim and no exchange of views took place as required by Article 283(1).

[161] That is, article 2(3) because of its alleged "certain specific rights", articles 55 and 56(2) read in conjunction with article 297(1)(c), article 56(2) because of its alleged "certain specific rights" to non-living resources, and articles 62(5), 63(1), 63(2), 64(1) and 194(1).

CHAPTER V

MAURITIUS' CLAIM THAT THE MPA IS INCOMPATIBLE WITH UNCLOS IS NOT WITHIN THE JURISDICTION OF THE TRIBUNAL

5.1 In Chapter 7 of its Memorial Mauritius argues that the Marine Protected Area (MPA) is incompatible with the 1982 Convention on the Law of the Sea, and that its establishment is an abuse of rights by the United Kingdom. In doing so, Mauritius seeks to formulate an UNCLOS fisheries or environmental case out of what is in reality a territorial sovereignty dispute.

5.2 The present Chapter explains why, quite apart from the reasons given in Chapter III above, and in Chapter IV concerning the absence of a dispute and exchange of views as required by article 283(1) UNCLOS, the claims in Chapter 7 of the Memorial are excluded from the Tribunal's jurisdiction by section 3 of Part XV. The particulars of Mauritius' claim that the establishment of the MPA is unlawful under the Convention have been set out in paragraph 4.14 above.

5.3 This Chapter is organized as follows. **Section A** shows that Mauritius' attempt to base jurisdiction on article 297(1)(c) is misconceived. Its case is not about "international rules and standards for the protection and preservation of the marine environment", and Mauritius has failed to identify any such relevant rules or standards. **Sections B** and **C** show that Mauritius' claims with respect to the MPA are excluded by article 297(3)(a) from binding compulsory jurisdiction under Part XV of UNCLOS because they relate to "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise"[162]. These sovereign rights include the regulation of access to, and conservation and management of, living resources[163]. At most, a dispute concerning the coastal State's exercise of these discretionary powers is subject to conciliation as provided for by article 297(3)(b).

5.4 **Section D** shows that Mauritius' claims with respect to the Indian Ocean Tuna Commission Agreement[164] are outside the Tribunal's jurisdiction because they are not justiciable in UNCLOS Part XV proceedings. The Indian Ocean Tuna Commission is the appropriate regional fisheries organisation for the purposes of cooperation between the

[162] Article 297(3)(a). The United Kingdom has not declared an EEZ around BIOT. However, it has made use of the powers available to coastal States under Part V of UNCLOS to regulate fishing and environmental protection in the 200 nm zone around BIOT.
[163] Articles 61-62.
[164] MM, paras. 5.35(v) and (vi).

Contracting Parties to that Agreement and disputes concerning cooperation must be settled in accordance with that Agreement.

5.5 Finally, **section E** shows that alleged fishing rights in the territorial sea[165], rights over non-living resources beyond the territorial sea[166], and the claim that the United Kingdom has abused its rights in declaring an MPA do not come within compulsory jurisdiction under Part XV of UNCLOS[167].

A. Article 297(1)(c) and Mauritius' "Environmental" Case

5.6 Mauritius attempts to portray its case as an environmental dispute falling within compulsory jurisdiction under article 297(1)(c), and therefore not excluded by article 297(3)[168]. Article 297(1)(c) refers to "specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention". But protection and preservation of the marine environment is dealt with in Part XII of UNCLOS, not in Part V. Part XII deals with pollution, not fisheries access, nor conservation and management of living resources. The international rules and standards to which articles 194, 208, 209, 210, and 211 refer all relate exclusively to marine pollution – from seabed activities, dumping, and ships. They do not cover fisheries or management and conservation of living resources and were never intended to do so[169].

5.7 The purpose of article 297(1)(c) is to constrain potential interference with freedom of navigation, not to provide an alternative jurisdictional basis for fisheries disputes[170]. It will, for example, cover disputes about EEZ areas "where the adoption of special mandatory measures for the prevention of pollution from vessels is required..." (article 211(6)). These will usually be the measures prescribed for special areas designated pursuant to the 1973/78 MARPOL Convention, or by IMO resolution[171]. Judge Mensah has written about the relationship between protection and preservation of the marine environment and the dispute

[165] MM, para. 5.35(i).
[166] MM, para. 5.35(iii).
[167] *Infra*, paras. 5.42-44.
[168] MM, para. 5.35.
[169] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p. 105; R. Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade", in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 407.
[170] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), p. 159, says that "Denials, or unauthorized restrictions, of the freedom of navigation are meant to be kept in check through Article 297(1)(c)".
[171] R. Lagoni, in A. Kirchner (ed.), *International Marine Environmental Law* (2003), pp. 156-67.

settlement regime in UNCLOS[172]. After citing the text of article 297(1)(c) he notes that a court or tribunal "will be competent to deal with such a dispute if it concerns the interpretation or application of any of the provisions of the Convention relating to the marine environment, as provided in the Convention". At that point his footnote [5] says: "The various sources of pollution of the marine environment are listed in Article 194 of the Convention". He does not cite the fisheries or marine living resources articles of Part V of UNCLOS. The whole of Part XII on protection and preservation of the marine environment is about pollution, not living resources.

5.8 The fact that the MPA serves environmental objectives is not sufficient to turn a case based on alleged violation of EEZ articles 55, 56, 62, 63, and 64 into a dispute about "specified international rules and standards for the protection of the marine environment". Mauritius also disregards the fact that article 297(3) was negotiated with the specific purpose of taking fisheries access, conservation and management disputes out of Part XV compulsory jurisdiction[173]. It cannot have been the intention of the drafters to reincorporate those very same disputes within compulsory jurisdiction via article 297(1)(c).

5.9 The "international rules and standards for the protection of the marine environment" which Mauritius says have been breached are articles 55[174], 62(5)[175] and 194(1)[176]. Mauritius' cannot establish jurisdiction under article 297(1)(c) by reference to any of these provisions.

5.10 First, as regards article 55, Mauritius' specific claim is that

> "[t]he dispute concerning the interpretation and application of Article 55 (para. 5.23(iv) above) falls within the jurisdiction of the Tribunal because the UK 'has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to [it] and which have been established by this Convention or through a competent international organisation or diplomatic conference in accordance with this Convention', (in contravention of inter alia Article 56(2) of the Convention); jurisdiction is accordingly provided by Article 297)(1)(c)."

5.11 This lacks substance. All that article 55 provides is that the exclusive economic zone is subject to the specific legal regime established in Part V and that the rights and obligations of the coastal State and other States in the exclusive economic zone are governed by the relevant provisions of the Convention. Article 55 does not contain any "specified rules and

[172] In Kirchner (ed.), *op.cit*, pp. 9-10.
[173] See Section B below.
[174] MM, para. 5.35(ii).
[175] MM, para. 5.35(iv).
[176] MM, para. 5.35(ix).

standards for the protection and preservation of the marine environment". Nor does article 56(2). The fact that, according to article 297(1)(c), a court or tribunal under Part XV has jurisdiction over "specified international rules and standards for the protection and preservation of the marine environment" neither establishes the existence of such rules or standards, nor means that such rules and standards therefore exist under article 55 or 56(2. Mauritius still has to point to actual rules and standards which cover the substance of its claim, which it has failed to do.

5.12 Second, Mauritius' claim that article 62(5) is an "international rule and standard" under article 297(1)(c) is untenable. Article 62(5) deals with giving "due notice of conservation and management laws and regulations". It relates to living resources in the exclusive economic zone, not to "protection and preservation of the marine environment", a term which, as explained above, applies to marine pollution standards adopted under Part XII of UNCLOS, not to fishery conservation laws. Article 297(1)(c) cannot confer jurisdiction over a dispute concerning article 62.

5.13 Third, article 194 applies only to international rules and standards for the prevention of marine pollution. It contains no international standards on conservation and management of living resources. Therefore the Tribunal does not have any jurisdiction under article 297(1)(c) by reference to article 194 in this case.

B. Article 297(3)(a) excludes Jurisdiction over EEZ Fisheries Disputes

(i) Article 297(3)(a)

5.14 Article 297(3)(a) of UNCLOS provides that:

> "(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

5.15 Disputes over fisheries management were deliberately excluded from compulsory third-party dispute settlement in the interests of reaching agreement at the Conference[177]. Klein concludes that: "Article 297 largely insulates the coastal State from review when it

[177] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V, pp. 87-94, 105; N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), pp. 175-188.

comes to fisheries"[178]. She points out that article 297(3)(a) emphasises that "'any dispute' relating to the costal State's sovereign rights over the living resources [*of the EEZ*] is excluded from the procedures in Section 2 of Part XV"[179]. Burke also summarises the position as follows:

> "Articles 61 and 62 are unequivocal in establishing the exclusivity of coastal State decision making authority, and article 297 both reinforces this exclusive authority and confirms the fact that decision making criteria are solely for the coastal State to determine in any specific instance."[180]

5.16 Disputes concerning fish stocks excluded from compulsory binding settlement by article 297(3)(a) will in some cases be subject to compulsory conciliation under article 297(3)(b). However, under that provision, conciliation is only required if the coastal State has "manifestly" failed to ensure through proper conservation and management that fish stocks are not seriously endangered, or if it has "arbitrarily" refused to determine the allowable catch or its own harvesting capacity, or to determine an surplus or allocate it to any State (article 297(3)(b)). A conciliation commission is prohibited by article 297(3)(c) from substituting its discretion on any of these matters for that of the coastal State. Conciliation thus affords the only remedy available in respect of fisheries disputes and only in cases of manifest or arbitrary abuse by the coastal State of its rights.

5.17 Moreover, if conciliators are prohibited from substituting their discretion for that of the coastal State, so *a fortiori* must an Annex VII tribunal respect the exercise of discretion by the coastal State. Even if it were accepted, *arguendo*, that Mauritius might succeed in making its case that the United Kingdom abused its rights by refusing to determine the allowable catch or allocate any licences to Mauritius, that conclusion would merely reinforce the point that, as pleaded by Mauritius, this case falls outwith the jurisdiction of an Annex VII tribunal under article 297(3)(a).

(ii) Jurisprudence under article 297(3)(a)

5.18 The Annex VII Arbitral Tribunal in the *Southern Bluefin Tuna Arbitration* considered article 297 and came to the conclusion that it lacked jurisdiction. *Inter alia* it made the following assessment:

> "61. Article 297 of UNCLOS is of particular importance … for it provides significant limitations on the applicability of compulsory procedures insofar as coastal States are

[178] Klein, *op.cit*, pp.175-6. See also M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), 121-2.
[179] Klein, *op.cit*, pp.177-8.
[180] W.T. Burke, "The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction", 63 *Oregon LR* 73 (1984), p.117.

concerned. Paragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases only, i.e. (a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and (b) cases involving the protection and preservation of the marine environment. ….Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important "but", the coastal State is not obliged to submit to such procedures *where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations*."[181] (emphasis added)

5.19 It may be noted that because Mauritius seeks access to fish stocks within the BIOT MPA, or seeks to challenge the compatibility of the MPA with the 1982 Convention, it has initiated a dispute which "relates to [the coastal State's] sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations". As indicated by the award of the Arbitral Tribunal in *Southern Bluefin Tuna* quoted in the previous paragraph, such a dispute is excluded from compulsory jurisdiction of an arbitral tribunal by article 297(3)(a).

5.20 In *Barbados* v. *Trinidad & Tobago*, the Tribunal noted, with respect to article 297(3)(a), that:

"276. The pattern of Barbadian fishing activity is relevant to the task of delimitation as a relevant circumstance affecting the course of the boundary, and as such it is plainly a matter that must be considered by the Tribunal. Taking fishing activity into account in order to determine the course of the boundary is, however, not at all the same thing as considering fishing activity in order to rule upon the rights and duties of the Parties in relation to fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one or other Party. Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal "any dispute relating to [*the coastal State's*] sovereign rights with respect to the living resources in the exclusive economic zone", and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal."
...

283. The Tribunal accordingly considers that *it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a)* [*emphasis added*] and because,

[181] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)("SBT")*, 4 August 2000, XXIII *RIAA*, p. 1.

viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*. …"[182]

5.21 The *Barbados* v. *Trinidad & Tobago* case is of particular relevance to the present dispute because, like Mauritius, Barbados argued that it had traditional fishing rights within the exclusive economic zone of the other party to the dispute. It is therefore notable that, notwithstanding article 56, the Arbitral Tribunal concluded that this aspect of the dispute was "outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a)"[183].

C. Mauritius' Claims are Covered by Article 297(3)(a)

5.22 Article 297(3)(a) is applicable for two reasons. First, it covers access to fisheries in the BIOT. Second, it also covers conservation and management of fish stocks. Both categories of dispute are expressly excluded from binding compulsory settlement under Part XV. By asserting a right to fish in the MPA, a right to fish in the MPA,[184] and by challenging the right of the United Kingdom to conserve and manage fish stocks within the MPA,[185] Mauritius necessarily brings its case within the terms of Article 297(3)(a).

(i) Mauritius' access to BIOT MPA fisheries

5.23 It is clear from the text and drafting history of article 297(3)(a) referred to in the previous section that disputes over access to EEZ fisheries are excluded from binding compulsory jurisdiction[186]. It is equally clear that in the present case Mauritius claims a right of access to fisheries within the MPA[187]. That claim is based on undertakings given in 1965 and subsequently that the UK would use its "good offices" with the United States to ensure "as far as practicable" that fishing rights would remain available to Mauritius[188]. Alternatively Mauritius claims traditional fishing rights in the MPA[189].

5.24 The United Kingdom is entitled in conformity with UNCLOS to exclude all vessels from access to fish stocks in the BIOT MPA, and, in adopting the MPA for reasons relating to the conservation and management of living resources, it has done so.

[182] XXVII *RIAA* 149.
[183] *Ibid.*, para. 283.
[184] MM, paras. 5.35(ii); 6.37-9; 6.42-45; 7.28-35.
[185] MM, paras. 5.35(ii); 7.28-35.
[186] See para. 5.15 above.
[187] MM, paras. 5.35(ii); 7.28-35.
[188] MM, paras. 3.87; 7.22-7.27.
[189] MM, paras. 7.9-7.21.

5.25 Access to EEZ fisheries is governed by article 62 of UNCLOS. Article 62 gives the coastal state a "broad discretion" in deciding which states' fishermen are to be given access to any surplus in the total allowable catch[190]. Moreover, "[t]his discretion is particularly broad, since ... in determining the allowable catch, the coastal State can also determine the size of any surplus (if any)"[191].

5.26 In claiming to exercise fishing rights within the BIOT MPA Mauritius seeks to challenge the broad discretion conferred on the coastal state in this case. Its fisheries claims "relate to [the coastal State's] sovereign rights with respect to living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations". These are among the rights referred to in article 297(3)(a). They are all matters in respect of which the coastal State "shall not be obliged to accept the submission to such settlement [i.e. binding compulsory settlement] of any dispute relating to its sovereign rights etc ...".

5.27 As such, the claims made by Mauritius with respect to its alleged fishing rights in the MPA[192] are excluded from the jurisdiction of the Tribunal by article 297(3)(a).

(ii) Mauritius' claims relate to conservation and management measures within the MPA

5.28 Mauritius also challenges the United Kingdom's right to conserve and manage living resources within the MPA. Article 61 of UNCLOS deals with conservation and management of living resources in the exclusive economic zone. Under this provision the coastal State must ensure "through proper conservation and management measures" that the living resources of the exclusive economic zone are maintained and not threatened by over-exploitation[193]. In formulating conservation and management measures the coastal State must "take into consideration" such ecological factors as "the effects on species associated with or dependent upon harvested species" with a view to maintaining or restoring populations of these species "above levels at which their reproduction may become seriously threatened"[194]. It must, in other words, consider the ecosystem as a whole and ensure the sustainability of living resources. Once again it is for the coastal State to decide what measures are necessary and appropriate in the circumstances.

[190] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd ed., 1999), p. 290.
[191] *Ibid*. See also N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, pp. 178-183.
[192] MM, paras. 5.35(ii); 7.28-35.
[193] Article 61(2).
[194] Article 61(4).

5.29 The limits on compulsory jurisdiction agreed by the States Parties to UNCLOS in article 297(3)(a) cannot be avoided by reformulating the same dispute as one concerning protection of the environment rather than conservation and management of living resources. The *Fisheries Jurisdiction (Spain* v. *Canada case)* defined the phrase "conservation and management measure" broadly and held that "in its ordinary sense the word [i.e. measure] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby"[195]. The no-take policy applied by the United Kingdom to fish stocks in the BIOT MPA is covered by article 297(3)(a). For reasons explained earlier it does not fall within article 297(1)(c)[196]. Accordingly, as the coastal State the United Kingdom "shall not be obliged to accept" the submission of any such dispute to binding compulsory settlement under Part XV of UNCLOS: it does not.

(iii) Consultation with regard to establishment of the MPA

5.30 The establishment of the MPA was an exercise by the United Kingdom of its sovereign rights with respect to conservation and management of living resources in the territorial sea, FCMZ and EPPZ of the BIOT[197]. Even if Mauritius were right to say that articles 56(2), 61, 62, 63, and 64 (or any other article) require consultation with other states and/or with the Indian Ocean Tuna Commission about highly migratory fish stocks, article 297(3)(a) will still apply. A dispute about consultation concerning conservation and management of living resources remains a dispute relating to "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise etc...".

5.31 Article 197, to which Mauritius also refers[198], has no bearing on the present point**.** Article 197 deals with cooperation in adopting international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment. It is not relevant to fisheries cooperation[199]. If it were relevant to conservation and management of living resources, it too would be caught by article 297(3)(a).

5.32 The decision of the Arbitral Tribunal in the *Lac Lanoux Arbitration* does not assist Mauritius[200]. First, the IOTC Convention, the 1995 UN Fish Stocks Agreement, and UNCLOS, are the relevant applicable law with respect to shared fish stocks, not the *Lac Lanoux Case*. Second, the rights and obligations over which the present Tribunal has jurisdiction are to be determined by reference to the UNCLOS, not the *Lac Lanoux* decision

[195] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 432, para. 66.
[196] See paras. 5.7-5.13 above.
[197] See Chapter II above.
[198] MM, paras. 7.43-7.45.
[199] M. Nordquist (ed.), *UN Convention on the Law of the Sea 1982: A Commentary,* Vol. IV, pp. 77-81.
[200] MM, para. 7.39.

or customary international law. Disputes concerning rights which are not found in the 1982 Convention do not fall within compulsory jurisdiction under Part XV.

5.33 There is no basis for Mauritius' claim to share sovereign rights in the BIOT MPA. Such a claim is incompatible with the coastal State's *sovereign* – i.e. exclusive – rights. In any event, the argument that Mauritius and the United Kingdom share sovereign rights within the BIOT waters is still a dispute about "sovereign rights with respect to living resources in the exclusive economic zone or their exercise" excluded from the Tribunal's jurisdiction by article 297(3)(a).

D. Cooperation with respect to Highly Migratory Fish Stocks

5.34 The United Kingdom is a member of the Indian Ocean Tuna Commission ('IOTC'). It contributes to the IOTC's budget and cooperates actively in its work[201]. So does Mauritius, although it is "not presently classified as a fishing nation for tuna species"[202]. In the period 2006-2010 Mauritius' average reported annual catch was only 542 metric tons[203]. So far as concerns specifically BIOT, two Mauritian-flagged vessels were licensed to fish for tuna in the waters of BIOT between 1991 and 2000. However, no Mauritian-flagged vessels have held such licences since 2000.

5.35 Mauritius claims that when adopting the MPA the United Kingdom failed in its alleged duty to cooperate with Mauritius and the IOTC[204]. It bases this claim not on the IOTC Agreement but on articles 63 and 64 of UNCLOS, and article 7 of the United Nations Fish Stocks Agreement of 1995. Three points can be made in response to this argument.

5.36 First, it is yet another attempt to challenge the discretionary exercise by the United Kingdom of its sovereign rights in relation to living resources, and "the terms and conditions established in its conservation and management laws and regulations"[205]. For that reason this part of its case again falls within the terms of article 297(3)(a) and is excluded from the compulsory jurisdiction under section 2 of Part XV.

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[201] For example, Dr Chris Mees represented the UK (BIOT) in the 12th Session of the Indian Ocean Tuna Commission Scientific Committee in April 2012. The key issue for the United Kingdom was the continued illegal, unregulated and unreported (IUU) fishing in BIOT waters by Sri Lankan flagged vessels. The United Kingdom presented an Information Note (IOTC–2012–CoC09-08b) proposing action by the Commission (UKPO, annex 21).

[202] IOTC, *National Report on Tuna Fisheries in Mauritius*, Fourteenth Session of the Scientific Committee, Mahé, Seychelles, 12-17 December 2011, Executive Summary (UKPO, annex 22).

[203] *Ibid.*, p. 5. In 2010 the total catch was only 306 metric tons.

[204] MM, paras. 7.63-4.

[205] Art. 297(3)(a).

5.37 Second, the IOTC Agreement is the applicable law with respect to co-operation among IOTC Members, not articles 63 and 64 of UNCLOS. The IOTC Agreement expressly preserves the sovereign rights of the coastal State with respect to conservation and management of fish stocks within the 200 nautical mile area. Article XVI (Coastal States' Rights) provides:

> "This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction."

5.38 Mauritius also alleges a breach of article 7(a) of the United Nations Fish Stocks Agreement, pursuant to which parties have an obligation "to ensure that measures established in respect of such stocks [i.e. tuna] for the high seas do not undermine the effectiveness" of conservation and management measures adopted by the United Kingdom within the MPA. The present Tribunal has no jurisdiction in respect of this claim.

5.39 Third, the IOTC is the appropriate regional fisheries organisation for the purposes of cooperation between coastal states and other states in accordance with the United Nations Fish Stocks Agreement. Article XXIII of the IOTC Agreement excludes the possibility of resort to Part XV of UNCLOS to resolve disputes arising between the parties concerning, *inter alia*, conservation and management of tuna stocks in the Indian Ocean. Article XXIII provides that:

> "Any dispute regarding the interpretation or application of this Agreement, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as a result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement."

This provision does not confer jurisdiction on the Tribunal.

5.40 The dispute settlement provisions of a regional fisheries convention such as the IOTC Agreement will normally apply in lieu of the provisions of Part XV of UNCLOS unless the parties agree otherwise. This follows from article 282 of UNCLOS if the outcome of any proceedings pursuant to Article XXIII is a binding decision. Moreover, it is also consistent with the Annex VII Tribunal's Award in *Southern Bluefin Tuna* if the outcome is not a

binding decision[206]. That Award was based on article 281 of UNCLOS, which provides as follows:

> "1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit."

5.41 In the view of that Arbitral Tribunal, the parties to the 1993 Convention on Conservation of Southern Bluefin Tuna had agreed to exclude Part XV procedures under UNCLOS. They were bound to use the procedures provided by Article 16 of the 1993 Convention:

> "56. The Tribunal now turns to the second requirement of Article 281(1): that the agreement between the parties "does not exclude any further procedure". This is a requirement, it should be recalled, for applicability of "the procedures provided for in this Part," that is to say, the "compulsory procedures entailing binding decisions" dealt with in section 2 of UNCLOS Part XV. The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.
>
> 57. Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive …That express obligation [to keep the matter under review] equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute."

5.42 If Article XXIII of the IOTC Agreement falls within the terms of article 281 of UNCLOS rather than article 282, the reasoning of the *Southern Bluefin Tuna* Tribunal is equally applicable to the present case. If it falls within article 282 then *a fortiori* the Tribunal has no jurisdiction. It follows that if Mauritius' case rests on the interplay of UNCLOS and the IOTC Agreement, it must proceed under the terms of that agreement and not under UNCLOS Part XV.

5.43 Finally, it remains the case that in seeking either to veto conservation and management measures adopted by the United Kingdom, or to subject them to consultation or cooperation with either itself or the IOTC, Mauritius is thereby challenging the discretionary

[206] XXIII *RIAA* 1.

exercise by the coastal State of its sovereign rights over living resources, as well as "the allocation of surpluses to other States" and "the terms and conditions established in its conservation and management laws and regulations".

5.44 For all these reasons, this part of Mauritius' claims must be excluded from compulsory jurisdiction under section 2 of Part XV by article 297(3)(a). A holding that an obligation to consult or cooperate gives the Tribunal jurisdiction would circumvent the provisions of article 297(3)(a), and allow claims by the "back door", contrary to the express wording of UNCLOS and the intention of the States Parties.

E. Other Claims over which the Tribunal has no Jurisdiction

(i) Access to territorial sea fish stocks

5.45 UNCLOS does not give other States any right to fish in the territorial sea. Mauritius' claim to do so depends entirely on whether there is, as it argues, an undertaking binding under international law by the United Kingdom vis-à-vis Mauritius to permit fishing by Mauritian vessels in the territorial sea, or on the basis of inshore fishing rights traditionally exercised by Mauritian fishermen[207].

5.46 Whether Mauritius has these rights within the BIOT territorial sea (or BIOT waters beyond the territorial sea[208]) (a) is not a question relating to the interpretation or application of UNCLOS as required by article 288(1); and (b) is not covered by any agreement to submit disputes concerning such non-UNCLOS rights to Part XV dispute settlement pursuant to article 288(2). The United Kingdom reiterates the position set out in paragraphs 3.14-3.19 above. By using, on each occasion, the expression "dispute(s) concerning the interpretation or application of this Convention" the States Parties established a fundamental limitation on the scope of jurisdiction under Part XV.

5.47 Mauritius also seeks to rely on article 293 of UNCLOS[209]. The United Kingdom reiterates the views it expressed on that article in Chapter III above (at paragraphs 3.20-3.34).

[207] The BIOT Administration reserved the right to limit the number of licences issued relative to the surplus allowable catch. For the banks (inshore) fishery the limit was initially six eighty-day licences, reduced to four in 1999.

[208] Although Mauritius' argument on jurisdiction appear to be is confined to fishing rights within the territorial sea (see para. 5.35(i)), its argument in Chapter 7 of its Memorial applies those claims to the FCMZ/EPPZ as well (paras.7.28-7.35).

[209] MM, paras. 7.8 and 7.23.

5.48 References to article 2(3) of UNCLOS do not assist Mauritius. To say that sovereignty in the territorial sea "is exercised subject to... other rules of international law" is to state an obvious fact[210], but article 2(3) does not incorporate other treaties, nor *a fortiori* unilateral undertakings, into the Convention[211]. Mauritius simply assumes that article 297 confers jurisdiction over disputes concerning the territorial sea that do not concern innocent passage[212].

(ii) Non-living resources beyond the territorial sea

5.49 Insofar as Mauritius maintains a claim relating to non-living resources beyond the territorial sea[213], which is understood to be based on the 1965 undertaking, the reasoning in paragraphs 5.46-5.47 above applies equally. Further, as explained in Chapter IV above, there is no dispute under article 56(2) with respect to natural resources and there has been no exchange of views as required by article 283(1). It follows that the Tribunal has no jurisdiction over this aspect of the claim.

(iii) Abuse of rights

5.50 Mauritius invokes article 300 and alleges abuse of rights. It asserts that the MPA was not established for reasons of conservation of living resources, but for other irrelevant political purposes[214]. The United Kingdom rejects this allegation as wholly unfounded. The history and rationale for the MPA is set out in Chapter II above. As indicated in paragraph 2.36, the establishment of the MPA is supported by a substantial body of expert scientific advice. For present purposes what matters is that Mauritius' invocation of article 300 does not give rise to an independent basis for compulsory settlement; it follows from article 297(3)(b) that any claim for abuse of rights in this context would be a matter for conciliation.

5.51 In *Southern Bluefin Tuna* the Arbitral Tribunal said:

> "64. The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing

[210] Article 2(3) is based on Article 1(2) of the Territorial Sea Convention, which reflects the proposed draft considered by the 1930 Hague Conference on the Codification of International Law. See the ILC commentary in *Yearbook of the International Law Commission, 1956*, Vol. II, p. 254. The Special Rapporteur's Commentary is in *Yearbook of the International Law Commission, 1952*, Vol. II, p. 27.
[211] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, pp. 45-46, para. 62: "Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay."
[212] Cf. R. Wolfrum, *Handbuch des Seerechts* (2006), p. 473, para. 33.
[213] See MM, para. 5.35(iii), albeit that it is not clear that Mauritius maintains this aspect of the claim in Chapter 7 of its Memorial.
[214] MM, paras. 7.81ff.

it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith."

5.52 The United Kingdom's conduct in declaring a no-take marine preserve cannot be considered to reach this threshold. The MPA:

- protects the environment and living resources, unlike the Japanese fishing at issue in the *Southern Bluefin Tuna Cases*;
- self-evidently is not irreversible;
- has in fact had a very limited impact, if any, on Mauritian fishery vessels.

5.53 Moreover, article 297(3)(b) already provides a remedy (conciliation) for abuse of rights in fisheries disputes.

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

5.55 That conclusion is consistent with the *Virginia Commentary*'s entry on article 300:

> "The presence of highly subjective elements in article 300 is compensated by the fact that the article comes within the scope of the provisions of Part XV for the settlement of disputes. This may lead to some measure of third-party control over the invocation of the article, though certain exceptions in article 297 go a long way towards protecting the discretion of coastal States from third party adjudication."[215]

5.56 Mauritius cannot and should not be allowed to achieve indirectly through allegations of improper purposes what it could not achieve directly – an adjudication on the exercise by the United Kingdom of "its discretionary powers for determining the… terms and conditions established in its conservation and management laws and regulations"[216].

[215] M. Nordquist (ed.), *UN Convention on the Law of the Sea 1982: A Commentary*, Vol. V, p. 152, para 300.6.
[216] Art. 297(3)(a).

F. Conclusions

5.57 However characterised, and whatever their merits may be, all of the claims made by Mauritius with respect to the legality of the MPA are excluded from binding compulsory jurisdiction under section 2 of Part XV. No enquiry into the merits is necessary to reach that conclusion.

5.58 To hold otherwise –

- would subject the exercise of coastal State sovereign rights over living resources to challenge and interference by other States;
- would upset the carefully balanced scheme for management of the exclusive economic zone by the coastal State; and
- would not be consistent with the ordinary meaning of the text of UNCLOS, interpreted in accordance with article 31 of the Vienna Convention on the Law of Treaties.

CHAPTER VI

THE PRELIMINARY OBJECTIONS SHOULD BE DEALT WITH AS A PRELIMINARY MATTER

A. Introduction

6.1 Article 11 of the Rules of Procedure, entitled 'Preliminary Objections', is set out in Chapter 1 above. Article 11 (3) and (4) read as follows:

> "(3) The Arbitral Tribunal may, after ascertaining the views of the Parties, determine whether objections to jurisdiction or admissibility shall be addressed as a preliminary matter or deferred to the Tribunal's final award. If either Party so requests, the Arbitral Tribunal shall hold hearings prior to ruling on any objection to jurisdiction or admissibility.
>
> (4) Should the United Kingdom request that any objection to jurisdiction or admissibility be dealt with as a preliminary matter, such request shall state whether the United Kingdom seeks a separate hearing on the question of bifurcating objections to jurisdiction or admissibility from the Tribunal's consideration of the merits. Within three weeks from the receipt of the United Kingdom's objections, Mauritius shall provide any comments it may have on the question of bifurcation. Within two weeks from the receipt of such comments, the United Kingdom may submit a reply to any views expressed by Mauritius on the question of bifurcation."

6.2 As indicated in Chapter I, the United Kingdom requests that its Preliminary Objections be dealt with at a preliminary hearing on jurisdiction, and it also seeks a separate hearing on the issue of the procedure to be followed in dealing with its Preliminary Objections – insofar as the United Kingdom's request is not accepted by Mauritius. In this respect, the United Kingdom invites Mauritius to recognise that the Preliminary Objections are serious and substantial, and are manifestly well-suited to being addressed as a preliminary matter, as would anyway be consistent with practice before the International Tribunal for the Law of the Sea and the International Court of Justice (i.e. the other fora referred to in article 287(1) of the UNCLOS). If Mauritius does so, the Tribunal and the parties may be spared the not insignificant costs of a separate one-day hearing to determine this procedural issue[217].

6.3 The Rules of Procedure do not establish any specific test to be applied in

[217] It is accepted that the issue of costs of the hearing could be dealt with appropriately in a ruling by the Tribunal.

determining whether preliminary objections to jurisdiction are to be joined to the merits rather than being dealt with as a preliminary matter, although:

a. It is inherent in the very notion of 'preliminary objections', which is what Article 11 deals with, that they should be dealt with as a preliminary matter, unless there is good reason to adopt a different procedure.

b. It is implicit in the formulation of Article 11(3) that the underlying question is whether any given objections are or are not suitable to be dealt with as a preliminary matter, i.e. whether dealing with them as preliminary matter would be inappropriate for some particular reason.

c. The practice before the International Tribunal for the Law of the Sea (ITLOS: see Rules of the Tribunal, Article 97) and before the International Court of Justice (ICJ: see Rules of Court, Article 79) is that preliminary objections to jurisdiction are dealt with at a hearing separate and prior to any hearing on the merits[218]. Consistent with this, and also with the final sentence of Article 11(3) of the Tribunal's Rules of Procedure, the natural default position is that preliminary objections should be dealt with as a preliminary matter with a view to achieving a fair and efficient resolution of the issues in dispute.

6.4 In addressing this matter, one important factor that has been emphasised is whether "the facts and arguments in support of … Preliminary Objections are in significant measure the same as the facts and arguments on which the merits of the case depend", and whether the objections are of "an exclusively preliminary character"[219].

6.5 In this respect, it is noted that both Article 97(6) of the ITLOS Rules and Article 79(9) of the ICJ Rules contain specific rules enabling a determination to be made on whether an objection possesses "an exclusively preliminary character". There may be some distinction to be drawn between those specific rules and the language of Article 11(3) of the Rules of Procedure of the present Tribunal, as the latter does not refer to exclusivity and is applied in a different context[220]. It is nonetheless useful to refer to the jurisprudence where a specific test of "exclusively preliminary character" has been applied, the relevant question then being

[218] Note that the decisive factors in this respect are when the objection is made (see e.g. Article 79(1) of ICJ Rules) and how the objections are characterised by the respondent State (see e.g. Article 79(1) of the ICJ Rules). A suspension of the proceedings on the merits is only automatic if the party raising objections expressly labels and files these as preliminary objections: see *The Statute of the International Court of Justice, A Commentary*, 2nd ed., p. 1163, para. 186 (Article 43 – Talmon).

[219] *Maritime Delimitation (Guyana* v *Suriname), Jurisdiction and Merits*, Order No. 2 dated 18 July 2005, the terms of which are set out in the Award of 17 September 2007 (2008) 47 ILM 166, at para. 47.

[220] The test under Article 97(6) of the ITLOS Rules and Article 79(9) of the ICJ Rules is to be applied in the context of determining the jurisdictional objections, i.e. it is a further alternative to upholding or rejecting the objections.

formulated as –

a. Whether the objection does much more than "touch upon subjects belonging to the merits of the case"[221]; or

b. Whether the objection is "inextricably interwoven" or "closely interconnected" with the merits[222].

6.6 A further important factor must be whether determination of the given objection or objections in favour of the respondent State would, if upheld by the court or tribunal, either dispose of the case entirely and thus eliminate the need to proceed to the merits, or at least significantly reduce the scope of the case. In either case, it would clearly be in the interests of the fair and efficient conduct of the proceedings to hear the objections as a preliminary matter.

6.7 As a final and further factor, the objection may raise a point of principle which is of particular and general importance, and thus favour consideration in isolation from the many and broader issues that would be raised on the merits of the case.

B. Suitability for Determination as a Preliminary Matter

6.8 The preliminary objections set out in Chapters III to V above are serious and substantial, and are indeed suitable for hearing separately from the merits and are not suitable for joining to the merits.

(i) The preliminary objection to jurisdiction over Mauritius' sovereignty claim

6.9 The United Kingdom's preliminary objection to jurisdiction over Mauritius' sovereignty claim is made on the basis that the relevant dispute does not concern the interpretation or application of the Convention. The claim therefore falls outside the scope of Part XV and in particular article 288(1) of the Convention.

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[221] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6,* p. 15, applied in e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 9, at p. 28, para. 50.

[222] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I. C. J. Reports 1964,* p. 46, applied in e.g. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 9, at p. 28, para. 50.

6.10 As to suitability for determination as a preliminary matter:

a. The questions of law raised by this objection are self-contained, and involve no consideration of issues of the merits. The questions of law concern the scope of jurisdiction under article 288(1), and nothing more[223]. The critical issue is whether there is a dispute for the purposes of a given compromissory clause – an issue that is well-suited to be dealt with as a preliminary matter as is demonstrated by the frequent practice of international courts and tribunals (e.g. in the *Georgia* v. *Russia* case).

b. The preliminary objection raises no issues of fact.

c. If, as the United Kingdom contends, the dispute over sovereignty is correctly characterised as the real dispute in this case, then determination of this preliminary objection in favour of the United Kingdom would effectively dispose of the case and thus eliminate the need to proceed to the merits. Even if the Tribunal were minded to decide the residual matters that Mauritius has raised, then – subject always to the second and third objections – determination of this objection in the United Kingdom's favour would very significantly reduce the scope of claim. As such, resolving this objection as a preliminary matter would lead to very significant savings for the parties (and for the Tribunal) in preparing and considering written pleadings, evidence and oral submissions.

d. The objection raises an issue of general importance. The outcome of this aspect of the proceedings will no doubt be closely monitored by those involved in a number of ongoing sovereignty disputes in various parts of the world, as well as those considering acceding to UNCLOS, and its early resolution is therefore desirable.

6.11 By contrast, joinder of this objection to the merits would require the Tribunal to

[223] This is entirely different from Suriname's objections to jurisdiction and admissibility in *Maritime Delimitation (Guyana* v. *Suriname), Jurisdiction and Merits,* Award of 17 September 2007 (2008) 47 ILM 166, outlined at paras. 174-185. Suriname's principal contention was that the Tribunal had no jurisdiction to delimit the maritime boundary in circumstances where there was no agreed terminus to the land boundary. However, it recognised that the Tribunal had jurisdiction to determine whether there was any such agreed terminus, which inevitably meant that the Tribunal would have to resolve a complex array of anterior factual and legal questions (including issues of alleged acquiescence and estoppel) in order to decide the jurisdictional objection. Suriname also raised objections to admissibility of the claims on the basis of an absence of any legal or factual basis / lack of clean hands – issues that raised complex legal and factual issues.

decide the objection alongside the long list of legal and factual issues raised by Mauritius in its Notification and Statement of Claim. That would not be conducive to the fair and efficient conduct of these proceedings.

(ii) Preliminary objection that Mauritius has not established the existence of a dispute or met the requirements of article 283(1)

6.12 The United Kingdom's second preliminary objection to jurisdiction is made by reference to the absence of a dispute and the absence of an exchange of views, as required by article 283(1) of the Convention.

6.13 As to suitability for determination as a preliminary matter:

a. The questions of law raised by this objection are self-contained, and involve no consideration of issues of the merits.

b. The preliminary objection raises no issues of fact (save as to any issues that may arise as to what was raised in any exchange of views upon which Mauritius may seek to rely).

c. Determination of this preliminary objection in favour of the United Kingdom would dispose of the remainder of the case and thus eliminate the need to proceed to the merits.

6.14 As with the first preliminary objection, this is a classic objection that goes to meeting the requirements established in a compromissory clause and is, again, well-suited to determination as a preliminary as is demonstrated by the practice of international courts and tribunals.

(iii) Preliminary objection that Mauritius' claims with respect to the MPA are excluded by (inter alia) article 297(3)(a)

6.15 The United Kingdom's third preliminary objection also turns on application of the limitations on jurisdiction under Part XV of the Convention, with a particular emphasis on articles 297(1) and 297(3)(a). The same points apply as with respect to the United Kingdom's second preliminary objection.

C. Conclusions

6.16 The United Kingdom's Preliminary Objections raise discrete issues that are typically

regarded as preliminary in nature. Further, they would, if determined in the United Kingdom's favour, dispose of the case and eliminate the need to proceed to what would be a costly and wide-ranging (in terms of both facts and law) merits phase.

6.17 Insofar as it is necessary to establish that the Preliminary Objections are exclusively preliminary in character, the simple point is that none of the objections come close to being "inextricably interwoven" or "closely interconnected" with the merits (cf. paragraph 6.5 above).

6.18 The United Kingdom's first preliminary objection also raises issues of particular importance to actual and potential UNCLOS States so far as concerns the scope of jurisdiction under article 288(1), including with regard to the jurisdiction that Mauritius asserts to decide "issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation and to other issues raised under the Convention"[224]. These are issues with wide ramifications so far as concerns participation in UNCLOS, and that without doubt warrant early consideration in isolation from the many and broader issues that are raised on the merits of the case.

[224] MM, para. 5.26.

SUBMISSIONS

For the reasons set out in these Preliminary Objections, the United Kingdom of Great Britain and Northern Ireland requests the Arbitral Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to the Tribunal by the Republic of Mauritius.

In accordance with Article 11, paragraph 2(a), of the Rules of Procedure, the United Kingdom requests that its Preliminary Objections be dealt with as a preliminary matter.

In accordance with Article 11, paragraph 4 of the Rules of Procedure, and unless the preceding request is accepted by Mauritius, the United Kingdom hereby seeks a separate hearing on the issue of the procedure to be followed in dealing with its Preliminary Objections.

C. A. Whomersley
Agent for the United Kingdom
of Great Britain and Northern Ireland

31 October 2012