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A Slight Revenge and a Growing Hope for Mauritius and the Chagossians: The UNCLOS Arbitral Tribunal's Award of 18 March 2015 on Chagos Marine Protected Area (Mauritius v. United Kingdom)

Uma suave revanche e a crescente esperança para as Ilhas Maurício e as Chagossians: (Ilhas Maurício v Reino Unido) Decisão do Tribunal Arbitral de 18 de Março de 2015 relativa a Área Marinha Protegida Chagos

Géraldine Giraudeau

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Géraldine Giraudeau**

ABSTRACT

The recent award of 18 March 2015 puts an end to the arbitration established under Part XV of the United Nations Convention of the Law of the Sea and its Annex VII, about the creation, by the United Kingdom, of a huge marine protected area around the Chagos islands. The proceedings – initiated by Mauritius- constitute a new page, this time at an international level, of the already very furnished litigation arising from the scandalous detachment of this isolated archipelago from the territory of the former British colony, and the removal of its entire population for defence interests. The award is substantially favourable to Mauritius and unanimously recognizes the incompatibility of the marine protected area (MPA) with articles 2(3), 56(2) and 194(4) UNCLOS. Even if it does not directly address the dispute regarding the sovereignty on the islands, it creates some fundamental consequences on the whole issue, by declaring the Lancaster House Undertakings legally binding. It also brings an essential enlightenment on the interpretation of the rights and the compulsory dispute settlement mechanisms provided by the Montego Bay Convention. This article analyses the award and the reasoning followed by the panel, in connexion with the whole dispute and the law of the sea. It also pretends to demonstrate the important consequences of the decision.

Keywords: International arbitration-Law of the Sea- Interpretation of UNCLOS

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1. INTRODUCTION

There is little doubt about the difficulty of judging, particularly when it is about deciding in the tense context of an international dispute, and especially when a question of territorial sovereignty is - directly or indirec-

tly- at stake. The case of the Chagos Marine Protected Area¹ makes no exception. Indeed, the role of the five members of the arbitral tribunal – constituted on the basis of Article 287 of the United Nations Convention on the Law of the Sea² and Article 1 of Annex VII – can certainly be qualified as a very delicate one. Four years after Mauritius started proceedings on December 2010, the panel unanimously decided that the establishment of the MPA surrounding the small isolated atoll was violating the provisions of articles 2(3), 56(2) and 194(4) UNCLOS³. The recognition of the responsibility of the UK for having breached its obligations under international law towards its former colony, emerged into a complex long term dispute between the two states on the sovereignty over the islands, and the rights of the Chagossians to return to their homeland. Indeed, the history of the Chagos archipelago is not a common one, and was the object in the 1960's of some scandalous strategies between the UK and the USA which implied the forced exile of the indigenous inhabitants of this tiny and fragmented piece of territory lost in the middle of the Indian Ocean. At that time, the Chagos islands were part of the British colony of Mauritius, but the central government of the UK excised them from that territory in 1965, before Mauritius' independence, and created the BIOT⁴. The UK and the USA had agreed that the land was strategic and suitable for the establishment of a security base. For that reason, the two states planned the illegal detachment of the archipelago, which was condemned by UN resolutions and domestic decisions⁵. Both states reached the deal that the southeast and principle island of Diego Garcia would be available for the US, where the Americans built an important military base which is still functioning, and playing a key role during the campaigns in the Middle East. Following the project established by London and Washington, the entire local population of the Chagos islands, some 1800 individuals, were secretly removed from their land and mainly displaced to Mauritius and the Seychelles between 1967 and 1973. Various procedures were engaged by the exiled Chagossians and

1 Hereafter «MPA».

2 Hereafter «UNCLOS».

3 PCA, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 march 2015, 217 p., available on the website of the Permanent Court of Arbitration: <http://www.pca-cpa.org/>.

4 Stands for «British Indian Ocean Territory», created by the BIOT Order 1965, and administered as an overseas territory.

5 In this article, II.

their descendants before English domestic courts. The dispute reached the European Court of Human Rights and concerned the right for the outer Chagossians to return to their homeland⁶.

However, the present case brought before the UNCLOS tribunal is related to the more recent decision of UK, taken on 1 April 2010, establishing a Marine Protected Area around the archipelago, covering a surface that goes up to 200 miles from the baselines and representing more than half a million square kilometers⁷. According to Mauritius, the British decision violated the Convention on the Law of the Sea, as the UK was not entitled to take these actions since it is not the “coastal state” in the meaning of the convention, and because of the undertakings it took towards Mauritius at the time of the detachment⁸. It contended that the MPA was incompatible with the rights provided for by the Convention, especially the fishing rights of Mauritius regarding the Chagos waters, and with the obligations of consultation and cooperation with other states. It also asked the tribunal to declare that the UK could not prevent the United Nations Commission on the Limits of the Continental Shelf from making some recommendations about the petition of Mauritius for an extended Continental shelf surrounding the Chagos archipelago. In response, the UK challenged the jurisdiction of the tribunal in all aspects. London presented the creation of the MPA as a necessary measure regarding the protection of the environment, and pretended that the proceedings were an “attempt by Mauritius to construct a case under the Convention in order to bring a dispute concerning sovereignty over the Chagos Archipelago within the jurisdiction of the Tribunal”⁹. The decision of the tribunal intervened in an political and legal imbroglio with questions and principles as important as the history of colonialism and self-determination, the preservation of environment, the interpretation of

6 See ALLEN, S. International Law and the Resettlement of the (Outer) Chagos Islands. *Human Rights Law Review*, Oxford, v. 8, n. 4, p. 683-702, 2008. From the same author: *The Chagos Islanders and International Law*, Oxford, Hart Publishing, 308 p.

7 Award, para. 5, p. 1. On the special nature of the MPA, see MONEBHURRUN, N. Creating Marine Protected Areas to assert territorial jurisdiction against the Right of Abode of Native Populations: The Case of the Chagos Archipelago. In: GÓMEZ, E. M. Vázquez; CINELLI, C. (Ed.). *Regional Strategies to Maritime Security. A Comparative Perspective*. Valence: Tirant Lo Blanch, 2014. p. 79-100.

8 See after «the Lancaster House Undertakings».

9 Award, para. 12, p. 2.

UNCLOS, and the scope of the jurisdiction provided by Part XV of the Convention. By three votes to two, the tribunal decided to dismiss Mauritius on its first and second demands, unanimously, to declare that there was no dispute about the CLCS and, last but not least, unanimously, after having recognized its jurisdiction on this question, to declare the incompatibility between the MPA and the Convention in its articles 2(3), 56(2), and 194(4). This long award – 217 pages – has some important legal and political consequences. It brings some precious clarifications on the UNCLOS, and will oblige Mauritius and the UK to renegotiate about the creation of a protected area around Chagos. It also recognizes the binding nature of the Lancaster House Undertakings of 1965, which will be of great significance for Mauritius' claim on the islands, and for the Chagossians' struggle for their right to be resettled.

2. BACKGROUND

A. Situation and history of the Chagos islands

The Chagos archipelago is constituted by coral atolls and islands situated in the middle of the Indian Ocean¹⁰. It counts more than 60 individual islands among which Diego Garcia is the largest one¹¹. The Chagos archipelago is one of the most isolated island groups in the world, located about 2200 kms from the main island of Mauritius, 1780 kms from Sri Lanka, and 1513 kms from Malé¹². It was discovered during the 16th century and claimed by France which administered it as a dependency of “*Ile de France*”, as was named Mauritius at that time. The British captured the “*Ile de France*” in 1810 and the territory, henceforth “Mauritius”, was officially ceded by France through the treaty of 30 May 1814. The Chagos archipelago was then administered by the UK as a dependency of Mauritius till 1965¹³.

¹⁰ Award, para 55, p. 13.

¹¹ San Diego is about 27.20 square kilometres. Then come respectively Eagle (Great Chagos Bank, 2.45 square kilometres), île Pierre (Peros Banhos, 1.50 square kilometres), Eastern Egmont (Egmont Islands, 1.50 square kilometres), île du Coin (Peros Banhos, 1.28 square kilometres) and île Boddam (Salomon Islands, 1.08 square kilometres): Mauritius' Memorial, para. 2.6, p. 10. All the writings and hearing transcripts quoted are available on the PCA website.

¹² Mauritius' memorial, p.10, and Preliminary Objections from United Kingdom, para. 2.5, p. 5.

¹³ On that early history, see Award, para. 56-61, p. 13-14.

In the second half of the XXth century, following the international dynamic of decolonization, Mauritius started to move towards independence. Meanwhile, the United Kingdom and the United States engaged in negotiations on the possibility to detach the Chagos archipelago from Mauritius, in order to establish a security zone in the Indian Ocean. The United States' plan was to create a military base and San Diego appeared as the good place for that, after a survey. While arranging the modalities of that shared defense strategy, the two states arrived to the conclusion that the UK would lend San Diego for the use of Washington, after having detached the entire archipelago from Mauritius, put it under UK administration, and displaced the entire local population to ensure the security facilities¹⁴. The UK and the USA also discussed the terms of compensation which would be submitted to the local politics. The formal proposal was officially sent by the Governor of Mauritius to the Mauritius Council of Ministers on 19 July 1965. The issue at that point was about how far this proposal was a real one, and not an element of blackmail in the achievement of independence. For that reason, writings of Mauritius in the MPA case, as well as the award of 18 March 2015, present in details the records of the meetings that took place between Mauritian political leaders and representatives of English government, especially the Secretary of State for the Colonies, Anthony Greenwood. Among these discussions, the most important is the Lancaster House Meeting of 23 September 1965, since Sir Seewoosagur Ramgoolam and his colleagues reached an agreement with the Secretary of State about the detachment of the Chagos islands, under some conditions clearly expressed in the draft record¹⁵. Here is reproduced part of this record, as the undertakings are of great importance for the solution reached by the tribunal:

«Summing up the discussion, the SECRETARY OF STATE asked whether he could inform his colleagues that Dr. [Seewoosagur] Ramgoolam, Mr. Bissoondoyal and Mr. Mohamed were prepared to agree to the detachment of the Chagos Archipelago on the understanding that he would recommend to his colleagues the following:

¹⁴ See Award para 69-99, p. 21-37. San Diego was supposed to be lent without charge, but United States agreed to contribute to the costs of establishing the BIOT for an amount of 5 millions pounds, “to be paid by waiving United Kingdom payments in respect of joint missile development programmes”: award para. 89, p. 33-34.

¹⁵ Award para. 74, p. 24. The Lancaster House conditions will be of great importance in the solution voted by the tribunal: this article, IV.

(i) negotiations for a defence agreement between Britain and Mauritius;

(ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;

(iii) compensation totalling up to [illegible] Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;

(iv) the British Government should use its good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;

(v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;

(vi) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius.

SIR S. RAMGOOLAM said that this was acceptable to him and Messrs. Bissoondoyal and Mohamed in principle but he expressed the wish to discuss it with his other ministerial colleagues.»¹⁶

It quickly appeared that the detachment of the Chagos archipelago and the forced removal of its population would violate the international obligations of the UK. When it was publically announced, the question was raised before the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Also, the General Assembly of the United Nations adopted three resolutions condemning the UK's behavior. The first one is resolution 2066(XX) of 16 December 1965, which, recalling resolution 1514(XV) notes "with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration..."¹⁷. The second and third ones are resolutions 2232(XXI) of 20 December 1966 and 2357(XXII) of 19 December 1967, which do not concern only Mauritius, but also deplore the conduct of administering powers towards various territories under foreign administration¹⁸. Ignoring these recommenda-

tions, the UK enacted the BIOT Order 1965 detaching the islands from Mauritius, and organized the removal of the entire Chagossian population between 1968 and 1973¹⁹. The BIOT Commissioner passed on 16 April 1971 the Immigration Ordinance prohibiting the entry or presence in the archipelago without a nominative permit²⁰. For mere compensation, Mauritius received 650000 pounds to be able to organize the resettlement of the displaced individuals²¹.

The award on the MPA dispute recalls precisely these events, as it is not possible to evaluate the present dispute without these information. Almost one third of the decision is actually dedicated to the history and factual background, including the facts surrounding the establishment of the MPA²². It is of importance to consider that from these events emerged at least two different litigations. One is about the illegal removal of the Chagossians and their right to return. The other one is the dispute at the international level between Mauritius and the UK regarding the sovereignty over the Chagos islands, and further the establishment of the MPA. These are two different disputes, but closely linked (for instance some domestic decisions concerning the Chagos were mentioned during the MPA procedure, to explain the UK's behaviour about fishing rights²³). For that reason, we'll start with a short reminder of the proceedings regarding the right of return of the Chagossians, mostly raised before English domestic courts, and then present the procedure at the international level.

B. Adjudication on compensation and right of return for the Chagossians

A few years after the forced removal of the entire Chagossian population, former residents and their descendants used their British citizenship to present their claim before the English domestic courts. The cases "Vincatassin", "Bancoult I", "Bancoult II", and "Bancoult III" about Chagossians' rights regarding national and international law, made the issue publically known. The struggle of the native population for the recognition of the injustice their suffered and their right to re-

United Nations General Assembly Resolution 2357(XXII).

19 Award para 90, p. 34.

20 Award, para. 90.

21 Award, para. 91.

22 Award, p. 1-69.

23 See UK's counter memorial, para. 3.33, p. 71-72.

16 Reproduced from para. 74, p. 24 of the award.

17 United Nations General Assembly Resolution 2066(XX).

18 United Nations General Assembly Resolution 2232(XXI) and

turn on the island, gained each day more importance in the UK media, above all in the last years.

1. The *Vencatassen* case

Litigation started in 1975, when Mr Michel Vencatassen, a former resident of the Chagos archipelago, initiated a claim for compensation in front of the courts of England and Wales²⁴. The UK government was directly accused, and finally settled the case through its engagement to pay 4 millions pounds to the “fund for the former residents of the Archipelago”²⁵. Mauritius and the UK then signed an arrangement on 7 July 1982 which mentions that the 4 millions pounds, together with the 650000 ones already paid²⁶, “shall be in full and final settlement of all claims (arising from the removal or resettlement of the population of the Chagos Archipelago)”²⁷. The recipients of the fund have been asked to sign a paper redacted in English where they renounced to their rights for future claims²⁸.

2. The *Bancoult I* case

It's only in 1998 that the issue concerning the islanders came back under the light. Another former resident, and leader of the Chagossians' revendications, Mr Olivier Bancoult, instituted a claim in front of the courts of England and Wales. He asked for judicial review of the section 4 of the BIOT Immigration Ordinance, 1971²⁹. The High Court declared the removal of the Chagossian people unlawful, and recognized their right to abode in the Chagos³⁰. A new ordinance was then enacted in 2000, including an exception to the restricted access to the archipelago for the entry of the Chagossians, except for Diego Garcia³¹.

24 UK's counter memorial para. 92, p. 34.

25 UK's counter memorial, para. 92.

26 See this article, introduction.

27 Agreement between the Government of the United Kingdom of Great Britain and Northern Island and the Government of Mauritius concerning the Ilois, Port Louis, 7 July 1982, with amending Exchange of Notes, Port Louis, 26 octobre 1982, Cmnd. 8785, 1316 UNTS 128. Quoted in the Award, para. 92. The agreement was implemented in Mauritius by the Ilois Trust Fund Act of 30 July 1982.

28 See *Chagos Islanders v. Attorney General* [2003] EWHC 2222 (Ouseley J). The question is about whether the persons concerned understood the paper they signed.

29 See this article, A.

30 *R (Bancoult) v. Secretary of State for foreign and Commonwealth Affairs (N. 1)* [2001] QB 1067 (Laws LJ and Gribbs J).

31 Immigration Ordinance 2000, see *R (Bancoult) v. Secretary of*

3. The Chagossians collective claim

Another claim was brought in 2002 by 4959 former residents of the Chagos and their descendants, against the Attorney general of England and Wales and the BIOT Commissioner, for compensation and restoration of property rights. However, on 9 October 2003, the action was dismissed by the High Court on the grounds “that no tort at common law was committed by the removal of the Chagossian population and that further compensation for property loss was precluded by the Limitation Act. 1980 and the Claimants' renunciation in exchange for the compensation provided in 1982”³².

4. The *Bancoult II* case

Meanwhile, the government also conducted some studies in order to determine the feasibility of a resettlement in the archipelago³³. The conclusion reached in 2002 of such study was that it was not feasible to resettle the Chagossian population, and, on that basis, the British government denied another time access of the Chagossians to the archipelago and right of abode³⁴. Mr Bancoult asked for the judicial review of the two Orders enacted in that sense. The “Bancoult II” claim was favourably received by the High Court and the Court of Appeal³⁵, but the House of Lords allowed an appeal and held, in a controversial decision, that, regarding the studies on the feasibility of a resettlement and the practical difficulties of such a measure (in particular economic ones), it was “impossible to say, taking fully into account the practical interests of the Chagossians, that the decision to reimpose immigration control on the islands was unreasonable or an abuse of power”³⁶. The claim

State for Foreign and Commonwealth Affairs (No. 2) [2008] QB 365, para. 18.

32 Award, para. 95, p. 35-36. *Chagos Islanders v. Attorney General* [2003] EWHC 2222 (Ouseley J). The Court of appeal denied leave of appeal on 22 July 2004, *Chagos Islanders v. Attorney General* [2004] EWCA Civ 997 (Sedley LJ).

33 ALLEN, S. “International Law and the Resettlement of the (Outer) Chagos Islands”. *Human Rights Law Review*, Oxford, v. 8, n. 4, p. 683-702, 2008. p. 685.

34 BIOT (Constitution) Order, 2004 and BIOT (Immigration) Order, 2004.

35 *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2006] EWCH 1038 (Admn.) and *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] QB 365.

36 *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453 (Hoffmann LJ). Quoted in

was then introduced by Mr Bancoult and other Chagossians to the European Court of Human Rights, but the latter declared it inadmissible, on the basis of the 1982 agreement, in a decision of 12 December 2012³⁷.

5. The Bancoult III case

Simultaneously, a third round of litigation emerged in this already long and complex dispute, through the “Bancoult III” procedure. This new case constituted, in the own words of the High Court, “a further chapter in the history of litigation arising out of the removal and subsequent exclusion of the local population from the Chagos Archipelago in the British Indian Ocean Territory (“BIOT”)³⁸. The demand was introduced by Mr Bancoult after the official proclamation of the MPA around the Chagos islands on 1 April 2010³⁹. He challenged the Foreign Secretary’s decision on the following grounds:

- «(1) an improper motive, namely an intention to create an effective long-term way to prevent Chagossians and their descendants from resettling in BIOT;
- (2) the failure to reveal, as part of the consultation preceding the decision, that the Foreign Secretary’s own consultants had advised that resettlement of the population was feasible;
- (3) the failure to disclose relevant environmental information in the course of the consultation;
- (4) the failure to disclose that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands;
- (5) breach of the obligations imposed on the United Kingdom under Article 198 of the Treaty on the Functioning of the European Union (“the TFEU”), which relates to the association of overseas territories with the European Union.»⁴⁰

The Court dismissed the Claimant’s case in its entirety in its decision of 6 June 2013⁴¹. An appeal was then

lodged with the Court of Appeal on 23 August 2013, but dismissed by a decision of 23 May 2014⁴².

Surprising is the fact that the award of 18 March 2015 doesn’t mention this proceeding in the part of the decision dedicated to the litigation in front of domestic courts. The Bancoult III was however mentioned several times by the UK during the pleadings, in some occasions to reinforce some of its arguments, especially about fishing rights⁴³. However, it was above all pointed by Mauritius to denounce a retention and redaction of documents. Reminding in its reply, that “this case has proceeded in parallel to a domestic judicial review before the English courts”, Mauritius advised the tribunal “that a great number of UK government documents were disclosed in those proceedings – in relation to the internal decision-making process – and that the UK consciously chose not to make this relevant material available to the Tribunal in these proceedings”⁴⁴. Mauritius counsels finally had access to these documents after having asked them to the solicitors representing Mr Bancoult. The state concluded, after consultation of this material, that not only did the UK not disclose all the available information, but also chose to add unfounded redaction to several documents⁴⁵. The UK was then asked to submit unredacted documents⁴⁶. This accusation became a real incident of procedure when the issue couldn’t be solved despite several letters exchanged by the two parties on that aspect. The tribunal had to inter-

document published by Wikileaks recording meeting with BIOT officials. The preliminary decision ruled that the Wikileaks’ document was inadmissible as a copy of an authentic US Embassy cable under the Vienna Convention on Diplomatic Relations of 1961.

42 R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (N. 3) [2014] EWCA CIV 708.

43 In its counter memorial, UK underlines in a foot note that “The basis of the judicial review proceedings in R(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2013] EWHC 1502 (Admin) was the Claimant’s contention that there was a sufficient argument concerning the existence of Mauritian fishing rights in respect of BIOT waters as to require mention to be made of it in the consultation document if the consultation was to be lawful: the Court concluded there was not (paras. 153-156). This did not require the Court to determine whether as a matter of international law, Mauritius had such rights which it indicated it would have declined to do on the basis of non-justiciability and other principled grounds (see para. 153) (Authority 43)”, UK’s counter memorial, footnote 224, p. 75. See also footnotes 239, 261, 268, 278.

44 Mauritius’s reply, para. 1.11, p.2.

45 The ones set out in Annex 185 of the UK’s counter memorial. These documents, according to Mauritius, clearly show the dissension existing between the UK foreign minister and the other actors at the time of creating the MPA, see after, C.

46 Mauritius’reply, para. 1. 11 to 1.21, p. 2-5.

the Award, para. 97, p. 36-37.

37 *Chagos Islanders v. United Kingdom*, no. 35622/04, para. 81, 12 December 2012.

38 *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (N. 3) [2013] EWHC 1502 (Admin) (Richards LJ), para. 1.

39 See above A.

40 *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (N. 3) [2013] EWHC 1502 (Admin) (Richards LJ), para. 2.

41 *Ibid.*, para. 77. The claimant evidenced this first ground on a

vene, by urging the UK “to remove all redactions that were not strictly required on the grounds of irrelevancy or legal professional privilege”⁴⁷. After several intents and the removal of some of the redactions, the tribunal decided to examine the documents with remaining ones, in advance of the hearing, and found that there were justified⁴⁸.

6. The claim in front of the UK Supreme Court

In 2014, there was a new turning point in the Chagos litigation, through the notification formulated in front of the UK Supreme Court, on the basis of the discovery of documents regarding the feasibility of the resettlement of the Chagossian people in the archipelago, which had not been disclosed at the time of the procedure. The issue raised by the claimant is formally “whether the judgment of the House of Lords in *R (on the application of Bancoult No 2) v Secretary of State for Foreign and Commonwealth Affairs* should be set aside on the alleged ground of material non-disclosure by the respondent and, if so, whether the appellant should be permitted to adduce fresh evidence at the rehearing of the appeal”⁴⁹. The UK Supreme Court’s decision is still expected while this article is redacted.

C. The Interstate Dispute over the Chagos islands and the proceedings about the MPA

The Mauritian pretensions on Chagos islands appeared in the 1980’s, after several years of silence⁵⁰. The manifestation of this pretention was made through the adoption of different texts expressively incorporating the Chagos in the Mauritian territory⁵¹, by the es-

tablishment of special entities⁵², and by the means of some official public declarations⁵³. Meanwhile, the British Government never denied its sovereignty over the BIOT, and there was no doubt about the existence of a territorial dispute between the two states regarding the Chagos archipelago.

Mauritius asserts it only became aware of the planned creation of the MPA after the publication of an article in *The Independant* on 9 February 2009⁵⁴. In reaction, Mauritius insisted on its sovereignty over the Chagos islands through correspondence, and during the joint talks with the UK (under a sovereignty umbrella)⁵⁵. While the UK and Mauritius were exchanging some views, the UK initiated a public consultation about the creation of the MPA. These exchanges by phone and letter are mentioned in detail in the award⁵⁶. Another important talk took place on November 2009 between the two respective prime ministers of Mauritius and the UK (Navinchandra Ramgoolam and Gordon Brown), both present at the Commonwealth Heads of Government Meeting, although the two parties still disagree on the content of this exchange⁵⁷. Meanwhile, the public consultation was still running until 5 March 2010. Documents show that the decision of the Foreign Secretary to create the MPA was taken despite the contrary advice of the British officials in charge of the BIOT, especially the BIOT Commissioner, and the BIOT Administrator⁵⁸. Nevertheless, the MPA was officially established by the Proclamation of 1 April 2010. Mauritius protested by a verbal note⁵⁹.

After the issue was unsuccessfully raised in some meetings⁶⁰, Mauritius initiated an arbitral proceeding

47 Award of 18 March 2015, para. 38, p. 8.

48 The President of the tribunal and the Registrar attended an *ex parte* meeting in Istanbul on 21 April 2014. Award, para. 48-49, p. 10.

49 *R (on the application of Bancoult No 2) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)*, *Case ID: UKSC 2015/0021, case summary*. Available on the: <<https://www.supremecourt.uk/cases/uksc-2015-0021.html>>

50 Mauritius explains this silence by the political and socio economic context. Mauritius underlined this reliance on UK in its writings, especially in its Reply, para. 2. 94, see also award, para. 100. While UK sees in it the recognition of the British sovereignty on the territory, para. 2. 61 of UK’s Rejoinder, quoted by para. 100 of the award.

51 The Award in its para. 100-111 mentions for instance the Interpretation and General Clauses (Amendment Act, 1982), the formulation adopted in the 1992 Constitution of Mauritius, the Mari-

time Zones Act (1977), the Maritime Zones (Exclusive Economic Zones) Regulations (1984), The Maritime Zones Act (2005) and the Maritime Zones Act (2005). Some of these texts provoked opposition by the British Government.

52 As the Select Committee on the Excision of the Chagos Archipelago created by the Mauritian Parliament on 21 July 1982.

53 See the declarations of the Mauritius Government in front of the General Assembly of United Nations, in Mauritius’ reply para. 2.85, quoted by the Award in its para. 103, p. 38.

54 The article in question was written by S. Gray and titled «Giant Marine Park plan for Chagos».

55 These talks had already planned in order to discuss the Chagos issue and the demands to address to the Commission on the Limits of the Continental Shelf: award, para 110, p. 41; and para. 128, p. 47.

56 Award, para. 131-134, p. 49-52.

57 Award, para. 135.

58 Award, para. 150, p. 61.

59 Award, para 153, p. 64-65.

60 Award, p. 66.

against the UK by a notification of 20 December 2010, on the basis of article 287 UNCLOS and article 1 of the annex VII to the Convention. The notification appoints Judge R. Wolfrum (a German national) as a member of the tribunal⁶¹. On 19 January 2011, the UK appointed Judge Ch. Greenwood (a British national) as another member of the tribunal⁶². Because of the disagreement between the parties regarding the appointment of the other members, Mauritius asked the President of the International Tribunal of the Law of the Sea to make a decision, in conformity with article 3(e) of Annex VII UNCLOS. The president of the ITLOS nominated judges J. Kateka (a Tanzanian national), A. Hoffmann (a South African national) as arbitrators, and I. Shearer (an Australian national) as arbitrator and president of the tribunal⁶³. It was settled that the Permanent Court of Arbitration would serve as Register for the proceedings⁶⁴. Mauritius decided to challenge the appointment of judge Greenwood, for insufficient guarantees of independence with the British government⁶⁵. The tribunal (constituted of four members for the occasion) held a hearing on that issue and dismissed the challenge⁶⁶.

On the other side, the UK decided to first raise preliminary objections to the jurisdiction of the tribunal, and to ask for the bifurcation of these proceedings. That is to say that the UK requested the tribunal to treat the jurisdictional objections as a preliminary matter and to organise a separate hearing on the question of bifurcation⁶⁷. As the British Counsels were challenging the

jurisdiction of the tribunal in all aspects, they were arguing among other things that in the case of a decision in the UK's favour, this would "eliminate the need to proceed to what would be a costly and wide-ranging (in terms of both facts and law) merits phase"⁶⁸. Rules of procedure had upstream been adopted by the tribunal and the parties, and contained in detail the procedure to follow in case of the submission of some preliminary objections⁶⁹. On that basis, the tribunal issued on 15 January 2013 an Order rejecting the UK's demand for bifurcation and decided that the objections would be considered during the proceedings on the merits⁷⁰.

These incidental proceedings, added to the already mentioned incident about the documents disclosed in annex 185 of the UK's counter memorial⁷¹, and to the various requested extensions of time to submit the written pieces⁷², considerably postponed the hearings on the merits. They finally took place from 22 April 2014 to 9 May 2014 in Istanbul.

The final submissions of the parties are redacted as follows:

For Mauritius:

"On the basis of the facts and legal arguments presented in its Memorial, Reply, and during the oral hearings, Mauritius respectfully requests the Arbitral Tribunal to adjudge and declare, in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea ("the Convention"), in respect of the Chagos Archipelago, that:

(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, 56 and 76 of the Convention; and/or

(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 56(1)(b)(iii) and 76(8) of the Convention; and/or

(3) the United Kingdom shall take no steps that may

61 Para. 10 of the notification, in accordance with article 3(b) of annex VII to the Convention.

62 In accordance of article 3(c) of annex VII to the Convention.

63 Award para. 15-18, p. 5.

64 Award, para. 18.

65 "On 19 May 2011, Mauritius requested additional disclosure from Judge Greenwood (the "Request for Additional Disclosure"). Mauritius expressed concern at the "long-standing" and "close working" character of the relationship between Judge Greenwood and the Government of the United Kingdom and also at the fact that Judge Greenwood had advised the United Kingdom "on many of the most sensitive issues of international law and foreign policy". Considering the "strategic importance for the United Kingdom" of the issues raised in the case brought before the Tribunal, Mauritius requested further disclosure": PCA, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Decision on challenge of 30 November 2011, para. 10.

66 PCA, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Decision on challenge of 30 November 2011, para. 10. The decision of almost 40 pages is interesting regarding application of standards to the appointment of international judges and arbitrators.

67 Award, para. 28-34, p. 7.

68 United Kingdom's Preliminary objections, para. 6. 16, p. 74-75.

69 Award para. 24- 27, p. 6.

70 CPA, *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Procedural Order n°2, 15 January 2015.

71 See this article, B.

72 Award para. 32-34, p. 7.

prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention;

(4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 63, 64, 194 and 300, as well as Article 7 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995.

For the United Kingdom:

"For the reasons set out in the Counter-Memorial, the Rejoinder and these oral pleadings, the United Kingdom of Great Britain and Northern Ireland respectfully requests the Tribunal:

- (i) to find that it is without jurisdiction over each of the claims of Mauritius;
- (ii) in the alternative, to dismiss the claims of Mauritius.

In addition, the United Kingdom of Great Britain and Northern Ireland requests the Tribunal to determine that the costs incurred by the United Kingdom in presenting its case shall be borne by Mauritius, and that Mauritius shall reimburse the United Kingdom for its

share of the expenses of the Tribunal".

3. DECISION ON JURISDICTION AND CLARIFICATION ON PART XV UNCLOS

The UK's objection to the tribunal's jurisdiction constituted a valuable opportunity for the arbitrators to bring some substantial interpretation of the United Nations Convention on the Law of the Sea. For the United Kingdom, there was no such legal ground in the concerned provisions, and, additionally, it contended that the procedural requirements of the previous exchange of views provided in article 283 UNCLOS hadn't been met⁷³. As set out in brief by the tribunal itself, "Mauritius considere[d] that the United Kingdom beare[d] the burden of establishing that an express exception to the

⁷³ See United Kingdom's counter memorial, chapters IV and V.

Tribunal's jurisdiction, such as those set out in Articles 297 and 298, [was] applicable"⁷⁴. In other words, the issue for the tribunal was about choosing an extensive or a restrictive interpretation of the UNCLOS articles establishing the compulsory procedures of dispute settlement. Prevalence of the objectives pursued by the Convention would lead to the first option, but there is no surprise in the tribunal's decision to not threaten the states' sovereignty by preferring a strict lecture of the will of the parties, at least regarding the jurisdiction on land disputes⁷⁵. The tribunal decided to deal with this question through its own approach, by examining its jurisdiction regarding Mauritius' first and second submissions, then Mauritius' fourth submission about the compatibility of the MPA to the Convention, after that Mauritius' third submission about CLCS, and by deciding finally on article 283 requirements.

A. Tribunals under UNCLOS have no jurisdiction on land disputes

1. Legal aspects at stake

The main arguments of UK regarding the alleged lack of jurisdiction of the tribunal towards Mauritius' first and second submissions turned logically around the issue of land sovereignty disputes and their treatment by the Montego Bay Convention. According to the UK, the notification presented by Mauritius was an attempt to requalify what was in reality a land dispute, and the sovereignty over the Chagos archipelago constituted "the real issue in the case"⁷⁶. A formulation that voluntarily referred to the important assertion of the International Court of Justice in the Nuclear Tests Award: "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim"⁷⁷. But these assertions raised three main legal points.

⁷⁴ Award para. 161, p. 71.

⁷⁵ It is useful to remind that the preamble of the Convention expresses these objectives with proper reference to the sovereignty of states, mentioning their desire to establish "through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment ...".

⁷⁶ United Kingdom's counter memorial, para. 4.3-4.9, quoted by the Award para. 164, p. 72.

⁷⁷ Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, para. 30, p. 466.

1.1. The first question was about the scope of the compulsory jurisdiction under article 286 and 288 of the Convention, which respectively provide that:

Article 286

Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section

Article 288

Jurisdiction

1. 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.

2. 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.

[...]

The UK argued that these provisions had to be understood in a restrictive way, with careful interpretation, and could not serve as a general basis to settle all kinds of international disputes. It contended that the real issue in the case was the question of sovereignty over the islands, which could not be identified as a dispute concerning the interpretation or application of UNCLOS. In their demonstration, the British counsels took the precaution to explain, that by maintaining this position, they were not trying to say that it was impossible for a tribunal to deal with some land issues when these aspects would be incidental or in the case of “mixed disputes” about maritime boundaries⁷⁸. For Mauritius, the case was limited to the interpretation of the Convention, for the starting point of the claim was indeed in it, and the question was about the notion of “coastal state”⁷⁹.

1.2. Another element discussed between the parties was the relevance of article 293 of the Convention and the implication of the application of “other rules of

international law not incompatible” with it⁸⁰. Mauritius was pretending that on that basis, “issues closely linked or ancillary to questions arising directly under the Convention are also questions ‘concern[ing] the interpretation or application of the Convention’⁸¹ and (ironically quoting A. Boyle’s academic writings, in this case acting as counsel for the UK) that “in compulsory jurisdiction cases, the tribunal may have to decide matters of general international law that are not part of the law of the sea and Article 293(1) allows for this”⁸². To what the UK answered substantially that article 293 could not in any case serve to extend the jurisdiction allowed by the Convention⁸³.

1.3. The third point concerned the relevance of article 298(1)(a)(i) of the Convention, and the question to know whether or not these provisions “excluding a dispute concerning sovereignty over land territory from compulsory conciliation implies *a contrario* that such a dispute would be subject to compulsory dispute resolution in the absence of such a declaration”⁸⁴. For Mauritius, mainly, an *a contrario* understanding of the article stayed in the following reasoning: “If, indeed, mixed disputes were not otherwise covered by the Convention’s jurisdiction, there would have been no need for the

80 The entire article sets out: “1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.”

81 Final transcript 446:2-4, quoted by the Award para. 182, p. 77-78.

82 *Ibid.*, 435:13-15. Ph. Sands here quotes during the public hearings A. Boyle, reminding an assertion already made in the writings and furnished in the Annex 103 of Mauritius’ reply, p. 49.

83 United Kingdom’s counter memorial, p. 121.

84 Award, para. 188, p. 79. Article 298(1)(a)(i) sets out: “1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission”.

78 United Kingdom’s counter memorial, p. 101-103; Award para. 166-174, p. 72-75.

79 Mauritius’ reply, para 7.5-7.28, p. 191-201; Award para. 175-179, pp 76-77.

specific exclusion in the last clause of Article 298(1)(a) (i)⁸⁵. Instead, the UK was underlining the specific nature of mixed disputes, and the fact that the Chagos case had nothing to do with a maritime boundary issue⁸⁶.

2. The tribunal's prudent approach on the compulsory settlement of disputes The reasoning adopted by the tribunal is in our point of view a reasonable one. Though the international judge can sometimes fulfill its mission with audacity in order to serve the necessary peaceful settlement of international disputes, it would have been adventurous to conclude from the Convention on the jurisdiction of the tribunal, on what was certainly mainly a land dispute. It would have indeed truncated the initial will of the parties to the Convention. The tribunal concluded that the first two submissions of Mauritius were related to the question of sovereignty on the Chagos islands, and that it had no jurisdiction on this aspect. It was somehow impossible to completely avoid this issue, since the decision on Mauritius' fourth submission does have some legal consequences on the territorial dispute between Mauritius and the UK about the Chagos islands.

2.1. The use of the notion of "coastal state" couldn't hide that the submissions were about land sovereignty. As the Convention does not "provide guidance on the identification of "the coastal state" in cases where sovereignty over the land territory fronting a coast is disputed"⁸⁷, the question, in the tribunal's point of view, "hing[ed] entirely on whether the issues raised in Mauritius' first submission [and therefore second submission] represent a dispute "concerning the interpretation or application" of the Convention"⁸⁸. It had then to decide upstream on the nature of the dispute raised by the first submission. According to the decision, there was no doubt on the existence of a dispute between the parties with respect to sovereignty over the Chagos islands, nor was there any doubt about the existence of a dispute between the parties with respect to the manner in which the MPA was declared⁸⁹. Hence the issue raised was at this point formulated in this way by the tribunal:

"Is the Parties' dispute primarily a matter of the interpretation and application of the term "coastal state", with the issue of sovereignty forming one

aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?"⁹⁰

The impressive amount of documents and evidential material furnished by the parties was not able to bring a clear answer to this question. A bit surprisingly, the judges focused on the consequences which could emerge from their decision. Mauritius' counsels, aware of that aspect, had actually already formulated them, rolling the dice, with the will to make these consequences less frightening: to state the UK is not the coastal state would

"do no more than state that Mauritius is "the coastal state" in relation to the Chagos Archipelago and that the Chagos Archipelago forms an integral part of the Republic of Mauritius. [...] The British [would] leave. The former residents of the Chagos Archipelago who wish to return finally [would] be free to do so and their exile would come to an end. [...] Those are the consequences of applying the law, from exercising jurisdiction and interpreting and applying the words that sit in the Convention"⁹¹.

But the demonstration did not have the expected impact, since the tribunal drew the opposite conclusion by stating in a very direct manner that these conclusions were "not the sort of consequences that follow from a narrow dispute regarding the interpretation of the words "coastal state" for the purposes of certain articles of the Convention"⁹², which, to the arbitrators, demonstrated that the dispute related to the first submission was "characterized as relating to land sovereignty over the Chagos Archipelago"⁹³.

2.2. What failed to be demonstrated was then the scope of jurisdiction allowed by the Convention and the measure to which it would cover "a dispute over land sovereignty when [...] that disputes touches some ancillary manner on matters regulated by the Convention"⁹⁴. The parties had exchanged long argumentation on this aspect, but the decision brushes off these considerations by establishing that the Convention gives no clue about the jurisdiction on land disputes, for the mere rea-

85 Final Transcript, 450:23-24, quoted by the Award para. 191, p. 80.

86 Although, as noticed by Mauritius, submissions have been presented to the CLTS.

87 Award para. 203, p. 85.

88 Award, para. 206, p. 86.

89 Award para. 209-210, p. 87.

90 Award, para. 211, p. 87.

91 Final Transcript, 1030:13-21, quoted in the Award para. 211, p. 88.

92 Award para. 211, p. 88.

93 Award para. 211.

94 Award para. 212.

son “that none of the Convention participants expected that a long-standing dispute over territorial sovereignty would ever be considered to be a dispute “concerning the interpretation or application of the Convention””⁹⁵.

To interpret the intent of the parties to the Convention, it was necessary, indeed, as underlined by the award, to refer to the evident major “sensitivity” of states when questions of territorial sovereignty are at stake⁹⁶. In a provocative but pertinent question, the decision asks:

“[...] if the drafters of the Convention were sufficiently concerned with the sensitivities involved in delimiting maritime boundaries that they included the option to exclude such disputes from compulsory settlement, is it reasonable to expect that the same States accepted that more fundamental issues of territorial sovereignty could be raised as separate claims under Article 288(1)”⁹⁷

The tribunal obviously answered “no” by considering that a reading of article 298(1)(a)(i) as it would cover matters of land sovereignty would “do violence to the intent of the drafters of the Convention...”⁹⁸ and concluded on the interpretation of part XV of UNCLOS:

“As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (see *Certain German Interests in Polish Upper Silesia*, Preliminary Objections, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 4 at p. 18). Where the “real issue in the case” and the “object of the claim” (*Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)”⁹⁹

It however took the precaution to precise, that through this declaration,

“[t]he Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty

could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.”¹⁰⁰

An hypothesis that did not correspond to the Chagos islands case, for what the decision excludes the jurisdiction of the tribunal towards Mauritius’ first submission. It also excludes jurisdiction towards the second submission, after having considered it distinct, but nevertheless referring in the same way to a territorial dispute over land¹⁰¹.

This conclusion was the only one not unanimously shared by the panel and was voted by three arbitrators¹⁰². The opposition of judges Kateka and Wolfrum on this question motivated the redaction of a joint dissenting and concurring opinion explaining the reasons of this disagreement¹⁰³. To them, the qualification of the dispute deserved to focus chiefly on the formulation of the submission made by Mauritius, and some elements showed that into the strict mark of the MPA case, the first concern of Mauritius was not the sovereignty claim¹⁰⁴. They both argued for a limited scope of Mauritius’ first submission, and an apprehension of the second submission, as it was not a question of sovereignty but a dispute as to whether the United Kingdom has ceded one or more rights as a coastal State in the commitments made in the Lancaster House Undertakings¹⁰⁵.

It is true that “the Tribunal missed the opportunity to deal with the separation of the Chagos Islands from Mauritius and the circumstances surrounding this separation”¹⁰⁶, but on a justified motivation. Moreover, as already mentioned, the award partly addresses the question on land sovereignty, since the decision on Mauritius’ fourth submission has some important consequences¹⁰⁷. Another solution would have supposed to decide on the existence of a legal title of the UK on the Chagos islands, which would have meant to decide on a

95 Award para. 215.

96 See Award para. 216, p. 89. The tribunal takes in account “the inherent sensitivity of States to questions of territorial sovereignty”.

97 Award para. 216.

98 Award para. 219, p. 90.

99 Award para. 220.

100 Award para. 221.

101 Award para. 228-230, p. 94-95.

102 Dispositif of the award, para. 547, p. 215.

103 The opinion also raises grounds of discordance on the relevant reasoning about the jurisdiction of the tribunal on Mauritius’ third and fourth submissions.

104 Dissenting and concurring opinion of judges James Kateka and Rüdiger Wolfrum, para. 3-17.

105 Dissenting and concurring opinion of judges James Kateka and Rüdiger Wolfrum, para. 19.

106 Dissenting and concurring opinion of judges James Kateka and Rüdiger Wolfrum, para. 67.

107 On that question, this article, IV.

land dispute independent from a question of interpretation of the Convention. It was not possible to give a statement on the competence about the MPA without deciding on the question of the territorial title. The judges couldn't ignore that the MPA issue was one facet of a larger dispute. It is logical that states voluntarily reduce the scope of an issue when they bilaterally submit it to an international settlement. It would however not be acceptable that one state could submit a dispute to such international mechanism without the consent, previous or present, of the other state, by focusing the initial claim on one consequence of the main issue. Pretending that the UNCLOS could serve as a conventional basis for the jurisdiction to deal with land disputes not even linked with maritime boundaries would be far from the drafters' intent, and would be contrary to the general rules of interpretation provided by international law.

B. The MPA is not only about fisheries and the tribunal has jurisdiction over issues related to these other aspects

1. Identification of the legal reasoning

The issue on the tribunal's jurisdiction with regard to Mauritius' fourth claim on the compatibility of the MPA with the Convention represents a large part of the award¹⁰⁸. The tribunal's jurisdiction on that aspect was related to the relevance of article 297 UNCLOS. This long article establishes grounds and exceptions to compulsory jurisdiction and was then crucial for both parties. In substance, there was a dissension in the manner to present the nature of the MPA. The UK presented it as a measure concerning above all fisheries, and was then rejecting the establishment of the tribunal on the grounds of article 297(1)(c) relating to the preservation of the environment, as Mauritius contended¹⁰⁹. It argued for the same reason that the jurisdiction of the tribunal was excluded by article 297(3)(a) UNCLOS which precludes compulsory proceeding for disputes relating to the sovereign rights of the coastal state "with respect to the living resources in the exclusive economic zone or their exercise..."¹¹⁰. The UK was

also denying the tribunal's jurisdiction towards Mauritius' claims about cooperation with respect to highly migratory fish stocks (articles 63 and 64 UNCLOS and 1995 Fish Stocks Agreement)¹¹¹, access to the territorial sea fish stock and to the exclusive economic zone fish stock (articles 2(3), 55 and 56(2) UNCLOS)¹¹², harvesting of sedentary species of the continental shelf (article 78 UNCLOS)¹¹³, marine pollution (article 194 UNCLOS)¹¹⁴, and the abuse of rights alleged by Mauritius (article 300 UNCLOS)¹¹⁵.

The tribunal found it had jurisdiction on these claims, except on those excluded by article 297(3)(a) for being related to fisheries. It exposed its decision in a three parts reasoning, respectively dedicated to the scope and character of the MPA, the scope and character of Mauritius' rights, and the articulation with article 297 (1)(c) UNCLOS.

1.1. The first question is quickly treated in the award by an efficient application of estoppel, without, however, naming the principle:

"[h]aving argued for the necessity and importance of the MPA by reference to environmental concerns that extend well beyond the management of fisheries, it is not now open to the United Kingdom to limit the jurisdiction of this Tribunal with the argument that the MPA is merely a fisheries measure"¹¹⁶

The decision reaches this conclusion from the official declarations of the British government around the establishment of the MPA, which let no doubt about the way the UK presented the creation of the area¹¹⁷.

1.2. The second part of the reasoning turning around the scope of Mauritius' rights brings a classification between the articles of the Convention invoked. As mentioned above, Mauritius contented that the MPA was incompatible with the UK's obligations under articles 2, 55, 56, 63, 64, 194, and 300 UNCLOS¹¹⁸. To determine

108 See Award p. 93-130.

109 On that question, Mauritius' memory p. 88-89 and UK's counter-memorial, p. 160-169.

110 Article 297(3)(a) UNCLOS. See again UK's counter-memorial, p. 160-169.

111 The following claims are detailed in Mauritius' memorial p. 124-153. For the arguments of UK on this point: UK's counter memorial p. 156-159 and p. 170.

112 Award, p. 154-156 and p. 173.

113 Award, p. 155. Mauritius raised the question of sedentary species but did not claim a violation of article 78 in the final submissions, as reminds the note 370 of the award.

114 Award, p. 159.

115 Award, p. 174. For more details about the arguments of these ultimate claims, see Award p. 100-111.

116 Award para. 291, p. 113.

117 Award para. 286-291, p. 111-113.

118 Award para. 294, p. 114.

the scope of Mauritius' rights, the decision establishes three categories among this list of dispositions.

On one side, articles 2(3) and 56(2) regarding the exercise of sovereignty or sovereign rights over the territorial sea and the exclusive economic zone refer respectively to "other rules of international law"¹¹⁹ and to an obligation "to have due regard to the rights and duties of other states"¹²⁰. The tribunal considered then "the rights in issue to be those originating in the Lancaster House Undertakings"¹²¹. The question of the binding nature of these rights was left for the merits, the question was at that point if they could "justify the provisional conclusion that they may have been binding as a matter of international law and relevant to the application of Articles 2 and 56"¹²². The tribunal found the test satisfied¹²³. The rights related to fisheries were clearly identified like falling under the exclusion of article 297(3)(a)¹²⁴, but the panel found that the undertakings relating to the return of the Archipelago (when no longer needed for defense purposes), and to the benefit of oil and mineral resources¹²⁵, were linked to the creation of the MPA and not covered by any exception. "The MPA's very existence bears upon the choices that Mauritius will have open to it when the Archipelago is eventually returned" expressed the tribunal¹²⁶, and "the benefit of the minerals and oil in the surrounding [...] may be significantly affected by the MPA" in such a situation¹²⁷.

On the other side, articles 63, 64 and 194 of the Convention directly create some rights to Mauritius by imposing some obligations to the UK¹²⁸. There was no much doubt about the fact that articles 63 and 64 (as well as the 1995 Fish Stocks Agreement) concerned fisheries and would fall under the exclusion of article

297(3)(a), even if subtle distinctions had been opposed by Mauritius¹²⁹. However, article 194 on marine pollution doesn't fall under exception, and the claim based on this article was actually not really opposed under the scope of jurisdiction¹³⁰.

Finally, articles 55 and 300 UNCLOS constitute for the tribunal a special kind of dispositions that don't add anything to the scope of Mauritius' rights: article 55 describes the exclusive economic zone¹³¹ and article 300 about abuse of rights is necessarily linked to the invocation of another article¹³².

To the panel, the claims could not be entirely excluded by the article 297(c)(a) exception, since the scope of Mauritius' alleged rights went beyond the strict mark of fisheries.

1.3. According to the previous steps of the demonstration, the tribunal concluded that it had jurisdiction to consider Mauritius' fourth submission and the compatibility of the MPA with articles 2(3), 56(2), 194 and 300 UNCLOS¹³³. But it reaffirmed its jurisdiction, prior to this conclusion, by identifying the dispute as entering into the scope of article 297(1)(c) UNCLOS¹³⁴. The articulation established between the dispute and this tortuous article of the Montego Bay Convention, as the last part of the reasoning, implies here some more explanations.

2. The inclusive interpretation of article 297(1) UNCLOS and its consequences on the tribunal's jurisdiction

The MPA case was a good opportunity to bring some enlightening on the enigmatic article 297(1) UNCLOS and the tribunal dedicated some important deve-

119 Article 2(3) UNCLOS sets out: "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

120 Article 56(2) UNCLOS sets out: "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

121 Award, para. 294.

122 Award, para. 296, p. 115.

123 Award para. 296.

124 Award para. 297, p. 116.

125 Undertakings vii et viii.

126 Award, para. 298, p. 116.

127 Award, para. 298.

128 Award, para. 293, p. 114.

129 Award para. 300-301, p. 117. Mauritius had for example tried to demonstrate that the Convention doesn't exclude jurisdiction on dispute about rights of fisheries in the territorial sea by a similar reading of the dispositions of the first and third paragraphs of article 297: Mauritius' memorial, p. 88-89.

130 Award, para 302.

131 "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, 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 this Convention."

132 "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

133 Award, para 323, p. 129-130.

134 Award, para. 319.

lopments to it. Mauritius had invoked article 297(1) to find some ground of its claim, but the tribunal chose to offer here a general reading of these dispositions, through an analyze of the textual construction and the relationship between articles 288(1) and 297(1)(c), and through the drafting history of the article.

2.1. A classical application of the rules of interpretation of conventional instruments imposes to start by studying the formulation of the dispositions whose meaning raises some question, as well as their situation in the whole text. Even without naming these evident rules of international law codified by the Vienna Convention on treaties, the panel did so by having a cloth look on article 297(1)(c) and its articulation with other dispositions of the Convention of Montego Bay. The question was about whether or not the first paragraph oh article 297 could limit the jurisdiction of the tribunal, and the panel answered through a more general one: can potentially article 297(1)(c) limit the jurisdiction of a tribunal? As a matter of fact, article 297(1) is phrased in affirmative terms and includes no exceptions¹³⁵, which would lead to a negative answer. As mentioned by the tribunal, it “does not state that disputes concerning the exercise of sovereign rights and jurisdiction are *only* subject to compulsory settlement in the enumerated cases”¹³⁶, which pleads for a lecture in the sense of an unlimited list. In this direction also goes the comparison with article 297(3), which would be unnecessary with another reading of article 297(1), and with article 297(2), which would be in contradiction with article 297(1), in the case of an exclusive lecture of the last mentioned dispositions¹³⁷.

Regarding these observations, “article 297(1) reaffirms, but does not limit, the Tribunal’s jurisdiction pursuant to article 288(1)”¹³⁸. Still, the problem also came from the place in the whole text and the subtitle of article 297: “Limitations on applicability of section 2” (a section dedicated to “compulsory procedures entailing binding decision”). Article 297(2) and 297(3) indeed express some limitations. Article 297(1) is located in section 3 of Part XV UNCLOS, a section reserved to “limitations and exceptions of section 2”. Because of “the apparent ambiguity of including a jurisdiction-affirming provision in an article otherwise devoted to limitations

on the exercise of compulsory dispute settlement”¹³⁹, the tribunal decided to have a look on the draft history of the article.

2.2. Article 297 has a complex history. The decision recalls the 1976 draft version, the 1977 draft version, the 1979 draft version, and the nearly final 1980 draft version¹⁴⁰. This makes the text of the award a bit cumbersome, but shows the difficulties the drafters met to find a satisfactory formulation of these dispositions. It is interesting to read that the first intent was effectively to formulate a limitation on the submission to compulsory settlement of disputes, but was then omitted in the final text¹⁴¹. The *Commentary of the Convention* explains this change¹⁴². To the tribunal, the historical also shows that “the placement of the jurisdiction affirming Article 297(1) within an Article devoted to limitations on the compulsory settlement of disputes is explained by the procedural safeguards that were briefly introduced into the Article and which ultimately became Article 294”¹⁴³. These considerations lead to the conclusion of the tribunal:

“The Tribunal considers that the drafting history confirms the conclusion it reached from the textual construction of Article 297. Article 297(1) reaffirms a tribunal’s jurisdiction over the enumerated cases and (through Article 294) imposes additional safeguards; it does not restrict a tribunal from considering disputes concerning the exercise of sovereign rights and jurisdiction in other cases. Where a dispute concerns “the interpretation or application” of the Convention, and provided that none of the express exceptions to jurisdiction set out in Article 297(2) and 297(3) are applicable, jurisdiction for the compulsory settlement of the dispute flows from Article 288(1). It is not necessary that the Parties’ dispute also fall within one of the cases specified in Article 297(1)”¹⁴⁴

C. The “exchange of views” requirement of article 283 UNCLOS is a procedural condition and must be interpreted with flexibility

After Mauritius’ third submission about petition to CLCS was quickly set aside for absence of dispute¹⁴⁵,

135 Award para. 307, p. 119.

136 Award para. 308.

137 Award para. 308.

138 Award para 308.

139 Award para. 308.

140 Award p. 120-126.

141 Award, para. 314, p. 126-127.

142 Award para. 314.

143 Award., para. 315.

144 Award, para. 317.

145 There’s no need to recall such part of the decision in details.

the tribunal still had to examine the UK's transversal argument on the unfulfilment of article 283. This article of part XV of the Convention contains general dispositions about the settlement of disputes between the parties, and provides that:

“1. 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.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.”

To the UK, the exchange of views was a precondition to the jurisdiction under the Convention, which hadn't been met in the case regarding the fourth submission. It argued that the requirement of article 283 differed from the general international law obligation to negotiate, and must be read as a higher standard¹⁴⁶. It was then “not sufficient to meet the requirements of article 283(1) simply to point to a stream of communications with the respondent State, even if they refer to an existing longstanding sovereignty claim”¹⁴⁷. Whereas Mauritius pretended that “the requirements of article 283 (were) not particularly onerous” and “(did) not need lengthy exchanges”¹⁴⁸.

It was here another opportunity for the tribunal to bring some substantial elements on the application of

the Convention. This issue was developed quite in details, to conclude that the requirement was met¹⁴⁹. To do so, the panel established a distinction between a requirement about exchanging views regarding the means for resolving the dispute, and a requirement about negotiating on the substance of the dispute¹⁵⁰. Article 283 would then relate to procedure, not to substance, as indicated by the textual structure of the provisions¹⁵¹.

Two points were then analyzed. Firstly, the absence of requirement in the Convention for substantive negotiations. Nevertheless, “to the extent that such a requirement could be considered to be implied from the structure of sections 1 and 2 of Part XV”, there would be for the tribunal “no hesitation” that Mauritius met it, regarding the talks that had been engaged¹⁵². The references to the furnished jurisprudence of general international law justified the conclusion¹⁵³. Secondly, the procedural requirement of article 283 UNCLOS should not be interpreted in a too formalistic manner, as it had been already set in the Barbados/Trinidad and Tobago award¹⁵⁴:

“Article 283 forms part of the Convention and was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings. It should be applied as such, but without an undue formalism as to the manner and precision with which views were exchanged and understood. In the Tribunal's view, Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed”¹⁵⁵

The tribunal unanimously recognized that Mauritius' and the UK's officials were having talks on the question of the submission to the CLCS. The issue emerged during the exchange of writings, when the UK raised some objections, but in the mark of a general argumentation about the MPA case. During the hearings, the UK expressed its will to cooperate, and Mauritius accepted the UK's proposition to organize the talks under a sovereign umbrella. Then the tribunal, by encouraging the parties to exchange their views on that question, contributed in resolving the dispute without a binding decision. See Award p. 130-139.

146 See UK's rejoinder, p. 105-125. The rejoinder, in para. 6.7, quotes judges Wolfrum and Treves, who had already concluded to this deviation from the general procedure in international law (*The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum*, paras. 28-29, and *Dissenting Opinion of Judge Treves*, para. 10.)

147 Award, para. 6.52, p. 124.

148 Final transcript 402:1-6, quoted by the Award para. 360, p. 142.

149 Award p. 147-152.

150 Award, para. 378, p. 147.

151 Award.

152 Award para. 378, p. 147-148.

153 For instance, the decision quotes: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 85, para. 30; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392 at p. 428-429; *Mavromatis Palestine Concessions, Jurisdiction, Judgment of 30 August 1924, PCIJ Series A, No. 2*, p. 6 at p. 13, 15

154 *Award of 11 April 2006, PCA Award Series*, p. 94-96, RIAA, Vol. XXVII, p. 147 at p. 206-207, paras. 201-205, quoted by the Award, para. 381, p. 149.

155 Award, para. 382, p. 149.

In the present case, the tribunal considered that the parties had engaged “in some exchange of views regarding the means to settle that dispute”, as shown by the correspondence of December 2009 relative to the settlement of the dispute¹⁵⁶, and had then met the article 283 requirement.

4. THE BREACH OF UNCLOS DISPOSITIONS

After so many considerations on background and jurisdiction, the award finally dedicates a short part to merits (60 pages on 217)- a paradox existing in many international rulings. The tribunal first had to determine “the content of Mauritius’ rights, both pursuant to the Convention and otherwise, in the territorial sea, exclusive economic zone, and continental shelf areas affected by the MPA”¹⁵⁷. That raised a delicate legal issue regarding the nature of the agreement reached between the British government and the representatives of Mauritius before its independence. Then, it had to examine whether the declaration of the MPA was breaching the UK’s obligations under the Convention.

A. The Lancaster House Undertakings are now international obligations

Two points needed to be apprehended by the judges when considering the scope of Mauritius’ rights. Firstly, the nature of the Lancaster House Undertakings, and secondly, the specific rights regarding fisheries mentioned in the above-mentioned agreement¹⁵⁸.

1. The legal nature of the Lancaster House Undertakings

Regarding the first and main point, Mauritius contended that the British undertakings drew their binding nature from the repetition of their expression by the UK government. Indeed, Mauritius maintained that no valid agreement had been reached in 1965, since

“the United Kingdom was in violation of its obligations with respect to self-determination, the

156 *Ibid.*, para. 383-384.

157 Award, para. 389, p. 153.

158 Mauritius was also contending the existence of traditional rights of fisheries apart from the Lancaster House Agreement, but having decided that the rights about fisheries mentioned in the Agreement had some legal effects, there was no need for the tribunal to examine them.

linkage between detachment and independence imposed by the United Kingdom put the Mauritius Council of Ministers under duress, and any purported consent “was not given in accordance with the applicable standards for the treatment of a colonizer towards an independence movement.”¹⁵⁹

The UK’s position was that the nature of the undertakings had to be examined exclusively under British law, and that the government had never intended to be bound by them¹⁶⁰.

As recalled by the decision itself, the legal effect of the Lancaster House Undertakings was actually central in Mauritius’ fourth submission, but also in the first and second ones¹⁶¹. Was the inclusion of such an observation a way for the tribunal to express its contribution to the “Chagos resettlement issue”, by deciding on the legal nature of the agreement, even having precluded its jurisdiction on the Mauritius’ submissions linked to the question of sovereignty over the Chagos islands? It might be so, as the conclusion of the internationally binding nature of these undertakings is of a great importance in the whole dispute. The recognition of the UK’s obligation to return the islands when there is no more need of defense consideration will certainly have some consequences in the way the dispute between the two states can be solved, and also on the way the last Chagossians claim will be heard by the British Supreme Court if it is reopened.

To treat this delicate issue, the tribunal adopted a four steps reasoning that consisted in recognizing that the British officials had made an offer with the intent to be bound, that the 1965 had become a matter of international law after the independence of Mauritius, that the 1965 undertakings had been repeated by the UK government, and finally that the British government was estopped from denying the binding effect of the undertakings¹⁶².

1.1. The parties’ intent

The tribunal extracted two conclusions from the detailed record of the meetings surrounding the Lancaster House meeting. On one hand, the fundamental impor-

159 Award para. 393, p. 154. The sentence quotes Final Transcript, 977:17-19. On the binding nature of the undertakings, see also Mauritius’ Reply p. 49-65.

160 On these legal aspects, see Uk’s counter memorial p. 212-219, the arguments are resumed in the para. 399-406 of the award.

161 Award., para. 418-419, p. 163.

162 Award p. 163-179.

tance the undertakings recovered in Mauritius’ “agreement” to detachment. On the other hand, the intent, by the UK officials, to be bound by the undertakings¹⁶³. This is a convincing demonstration, seeing the whole record, the context, and the details of negotiations. The tribunal also mentioned the language used as an evidential element for the UK’s intent to be bound¹⁶⁴.

1.2. The nature of the Undertakings

This said, the place of the “agreement” in international law was very uncertain. It had been concluded between the British government and a non-self-governing territory, for what it should exclusively respond to British law, which precludes any effect in the international order for such agreement, as it would be in any other state¹⁶⁵. To the panel, however, the event of the independence of Mauritius propelled the undertakings to the international level. To the tribunal, “[t]he independence of Mauritius in 1968, however, had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement”¹⁶⁶.

The judges concluded that the “1965 agreement” became a matter of international law¹⁶⁷. It took for that in account the context of the commitment:

“The Parties did not themselves characterize the status of the 1965 Agreement either at its conclusion or at the moment of Mauritian independence. The Tribunal, in turn, does not consider the circumstances in which the Agreement was initially framed—as a matter between the United Kingdom and its colony—to be determinative of the Parties’ intent with respect to its eventual status. Objectively, the Tribunal considers the subject matter of the 1965 Agreement— an agreement to the reconstitution of a portion of a soon-to-

-be-independent colony as a separate entity in exchange for compensation and a series of detailed undertakings—to be more in the nature of a legal agreement than otherwise. And, as set out above, the Tribunal sees no hint in the course of negotiations or in the language used in 1965 that anything less than a firm commitment was intended»¹⁶⁸

The decision is less clear on the conditions that would permit to identify the expression of the undertakings and the following detachment of the Chagos islands as an “agreement”. It was actually a big issue, for Mauritius’ and the Chagossians’ argument precisely denounced the nullity of such an “agreement” concluded, to them, under duress. During the proceeding, Mauritius presented the Lancaster House Undertakings more as an international promise than an agreement for that reason. And the decision is somehow ambiguous when it starts to use the term “1965 agreement”. It was impossible for the tribunal, however, to totally escape from this important legal and political issue, resolved in the award by the recognition that the commitments had been renewed.

1.3. The repetition of the Undertakings

The decision manoeuvres a bit quickly but skilfully on the issue above mentioned, admitting that “the United Kingdom’s repetition of the undertakings, and Mauritius’ reliance thereon, suffices to resolve any concern that defects in Mauritian consent in 1965 would have prevented the Lancaster House Undertakings from binding the United Kingdom”¹⁶⁹. The undertakings, at least those concerned by the establishment of the MPA, actually were repeated, as a whole or separately, on numerous occasions¹⁷⁰, as Mauritius had contended¹⁷¹.

The repetition of the Lancaster House engagements is then a fundamental point in the reasoning, for resolving any concern about the validity of consent of Mauritius in 1965, and for entering into the tribunal’s approach to conclude that UK was estopped by their formulation.

1.4. The application of estoppel

To bring an even more complete demonstration, the

163 Award, para. 421-423, p. 164-167. We put the word agreement between comas for the issue there is around the validity of the consent by Mauritius officials. The words of the tribunal in paragraph 422 are the following: “Without yet passing on the legal nature of these commitments or the validity of Mauritian consent, the Tribunal is confident that, without the United Kingdom’s undertakings, neither Sir Seewoosagur Ramgoolam nor the Mauritius Council of Ministers would have agreed to detachment”. Mauritius uses the word agreement between comas in its memorial, see p. 117.

164 Award, para. 423.

165 Award, para. 425. The tribunal refers to I. Hendry and S. Dickson, *British Overseas Territories Law* (2011), p. 261.

166 Award, para. 425, p. 167.

167 Award, para. 428, p. 168.

168 Award, para. 427.

169 Award, para. 428, p. 168.

170 Award, para. 429-433.

171 Mauritius’ memorial, p. 117.

decision enters at that level to a detailed application of the classical estoppel. It makes a doctrinal parenthesis with the definition of the principle and a rich recall of the jurisprudential application of it, from which the tribunal drew four conditions:

«Further to this jurisprudence, estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely»¹⁷²

The two first conditions were already answered by the previous observations, the tribunal examined then “whether Mauritius relied to its detriment on the United Kingdom’s representations”, and “whether Mauritius was entitled to rely upon the United Kingdom’s representations”¹⁷³. To the arbitrators, the following analysis grid had to be applied. Firstly, about the existence of the reliance, they considered that “evidence of opportunities foregone in reliance upon a representation constitutes one of the clearest forms of detrimental reliance, although a benefit conveyed on the representing State will also suffice”¹⁷⁴. And, specified, about the entitlement on reliance that:

“[...] Not all reliance, even to the clear detriment of a State, suffices to create grounds for estoppel. A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate. Nor does a State that relies upon an expressly revocable commitment render that commitment irrevocable.”

At the same time, the Tribunal does not consider that a representation must take the form of a binding unilateral declaration before a State may legitimately rely on it. To consider otherwise would be to erase any distinction between estoppel and the doctrine on binding unilateral acts”¹⁷⁵.

It answered positively to both questions. On the first issue, it relied, among other elements, on Mauritius’ denial to have formalized the undertakings in a treaty in

2009 because it considered the existent ones were sufficient¹⁷⁶. It also explained Mauritius’ temporary silence about the sovereignty claim on the Chagos islands on this way:

“Had the package of undertakings not been given, the Tribunal considers it beyond question that Mauritius would have asserted its claim to the Archipelago earlier and more directly, and would have withheld its cooperation in other areas of the Parties’ bilateral relations, as indeed occurred in 2009 and 2010 when the United Kingdom appeared (at least to Mauritius) to have set aside its concern for Mauritian rights in favour of the pursuit of the MPA”¹⁷⁷

On the second issue, the tribunal considered that Mauritius was entitled to rely on the UK’s undertakings, particularly after their reiteration, and had no reason to think they were revocable¹⁷⁸. The recall at that point of the *Lac Lanoux* case and the fact that “bad faith is not presumed”, sounds like a reproving message addressed to the British government.

2 The fishing rights.

An ancillary issue was the need to clarify the containing of the fishing rights, since the parties had a different interpretation on that point. Mauritius had logically a broad understanding of them, considering that Mauritius vessels could fish “anywhere in the Chagos waters except in the immediate vicinity of Diego Garcia Island, and for any species, subject only to the requirement that they obtain fishing licences, which were issued freely and without charge”¹⁷⁹. The UK had a more restrictive view limited to “preferential fishing rights”¹⁸⁰.

The tribunal finally chose an intermediate way, between these two extreme lectures, of some fishing rights but with limitations. References were here again made to the terms of the undertakings and to the record of the officials exchanges. The UK, regarding the text of the undertaking, still has the margin of appreciation to decide on the manner it has to ensure that Mauritius’ rights remain available¹⁸¹.

172 Award para. 438, p. 174.

173 Award, p. 175-178.

174 Award, para. 440, p. 175.

175 Award, para. 445-446, p. 177.

176 Award, para. 440.

177 Award, para. 442.

178 Award, para. 447, p. 178.

179 Final Transcript 167:11-13, quoted by the Award, para. 408, p. 160.

180 Final Transcript 595:18-20, quoted by the award para. 411, p. 161.

181 Award, p. 181.

B. The interpretation of articles 2(3), 56(2), 194, and 300 UNCLOS

Mauritius' claim implied a separate analysis of each article and the respective arguments of the parties. Nevertheless, the most important dissension about interpretation concerned article 2(3), which deserves for that reason a special mention. The tribunal then applied articles 2(3) and 56(2), affirmed apart the incompatibility of the MPA with article 194, and dismissed Mauritius regarding the claim on article 300.

1. Article 2(3) creates a general obligation

Regarding article 2(3), the parties were differing on whether it creates an obligation for the states. The decision reveals a substantive work of interpretation, as well as a classical application of the dispositions of the Vienna Convention on Treaties. A cloth examination of the words of the article, including a comparison to non-English version¹⁸², an analysis of the whole structure of the Convention¹⁸³, and a (too) long regard to the origin of the dispositions¹⁸⁴, lead the tribunal to a positive answer. To the pane, article 2(3) creates a general obligation to exercise sovereignty subject to the general rules of international law. It's a mere obligation, not an obligation of compliance¹⁸⁵. In this case, it would mean that the UK had "to act in good faith in its relations with Mauritius, including with respect to undertakings"¹⁸⁶.

2. The application of the Convention to the establishment of the MPA

The tribunal first applied article 2(3) in connexion with article 56(2) UNCLOS. There was no much doubt about the text of article 56(2), except about the implications of the expression "due regard"¹⁸⁷. The two articles

were applied together since the requirements they both establish were considered by the tribunal "to be, for all intents and purposes, equivalent"¹⁸⁸. The reasoning is developed in details in the award, based on the record of talks and correspondence, but paragraph 535 says it all:

"The Tribunal also concludes that the United Kingdom failed properly to balance its own rights and interests with Mauritius' rights arising from the Lancaster House Undertakings. Not only did the United Kingdom proceed on the flawed basis that Mauritius had no fishing rights in the territorial sea of the Chagos Archipelago, it presumed to conclude—without ever confirming with Mauritius—that the MPA was in Mauritius' interest. This approach is to be contrasted with the one adopted with respect to the United States, as another State with rights and interests in the Archipelago. There, the record demonstrates a conscious balancing of rights and interests, suggestions of compromise and willingness to offer assurances by the United Kingdom, and an understanding of the United State's concerns in connection with the proposed activities. All these elements were noticeably absent in the United Kingdom's approach to Mauritius"

The formulation of this conclusion, as well as the comparison established with UK's behaviour towards United States, are not neutral. It shows that this decision is not only about applying the technical law of the sea, but also about rending justice in a very wider context of postcolonialism policy. The judicial demonstration sounds like a general "remonstrance" to the UK, and a condemnation of the double standards behaviour adopted at an international level towards the most powerful ones and the less powerful states.

The judges made somehow a more flexible application of article 194. They distinguished for that articles 194(1) and 194(4). The first dispositions, on one hand, would only be prospective and require UK's "best efforts"¹⁸⁹. Seing "the limited life of the MPA"¹⁹⁰, UK would not have violated this obligation. The dispositions of article 194(4), on the other hand, establishing a obligation to "refrain from unjustifiable interference", would create a requirement "functionally equivalent to

tion will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State".

188 Award, para. 520, p. 203.

189 Award, para. 539, p. 211.

190 Award, para. 539.

182 The English and French versions make no distinction.

183 For instance, the article 87 about High seas makes a difference between the expressions "is exercised" and "shall be exercised", as mentioned by the award in note 654.

184 It finds its origin in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

185 Award, para. 516, p. 201-202.

186 Award, para. 517.

187 Para. 519, p. 202, of the decision sets out: "In the Tribunal's view, the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Conven-

the obligation of “due regard”, set out in Article 56(2), or the obligation of good faith that follows from Article 2(3)¹⁹¹. It would then require in the same way “a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue”¹⁹². However, the article specifies that this obligation is reserved towards the “activities carried out by other States”, so the application of article 194(4) was here reserved to the activities of fisheries in the territorial sea. For the same reasons explained regarding the application of articles 2(3) and 56(2), the tribunal concluded to a violation of the Convention¹⁹³.

Despite the clear condemnation of UK’s behaviour, the claim on article 300 was dismissed by the arbitrators, who, haven already recognized the UK’s infringement of its international commitments, saw no need to enter in a new polemic. The Mauritius’ claim about the alleged abuse of rights was indeed essentially based on an exchange of notes verbales between Colin Roberts, Director of the Overseas Territories Department at the FCO, and a Political Counsellor at the US Embassy, in London, on 12 May 2009. The outcome of the exchange would have been recounted in a cable from the US Embassy addressed to the US Secretary of State, and published on the “Wikileaks” website in December 2010¹⁹⁴.

5. FINAL CONCLUSIONS

The award of 18 March 2015 on the MPA around Chagos islands has a great importance legally and politically speaking.

Regarding the legal aspect, it brings some substantial elements on the interpretation of the United Nations Convention on the Law of the Sea on rights and obligations, and on the scope of the jurisdiction provided by Part XV. It was only the twelfth case treated by a tribunal constituted under the Annex VII of the Con-

vention, and each proceeding creates high expectations. The panel fulfilled the challenge by publishing a rich, and, in some aspects, an audacious decision, which also contributes to defuse the threat of the fragmentation of international law, by referring to numerous decisions of arbitral tribunals and of the International Court of Justice. It also made some detailed application of classical concepts of general international law, as estoppel, and brought a singular reasoning on the international effects of the 1965 “arrangement” between the British government and the not yet independent Mauritian political leaders.

In terms of judicial policy, it was everything except easy to intervene in the context of this long standing dispute, and to decide on a case involving considerations as essential as the respect of human rights and the protection of the environment. By unanimously condemning the establishment of the MPA by the UK, the tribunal ran the risk to treat the protection of the environment on a secondary level. That’s why the judges chose to express their concern in some “final observations” to underline that the decision was about ‘the manner in which the MPA was established, rather than its substance’¹⁹⁵. They also called the parties to a necessary negotiation in order to achieve “a mutually satisfactory arrangement for protecting the marine environment...”¹⁹⁶. The award therefore found its place into the continuity of the diplomatic process¹⁹⁷.

In that sense, it must be noted that the tribunal constituted under the UNCLOS provisions dismissed Mauritius’ submissions related to the claim of sovereignty on the Chagos islands, but couldn’t avoid to face the nature of the whole issue. It had to manage with the sensibilities of the parties, exaggerated by the dimension of the territorial dispute and the context of the Chagossians struggle for resettlement. The decision voted only partially, although substantially, satisfies Mauritius¹⁹⁸. It is at the same time an audacious award, by expressing a clear condemnation of the UK’s behaviour, and by declaring the binding effect of the Lancaster House Undertakin-

191 Award, para. 540, p. 211.

192 Award.

193 Award, para. 541, p. 212.

194 Mauritius’ memorial, p. 72 and 148. The cable published by Wikileaks mentioned the British and American commune intent to preserve their interests and to put a stop to the Chagossians claim for resettlement. The English domestic courts already refused to receive the Wikileaks document as a piece of proof: this article, II.

195 Award para. 544, p. 212.

196 Award, para. 544.

197 On that question see WELLENS, K. *Negotiations in the Case Law of the International Court of Justice: a Functional Analysis*. Ashgate, 2014. p. 358.

198 The tribunal qualifies itself the decision as substantially satisfying for Mauritius in the paragraph 546 of the award. In the mark of this will to not aggravate the dispute enters the decision for the costs to be equally shared, para. 546, p. 213 of the award.

gs. As a matter of fact, despite the strategic interests at stake, domestic or international jurisdictions that would have in the future to reconsider the Chagossians' claim or to settle the territorial dispute between Mauritius and UK, would not be able to ignore the legal obligations of the British government as they were recognized in this award, especially the commitment "to return the Archipelago to Mauritius when no longer needed for defense purposes".

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