INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

United Nations Convention on the Law of the Sea—marine protected area—rights of coastal states—jurisdiction—territorial disputes vs. maritime issues—protection of living resources vs. environmental matters

IN RE CHAGOS MARINE PROTECTED AREA (Mauritius v. United Kingdom). PCA Case No. 2011-3. *At* http://www.pca-cpa.org.
UN Convention on the Law of the Sea Annex VII Arbitral Tribunal, March 18, 2015.

On March 18, 2015, an arbitral tribunal (Tribunal) constituted in accordance with Annex VII to the 1982 United Nations Convention on the Law of the Sea (Convention)[1] under the auspices of the Permanent Court of Arbitration handed down its award in a proceeding brought by Mauritius in 2010 challenging the United Kingdom's establishment of a marine protected area (MPA) around the Chagos Islands in the Indian Ocean, which are claimed by Mauritius.[2] The Tribunal held that it did not have jurisdiction under the Convention to address whether the United Kingdom or Mauritius has the rights of a coastal state regarding the Chagos Islands. Nevertheless, the Tribunal also held that, in creating the MPA by unilateral declaration, the United Kingdom had failed to take into account certain legitimate interests of Mauritius and had thereby breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.

The key facts in the case concern the way the United Kingdom, as the former colonial power, detached the Chagos Islands from the colony of Mauritius in 1965, prior to Mauritian independence in 1968, and the way the United Kingdom established the MPA in 2010. These unique facts limit the award's precedential value. Broadly speaking, however, the case represents the creative use of the dispute settlement procedures of the Convention by a territorial claimant of limited means (Mauritius) to seek redress and to get its position heard. While jurisdictional barriers constrained Mauritius on the basic question of territorial sovereignty, the Tribunal's finding that the island republic has legitimate interests in the waters surrounding the Chagos Archipelago will no doubt be of some assistance to Mauritius in the years ahead, and is also likely to have importance for similarly situated states in other cases.[3]

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/depts/los/.

[2] *In re* Chagos Marine Protected Area (Mauritius v. UK), PCA Case No. 2011-3 (UNCLOS Annex VII Arb. Trib. Mar. 18, 2015), *at* http://www.pca-cpa.org [hereinafter Award]. The Tribunal was composed of the following members: Ivan Shearer (president), Christopher Greenwood, Albert Hoffmann, James Kateka, and Rüdiger Wolfrum.

[3] *E.g.*, Republic of the Philippines v. People's Republic of China, PCA Case No. 2013-19 (UNCLOS Annex VII Arb. Trib. filed Jan. 22, 2013), *at* http://www.pca-cpa.org.

Mauritius formulated its requests to the Tribunal in four submissions, which asked it to declare (1) that the United Kingdom was not entitled to establish any maritime zones with respect to the Chagos Archipelago because it is not the "coastal State" within the meaning of the relevant articles of the Convention; (2) that, on the basis of commitments made to Mauritius by the United Kingdom, the United Kingdom was not entitled unilaterally to declare maritime zones off the Chagos Archipelago because Mauritius has rights as a coastal state within the meaning of the relevant articles of the Convention; (3) that the United Kingdom had no right to hinder Mauritius from making a submission to the Commission on the Limits of the Continental Shelf or to hinder the work of the commission in this regard; and (4) that the declared MPA was incompatible with certain substantive and procedural obligations of the United Kingdom under the Convention.

For its part, the United Kingdom denied the Tribunal's jurisdiction to decide the claims of Mauritius and contended that the claims should therefore be dismissed.

Critical to Mauritius's claims were certain understandings reached between the parties during the negotiations that led to the detachment of the Chagos Archipelago from the colony of Mauritius in 1965, referred to by the Tribunal as the "Lancaster House Undertakings."[4] Three in particular were essential to the proceeding: (1) that the islands should be returned to Mauritius if there was no longer a need for the defense facilities there (which the United States shared with the United Kingdom and because of which the islands' population had been resettled); (2) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius government; and (3) that the British government would use its good offices with the United States government to ensure that fishing rights would remain available to the Mauritius government as far as practicable. Mauritius had relied on these (and other) understandings in deciding not to object to the formal detachment of the Chagos Archipelago from the colony of Mauritius in 1965 (paras. 78–85).

Before 2010, in the waters surrounding the Chagos Archipelago, the United Kingdom had established a 3-nautical-mile territorial sea, a 12-nautical-mile contiguous zone, and a 200-nautical-mile fishery conservation management zone. It provided Mauritian fishermen with free licenses to fish in the contiguous zone, as well as in the fishery conservation and management zone. Apart from occasional pro forma reassertions of its claim to sovereignty, Mauritius appears to have acquiesced in these arrangements.

The announcement of the MPA initiative changed the situation. In early 2009, momentum had begun to build in the United Kingdom, spurred by environmental groups, for the establishment of an MPA around the Chagos Archipelago. This prospect proved controversial for Mauritius, perhaps because of fears that the MPA would result in a complete "no-take" zone in the waters surrounding the Chagos Archipelago, or perhaps because the United Kingdom made little effort to seek the views of Mauritius. Whatever the reason, the UK establishment of the MPA on April 1, 2010, led directly to the decision by Mauritius to take the matter to arbitration, which it did on December 20, 2010.

The Tribunal considered Mauritius's submissions against this background. The first and second submissions, although framed in terms of coastal states' rights, raised the basic question

[4] See Award, para. 77, where the Tribunal quotes in full the final record of a meeting held at Lancaster House on September 23, 1965. Points (i)–(viii) of paragraph 22 of that record are what the Tribunal refers to as the Lancaster House Undertakings.

of the degree to which territorial sovereignty questions may be addressed pursuant to the dispute settlement procedures of Part XV of the Convention. These two submissions were formulated differently, but the Tribunal found them to be much the same: "[N]otwithstanding the difference in presentation, the Tribunal concludes that Mauritius' Second Submission is properly characterized as relating to the same dispute in respect of land sovereignty over the Chagos Archipelago as Mauritius' First Submission" (para. 230).

Article 288(1) of the Convention limits a tribunal's jurisdiction to a "dispute concerning the interpretation or application of this Convention."[5] To answer whether the dispute posed by the first and second submissions concerned the interpretation or application of the Convention, the Tribunal asked two questions: first, what was the nature of the dispute? and, second, if the dispute was fundamentally about territorial sovereignty, "to what extent does Article 288(1) permit a tribunal to determine issues of disputed land sovereignty as a necessary precondition to a determination of rights and duties in the adjacent sea?" (para. 206).

Under international law, the state that is sovereign over a stretch of coast is entitled to establish maritime zones seaward of that coast. The Convention refers to this state as the "coastal State" without, however, defining the term. The submissions of Mauritius that asserted or implied that it was the coastal state of the Chagos Archipelago, or had coastal state rights in the surrounding waters, amounted to a claim of land or territorial sovereignty over those islands. The Tribunal's majority had no difficulty finding that the dispute presented by the first and second submissions was "properly characterized as relating to land sovereignty over the Chagos Archipelago" (para. 212). The Tribunal also concluded that "the identity of the coastal State for the purposes of the Convention would be a matter to be determined through the application of rules of international law lying outside the international law of the sea" (para. 203).

In the Tribunal's analysis it remained to determine whether Article 288(1) allows for jurisdiction respecting a dispute over territorial sovereignty when it "touches in some ancillary manner on matters regulated by the Convention" (para. 213). The Convention does not deal with this question directly and its provisions may be open to multiple interpretations, especially since Article 297(2) and (3) and Article 298 provide for various exceptions to jurisdiction without addressing this point.

Having reviewed the various textual and inferential arguments put forward by the parties, the Tribunal chose not to parse words or construe the provisions of the Convention and their relationships, or to rely upon occasional references in records of the Third United Nations Conference on the Law of the Sea. Instead, it reached the following conclusion: "The Tribunal considers that the simple explanation for the lack of attention to this question is that none of the Conference 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'" (para. 215). Accordingly, the Tribunal ruled that it had no jurisdiction to address the first (as well as the second) submission of Mauritius.[6]

[5] The parties agreed that neither the automatic exceptions to jurisdiction set forth in Article 297 nor those provided for in Article 298 were applicable to the questions posed by the first and second submissions. Award, para. 206.

[6] The Tribunal did not rule out that in some cases there might be minor issues of territorial sovereignty ancillary to a dispute concerning the interpretation or application of the Convention that would not preclude jurisdiction under Part XV. Thus, the award does not seem to contradict the *Guyana-Suriname* award, which dealt with a land

https://doi.org/10.5305/amerjintelaw.109.4.0845 Published online by Cambridge University Press

As for the third submission, issues concerning the outer continental shelf or hindering Mauritian access to the Commission on the Limits of the Continental Shelf had not featured in Mauritius's original Notice and Statement of Claim. Prior to the establishment of the MPA, the parties had worked cooperatively on these matters under a nonprejudice-to-sovereignty umbrella. But certain statements in the United Kingdom's written pleadings prompted Mauritius to include a final submission in this regard. During the oral hearings, the United Kingdom clarified its willingness to continue cooperating on outer continental shelf matters. For this reason, the Tribunal found that there was no dispute related to the third submission that required a ruling (para. 350).

Finally, Mauritius argued that the establishment of the MPA had been incompatible with its rights under Articles 2, 55, 56, 63, 64, 194, and 300 of the Convention and Article 7 of the 1995 agreement on straddling fish stocks and highly migratory fish stocks (fish stocks agreement).[7] These eight claims raised two questions for the Tribunal: first, did it have jurisdiction to address them under the terms of the Convention? and, second, if so, did the facts support the claim that the United Kingdom had breached its obligations?

The Tribunal was therefore required to take up each of the eight sources of obligation that Mauritius claimed had been breached by the United Kingdom. The Tribunal dismissed four of those claims for jurisdictional reasons or irrelevancy. Since Article 297(3)(a) of the Convention precludes jurisdiction to consider questions relating to fisheries in the exclusive economic zone, the Tribunal found that it did not have jurisdiction to address Mauritius's claims pertaining either to Articles 63 and 64 on that subject or to the fish stocks agreement. It indicated that Article 55 was irrelevant because it is simply a descriptive article about the exclusive economic zone.

Concerning Articles 2(3), 56(2), and 194(4), the questions were more complex. The Tribunal devoted 101 paragraphs of its award to a discussion/analysis of its jurisdiction to decide questions raised by the fourth submission, and 86 paragraphs to consideration of the merits of the claims under Articles 2(3), 56(2), 194(4), and 300. To comprehend the full complexity of the Tribunal's approach, readers are referred to the text of the award.

In general, it may be said that the Tribunal found that these articles implicated the obligations of the United Kingdom originating in the Lancaster House Undertakings. The Tribunal therefore proceeded to examine the nature and scope of those understandings.

The Tribunal found that the UK Lancaster House Undertaking regarding fishing rights was excluded from its jurisdiction by Article 297(3)(a) insofar as the exclusive economic zone is concerned, leaving intact its jurisdiction to consider this undertaking respecting the waters of the territorial sea (para. 297). In the Tribunal's view, the undertaking to return the Chagos Archipelago to Mauritius "gives Mauritius an interest in significant decisions that bear upon the possible future uses of the Archipelago" (para. 298). The Tribunal reached a similar conclusion about the undertaking to accord Mauritius the benefit of minerals and oil in the waters

boundary issue in the context of determining the starting point of the maritime boundary. Guyana v. Suriname (UNCLOS Annex VII Arb. Trib. Sept. 17, 2007), *at* http://www.pca-cpa.org.

[7] 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, *opened for signature* Dec. 4, 1995, S. TREATY DOC. NO. 104-24 (1996), 2167 UNTS 3, *available at* http://www.un.org/depts/los/.

surrounding the Chagos Archipelago (*id.*). Yet it remained for the Tribunal to determine whether these undertakings constituted a binding commitment.

After a thorough review of the record, the Tribunal was convinced that in 1965 "the undertakings provided by the United Kingdom at Lancaster House formed part of the *quid pro quo* through which Mauritian agreement to the detachment of the Chagos Archipelago from Mauritius was procured" (para. 421). This conclusion did not resolve the matter, however, as the Lancaster House meeting preceded independence by three years and the legal basis for those undertakings was British constitutional law. The Tribunal overcame this problem by finding that "[t]he independence of Mauritius in 1968 . . . 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" (para. 425). The Tribunal also determined that the United Kingdom "is estopped from denying the binding effect of these commitments . . . in view of their repeated reaffirmation after 1968" (para. 448).

This finding of the binding nature of the Lancaster House Undertakings still did not necessarily bring the activities alleged to be unlawful in the fourth submission within the scope of the Convention. Thus, the Tribunal addressed the specific commitments of the United Kingdom in relation to Convention Articles 2(3), 56(2), 194, and 300.

Article 2(3) of the Convention provides that "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law." The Tribunal concluded that this reference "to other rules of international law" does not refer to bilateral commitments as such rules but "is limited to exercising sovereignty subject to the general rules of international law" (para. 516). This conclusion seems questionable and is unnecessary to the analysis. Nevertheless, the Tribunal went on to find that since general international law requires a state to act in good faith, Article 2(3) requires the United Kingdom to act in good faith to the extent that the Lancaster House Undertakings pertain to the territorial sea (para. 520).

Article 56(2) of the Convention concerns the actions of the coastal state in the exclusive economic zone and requires the coastal state to have "due regard" to the rights and duties of other states. Here, the Tribunal declined to find that the "due regard" standard refers to a specific set of rules of conduct applicable to all cases, stating:

> 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 . . . . [T]he extent of the regard required by the Convention 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. (Para. 519)

In summary, the Tribunal concluded:

> There is no question that Mauritius' rights have been affected by the declaration of the MPA. In the territorial sea, Mauritius' fishing rights have effectively been extinguished. . . . [T]he United Kingdom's undertaking for the eventual return of the Archipelago gives Mauritius an interest in significant decisions that bear upon its possible future uses. The declaration of the MPA was such a decision and will invariably affect the state of the Archipelago when it is eventually returned to Mauritius. (Para. 521)

As for Article 194, it requires states to "endeavour to harmonize their policies" on the protection and preservation of the marine environment; more specifically, Article 194(4) requires

states to "refrain from unjustifiable interference with activities carried out by other States." The Tribunal reasoned that this standard was functionally equivalent to the obligations of due regard and good faith and that the "declaration of the MPA was not compatible with Article 194(4)" (para. 541).

Having concluded that the MPA was not declared "in keeping with Articles 2(3), 56(2), and 194(4) of the Convention," the Tribunal found no need to address Mauritius's abuse-of-rights argument based on Article 300 (para. 543).

* * * *

Mauritius clearly succeeded in achieving a determination that the Lancaster House Undertakings are legally binding and that the establishment of the MPA did not take Mauritian interests into account. But the Tribunal was concerned only with the way the MPA was established; it took "no view on the substantive quality or nature of the MPA" (para. 544). The Tribunal concluded by simply observing that "[i]t is now open to the Parties to enter into the negotiations that the Tribunal would have expected prior to the proclamation of the MPA" (*id.*).

The Tribunal may have felt constrained in this regard by the way the case was pleaded and, in particular, by the way the Mauritian submissions were framed. The first and second submissions were based on the proposition that Mauritius was the coastal state, while the fourth submission proclaimed that in the exercise of coastal state rights the United Kingdom had breached, or had not taken into account, the interests of Mauritius. Indeed, one may ask if the MPA, as such, is lawful under the Convention. The term "Marine Protected Area" does not appear in the Convention and, at a minimum, one could surely argue that the idea of a no-take zone covering 640,000 square kilometers of ocean does not meet the optimum utilization of living resources and other requirements of Article 62 of the Convention.

Moreover, the conclusion by the Tribunal that it lacked jurisdiction concerning the first and second submissions was challenged by two arbitrators in a joint dissent.[8] Their dissenting and concurring opinion is notable for arguing strongly that the Tribunal did have jurisdiction under the Convention to decide whether the United Kingdom or Mauritius is the coastal state of the Chagos Archipelago—a finding that would amount to a determination of territorial sovereignty.

Their argument was based on two threads of reasoning. The first concerned the characterization of the nature of the dispute. In contrast to the majority, which based its rejection of jurisdiction on Article 288(1) on interpretation or application of the Convention, the dissent argued that the dispute was about Article 56 (that is, requiring determination of the coastal state) and that the Tribunal was permitted to answer that question by deciding incidentally about sovereignty issues. Thus, the dissent contended that it is within the jurisdiction of a Part XV tribunal to determine which disputant is the coastal state even if the tribunal must have recourse to the body of law relating to territorial sovereignty that lies beyond the Convention.[9]

The other thread depended on an *a contrario* argument: namely, since the Convention does not expressly exclude territorial sovereignty matters from its dispute settlement procedures, it should be interpreted to allow for consideration of territorial sovereignty disputes under those procedures.

[8] Award, Dissenting and Concurring Opinion: Judge James Kateka and Judge Rüdiger Wolfrum.
[9] *Id.*, para. 45.

We submit that the majority's finding is correct. The dissent's interpretation of the Convention is based on *a contrario* arguments, inference, and selected references that would permit Part XV dispute settlement bodies to address and decide major and long-standing territorial sovereignty questions. In our view, that is not what was agreed on at the conference on the law of the sea. Many states parties to the Convention, including major powers, are embroiled in such politically sensitive, not to say explosive, disputes. We cannot believe that knowingly, and without comment in their approval of the Convention, they determined that these long-standing territorial sovereignty disputes would henceforth be subject to the dispute settlement regime of the Convention.

Finally, the award sidesteps the question whether military/security issues were/are the real motivation for the MPA. The Tribunal refused to take into account the U.S. Embassy cable dated May 15, 2009, recording a meeting of U.S. and British officials—released by WikiLeaks—that formed the basis of Mauritius's Article 300 claim.[10] Further, it is open to question whether the award advances the interests of the exiled Chagos Islanders. If anything, by finding that the Lancaster House Undertakings are legally binding, the award would seem to have only reinforced the status quo.

We believe the award will ultimately be remembered for upholding the strict view that the states parties to the Convention have not authorized its dispute settlement bodies to decide questions of sovereignty over land territory. One must expect, however, that the issue will arise again in pending and future proceedings.

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UN Convention on the Law of the Sea—advisory jurisdiction—illegal, unreported, and unregulated fishing in the exclusive economic zone—Convention on Minimal Conditions for Access—flag state liability—due diligence—duty to cooperate

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE SUB-REGIONAL FISHERIES COMMISSION (SRFC). Case No. 21. *At* https://www.itlos.org.
International Tribunal for the Law of the Sea, April 2, 2015.

On April 2, 2015, the International Tribunal for the Law of the Sea (ITLOS or Tribunal) rendered an advisory opinion on the rights and obligations of flag states and coastal states regarding illegal, unreported, and unregulated (IUU) fishing within the exclusive economic zone (EEZ).[1] ITLOS confirmed that the full Tribunal—not just its Seabed Disputes Chamber—has jurisdiction to render advisory opinions, a matter of controversy that had previously been untested. The Tribunal also held that under the 1982 United Nations Convention on the Law of the Sea (UNCLOS or Convention),[2] flag states have a "due diligence" obligation to

[10] *See* U.S. Embassy London, HMG Floats Proposal for Marine Reserve Covering (May 15, 2009), *at* http://www.theguardian.com/world/us-embassy-cables-documents/207149.

[1] Request for an Advisory Opinion Submitted by the Sub-regional Fisheries Commission (SRFC), Case No. 21, Advisory Opinion (ITLOS Apr. 2, 2015), *at* http://www.itlos.org [hereinafter *SRFC* Opinion]. Documents relating to the case cited below can be accessed at http://www.itlos.org/cases/list-of-cases/case-no-21/ [hereinafter Case No. 21].

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS], *available at* http://www.un.org/depts/los/.