The Chagos UNCLOS Arbitration: Maritime, Fishing and Human Rights Issues and General International Law

Anthony E Cassimatis

The University Of Queensland
AUSTRALIA
TC BEIRNE SCHOOL OF LAW

The Chagos UNCLOS Arbitration - Introduction

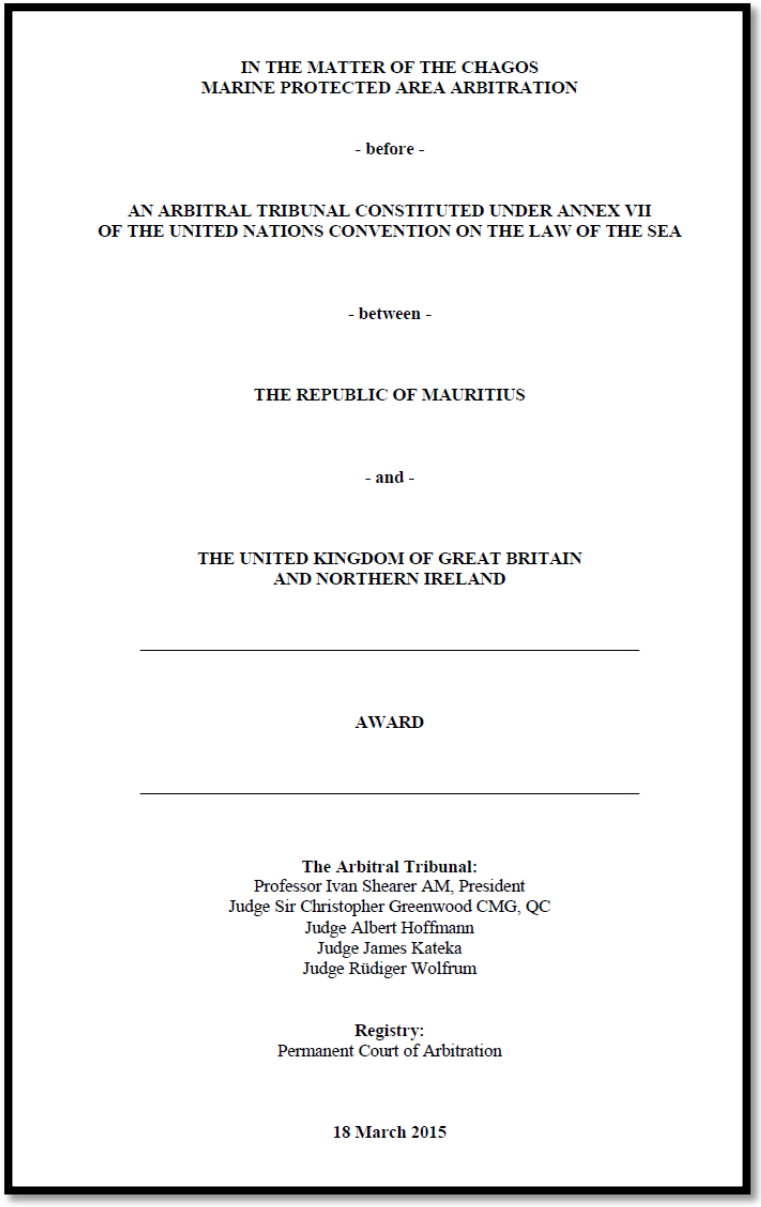
In the Matter of the Chagos Marine Protected Area Arbitration – Mauritius v UK

Arbitral Award – 18 March 2015

Arbitral Tribunal constituted under Annex VII of the UN Convention on the Law of the Sea

The Arbitral Tribunal comprised:

Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

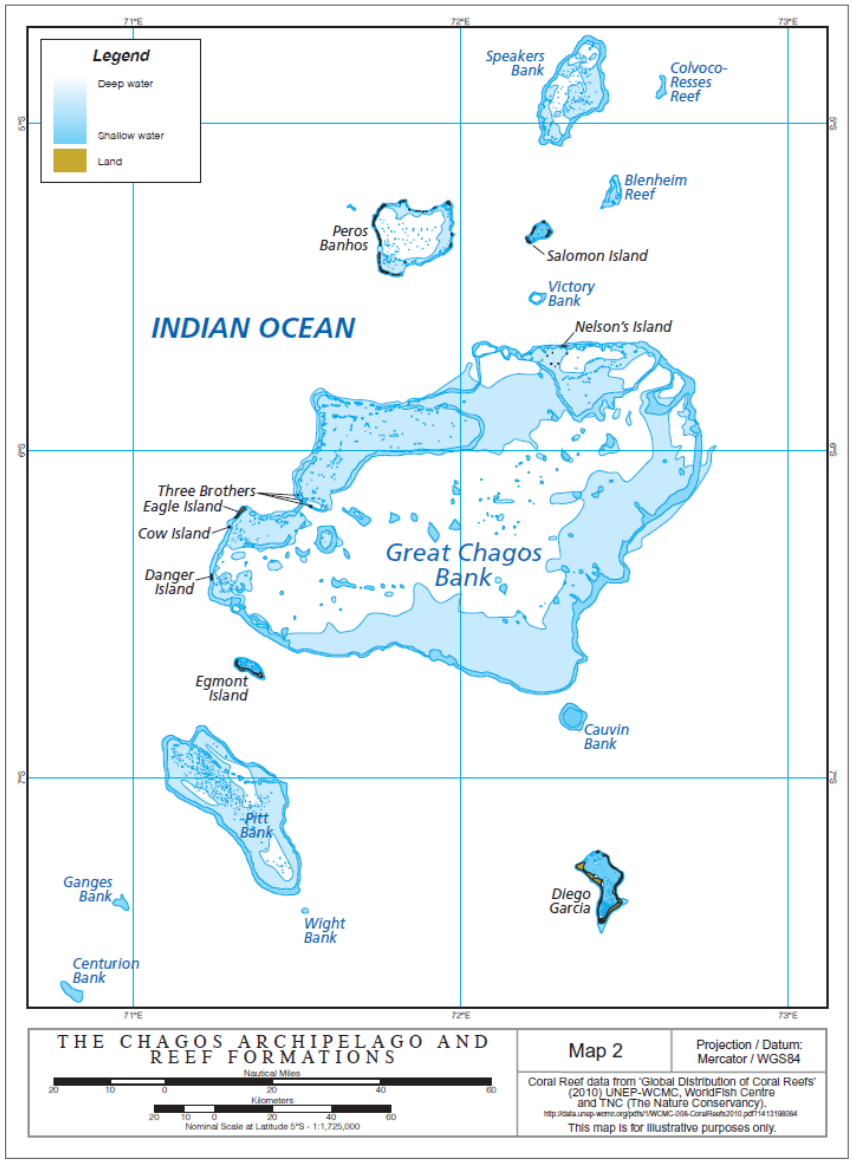
AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

18 March 2015

The Chagos UNCLOS Arbitration - Introduction



Diverse background issues:

Cold War US Airbase

Decolonisation – Detachment of Colonial territories

War on Terror, Extraordinary Rendition and Black Sites

Wikileaks – US Cable reporting on 2009 meeting

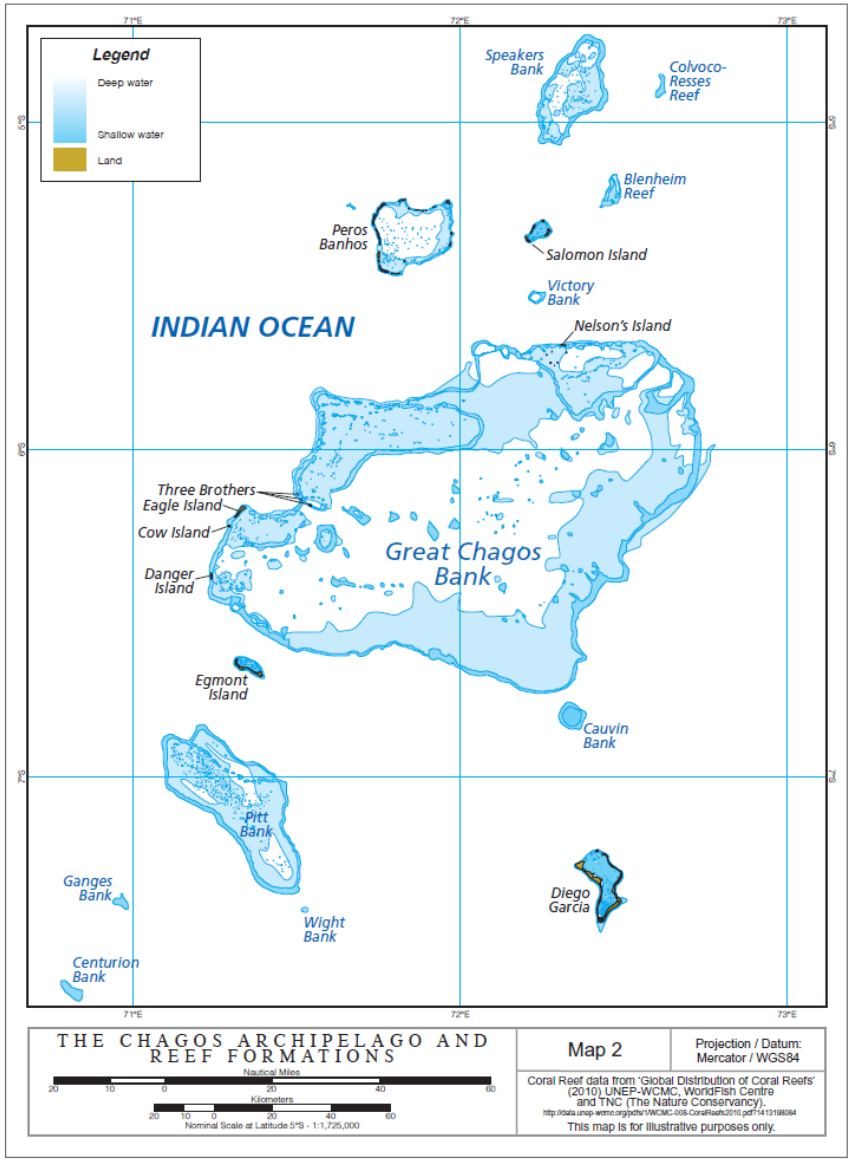
The Chagos Islands

- Mauritius became a French colonial possession in 1715
- The Chagos Islands became a French dependency of Mauritius in the mid-18th century
- In 1810, the British captured Mauritius and France ceded to Britain Mauritius and all its dependencies (including the Chagos Archipelago) in 1814

The Chagos UNCLOS Arbitration - Introduction

The Chagos Islands

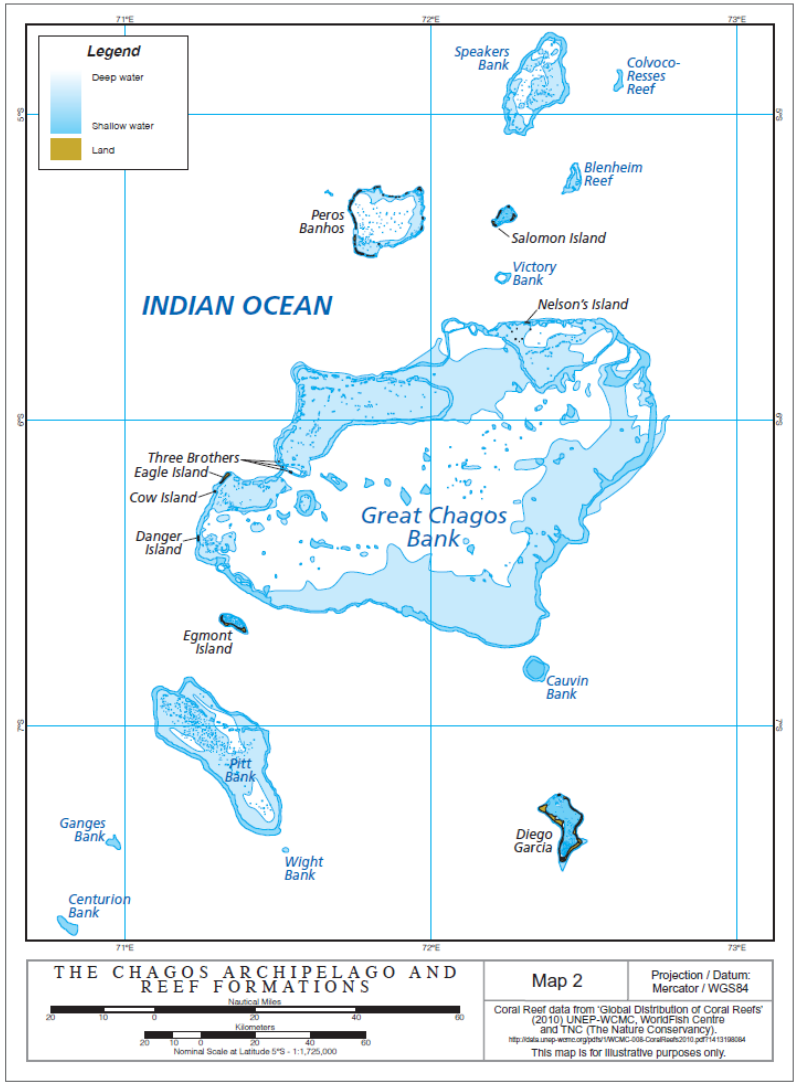
- Mauritius became independent on 12 March 1968
- Prior to independence, Britain began negotiations with the Mauritius Council of Ministers on the detachment of the Chagos Archipelago in 1965 in order to establish a US airbase on the Island of Diego Garcia
- The Mauritius Council of Ministers was composed of 19 elected members and 16 members nominated by the British authorities



Detachment negotiations

- Lancaster House Meeting and subsequent negotiations - 23 September 1965 to 5 November 1965
- Agreement to detach Chagos Islands
- Conditions included:
  - "if the need for the [US defence] facilities on the islands disappeared the islands should be returned to Mauritius"
  - "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government"
- On the issue of fishing, the British agreed to:

  "use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable … (b) Fishing Rights…"



Events following detachment

- British Indian Ocean Territory established on 8 November 1965
- UN General Assembly resolution 2066 (XX) of 16 December 1965:

2066 (XX). Question of Mauritius

The General Assembly,

Having considered the question of Mauritius and other islands composing the Territory of Mauritius,

Having examined the chapters of the reports of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples relating to the Territory of Mauritius,[16]

Recalling its resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Regretting that the administering Power has not fully implemented resolution 1514 (XV) with regard to that Territory,

Noting 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, and in particular of paragraph 6 thereof,

The Chagos UNCLOS Arbitration - Introduction

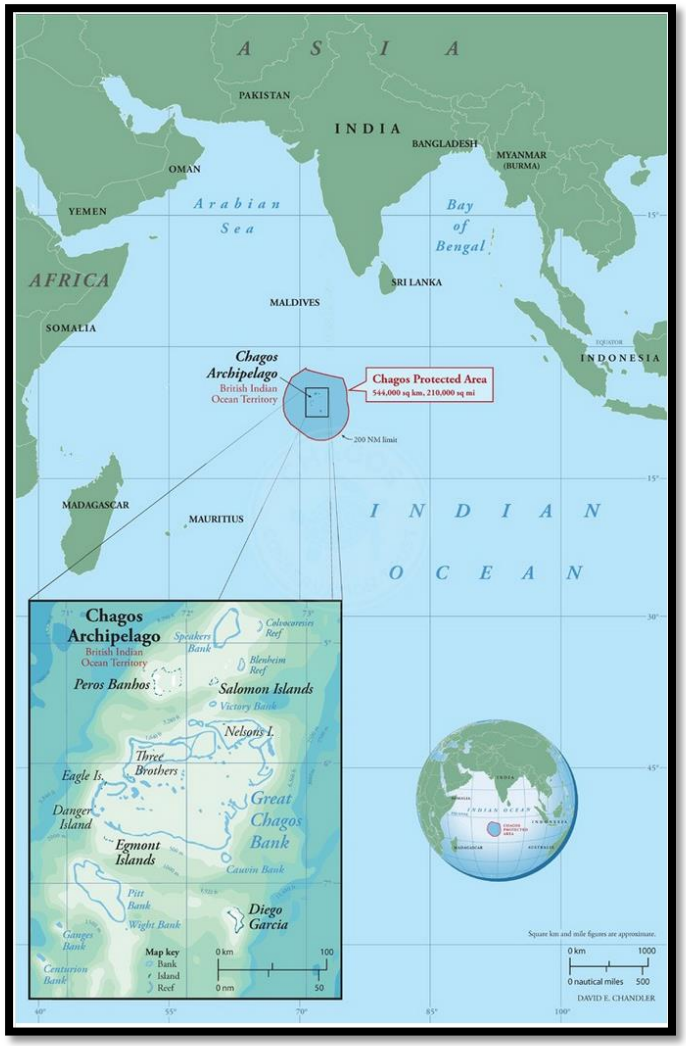
THE UNIVERSITY OF QUEENSLAND AUSTRALIA | TC BEIRNE SCHOOL OF LAW

Events following detachment

- **Agreement on 30 December 1966 to lease Diego Garcia to the US until 2016**
- **Removal of Chagossian population and payments**
- Population of Chagos Islands in 1965 – approx 1360 persons
- Between 1968 and 1973, UK proceeded to arrange for the purchase of privately held land and to remove the Chagossian population from the Archipelago
- 1972 – UK agreed to pay Mauritius the sum of £650,000 as compensation for the costs of resettling persons displaced from the Chagos Archipelago
- Some Chagossians settled in Mauritius, some in the Seychelles and some eventually in the UK
- 1982 "ex gratia" agreement to pay Mauritius £4 million into a fund for former residents of the Archipelago

Events following detachment

- Ongoing sovereignty negotiations 1980-2015
- Delimitation issues, eg EEZ claims and submission to the Commission on the Limits of the Continental Shelf
- Preferential arrangements for fishing by Mauritian flagged vessels
- UK litigation
  - 2000 – successful challenge before English courts to ordinance requiring removal of Chagossians
  - 2004 Order in Council reversed result of 2000 challenge – 2008 – House of Lords affirmed validity of Order in Council
- February 2009 British press breaks news of UK plans to establish a Marine Protected Area (MPA) around the Archipelago
- UK initiates public consultation on establishment of MPA on 10 November 2009 over protests from Mauritius
- Report on consultation delivered in March 2010.
- MPA declared on 1 April 2010. Under MPA complete ban on fishing once existing licences expired

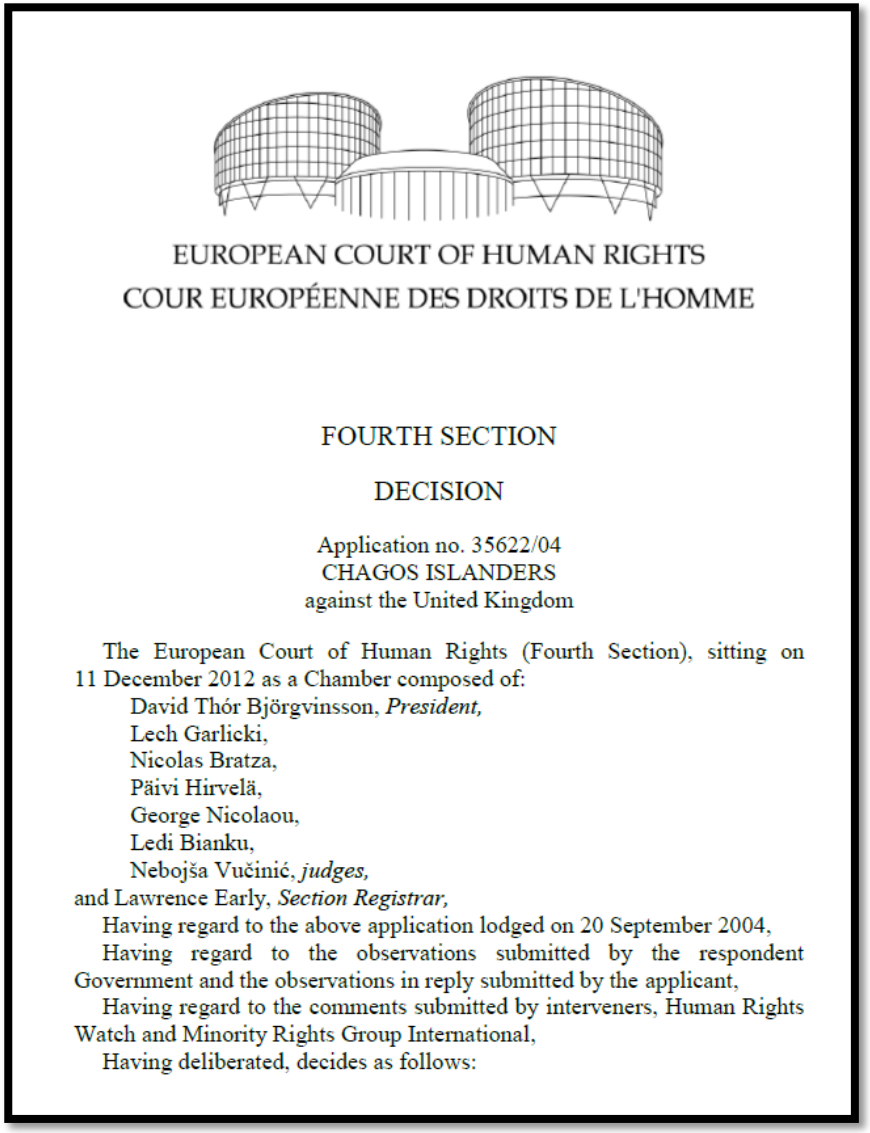


The Chagos UNCLOS Arbitration - Introduction

Mauritius commenced litigation under UN Convention on the Law of the Sea in December 2010

Other litigation commenced by Chagossians:

- Before the European Court of Human Rights – declared inadmissible in December 2012
- Before the EU's European Commission – The Commission terminated the case in 2013
- Further proceedings before UK courts following Wikileaks disclosure – unsuccessful in 2014



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 35622/04
CHAGOS ISLANDERS
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 11 December 2012 as a Chamber composed of:
David Thór Björgvinsson, *President,*
Lech Garlicki,
Nicolas Bratza,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*
Having regard to the above application lodged on 20 September 2004,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having regard to the comments submitted by interveners, Human Rights Watch and Minority Rights Group International,
Having deliberated, decides as follows:

The Chagos UNCLOS Arbitration - Introduction

Wikileaks disclosure:

"7. (C/NF) Roberts acknowledged that "we need to find a way to get through the various Chagossian lobbies." He admitted that HMG is "under pressure" from the Chagossians and their advocates to permit resettlement of the "outer islands" of the BIOT. He noted, without providing details, that "there are proposals (for a marine park) that could provide the Chagossians warden jobs" within the BIOT. However, Roberts stated that, according to the HGM,s current thinking on a reserve, there would be "no human footprints" or "Man Fridays" on the BIOT's uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents. Responding to Polcouns' observation that the advocates of Chagossian resettlement continue to vigorously press their case, Roberts opined that the UK's "environmental lobby is far more powerful than the Chagossians' advocates." (Note: One group of Chagossian litigants is appealing to the European Court of Human Rights (ECHR) the decision of Britain's highest court to deny "resettlement rights" to the islands' former inhabitants. See below at paragraph 13 and reftel. End Note.)" **Roberts = Mr Colin Roberts, UK Foreign and Commonwealth Office**


masterclasses Australia edition

theguardian

Winner of the Pulitzer prize 2014

Chagos Islands
US embassy cables: the documents

Friday 3 December 2010 10.45 AEDT

Shares 48

US embassy cables: Foreign Office does not regret evicting Chagos islanders

Friday, 15 May 2009, 07:00
C O N F I D E N T I A L LONDON 001156
NOFORN
SIPDIS
EO 12958 DECL: 05/13/2029
TAGS MARR, MOPS, SENV, UK, IO, MP, EFIS, EWWT, PGOV, PREL
SUBJECT: HMG FLOATS PROPOSAL FOR MARINE RESERVE COVERING
THE CHAGOS ARCHIPELAGO (BRITISH INDIAN OCEAN TERRITORY)
REF: 08 LONDON 2667 (NOTAL)
Classified By: Political Counselor Richard Mills for reasons 1.4 b and d

The Chagos UNCLOS Arbitration - Background

masterclasses Australia edition

theguardian
Winner of the Pulitzer prize 2014

Chagos Islands
The Observer

UK urged to admit that CIA used island as secret 'black site' prison

Human rights group representing Gaddafi opponent rendered to Libya via Diego Garcia says Britain must 'come clean' over role

Jamie Doward

Sunday 13 April 2014 09.06 AEST

Shares 927 Comments 56

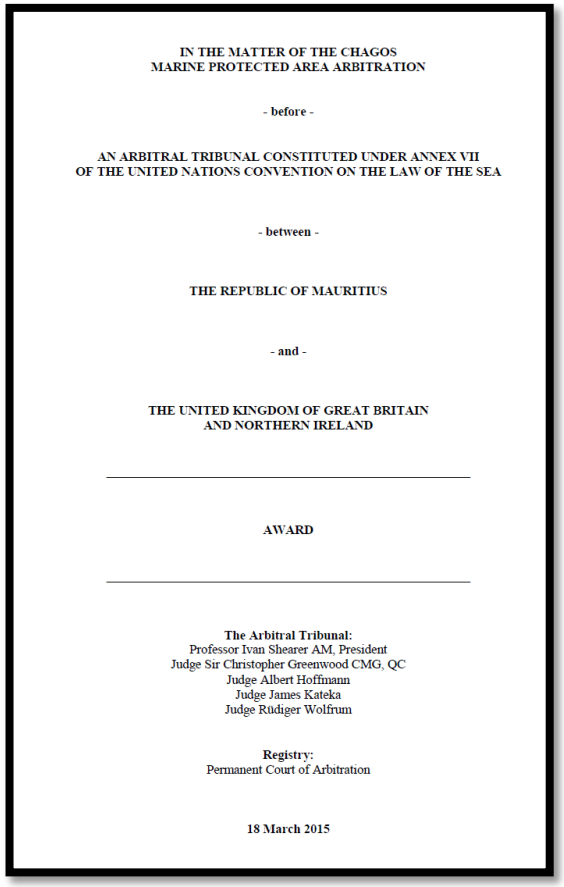
The US navy base at Diego Garcia, the British Indian Ocean Territory. Photograph: PA

The government is under mounting pressure to "come clean" about the role of an overseas UK territory leased to the US and allegedly used as a secret "black site" detention centre.

The Chagos UNCLOS Arbitration

Significance of the March 2015 Arbitral Award:

- The Arbitral Tribunal found that the UK had violated its duties under the 1982 *UN Convention on the Law of the Sea* to consult with Mauritius prior to establishing the Marine Protected Area
- The Arbitral Tribunal recognised Mauritius' reversionary interests in the Chagos Archipelago. The Tribunal found that the UK was bound under international law to:
  - Return the Chagos Archipelago to Mauritius when no longer needed for defence purposes;
  - Preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius; and
  - Ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

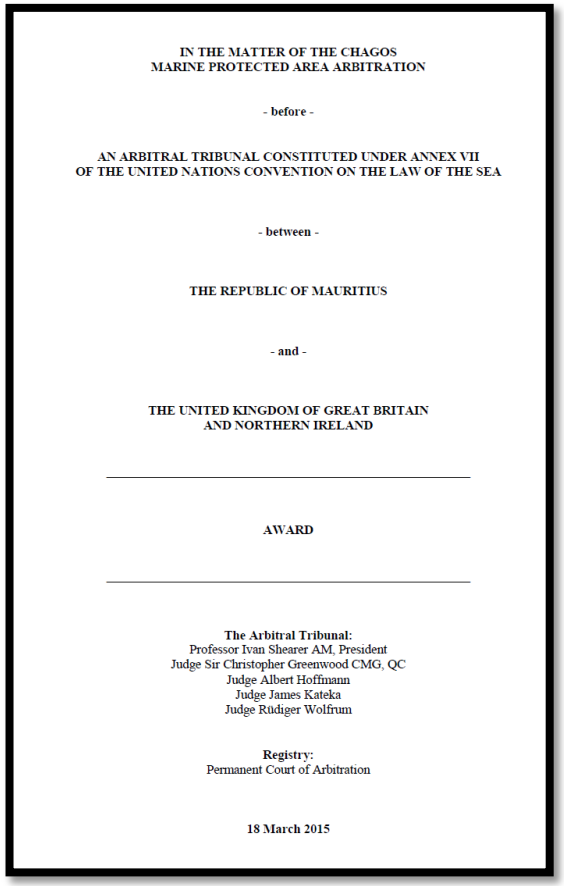
18 March 2015

The Chagos UNCLOS Arbitration

Significance of the March 2015 Arbitral Award:

The Arbitral Tribunal explored the relationship of the obligation to have "due regard" with other related obligations under the *UN Convention on the Law of the Sea*:

> "[540] The Tribunal considers the requirement that the United Kingdom 'refrain from unjustifiable interference' [in Article 194(4)] to be functionally equivalent to the obligation to give 'due regard', set out in Article 56(2), or the obligation of good faith that follows from Article 2(3). Like these provisions, Article 194(4) requires 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. Article 194(4) differs, however, in that it facially applies only to the 'activities carried out by other States' pursuant to their rights, rather than to the rights themselves."



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

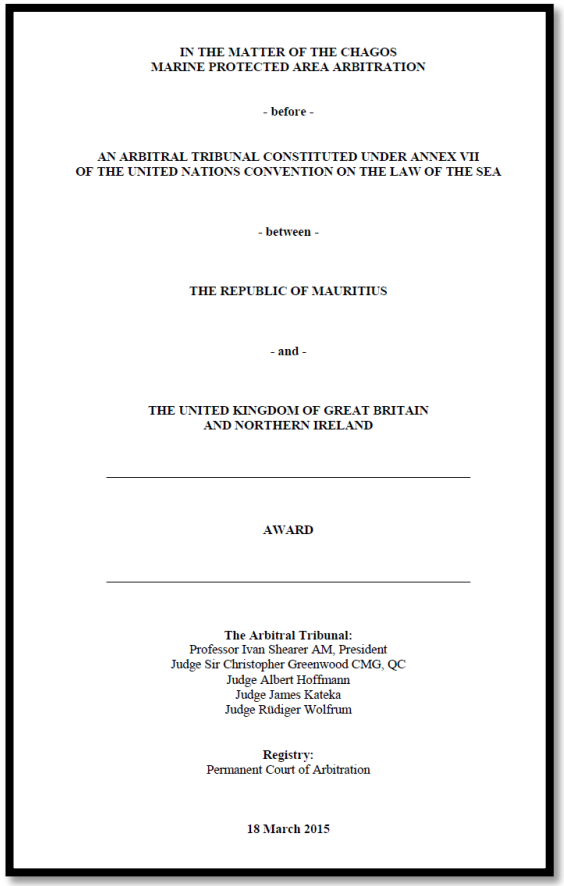
18 March 2015

The Chagos UNCLOS Arbitration

The Arbitral Award also has **broader significance**:

In the absence of general compulsory jurisdiction, the Award addresses the breadth of jurisdiction deriving from the compromissory clauses of the *UN Convention on the Law of the Sea*, eg:

"[220] 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 … Where the 'real issue in the case' and the 'object of the claim' … do not relate to the interpretation or application of the Convention, however, an incidental connection 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)."



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

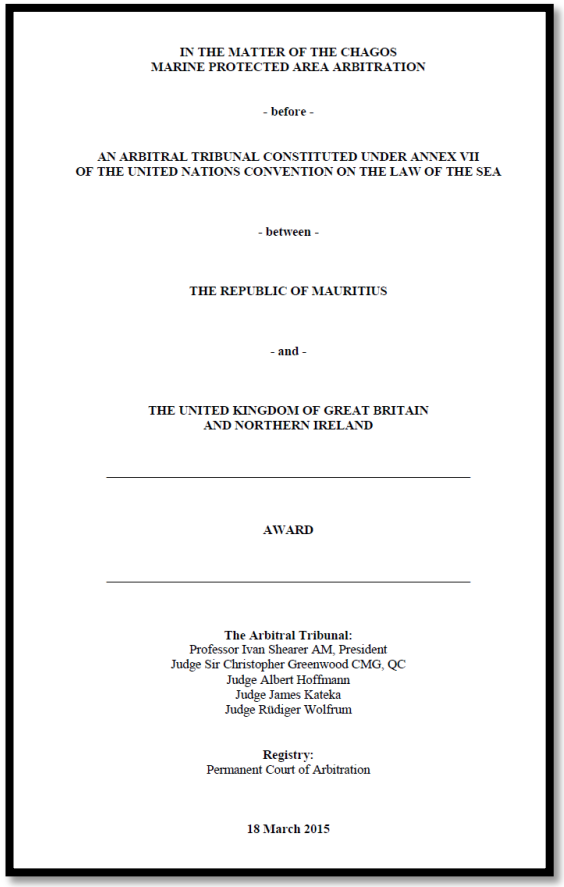
Registry:
Permanent Court of Arbitration

18 March 2015

The Chagos UNCLOS Arbitration – Broader Significance

The Award consolidates the jurisprudence on **estoppel** under international law and explores the relationship between **estoppel** and binding **unilateral undertakings**:

> "[446] While the … [International Law Commission] excluded estoppel from the scope of its study on unilateral acts, the course of its debates clearly recognized the distinct legal origins of the two related concepts …
>
> In the course of these proceedings, the Parties argued for and against the existence of one or more binding unilateral acts by reference to the Nuclear Tests cases … The sphere of estoppel, however, is not that of unequivocally binding commitments (for which a finding of estoppel would in any event be unnecessary…) but is instead concerned with the grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law."



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

18 March 2015

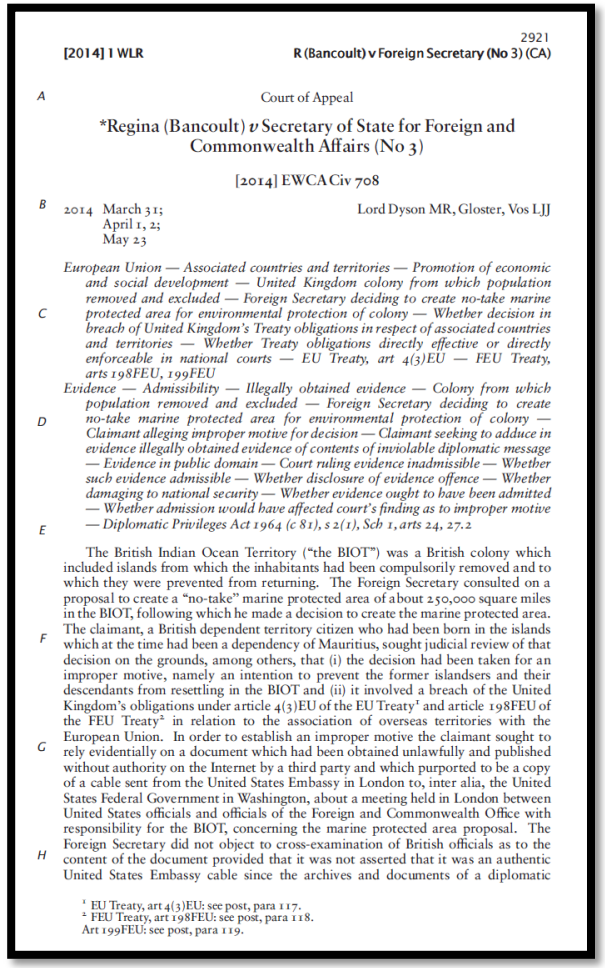
The Chagos UNCLOS Arbitration

Issues that the Arbitral Award did not explore in great depth:

- Unilateral undertakings
- Abuse of rights (Article 300)
- Wikileaks Cable – Note the 2014 English Court of Appeal decision that dealt with the admissibility of the cable and cross-examination regarding it. What were the real reasons for the haste in declaring the MPA?

The Divisional Court's suggestion:

nothing to do with Chagossian ambitions. The decision to override official advice can best be understood in the political context: Parliament was about to be dissolved. The Foreign Secretary no doubt believed that the decision would redound to the credit of the Government and, perhaps, to his own credit. It would do so the more if a decision with immediate effect was taken. Officials thought that this would create difficulties but it was the Foreign Secretary's prerogative to override their reservations and make the decision which he did. There is simply no ground to suspect, let alone to believe or to find proved, that the Foreign Secretary was motivated by the improper purpose for which the claimant contends.



Court of Appeal

*Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)

[2014] EWCA Civ 708

2014 March 31; April 1, 2; May 23

Lord Dyson MR, Gloster, Vos LJJ

European Union — Associated countries and territories — Promotion of economic and social development — United Kingdom colony from which population removed and excluded — Foreign Secretary deciding to create no-take marine protected area for environmental protection of colony — Whether decision in breach of United Kingdom's Treaty obligations in respect of associated countries and territories — Whether Treaty obligations directly effective or directly enforceable in national courts — EU Treaty, art 4(3)EU — FEU Treaty, arts 198FEU, 199FEU

Evidence — Admissibility — Illegally obtained evidence — Colony from which population removed and excluded — Foreign Secretary deciding to create no-take marine protected area for environmental protection of colony — Claimant alleging improper motive for decision — Claimant seeking to adduce in evidence illegally obtained evidence of contents of inviolable diplomatic message — Evidence in public domain — Court ruling evidence inadmissible — Whether such evidence admissible — Whether disclosure of evidence offence — Whether damaging to national security — Whether evidence ought to have been admitted — Whether admission would have affected court's finding as to improper motive — Diplomatic Privileges Act 1964 (c 81), s 2(1), Sch 1, arts 24, 27.2

The British Indian Ocean Territory ("the BIOT") was a British colony which included islands from which the inhabitants had been compulsorily removed and to which they were prevented from returning. The Foreign Secretary consulted on a proposal to create a "no-take" marine protected area of about 250,000 square miles in the BIOT, following which he made a decision to create the marine protected area. The claimant, a British dependent territory citizen who had been born in the islands which at the time had been a dependency of Mauritius, sought judicial review of that decision on the grounds, among others, that (i) the decision had been taken for an improper motive, namely an intention to prevent the former islandsers and their descendants from resettling in the BIOT and (ii) it involved a breach of the United Kingdom's obligations under article 4(3)EU of the EU Treaty[1] and article 198FEU of the FEU Treaty[2] in relation to the association of overseas territories with the European Union. In order to establish an improper motive the claimant sought to rely evidentially on a document which had been obtained unlawfully and published without authority on the Internet by a third party and which purported to be a copy of a cable sent from the United States Embassy in London to, inter alia, the United States Federal Government in Washington, about a meeting held in London between United States officials and officials of the Foreign and Commonwealth Office with responsibility for the BIOT, concerning the marine protected area proposal. The Foreign Secretary did not object to cross-examination of British officials as to the content of the document provided that it was not asserted that it was an authentic United States Embassy cable since the archives and documents of a diplomatic

[1] EU Treaty, art 4(3)EU: see post, para 117.
[2] FEU Treaty, art 198FEU: see post, para 118. Art 199FEU: see post, para 119.

The Chagos UNCLOS Arbitration – The Result

CHAPTER VIII - DISPOSITIF

547. For the reasons set out in this Award, the Tribunal decides as follows:

A. In relation to its jurisdiction, the Tribunal,

(1) FINDS, by three votes to two, that it lacks jurisdiction with respect to Mauritius' First and Second Submissions;

(2) FINDS, unanimously, that there is not a dispute between the Parties such as would call for the Tribunal to exercise jurisdiction with respect to Mauritius' Third Submission;

(3) FINDS, unanimously, that it has jurisdiction pursuant to Article 288(1), and Article 297(1)(c), to consider Mauritius' Fourth Submission and the compatibility of the MPA with the following provisions of the Convention:

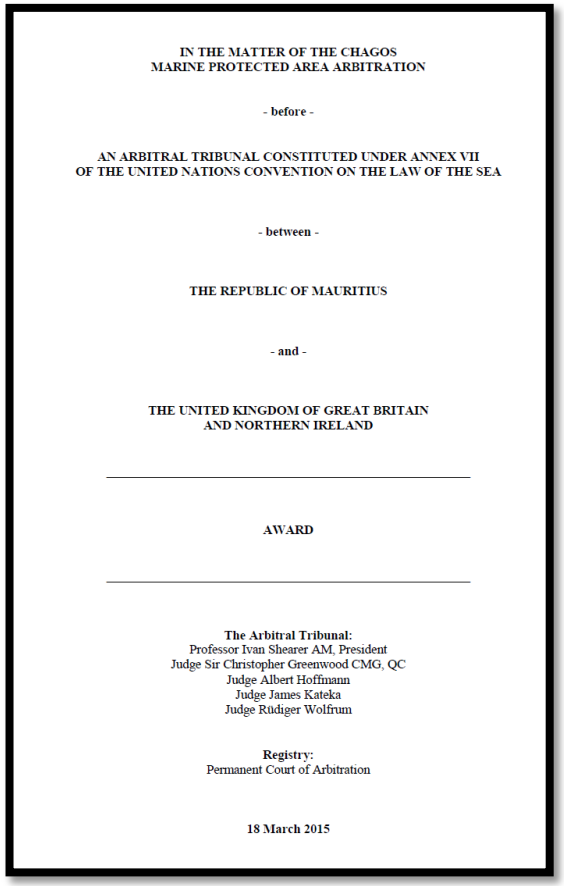
a. Article 2(3) insofar as it relates to Mauritius' fishing rights in the territorial sea or to the United Kingdom's undertakings to return the Archipelago to Mauritius when no longer needed for defence purposes and to return the benefit of any minerals or oil discovered in or near the Chagos Archipelago to Mauritius;

b. Article 56(2), insofar as it relates to the United Kingdom's undertakings to return the Archipelago to Mauritius when no longer needed for defence purposes and to return the benefit of any minerals or oil discovered in or near the Chagos Archipelago to Mauritius;

c. Article 194; and

d. Article 300, insofar as it relates to the abuse of rights in connection with a violation of one of the foregoing articles;

(4) AND DISMISSES, unanimously, the United Kingdom's objection to the jurisdiction of the Tribunal over Mauritius' Fourth Submission with respect to the aforementioned provisions of the Convention.



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

18 March 2015

The Chagos UNCLOS Arbitration – The Result

CHAPTER VIII - DISPOSITIF

547. For the reasons set out in this Award, the Tribunal decides as follows:

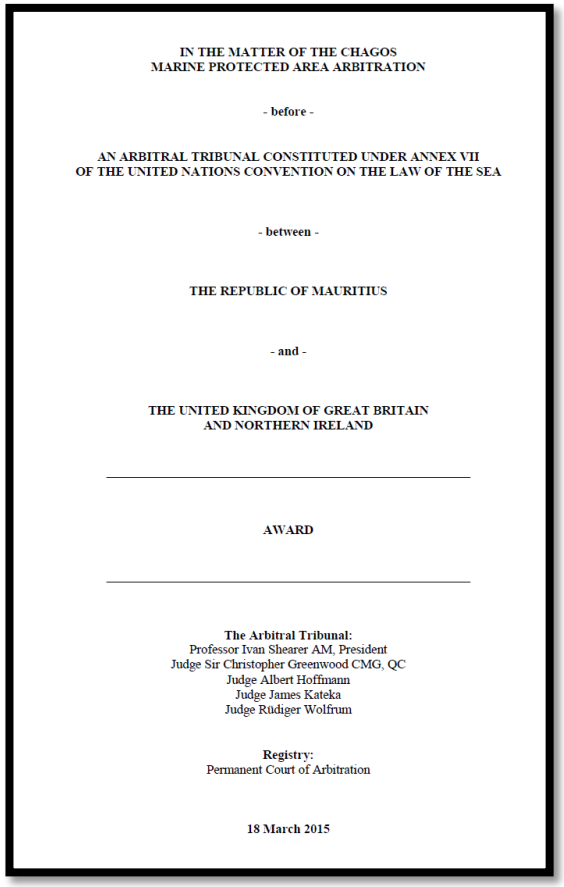
B. In relation to the merits of the Parties' dispute, the Tribunal, having found, *inter alia*,

(1) that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea;

(2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and

(3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding;

DECLARES, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

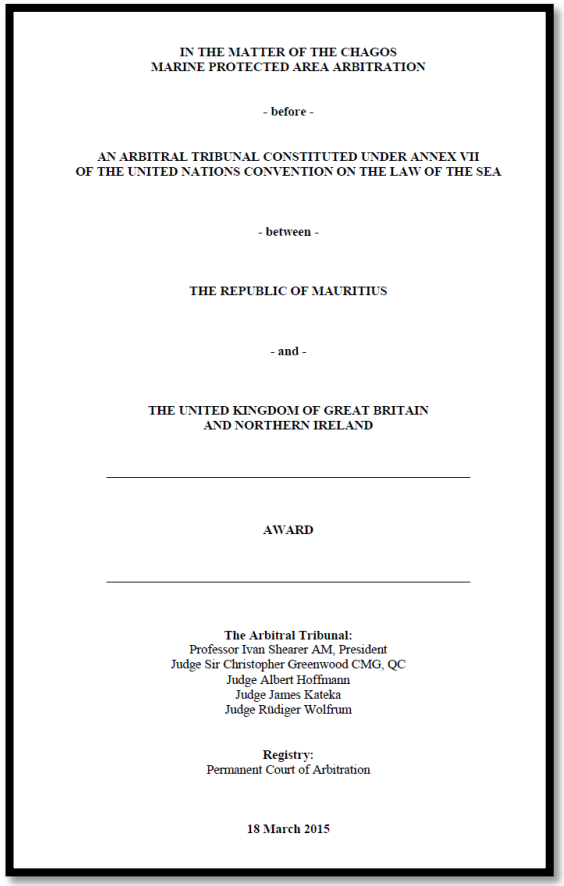
Registry:
Permanent Court of Arbitration

18 March 2015

The Chagos UNCLOS Arbitration

Concluding Observations:

- Members of the arbitral tribunal included outstanding international legal generalists. This enhanced the Tribunal's capacity to apply rules of general international law
- Significant degree of consensus amongst Judges (including amongst those Judges in partial dissent)
- Notwithstanding the fragmented nature of legal proceedings surrounding the Chagos Islands, the Arbitral Award affirms the systemic integrity of international law



IN THE MATTER OF THE CHAGOS
MARINE PROTECTED AREA ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MAURITIUS

- and -

THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND

AWARD

The Arbitral Tribunal:
Professor Ivan Shearer AM, President
Judge Sir Christopher Greenwood CMG, QC
Judge Albert Hoffmann
Judge James Kateka
Judge Rüdiger Wolfrum

Registry:
Permanent Court of Arbitration

18 March 2015