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Mauritius Brings UNCLOS Arbitration Against The United Kingdom Over The Chagos Archipelago

By [Peter Prows](#)



Introduction

The Chagos Archipelago, which dots the heart of the Indian Ocean, is in the middle of a very 21st century international dispute. In April 2010, the United Kingdom, with the backing of ocean science and environmental groups, declared most of the exclusive economic zone ("EEZ") of the

archipelago a marine protected area ("MPA") and off-limits to all fishing.^[1] Extending over a quarter-million square miles would be the largest "no-take" MPA in the world. The island of Diego Garcia, which houses a major U.S. military base, listening post, and occasional prisoner waypoint for the wars in Iraq, Afghanistan, and beyond, is excepted from the MPA designation.

Mauritius also claims title to the archipelago and asserts that Mauritius and the people who previously lived there (the Chagossians or *Îlois*) have rights to the archipelago's fisheries and other resources.

In early December 2010, the dispute between the United Kingdom and Mauritius came into sharp relief when the *Wikileaks* website published a leaked cable from the U.S. Embassy in London recounting a conversation with the Director of Overseas Territories in the U.K. Foreign and Commonwealth Office. He is reported to have suggested that the MPA was designated not for environmental reasons, but to prevent the Chagossians from returning to the islands and interfering with the Diego Garcia base.^[2]

On December 20, 2010, Mauritius instituted arbitral proceedings against the United Kingdom under the U.N. Convention on the Law of the Sea ("UNCLOS").^[3] Mauritius seeks to resolve title to the archipelago and to challenge the MPA. This suit has the potential to upend military operations at Diego Garcia and to address several important outstanding questions in international law.

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Background

The first Europeans to arrive at the archipelago in the 16th century found it uninhabited. The French later claimed the archipelago and populated it with African slaves to work its copra plantations. The British took control of the islands in 1810, during the Napoleonic Wars, and France formally ceded them to the United Kingdom, as part of its new colony of Mauritius, by the 1814 Treaty of Paris.

By the early 1960s, with the hardening of the Cold War, the United States had begun to covet Diego Garcia's strategic location and natural deepwater port. But neither the Americans nor the British wanted any military base there to be subject to the control of Mauritius, which was on a path towards independence. In 1964, the United States and the United Kingdom agreed that the archipelago should be separated from Mauritius and kept under British control, and that the Chagossians should be resettled elsewhere. In 1965, Mauritius and the United Kingdom reached an agreement ("1965 Agreement") that the archipelago would be excised from Mauritius and returned when no longer needed for defense purposes in exchange for £3 million plus the costs of resettling the Chagossians and buying out the plantations. In November 1965, the British government issued an Order in Council under the Royal Prerogative^[4] formally detaching the archipelago from Mauritius and reconstituting it as a new colony—the British Indian Ocean Territory ("BIOT").^[5] The following month, the U.N. General Assembly condemned the effort by the British to detach the archipelago from Mauritius to build a military base as a violation of the principles of self determination set out in Resolution 1514 on the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Resolution 1514").^[6] The United Kingdom granted Mauritius independence in March 1968.^[7]

To make way for a military base on Diego Garcia, the Chagossians in the archipelago had to be relocated. Since the copra companies had owned all the property in the archipelago, the British simply bought out the plantations and closed them down.^[8] By 1973, the British government shipped all the Chagossians to Mauritius and the Seychelles, where, by all accounts, many continue to live in poor conditions.^[9]

The British initially paid Mauritius £650,000 to cover resettlement costs. Subsequently, in 1982, the United Kingdom and Mauritius agreed that the British would set aside an additional £4 million in trust for the benefit of the Chagossians as "full and final settlement" of any claims on their behalf which may arise out of "all acts, matters and things done by or pursuant to the [BIOT] Order 1965" ("1982 Settlement Agreement").^[10] Some Chagossians nevertheless did sue in U.S. and U.K. courts for the right to return to the archipelago and for compensation, but the courts dismissed those suits by June 2008.^[11] These Chagossians are now pursuing their claims before the European Court of Human Rights ("ECHR"), where their claims are still pending.^[12]

Meanwhile, the United Kingdom was preparing to establish the MPA. It held formal consultations with Mauritius on the issue in January and July 2009, and it opened the question up to the public in November 2009.^[13] Environmental NGOs, such as the Pew Foundation, supported the MPA proposal as essential to protecting the archipelago's "exceptional" biological diversity and relatively pristine condition.^[14] Some human rights groups condemned the effort, however, as an attempt to "prevent[] Chagossians from

[Chagos Islanders v. Attorney General](#)

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resettling, because if fishing were prohibited they would have no means to support themselves after return."^[15]

British Foreign Secretary David Miliband went ahead and announced the creation of the MPA on April 1, 2010, reserving that it was “without prejudice” to the ECHR proceedings or its commitment to return the archipelago to Mauritius when no longer needed for defense purposes.^[16]

Mauritius’s Claims

After the revelation of the *Wikileaks* cable, Mauritius brought the present arbitration under UNCLOS Part XV and Annex VII, ^[17] which allow a party to submit “any dispute concerning the interpretation or application” of UNCLOS to binding arbitration, with certain exceptions.^[18] Mauritius’s claim focuses on two main arguments: (i) the United Kingdom is not the “coastal state” with respect to the archipelago, and therefore the United Kingdom has no right to establish any MPA in the archipelago’s waters in the first instance; and (ii) even if it is the coastal state, in establishing the MPA, the United Kingdom breached obligations under UNCLOS by acting in bad faith and without regard to the rights of Mauritius and the Chagossians and without sufficient consultation with other interested states and regional organizations.

Mauritius’s first claim—that the United Kingdom is not the “coastal state”—is really a challenge to title to the archipelago, since only the “coastal state” has the right to regulate fishing in coastal waters.^[19] The United Kingdom claims that Mauritius ceded sovereignty to the archipelago to the United Kingdom in exchange for £3 million under the 1965 Agreement.^[20] Mauritius counters that the 1965 Agreement was the product of extortion and abuse and is invalid, and that Mauritius retains sovereignty over the archipelago. Mauritius alleges that the United Kingdom conditioned Mauritius’s independence on it giving up the archipelago, in violation of fiduciary obligations owed to its then-colony under Article 73 of the U.N. Charter and Resolution 1514.^[21]

Whether these allegations, if proven, constitute sufficient basis for invalidating the 1965 Agreement may depend on the applicable law. As a colony, Mauritius lacked full responsibility for its internal affairs and foreign relations and thus may not have been a “State” capable of entering into a treaty whose validity would be governed by the relatively strict Vienna Convention on the Law of Treaties.^[22] If the Vienna Convention does apply, Mauritius would have to establish that the United Kingdom’s conduct was so bad as to amount to a violation of a peremptory norm of international law, since mere coercion, absent the actual threat or use of force, is insufficient.^[23] Mauritius would also have to comply with the procedures of Article 65 of the Vienna Convention, which require a state claiming that a treaty is invalid to give notice of its “reasons” in a possibly more direct form than what is merely implicit in Mauritius’s current claims.

Mauritius’s second claim is that, even if the United Kingdom is the “coastal state,” this large no-take MPA is “incompatible with [UNCLOS], and is without legal effect.” States have certain responsibilities under international law to coordinate efforts to conserve environmental resources while also putting them to beneficial use. UNCLOS, for example, allows coastal States to enact conservation measures in their waters to “protect and preserve . . . marine life,”^[24] while also requiring that they exercise “due regard” for the

rights of others to catch “surplus” fish.^[25] Other large MPAs established in recent years have allowed some fishing to occur in certain areas.^[26]

Mauritius alleges that the United Kingdom breached these obligations by unilaterally establishing the MPA without sufficient consultation with, or regard for, Mauritius, the Chagossians, or relevant regional fisheries management organizations (such as the Indian Ocean Tuna Commission). The United Kingdom is likely to counter by arguing that it satisfied its obligations by consulting with Mauritius and accepting public comment on the MPA before it was implemented. It is also likely to point out that the MPA was established “without prejudice” to the outcome of the Chagossians’s ECHR proceedings, and that the MPA may be revised as appropriate if the Chagossians prevail there.

Mauritius goes further to challenge not just the substance of the MPA but also the United Kingdom’s intentions in establishing it. Mauritius relies on the *Wikileaks* disclosure to allege that the United Kingdom breached its obligations under UNCLOS Article 300 to act in good faith and not abuse its rights, since “[i]t appears that the true purpose of the ‘MPA’ is not conservation but to prevent the right of return” of the Chagossians.^[27]

Jurisdiction

To reach the merits of these allegations, Mauritius may have to contend with several jurisdictional issues. The first is whether the dispute settlement provisions of UNCLOS empower a tribunal to resolve disputes over title to land.^[28] Some have asserted that this jurisdiction obviously exists,^[29] while others have assumed that it plainly does not.^[30] This question was argued in the *Guyana/Suriname* arbitration,^[31] but that tribunal avoided the issue by finding that the parties were actually governed by an agreement on the starting point of the maritime boundary, and thus that its findings “have no consequence for any land boundary that might exist between the Parties.”^[32] The *Mauritius/United Kingdom* tribunal will likely face this issue.

The tribunal will also have to decide whether it has jurisdiction over Mauritius’s second claim challenging the scope of the MPA. The United Kingdom is likely to argue that Mauritius gave up the right to invoke the rights of the Chagossians to fish in the archipelago under the 1982 Settlement Agreement. If that objection fails, the United Kingdom may also invoke its right under UNCLOS not to accept compulsory settlement of any dispute relating to fisheries in its EEZ.^[33] Mauritius may then counter that this exception cannot apply because the dispute is not really about fisheries but about preserving military operations in Diego Garcia. But there too the United Kingdom has opted out of compulsory jurisdiction under UNCLOS for disputes concerning military activities.^[34] Alternatively, Mauritius may argue that a claim of bad faith under Article 300 provides an independent basis for jurisdiction from which UNCLOS provides no relevant exceptions.^[35]

Conclusion

On the merits, this case presents a conflict between the right of a coastal state to enact environmental restrictions on fishing in its EEZ and the rights of others to fish to protect their livelihoods. MPAs have become a favored tool of marine scientists,

environmentalists, and policy makers to protect and conserve global fish stocks, as exemplified by the call in the 2002 World Summit on Sustainable Development to establish “representative networks” of marine protected areas around the world by 2012.^[36] But human rights groups have also raised concerns about the potential of MPAs to restrict disadvantaged peoples (like the Chagossians) from using those resources to improve their condition.^[37] This case presents an opportunity for the tribunal to decide whether the United Kingdom struck the right balance with this MPA.

Then there is *Wikileaks* and the merits of Mauritius’s claim of bad faith. In the end, the United Kingdom may still need to show that the MPA was carefully designed to protect not only a strategic military area, but a valuable environmental one as well.

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About the International Environmental Law Interest Group:

This Interest Group was formed to examine issues of development and implementation of international environmental law such as environmental governance, climate change, globalization and environmental law, water law, and the effect of war on the environment. The group emphasizes the inter-disciplinary nature of environmental law and its presence as a core area of international law, and looks at linkages with other areas such as trade law, humanitarian law and science, as well as specifically addressing international wildlife law as a distinct area under the umbrella of international environmental law. The IEnLIG is comprised of a diverse membership whose specialties cover all aspects of international law, underscoring the importance of the integration of environmental law into other areas of international law.

Endnotes:

[1] *New Protection for Marine Life*, U.K. Foreign and Commonwealth Office, (Apr. 1, 2010), available at <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=22014096>.

[2] The *Wikileaks* cable is reprinted as Annex 2 to Mauritius’s Notification and Statement of Claim, which are available through the website of the American Society of International Law, International Environmental Law Interest Group, <http://www.asil.org/interest-groups-public-files.cfm>.

[3] *Id.* Mauritius named Judge Rüdiger Wolfrum as its party-appointed arbitrator. On March 25, 2011, the President of the International Tribunal for the Law of the Sea appointed three more arbitrators to the tribunal: Ivan Shearer (Australia), James Kateka (Tanzania), and Albert Hoffmann (South Africa). United Kingdom has appointed Judge Christopher Greenwood to the tribunal.

[4] An Order in Council issued under the Royal Prerogative is a type of executive decree; it is a law enacted by the U.K. Privy Council (controlled by the Cabinet) without involvement by Parliament.

[5] *Chagos Islanders v. Attorney General* [2003] EWHC (QB) 2222 (Ouseley, J.), Appendix A, ¶¶ 1-35. BIOT initially also included three islands detached from the British colony of the Seychelles, but these were returned to the Seychelles in 1976. *Id.* ¶ 74.

[6] G.A. Res. 1514, UN Doc. A/RES/20/2066 (Dec. 16, 1965), available at <http://wpik.org/Src/unga1514.html>.

[7] Mauritius Independence Act 1968 (ch. 8), *available at* <http://www.legislation.gov.uk/ukpga/1968/8/contents>.

[8] The British bought the plantations in 1967 and then enacted an immigration ordinance in 1971 prohibiting any person from being present in BIOT without permission. *Chagos Islanders*, Annex A, ¶¶ 56-330.

[9] *Id.* Annex A, ¶¶ 331-69.

[10] *Id.* Annex A, ¶ 580 (setting out agreement in full).

[11] See *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007) (dismissing Chagossians's challenge under Alien Tort Claims Act to the decision to establish Diego Garcia and remove the Chagossians as a nonreviewable political question because it directly involved national security and foreign policy); *R (Bancoult) v. Foreign Secretary* [2008] UKHL 61, ¶¶ 52-58 (rejecting challenge to BIOT immigration order excluding Chagossians from the archipelago and deferring to the Crown's reasonable preference in favoring the military and foreign policy interests supporting the order to the interests of the Chagossians "to return to live Crusoe-like in poor and barren conditions of life").

[12] See *Chagos Islanders v. United Kingdom*, No. 35622/04 (Eur. Ct. H.R.) (communicated to the United Kingdom in February 2009).

[13] See *Consultation on Whether to Establish a Marine Protected Area in the British Indian Ocean Territory*, U.K. Foreign and Commonwealth Office, *available at* <http://www.fco.gov.uk/resources/en/pdf/21153320/mpa-consultation-101109> (last visited Apr. 4, 2011) [hereinafter Consultation Report].

[14] UK Natural Environment Research Council, *Marine Conservation in the British Indian Ocean Territory: Science Issues and Opportunities* (2009), *available at* http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Other_Resource/Marine%20Conservation%20in%20the%20British%20Indian%20Ocean%20Territory.pdf.

[15] Consultation Report, *supra* note 13, ¶ 61.

[16] *New Protection for Marine Life*, *supra* note 1.

[17] Arbitration is the appropriate dispute settlement procedure because the United Kingdom submitted a declaration under UNCLOS Article 287(1) choosing the International Court of Justice as the means for dispute settlement, but Mauritius made no declaration under UNCLOS Article 287(1) and is thus deemed by UNCLOS Article 287(3) to have accepted Annex VII arbitration. See United Nations Convention on the Law of the Sea art. 287(5), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[18] *Id.* arts. 286, 288(1).

[19] *Id.* art. 56(1).

[20] See *Country Profile: British Indian Ocean Territory*, UK Foreign and Commonwealth Office (Dec. 21, 2010), *available at* <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/british-indian-ocean-territory/?profile=all> ("[W]ith the full agreement of the Mauritius Council of Ministers, [the Chagos islands] were detached to become part of the British Indian Ocean Territory in 1965 . . . [and] Britain paid a grant of £3 million to Mauritius in consideration of the detachment of the Chagos islands.").

[21] See *Statement of the Position of the Government of the Republic of Mauritius with Respect to the Deposit by the United Kingdom of Great Britain and Northern Ireland of a List of Geographical Coordinates of Points Pursuant to Article 75, Paragraph 2, of the United Nations Convention on the Law of the Sea, 14 April 2004*, in *Law of the Sea Information Circular No. 20, 25* (UN Division for Ocean Affairs and Law of the Sea, 2004):

The Government of the Republic of Mauritius wishes to reiterate in very emphatic terms that it does not recognize the so-called "British Indian Ocean Territory" which was established by the unlawful excision in 1965 of the Chagos Archipelago from the territory of Mauritius, in breach of the United Nations General Charter, as applied and interpreted in accordance with resolution 1514 (XV) of 14 December 1960, resolution 2066 (XX) of

See also UK Select Committee on Foreign Affairs, Minutes of Evidence, Examination of Mr. Richard Gifford [solicitor and attorney for the Chagossians in the *Bancoult* cases], Question 168 (Jan. 23, 2008), available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcaff/147/8012305.htm>:

They [i.e., the Mauritian Government] take the view that “We was robbed”. They believe that Mauritius was regarded as an inferior, non-independent country. It was worried about negotiating the terms of its independence at the time, and it had its arm twisted, so it was in a lower bargaining position and it was not true consent when it agreed, in return for £3 million, to cede the islands to Britain.

[22] Article 2(a) of the Vienna Convention defines “treaty” as “an international agreement concluded *between States* . . .” (emphasis added). Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. A “State” is usually defined as being “under the control of its own government” and having the capacity to engage in “formal relations” with other States. *E.g.*, Restatement of the Law (Third) of the Foreign Relations Law of the United States § 201 (1986).

[23] See Vienna Convention, *supra* note 22, arts. 52 (coercion), 53 (peremptory norms).

[24] UNCLOS, *supra* note 17, art. 194(5).

[25] *Id.* arts. 56(2), 62(2). The Convention on Biological Diversity similarly implores parties to “establish a system of protected areas” and to “promote the protection of ecosystems . . . in natural surroundings” (art. 8, paras. (a) and (d)), while also “cooperat[ing]” on “matters of mutual interest” (art. 5) and “protect[ing] and encourag[ing] customary use of biological resources in accordance with traditional cultural practices” (art. 10(c)).

[26] The Papahānaumokuākea Marine National Monument, for example, established off a large portion of the waters off Hawaii’s northwest islands, forbids all commercial fishing after June 2011, but allows limited subsistence fishing by permit. See Proclamation 8031, Establishment of the Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 36443, 36447-48 (June 15, 2006). The “Micronesia Challenge” network of MPAs being established by Palau, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Commonwealth of the Northern Mariana Islands will conserve thirty percent of near-shore marine resources, but will not affect fishing in other areas. See Declaration of Commitment: The Micronesia Challenge, available at <http://palau.chm-cbd.net/micronesia-challenge>.

[27] Mauritius Notification and Statement of Claim, *supra* note 2, ¶ 4.

[28] UNCLOS Article 298(1)(a)(i) allows parties to opt out of jurisdiction in disputes relating to “sea boundary delimitations” or “titles,” but neither the United Kingdom nor Mauritius has done so here.

[29] See, e.g., Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 Int’l & Comp. L.Q. 37, 44 (1997) (“Maritime boundary disputes are in principle subject to compulsory binding settlement, even where they also involve disputed sovereignty over islands or other land territory.”).

[30] See, e.g., Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session*, 75 Am. J. Int’l L. 211, 233 n.109 (1981):

While the exclusion for land territory disputes is drafted so that it does not literally apply to adjudication or arbitration under the Convention when a state does not elect to reject such procedures, it would seem that this is a mere drafting point. In any event, the same result seems implicit in the fact that the jurisdiction of a judicial or arbitral tribunal under the Convention is limited to the interpretation or application of the Convention. The Convention does not deal with questions of sovereignty or other rights over continental or insular land territory—questions that can hardly be regarded as incidental or ancillary.

[31] Thomas W. Donovan, *Guyana Invokes Annex VII of United Nations Convention on Law of the Sea Against Suriname for Disputed Maritime Boundary*, ASIL Insights (Apr. 2004).

[32] *Guyana v. Suriname*, ¶ 308 (Perm. Ct. Arb. Sept. 17, 2007), available at <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>.

[33] UNCLOS, *supra* note 17, art. 297(3)(a).

[34] On April 7, 2003, the United Kingdom submitted a declaration under UNCLOS Article 298(1)(b) opting out of compulsory jurisdiction for disputes concerning military activities. See *Declarations and Statements*, Oceans and the Law of the Sea, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#UK%20Declaration%20made%20after%20accession (last visited Apr. 4, 2011).

[35] The *Southern Bluefin Tuna* tribunal suggested that bad faith breaches may indeed provide an independent basis for jurisdiction. See *Southern Bluefin Tuna Case* (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, ¶ 64 (UNCLOS Annex VII Arbitration, Aug. 4, 2000).

[36] Report of the World Summit on Sustainable Development, A/CONF.199/20, ¶ 32(c) (2002).

[37] See generally Thomas Greiber *et al.*, *Conservation with Justice: A Rights-Based Approach*, 87-88 (International Union for Conservation of Nature 2009), available at <http://data.iucn.org/dbtw-wpd/edocs/EPLP-071.pdf>.