

***Déjà Vu* in The Hague – the relevance of the *Chagos* arbitral award to the proceedings before the ICJ**

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1. *Introduction*

On 18 March 2015, an UNCLOS Annex VII tribunal constituted under the auspices of the Permanent Court of Arbitration issued its award in the *Chagos* Arbitration, finding that the UK's establishment of a Maritime Protected Area (MPA) in the archipelago was in violation of international law.¹ The decision features among the documents attached to the UNGA's request for an advisory opinion of the ICJ on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in*

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¹ *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* PCA, Award of 18 March 2015. See M Waibel, 'Mauritius v. UK: Chagos Marine Protected Area Unlawful' EJIL: Talk! (17 April 2015) <www.ejiltalk.org/mauritius-v-uk-chagos-marine-protected-area-unlawful/>; G Giraudeau, '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)' (2015) 12 *Revista de Direito Internacional* 705; T Appleby, 'The Chagos Marine Protected Area Arbitration – A Battle of Four Losers?' (2015) 27 *J of Environmental L* 529; D Colson, B Vohrer, 'In re Chagos Marine Protected Area (Mauritius v. United Kingdom)' (2015) 109 *AJIL* 845; T Young, 'Chagos Marine Protected Area: Arbitral Tribunal Rejects UK's Declaration' (2015) 45 *Environmental Policy and L* 62; P Harris, 'Why Law and Politics Matter for Marine Conservation – The Case of the Chagos Marine Protected Area' (2015) 45 *Environmental Policy and L* 204; M Meetarbhan, 'Re-examining the Chagos Marine Protected Area Arbitration – The Lancaster House Undertakings' (2015) 45 *Environmental Policy and L* 248; W Qu, 'The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond' (2016) 47 *Ocean Development and Intl L* 40; R Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016' (2017) *Intl J of Marine and Coastal L* 379, 386-393.



1965.² It has also been brought up in written statements and oral presentations before the ICJ. The purpose of this article is to assess the potential impact of the arbitral decision on the Advisory Opinion. While there is consensus as to the binding force of the Award between the parties, States disagree on how the findings of the arbitral tribunal should be interpreted in light of the questions before the ICJ.

2. *The findings of the Arbitral Tribunal.*

In the arbitral proceedings, Mauritius contested the legality of the marine protected area (MPA) established by the UK on 1 April 2010,³ making four submissions.⁴ It argued, first, that the UK was not entitled to establish the contested MPA because it was not a ‘coastal State’ within the meaning of UNCLOS; second, that the UK could not unilaterally declare an MPA because of Mauritius’ rights as a coastal State; third, that the UK should take no steps that might prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius regarding the Chagos Archipelago; and fourth, that the purported MPA was incompatible with the UK’s substantive and procedural obligations under UNCLOS. The arbitral tribunal, by majority, declined jurisdiction over the first two claims, as they did not concern the interpretation or application of UNCLOS.⁵ Two dissenting arbitrators, however,

² For a general comment on the advisory opinion request see C Alexandre, K Koutouki, ‘No Way Home for the Chagossians: Law and Power Politics’ (2018) 25 *Intl J on Minority and Group Rights* 369.

³ For some background information on the MPA, see P Sand, ‘Fortress Conservation Trumps Human Rights? The “Marine Protected Area” in the Chagos Archipelago’ (2012) 21 *J of Environment and Development* 36; S Farran, ‘Chagos and the ICJ – The Marine Protected Area’ (2018) 55 *QIL-Questions Intl L* 71.

⁴ For a discussion of the case predating the delivery of the award, see I Papanicolopulu, ‘Current Legal Developments. Mauritius/United Kingdom’ (2011) 26 *Intl J of Marine and Coastal L* 667.

⁵ See for commentary, L Ngoc Nguyen, ‘The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?’ (2016) 31 *Intl J of Marine and Coastal L* 120; S Talmon, ‘The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts And Tribunals’ (2016) 65 *ICLQ* 927. See also the symposium in 48 *Ocean Development and Intl L* 209, introduced by Ø Jensen and N Bankes, ‘Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction’ 209.



considered that the tribunal did have jurisdiction and should have addressed ‘whether the excision of the Chagos Archipelago was contrary to the legal principles of decolonization ... or contrary to the principle of self-determination’.⁶ The dissent suggests that the detachment was indeed contrary to international law and that the consent of the Mauritian ministers, given under pressure, was invalid. In regard to the third claim, the tribunal unanimously ruled that there was no dispute between the parties.

Under the fourth claim, the tribunal assessed the legal value of certain commitments made by the UK in 1965, prior to the detachment of the Chagos Archipelago (the so-called Lancaster House Undertakings). These commitments included that Mauritius would retain fishing rights in the Archipelago; that the islands would be returned to Mauritius if no longer needed for defence purposes; and that the benefit of any minerals or oil from the Chagos Archipelago would revert to Mauritius. The tribunal considered that these undertakings formed an essential condition for the Mauritian consent to the detachment of the Archipelago,⁷ and that upon Mauritian independence in 1968, they became binding under international law.⁸ In the view of the tribunal, the UK was estopped from denying the binding effect of these commitments.⁹ In the context of the UK’s obligations under Article 56(2) of UNCLOS, the tribunal held:

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. And as set out above, the Tribunal considers that the 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

⁶ *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum of 18 March 2015, para 70.

⁷ *Chagos Marine Protected Area Arbitration*, Award (n 1) para 422.

⁸ *ibid* para 428.

⁹ *ibid* para 448. See for a critical take on the tribunal’s use of the notion of estoppel, S Allen, ‘The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*’ in S Allen and C Monaghan (eds), *Fifty Years of the British Ocean Territory: Legal Perspectives* (Springer 2018). Generally, see K Pan, ‘A Re-Examination of Estoppel in International Jurisprudence’ (2017) 16 *Chinese J of Intl L* 751.

MPA was such a decision and will invariably affect the state of the Archipelago when it is eventually returned to Mauritius. The Tribunal considers Mauritius' rights to be significant and entitled, as a matter of good faith and the Convention, to a corresponding degree of regard.¹⁰

According to the tribunal, the UK had failed to give such regard to Mauritius' rights when declaring the MPA. It had not properly informed or consulted Mauritius, and had failed to balance the rights of the latter against its own rights.¹¹ This constituted a breach of UNCLOS. The tribunal concluded 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, with a view to achieving a mutually satisfactory arrangement for protecting the marine environment'.¹² Thus, the tribunal's ultimate finding of a breach of UNCLOS was relatively narrow and concerned primarily procedural flaws in the way the UK established the MPA.¹³

3. *Points of potential relevance to the ICJ's Advisory Opinion*

3.1. *The ICJ's Discretion to Accept the Request*

The *Chagos* Award has been brought up repeatedly both in written and oral statements before the ICJ. First of all, it has been argued that the mere occurrence of the arbitral proceedings between Mauritius and the UK demonstrates the existence of a bilateral dispute over the Chagos Archipelago. Indeed, according to the United Kingdom, '[t]he *Chagos Arbitration* provides an important illustration of how the Request – despite its formulation as a matter concerned with the process of decolonization – concerns issues that have long been in dispute between the

¹⁰ *Chagos Marine Protected Area Arbitration Award* (n 1) para 521.

¹¹ *ibid* para 534-535.

¹² *ibid* para 544.

¹³ cf T Appleby, 'The Chagos Marine Protected Area Arbitration – A Battle of Four Losers?' (2015) 27 *J Environmental L* 529, 539: '[t]he Tribunal makes the comment that Mauritius has succeeded 'in significant part' in its arguments, but when the detail of the decision is analysed that does not appear to be the case'; 540: 'the outcome of the Tribunal is not a significant departure from the *status quo ante*'.



United Kingdom and Mauritius at the bilateral level'.¹⁴ In other words, '[h]aving failed before the Tribunal in 2015, Mauritius elected in 2016 to bring the same issues before the General Assembly with a view to seeking an advisory opinion'.¹⁵ According to the UK, the Court should refuse the request for this reason, mindful of the principle that the adjudication of inter-State disputes requires consent.¹⁶

The relevance of State consent for the ICJ's advisory jurisdiction has led to some scholarly debate.¹⁷ In the *Wall* Advisory Opinion, the Court summarised its previous rulings on this matter, pointing out that the lack of consent from an interested State 'has no bearing on the Court's jurisdiction', but can provide a reason for the Court to decline a request for an advisory opinion in the exercise of its discretion under Article 65 of the Statute.¹⁸ As was held in the *Western Sahara* Advisory Opinion, 'the

¹⁴ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, ICJ, Written Statement by the UK (15 February 2018) para 6.2.

¹⁵ *ibid.*

¹⁶ For a defence of this position see S Yee, 'Notes on the International Court of Justice (Part 7) – The Upcoming *Separation of the Chagos Archipelago* Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement' (2018) 16 *Chinese J Intl L* 623, 641: '[t]he fact that fully answering the questions put to the Court would necessitate addressing the main or essential issues, including the lawfulness of the detachment of the Chagos Archipelago from Mauritius and ultimately the validity of the detachment agreement, in the bilateral dispute between Mauritius and the United Kingdom without the latter's consent, and would be incompatible with the Court's judicial character, is a compelling reason calling for the Court's refusal to give the requested opinion on such issues'.

¹⁷ R Kolb, *The International Court of Justice* (Hart 2013) 1069-1076. For a discussion with regard to the *Wall* Opinion, see M Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial' (2005) 99 *AJIL* 26; M Aljaghoub, 'The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints. Reflections on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004' (2010) 24 *Arab L Q* 191. For a discussion of the *Kosovo* Opinion, see V Djerić, 'Questions of Jurisdiction and the Discretion to Decline a Request for an Advisory Opinion' in M Milanović, M Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015). For a discussion with regard to the *Chagos* case in particular, see D Akande, A Tzanakopoulos, 'Can the International Court of Justice Decide on the Chagos Islands Advisory Proceedings without the UK's Consent?' *EJIL: Talk!* (27 June 2017) <www.ejiltalk.org/can-the-international-court-of-justice-decide-on-the-chagos-islands-advisory-proceedings-without-the-uks-consent/>.

¹⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 157 para 47.

lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character'.¹⁹ This would be the case if 'the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.²⁰ In the concrete circumstances of the *Western Sabara* Opinion, however, the Court considered that the relevant legal controversy 'arose during the proceedings of the General Assembly' and not 'independently in bilateral relations'.²¹ In the *Wall* Opinion, it was noted that the relevant controversy 'must be deemed to be directly of concern to the United Nations', given the latter's 'powers and responsibilities ... relating to international peace and security'.²²

In regard to the *Chagos* case, the occurrence of inter-State arbitration proceedings in which the question of sovereignty over the archipelago was raised if not ruled upon, might suggest that the controversy at stake arose 'independently in bilateral relations' rather than during UNGA proceedings. This could then substantiate the claim that accepting the request would circumvent 'the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.²³ At the same time, the Court could attach weight to the circumstance that the questions posed by the UNGA are phrased in a relatively broad manner, referring to questions of decolonization which have been of concern to the UNGA for a long time.²⁴

¹⁹ ICJ, *Western Sabara* (Advisory Opinion) [1975] ICJ Rep 24 para 32.

²⁰ *ibid* para 33. This reasoning found its clearest application in *Status of the Eastern Carelia*, PCIJ Series B Advisory Opinion No 5 para 35: '[a]nswering the question would be substantially equivalent to deciding the dispute between the parties'. It is generally considered, however, that the crucial issue in that case was that Russia was not a member of the League of Nations. M Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (Nijhoff 2003) 92-100.

²¹ *Western Sabara* Advisory Opinion (n 19) para 34.

²² *Wall* Advisory Opinion (n 18) para 49.

²³ *Western Sabara* Advisory Opinion (n 19) para 33.

²⁴ M Milanovic, 'ICJ Advisory Opinion Request on the Chagos Island' EJIL : Talk ! (24 June 2017) <www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/>; Z Crespi Reghizzi, 'La juridiction consultative à l'épreuve du principe consensuel: l'affaire des Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965' (2018) 55 QIL-Questions Intl L 15: 'Il s'ensuit que la question posée par l'Assemblée générale ne s'épuise pas dans l'évaluation d'un simple différend bilatéral 'né indépendamment' dans les relations entre le Royaume-Uni et Maurice, mais concerne l'évaluation juridique



In my view, the differences between the Court's contentious and advisory jurisdiction mitigate the relevance of State consent in the latter case. As the Court held in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*:

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take.²⁵

These comments concerned the Court's jurisdiction rather than its discretion, but I fail to see why the absence of consent should compel the Court to reject a request although it does not affect its jurisdiction. In my view, the requirement of consent applicable in contentious proceedings is of little relevance to the delivery of an advisory opinion. By acceding to the UN Charter, States consent to the UNGA's competence to ask the ICJ for advisory opinions. The Court itself has ruled that only 'compelling reasons' can justify a refusal to assist in the solution of a problem confronting the UNGA.²⁶ Moreover, the requirement of consent in international adjudication seems mandated by the binding nature of a judgment in a contentious case. An advisory opinion does not have such a binding nature and for that reason it is less problematic if a State would be subjected to an adverse advisory opinion without its consent. Admittedly, a judgment in a contentious case is not binding on third States either and still the Court consid-

d'une relation multilatérale susceptible d'intéresser les Nations Unies et la Communauté internationale: partant, pour reprendre l'expression de la Cour, cette question s'inscrit 'dans un cadre bien plus large que celui d'un différend bilatéral'.

²⁵ ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 71.

²⁶ The Court referred to the need of compelling reasons in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (Advisory Opinion) [1956] ICJ Rep 1956 para 86. Cf *Western Sahara* Advisory Opinion (n 19) para 23.

ered in *Monetary Gold* that the lack of consent of Albania provided sufficient reason not to ‘adjudicate upon the international responsibility of Albania without her consent’ in contentious proceedings between other States.²⁷ Yet a judgment in a contentious case is binding upon the disputing parties and for that reason it can have indirect implications for third States, which would justify the need for their consent. An advisory opinion, however, has no binding effect on any State, and for that reason it seems unproblematic if such an opinion concerns a State that has not consented to a contentious proceeding.²⁸ Consequently, the possibility that a request for an advisory opinion circumvents, to some extent, the requirement of consent should have only limited weight when balanced against the UNGA’s apparent need for an answer by the Court. Indeed, accepting the request in the *Chagos* case would fit with the Court’s consistent practice of reaffirming the theoretical possibility of rejecting a request of the UNGA without ever doing so in practice.

3.2. *The merits of the Request*

The *Chagos* arbitral award has been invoked before the ICJ not only in regard to the admissibility of the request for an Advisory Opinion, but also in regard to the merits. According to the UK, the arbitral award confirmed the 1965 Agreement between the UK and the Mauritius Government as binding international law. This would mean that the detachment of the Chagos Archipelago, to which Mauritius agreed in 1965, is valid under international law. After all, it is difficult to see how only the UK could be held bound by the Agreement. As the UK held at the oral hearings: ‘Mauritius is being disingenuous, since it claims, on the one hand, that the reaffirmations by the United Kingdom of its part of the Agreement are binding, but, on the other hand, its own reaffirmations of the Agreement are,

²⁷ ICJ, *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States)* [1954] ICJ Rep 32.

²⁸ cf H Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons 1958) 358: ‘[t]here seems to be no decisive reason why the sovereignty of States should be protected from a procedure, to which they have consented in advance as Members of the United Nations, of ascertaining the law through a pronouncement which, notwithstanding its authority, is not binding upon them’, quoted by South Africa before the ICJ, *Chagos Advisory Opinion* (n 14) Verbatim Record of the Public Sitting held on Tuesday 4 September 2018 at 10 am, 10-11. In an advisory opinion, the ICJ does not ‘adjudicate’ as it does in contentious proceedings like *Monetary Gold*.



somehow, without legal effect'.²⁹ Thomas Grant has provided a similar reading of the arbitral award, confirming that 'the [Lancaster House] Undertakings and the act of separation are part of a unitary transaction – an arrangement that is to be considered in its totality. ... To say that one half of a transaction like that forms the basis for the settlement of the dispute but then to deny that the other half has legal effect is unconvincing'.³⁰ Indeed, according to Grant, the obligations imposed on the United Kingdom by the award suppose that 'the United Kingdom is in lawful possession of the archipelago'.³¹

Mauritius, however, contests such an interpretation, arguing that the tribunal only held 'that because the U.K. repeated and reaffirmed those unilateral undertakings to Mauritius after its independence, the U.K. was estopped from acting inconsistently with them'.³² Accordingly, there has been no ruling by the tribunal on the validity of Mauritius' consent to the detachment: '[a]ny attempt to argue that Mauritius validly consented to the dismemberment must, therefore, look elsewhere than to the UNCLOS Award, which did not address the issue (and cannot therefore amount to *res judicata*)'.³³

Mauritius' understanding of the award seems justified, as the tribunal had declined jurisdiction over the question of sovereignty. Moreover, the tribunal's application of estoppel rather than the 1965 Agreement itself allowed it to avoid responding to several potential problems concerning that Agreement's validity. For instance, as noted by Stephen Allen, there is uncertainty over the Agreement's legal status under UK law, before Mauritian independence.³⁴ In addition, it is contested whether the Mauritian delegation that participated in the Lancaster House meetings could be consid-

²⁹ *Chagos Advisory Opinion* (n 14) Verbatim Record of the Public Sitting held on Monday 3 September 2018 at 3 pm, 57.

³⁰ T Grant, 'The Once and Future King: Sovereignty over Territory and the Annex VII Tribunal's Award in *Mauritius v United Kingdom*' in Allen, Monaghan (n 9) 224-225.

³¹ *ibid* 225.

³² *Chagos Advisory Opinion* (n 14) Written Comments of Mauritius (15 May 2018) para 2.71.

³³ *ibid* para 3.86.

³⁴ S Allen, 'The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*' in Allen, Monaghan (n 9) 236-239.

ered the legitimate representatives of the new independent State of Mauritius³⁵ and whether they had not decided under duress.³⁶ The tribunal's application of estoppel allowed it to avoid ruling on these matters: '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'.³⁷

Consequently, it seems justified to understand the tribunal's findings as given without prejudice to the question of whether Mauritius is bound by the 1965 Agreement insofar it entails consent to the detachment of the Chagos archipelago. Admittedly, the award is somewhat ambiguous on the matter. The tribunal noted that 'upon Mauritian independence, the 1965 Agreement became a matter of international law between the Parties'.³⁸ This finding, however, seems to concern only the obligations of the UK. As the tribunal summarised later, 'the United Kingdom is estopped from denying the binding effect of these commitments, which the Tribunal will treat as binding on the United Kingdom in view of their repeated reaffirmation after 1968'.³⁹ The question of whether Mauritius is also estopped from denying the validity of the agreement is not discussed by the tribunal. This would, after all, concern the question of sovereignty, over which the tribunal lacked jurisdiction. Accordingly, the relevance of the award is limited to the manner in which the UK should administer the archipelago as long as it has *de facto* control over the islands, without prejudice to the question of whether the UK's possession is *de jure* as well, since that latter question was outside the tribunal's jurisdiction.

³⁵ D Ong, 'Implications of the Chagos Marine Protected Area Arbitral Tribunal Award for the Balance Between Natural Environmental Protection and Traditional Maritime Freedoms' in Allen, Monaghan (n 9) 275.

³⁶ As argued by Mauritius before the tribunal. *Chagos Marine Protected Area Arbitration*, Award (n 1) para 393. See also dissenting opinion, para 74. The dissenters also considered, in the alternative, that 'one may argue that the "agreement" reached in the Lancaster House Conference has been terminated by the United Kingdom *ex nunc* by establishing the MPA unilaterally' para 79. This suggests an analogous application of Article 60 of the Vienna Convention on the Law of Treaties, but the dissenting opinion does not provide any substantiation in this regard.

³⁷ *Chagos Marine Protected Area Arbitration*, Award (n 1) para 428.

³⁸ *ibid.*

³⁹ *ibid* para 448.



The *Chagos* award has not only been referred to in the context of the first question pending before the ICJ, but also in the context of the second question. According to the UK, the answer to this question is ‘largely determined, with binding force as between the Parties, in the 2015 *Chagos Arbitration Award*’.⁴⁰ This is slightly misleading, because there can be other ‘consequences under international law ... arising from the continued administration by the UK’ than the ones identified by the tribunal.⁴¹ Moreover, with regard to the obligations identified in the award, Mauritius has complained that the UK has not taken any steps to fulfil them and that, to the contrary, the lease agreement with the US was extended without consultation of Mauritius.⁴² This could be seen as contradictory to the tribunal’s finding that ‘the 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’.⁴³ On the other hand, unlike the MPA, the lease concerns the use of the archipelago for defence purposes and may therefore be seen as postponing the return of the archipelago rather than impacting upon its future after its return.

While the UK acknowledges the obligation to ultimately return the Chagos Archipelago to Mauritius, it emphasises that, according to the award, this obligation will only materialise when the islands are no longer needed for defence purposes.⁴⁴ Yet here again, the tribunal’s finding is arguably without prejudice as to whether the UK’s current administration of the islands, even if justified by defence purposes, is lawful at all. Admittedly, this reading of the award is somewhat contradictory and unsatisfy-

⁴⁰ *Chagos Advisory Opinion* (n 14) Written Comments by UK (14 May 2018) para 5.29; Verbatim Record of the Public Sitting held on Monday 3 September 2018 at 3 pm, 9.

⁴¹ The quotation is from the second question in the UNGA’s request for the advisory opinion.

⁴² *Chagos Advisory Opinion* (n 14) Written Statement by Mauritius (1 March 2018) para 4.22.

⁴³ *Chagos Marine Protected Area Arbitration, Award* (n 1) para 521. See eg M Waibel, ‘Mauritius v. UK: Chagos Marine Protected Area Unlawful’ (n 1): ‘the UK will find it difficult to avoid engaging in serious consultations with Mauritius on the renewal of the lease of Diego Garcia to the United States in 2016. The renewal is likely as significant for the condition in which the archipelago will eventually return to Mauritius as the MPA which the Tribunal considered to be unlawful’.

⁴⁴ *Chagos Advisory Opinion* (n 14) Written Statement by the UK (15 February 2018) para 6.16.

ing. It would be even more problematic, however, to infer from the tribunal's recognition of the UK's obligation to ultimately return the islands that its current possession is lawful, because the tribunal had declined jurisdiction over that question. Consequently, it is up to the ICJ to find its own answers on this matter.

4. *Conclusions*

To some observers, the *Chagos* award provided a Pyrrhic victory to Mauritius. The tribunal agreed that the Lancaster House Undertakings were binding on the UK and that the MPA had been established in violation of international law. At the same time, the award seems to suggest that the UK's current administration of the archipelago, as long as justified by defence purposes and exercised in accordance with the Lancaster House Undertakings, does not raise problems under international law. I have argued, however, that any interpretation of the award must acknowledge that the tribunal was well aware of the limits of its jurisdiction and that it refused to determine whether the United Kingdom or Mauritius was the relevant 'coastal State'. For that reason, it seems unjustified to use the award in the context of determining whether the detachment of the archipelago or the UK's continuous administration of the islands is in accordance with international law. Rather, the tribunal's findings on the obligations that bind the UK as long as it is in *de facto* control of the archipelago are without prejudice to the question of whether this control is lawful in itself. As pointed out by Nicaragua in its oral submissions, the crucial observation 'is that the Award is limited, as it should be, to questions of the law of the sea. It could not have been otherwise. It was the only subject within its competence'.⁴⁵

⁴⁵ *Chagos* Advisory Opinion (n 14) Verbatim Record of the Public Sitting held on 5 September 2018 at 3 pm, 42.

