The Chagos Marine Protected Area Arbitral Award and its Ruling on Fishing Rights

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Decision commented on: The Matter of the Chagos Marine Protected Area Arbitration, Between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland (hereafter UK), Award of 18 March 2015 (Registry, the Permanent Court of Arbitration).

Pursuant to Articles 286, 287 and Article 1 of Annex VII of the Convention on the Law of the Sea (LOSC), on 20 December 2010, the Republic of Mauritius instituted arbitral proceedings concerning the decision of the United Kingdom to establish a Marine Protected Area around the Chagos Archipelago. The Arbitral Tribunal (hereafter Tribunal) was fully constituted on 25 March 2011.

Mauritius made four submissions requesting the Tribunal to find that:

1. The UK is not entitled to declare a marine protected area (MPA) or other maritime zones because it is not the ‘coastal state’ within the meaning of, *inter alia*, Articles 2, 55, 56, and 76 of the LOSC; and/or
2. Having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the UK is not entitled unilaterally to declare an MPA or other maritime zones because Mauritius has rights as a ‘coastal state’ within the meaning of, *inter alia*, Article 56(1)(b)(iii) and 76(8) of the LOSC;
3. The UK shall take no step that may prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the LOSC;
4. The UK’s purported MPA is *incompatible with the substantive and procedural obligations* of UK under the LOSC, including *inter alia* Articles 2, 55, 56, 63, 64, 194, and 300, as well as Article 7 of the 1995 UN Fish Stock Agreement.

The fourth submission was the only submission on which the Tribunal unanimously agreed that it had jurisdiction to consider the merits. The fourth submission involved two main important issues: the nature and content of Mauritius’ rights in the territorial Sea, the exclusive economic zone (EEZ) and the Continental Shelf; and whether the UK, in declaring
the MPA, breached its obligations under the LOSC. The first issue is of particular importance, and is the focus of this post. The post does not discuss the issue of whether the establishment of the MPA is incompatible with UK’s obligations under the LOSC or the Tribunal’s consideration of the first three issues.

This post first provides the factual background to the dispute and then offers a summary of the Chagos Arbitral Tribunal’s Award (hereafter CAA) and its reasoning, concentrating on the fishing rights of Mauritius and the corresponding obligation of the UK. The post continues with a short discussion of the concept of Traditional Fishing Rights (hereafter TFRs), and concludes with some final observations and comments on the Tribunal’s position with respect to the issue of TFRs.

**Factual Background to the Dispute**

Mauritius is composed of a group of Islands located in the south-western part of the Indian Ocean, one of which is the Chagos Archipelago. Mauritius, including the Chagos Archipelago, was a colony of the UK from 1814 until its full independence was officially decided by the 1965 London Constitutional Conference, and took effect in 1968. As a condition of granting Mauritius full independence, UK required the detachment of the Chagos Archipelago which it sought to retain it under its control. Mauritian leaders rejected that proposal and alternatively proposed a long-term lease of the Archipelago. The main reason to detach the Chagos Archipelago was the decision of the UK and the USA to establish a joint defence facility on Diego Garcia, the biggest southerly island of the Chagos Archipelago. Discussions over the detachment of the Chagos Archipelago continued in a series of meetings, which culminated in the agreement on its detachment, known as the “Lancaster House Agreement” of 23 September 1965. The main undertakings of the UK in the “Lancaster House Agreement” were:

1. to pay compensation totaling up to 3 million pounds to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
2. to use its “good offices” with the U.S. Government to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius “as far as practicable”;  
3. to return the islands to Mauritius if the need for the defense facilities disappeared;  
4. to reserve to the Mauritius Government the benefit of any minerals or oil discovered in or near the Chagos Archipelago.

On the basis of the Lancaster House Undertaking, the Chagos Archipelago was detached from Mauritius, and became the British Indian Ocean Territory (BIOT). After the independence of
Mauritius, the UK took a number of measures relating to the latter’s fishing rights with a view to fulfilling its obligations under the Lancaster House Undertaking. In 1969, it established a 12 nm fishery zone contiguous to the territorial sea where Mauritius was allowed to fish (CAA, para. 113). In April 1971, it enacted the Fisheries Limits Ordinance, which imposed a general prohibition on commercial fishing within the 12 nm limit. However, the Ordinance exempted Mauritian fishermen from the prohibition in “certain waters which have been traditionally fished by vessels from Mauritius” (CAA, para. 115). Moreover, in July 1991, the UK declared a 200 nm Fisheries Conservation and Management Zone (FCMZ) in the waters surrounding the Chagos Archipelago but committed to offer a limited number of licenses free of charge to artisanal fishing companies of Mauritius (CAA, para.119). Mauritius, for her part, performed certain activities to strengthen its position over the Chagos Archipelago. Among others, it incorporated the Chagos Archipelago in its Constitution, and enacted several maritime zone regulations making it part of its territorial sovereignty.

Beginning in 2009, the UK planned to establish an MPA in the Chagos Archipelago. In the absence of an agreement with Mauritius in their initial joint-talk and discussions on the matter of the establishment of MPA, the UK unilaterally conducted a public consultation without the consent and involvement of Mauritius and officially declared the establishment of the MPA on 1 April 2010 banning any fishing in the area. Mauritius protested this decision and initiated this Arbitration on 20 December 2010 pursuant to Articles 286 and 287 of the LOSC.

The Tribunal’s ruling on the nature and scope of Mauritius’ fishing rights

Two important issues that the Tribunal was requested to decide in relation to Mauritius’ fourth submission were: whether the Lancaster House Undertakings with respect to the fishing rights were binding, and the scope of such fishing rights; and whether Mauritius has traditional fishing rights independently of the undertaking.

The Tribunal rejected the UK’s argument that the Lancaster House Agreement was not intended to be binding and could not have been legally binding as a matter of British constitutional law. The tribunal reasoned that the Lancaster House Undertakings “formed part of the quid pro quo through which Mauritian agreement to the detachment of the Chagos Archipelago was procured” (CAA, para. 421). The undertakings were essential conditions, without which Mauritius would not grant its consent. The Tribunal acknowledged that an agreement between the British Government and the then non-self-governing territory would not be binding agreement under international law if Mauritius had remained part of the British Empire. However, the 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” (CAA, para. 425, emphasis supplied). Moreover, the UK in its subsequent state-to-state relations and practices repeated and reaffirmed the Lancaster House Undertakings on multiple occasions, all of which transformed the 1965 Agreement into a matter of international law between the Parties. Accordingly, the Tribunal unanimously found that, as a result of the 1965 undertakings of the UK and its repeated subsequent practice, Mauritius holds legally binding rights to fish in the waters surrounding the Chagos Archipelago so far as practicable, to have the UK preserve minerals and oils for the benefit of Mauritius, and to the eventual return of the Chagos Archipelago to Mauritius when no longer needed for defence purpose (CAA, para. 448).

The parties also disagreed as to the scope and extent of these undertakings. While Mauritius adopted a broad interpretation that would allow its vessels to fish anywhere in the Chagos waters and for any species except in the immediate vicinity of the defence facility (CAA, para. 408), the UK proposed a narrow interpretation by reference to the very limited fishing practice at the time of the conclusion of the agreement (CAA, para. 411). The UK also argued that the right was merely a preferential right to fish (CAA, para. 411).

The Tribunal rejected both of the UK’s submissions but also ruled that Mauritius did not have a “perpetual and absolute right” to fish because the express words of the undertaking imposed some limitations on the right (CAA, para. 451). It concluded that the UK’s undertaking with respect to fishing rights is to be understood as “a positive obligation subject to some limitations” (CAA, para. 452). The positive aspect of the obligation is found in the express words of the undertaking (“ensure” and “would remain available”), whereas the limitations are found in the words “use their good offices with the U.S. Government” and “as far as practicable” (CAA, para. 452). The tribunal failed to interpret and elaborate what might be entailed by the positive obligations to “ensure” and “would remain available”.

The Tribunal declined to rule on TFRs

Independently of the Lancaster House Undertaking, Mauritius also claimed that it has traditional fishing rights in the territorial sea and the exclusive economic zone surrounding the Chagos Archipelago. According to Mauritius, “even if the Chagos Archipelago was lawfully detached from Mauritius (. . . ) , the detachment cannot render void any existing rights of access or use, or other rights related to the exploitation of natural resources” (Applicant’s memorial, para. 7.10). In the view of Mauritius, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of the territory and the resources thereto (Applicant’s memorial, para. 7.10). Mauritius further argued that the legitimate standard and criteria for such traditional fishing
right is merely that they have been exercised for many years in the waters surrounding the
Chagos Archipelago, and with the acquiescence of the UK, as evidenced in its decades of
practice (Reply, para. 6.60 – 6.61). On the contrary, the UK submitted that Mauritius has no
traditional fishing rights, for there was extremely limited fishing in 1965 and such limited
fishing “does not come close to any form of historic dependence as commonly understood by
traditional fishing” (counter memorial, para. 8.32 (c)). UK further argued that “even if there
were TFRs, the existence of such rights would not operate so as to prevent the establishment
of the MPA” (counter memorial, para. 8.31).

Unfortunately, the Tribunal declined to address Mauritius` submission on the issue of TFRs.
The tribunal stated that:

In light of the Tribunal’s conclusion that Mauritius is entitled to fishing rights in the
Territorial Sea pursuant to the United Kingdom’s undertaking at Lancaster House, the
Tribunal considers it unnecessary to address the question of whether Mauritius possessed
traditional fishing rights independently of any commitment by the United Kingdom (CAA,
para. 456).

It is this ruling of the Tribunal which is the subject of comment in this post. But, before
commenting on the Tribunal’s position on this issue, it is necessary to provide a short
explanation of the concept of TFRs and examine the existing jurisprudence, particularly of
the Anglo-Norwegian Fisheries case, as well as the 1998 and 1999 Eritrea\Yemen Arbitral
Award on the issue of TFRs.

**The concept of TFRs and existing jurisprudence**

In her [survey of state practice](#) Polite Dyspriani defines traditional fishing rights as fishing
rights granted to certain groups of fishermen who have habitually fished in certain areas over
a long period of time (at 2). Traditional fishing rights constitute two broad categories: TFRs
exercised in a certain traditional fishing area by the traditional inhabitants or indigenous
peoples within the limits of their national maritime jurisdiction; and TFRs exercised by
nationals of one State in another State’s maritime jurisdiction. The first category of rights are
claimed by traditional inhabitants and indigenous peoples against their own State to have
access to fishing, and other traditional and cultural activities in the marine space, such as
bays, fjords, and estuaries. The second category of traditional fishing rights, however, are
claimed by nationals of one State to continue fishing and conducting other traditional
activities within the maritime areas of another State on the ground of habitual fishing
practice and historic attachment to the area. It is this second category which is of interest
here and it is a form of historic title claim.
In the Anglo-Norwegian Fisheries Case, [1951] ICJ Rep 131 the International Court of Justice (ICJ) noted that the existence of historic title gives rise to the recognition of certain rights even though it constitutes a derogation of general rules of international law (at 130). In other words, historic title justifies rights which (at 131) “would otherwise be in conflict with international law”. It follows that historic title enables the exercise of certain rights, such as fishing rights, within the maritime jurisdiction of other States, without, however, conferring sovereign rights over the area (Symmons: 4). Put differently, claims of rights based on historic title do not “amount to zonal claims of jurisdiction or sovereignty” (Symmons: 5), but a claim to continue exercising existing rights. Hence, the delimitation of maritime boundary or the transfer of a territory to another State should not have a detrimental effect on the local fishermen; and is not a bar to the exercise of existing traditional fishing rights that the area where such rights are to be exercised fall within the exclusive maritime zones of another State. Of course, the actual exercise of the rights must be conducted in conformity with the laws of, and in consultation with, the State concerned. The principle of historic title for the recognition of traditional fishing rights was applied in the Eritrea\Yemen arbitral award (Phase I: Territorial sovereignty and scope of dispute, 1998 and Phase II: maritime delimitation, 1999). The Award describes the traditional fishing rights as:

A regime that has existed for the benefit of the fishermen of both countries throughout the region. By its very nature it is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea [...]. The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports [...] (Phase II at para. 109, emphasis supplied).

Accordingly, the Eritrea\Yemen Arbitral Tribunal declared that “the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen” (Phase I at para 527(vi), emphasis supplied). Thus the Tribunal’s Award provided for the perpetual continuation of the traditional fishing rights of the Eritrean fishermen in maritime areas decided to fall within the maritime sovereignty of Yemen (both in the territorial sea and the EEZ). This is a clear indication that traditional fishing rights may survive the drawing of international maritime boundary.

**Final observations and concluding remarks**

The Tribunal missed an important opportunity to clarify the traditional fishing rights claimed by Mauritius. The only reason why the Tribunal considered it unnecessary to address TFRs seems to be because it had already found that Mauritius is entitled to fishing rights in the territorial sea based on the Lancaster House Undertaking. By this reasoning, the Tribunal
seems to equate TFRs with fishing rights arising from UK’s Lancaster House Undertakings. Nonetheless, the concept and essence of TFRs is of a different nature and may exist irrespective of any agreement between the parties, as shown above.

One of the obvious effects of the detachment of the Chagos archipelago was the possible exclusion of the rights of Mauritian nationals who had fished in the waters surrounding the Chagos Archipelago for long period of time, by turning those waters into the sovereign confines of UK. But, such sovereign control of the waters as well as the establishment of an MPA may not extinguish historically existing rights if found to exist. Therefore, the Tribunal should have examined the facts and arguments of the parties on the issue, and should have ruled on the issue of whether Mauritius has traditional fishing rights around the Chagos archipelago. Since TFRs are claimed on different grounds than those that stem from the 1965 Lancaster House Agreement a positive ruling from the Tribunal on this issue would have strengthened the position of Mauritius.

References:


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