

STATEMENT BY DR THE HON. PRIME MINISTER

TO THE NATIONAL ASSEMBLY

31 MAY 2011

Mr Speaker, Sir,

With your permission, I would like to make a statement on the case brought by Mauritius against the UK with regard to the ‘marine protected area’ which the United Kingdom has purported to establish around the Chagos Archipelago.

As the House is aware, the Government of Mauritius initiated proceedings on 20 December 2010 against the UK Government under the United Nations Convention on the Law of the Sea (UNCLOS) to challenge the legality of the ‘marine protected area’. Mauritius considers that the UK, not being a “coastal State” under UNCLOS and international law, had no authority to purport to establish a marine protected area around the Chagos Archipelago.

Since Mauritius and the UK have not agreed on the means for the settlement of the dispute, it has to be submitted to arbitration in accordance with Annex VII to the UNCLOS.

Annex VII to UNCLOS provides for the constitution of an Arbitral Tribunal consisting of five members. In accordance with the requirements of Article 3(b) of Annex VII, Mauritius has appointed Judge Rüdiger Wolfrum, Judge of the International Tribunal on the Law of the Sea (ITLOS), as a member of the Arbitral Tribunal. As for the UK, it has appointed on 19 January 2011

Sir Christopher Greenwood, Judge of the International Court of Justice, as arbitrator. The other three members of the Arbitral Tribunal had to be appointed by agreement between Mauritius and the UK.

Since Mauritius and the UK could not reach agreement on the appointment of the other three arbitrators, Mauritius requested the President of ITLOS, Judge José Luis Jesus, to assume the role of appointing authority pursuant to Article 3(e) of Annex VII to UNCLOS. After consultations with the Parties, the President of ITLOS appointed on 25 March 2011 Professor Ivan Shearer of Australia, and two ITLOS Judges, Judge James Kateka of Tanzania and Judge Albert Hoffmann of South Africa, as the three remaining arbitrators. He also appointed Professor Ivan Shearer as President of the Arbitral Tribunal.

Following their appointment, the five arbitrators submitted Declarations of Acceptance and Statements of Impartiality and Independence which were transmitted to the Parties for comments by 23 May 2011.

It is a matter of public record that Judge Greenwood, while in private practice at the English Bar, has had a long-standing and close working relationship with the UK Government, including advising on many of the most sensitive issues of international law and foreign policy. According to his disclosure statement, he has acted for the UK within the past three years, in the period before he became a Judge at the International Court. He has also recently participated on a panel that selected the new Legal

Adviser at the UK Foreign and Commonwealth Office, showing the continuing relationship he has with the UK Government.

Mauritius is concerned to ensure the independence and impartiality of the Arbitral Tribunal and each of its members. Mauritius expressed serious concerns about whether it is appropriate for Judge Greenwood to sit on a case raising issues of strategic importance for the UK in circumstances in which he may be said to have such a close relationship with the party appointing him. We therefore requested additional disclosure from Judge Greenwood. A further disclosure statement was submitted by Judge Greenwood on 20 May 2011. This provided further details as to the timing of his contribution as a member of the panel that selected the new Foreign Office Legal Adviser. It made clear that, having been appointed to the arbitral tribunal in January 2011, he then served on a panel that decided on 14 March 2011 on the appointment of the new Foreign Office Legal Adviser.

I am bound to share with you my surprise at this regrettable turn of events. In fact, because of the urgency and sensitive nature of this matter, I personally met and discussed the whole issue with our Leading Counsel, Mr Philippe Sands QC last week in London. In our opinion, there are strong grounds for the view that a sitting arbitrator who has plainly been advising the British Government on matters proximate to, and which arguably have a bearing upon, issues before the Arbitral Tribunal and in addition who contributes to the selection of the new legal adviser of the

party that appointed him and who may possibly form part of the team appearing in the case before him, should not sit as a member of the Tribunal. We have noted, in this regard, that the International Bar Association Guidelines on Conflicts of Interest state: “There is an unacceptable appearance of bias if: [...] the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.” Members of this House and members of the public may form their own view as to how a reasonable observer would react to such facts.

Judge Greenwood is an International Judge of great distinction and of impeccable reputation whom both the Government and I personally hold in considerable esteem. Therefore, it is with regret that we have concluded that we cannot submit to the appointment of Judge Greenwood without inviting the Tribunal to consider whether his continued tenure as a member of the Arbitral Tribunal is compatible with the well-established principles of objective independence and impartiality applicable to all judicial and arbitral proceedings. Having taken advice from our legal advisers, Mauritius has decided to challenge Judge Greenwood’s appointment. We regret the delay that this will cause, but we see no alternative.

The Arbitral Tribunal has invited the Permanent Court of Arbitration, which acts as the Registry for the case between Mauritius and the UK, to consult with the Parties with respect to the procedure for resolving the challenge to Judge Greenwood’s appointment with a view to reaching an agreement between the Parties. Should the Parties be unable to agree on any matters

relating to the challenge procedure, the Arbitral Tribunal will decide on how to proceed, in consultation with the parties.

A procedural meeting of the Arbitral Tribunal had been scheduled for 9 June 2011 in London to decide on the order of the proceedings. That has now been postponed until the challenge to Judge Greenwood's appointment is resolved, which we hope will be done expeditiously. I will keep the National Assembly informed of further developments.
