

MCNAIR CHAMBERS

INTERNATIONAL COMMERCIAL LAWYERS

A QFC registered LLC

INTERNATIONAL COURT OF JUSTICE HEARS CHAGOS ISLANDS CASE

Introduction

On 28 June 2017, the Registry of the ICJ filed a Request for an Advisory Opinion received from the United Nations General Assembly – the first in almost a decade – relating to the sovereignty of the Chagos Archipelago, a long running dispute between Mauritius and the United Kingdom. Oral hearings took place last week between 3-6 September at the Peace Palace in the Hague, and the International Court of Justice will now consider its verdict.

Requests for Advisory Opinions

In addition to deciding disputes of a legal nature that are submitted to it by States in accordance with the rules and principles of international law (the Court’s “contentious jurisdiction”), the ICJ can also give advisory opinions on legal questions at the request of organs of the United Nations (and certain other specialised agencies). These advisory opinions have no binding effect.

Since 1946, the Court has delivered 27 advisory opinions. Of those 27 opinions, 16 were requested by the UN General Assembly and the remaining 11 were requested by one of UNESCO (1), World Health Organisation (2), International Maritime Organisation (1), Security Council (1), International Fund for Agricultural Development (1), Economic and Social Council (2) or Committee on Applications for Review of Administrative Tribunal Judgments (3).

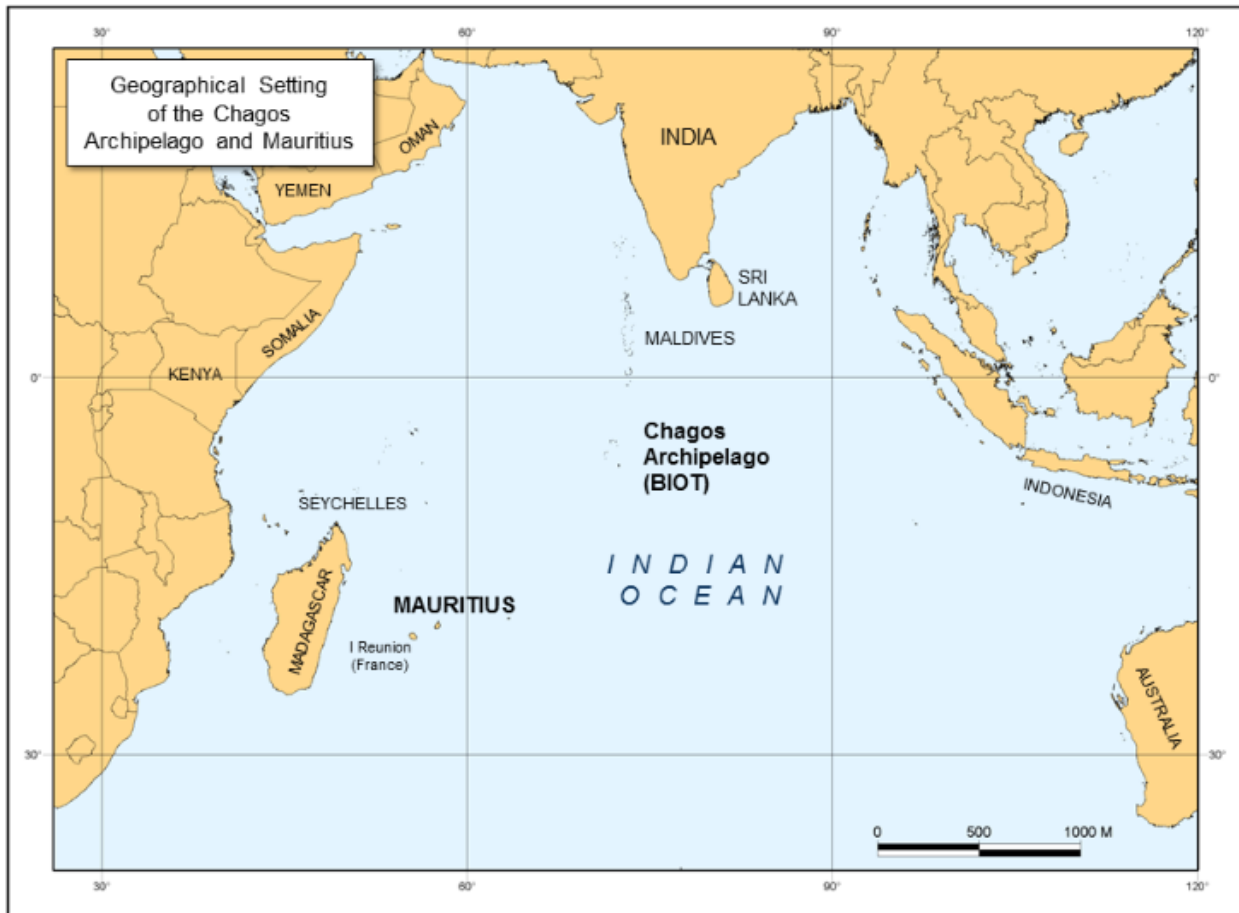
Requests may cover a wide range of subject matters, including political and state issues (such as the status of South West Africa (on which four advisory opinions were delivered), the Kosovan declaration of independence in 2008; the construction of a wall in occupied Palestinian territory in 2003-2004; and the legality and use of nuclear weapons), Treaty interpretation, and judgments/awards of the United Nations Administrative Tribunal.

Following receipt of a request for an advisory opinion, the Court itself draws up a list of States and organisations that may be able to furnish relevant information, and then organizes the written and/or oral proceedings pursuant to Articles 66 of its Statute and 105 of its Rules. As a result of the sometimes political nature of such requests for advisory opinions, the written and oral phases can be extensive - for example, in the proceedings in respect of Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, written statements were filed by as many as 36

Member States, written comments on those written statements were made by 14 Member States, and oral submissions were made on behalf of 28 Member States during hearings over a 10-day period.

The Chagos Islands case

By way of background, the current proceedings arise from the separation of the Chagos Archipelago (a group of islands in the Indian Ocean) from Mauritius in 1965. There is a long-standing dispute between the United Kingdom and Mauritius as to the sovereignty of the Chagos Islands.



In a letter dated 14 July 2016 to the Secretary-General (A/71/142), the Permanent Representative of Mauritius to the United Nations transmitted a request from Mauritius for the inclusion in the provisional agenda of the seventy-first session of the General Assembly of an item entitled "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965".

Subsequently, on 22 June 2017, the General Assembly of the United Nations adopted resolution A/RES/71/292 in which, referring to Article 65 of the Statute of the Court, it requested the International Court of Justice to give an advisory opinion on the following questions:

- (a) *“Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from*

Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?";

(b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

The Request for an Advisory Opinion was transmitted to the Court by the Secretary-General of the United Nations in a letter dated 23 June 2017 which was filed with the Registry on 28 June 2017.

Written and oral proceedings

In addition to the United Kingdom and Mauritius, written statements were filed by Belize, Germany, Cyprus, Liechtenstein, Serbia, Netherlands, Brazil, USA, Republic of Korea, Chile, India, Seychelles, Australia, Russian Federation, Israel, France, Namibia, Marshall Islands, South Africa, Vietnam, Cuba, Lesotho, Argentina, Guatemala, African Union, Nicaragua, Djibouti, People's Republic of China, Madagascar and Niger. Further written comments were submitted by the African Union, Serbia, USA, Seychelles, Nicaragua, Mauritius, Guatemala, Argentina, United Kingdom, Marshall Islands and Cyprus.

Public hearings took place between 3-6 September. Twenty two States and the African Union had expressed their intention of participating in the oral proceedings before the ICJ, with Mauritius and the United Kingdom being allocated 3 hours each, and other countries receiving 40 minutes for their submissions.

Summary of positions of UK and Mauritius

Both Mauritius and the United Kingdom have submitted both written statements and written comments to the ICJ, and made oral submissions before the ICJ on 3 September.

Mauritius' position is that the ICJ has jurisdiction to give the advisory opinion and there is no reason for the Court to decline to give it. As to the merits, Mauritius asserts that the decolonization of Mauritius was not lawfully completed when Mauritius was granted independence in 1968, and has not been lawfully completed to this day, as a result of the separation of the Chagos Archipelago from Mauritius.

Accordingly, Mauritius' position is that "*international law requires that:*

(a) The process of decolonisation of Mauritius be completed immediately, including by the termination of the administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, so that Mauritius is able to exercise sovereignty over the totality of its territory;

(b) Mauritius be able to implement with immediate effect a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin;

(c) No State may render aid or assistance that will prevent the process of decolonisation from being completed; and

(d) The United Nations, and especially the General Assembly, shall take all actions necessary to enable the process of decolonisation to be completed without further delay.”

In contrast, the UK, while accepting that “*it treated the Chagossians very badly at and around the time of their removal and it deeply regrets that fact*”, requests that the ICJ should exercise its discretion and decline to give the requested Advisory Opinion for reasons of judicial propriety. In particular, the UK asserts that this is a long standing dispute and for the ICJ to give a reply would (citing Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 25, paras. 32-33) “*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.*”

The written statements filed by other States are broadly in support of Mauritius’ position as to the Court’s jurisdiction (and merits, where discussed in those written submissions). However, some jurisdictions agreed with the UK’s position that the ICJ should decline jurisdiction as this was a bilateral dispute and there was no consent for the referral of the dispute to the ICJ; including France, USA, Australia, and Israel (which voted against the General Assembly resolution).