INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 13 TO 19 OCTOBER 2020

Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 13 AU 19 OCTOBRE 2020

Différend relatif à la délimitation de la frontière maritime entre Maurice et les Maldives dans l'océan Indien (Maurice/Maldives), exceptions préliminaires

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

Minutes of the Public Sittings held from 13 to 19 October 2020

Procès-verbal des audiences publiques tenues du 13 au 19 octobre 2020

PUBLIC SITTING HELD ON 13 OCTOBER 2020, 2 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

Mauritius is represented by:

Mr Dheerendra Kumar Dabee, G.O.S.K., S.C.,
Solicitor-General, Attorney General's Office,

as Agent;

Mr Jagdish Dharamchand Koonjul, G.O.S.K.,
Ambassador and Permanent Representative of the Republic of Mauritius to the United Nations in New York, United States of America,

as Co-Agent;

and

Mr Philippe Sands QC,
Professor of International Law at University College London, Barrister at Matrix Chambers, London, United Kingdom,

Mr Paul S. Reichler,
Attorney-at-Law, Foley Hoag LLP, member of the Bar of the district of Columbia, United States of America,

Mr Pierre Klein,
Professor of International Law at the Université Libre de Bruxelles, Brussels, Belgium,

as Counsel and Advocates;

Mr Remi Reichhold,
Barrister at 5 Essex Court, London, United Kingdom,

Mr Andrew Loewenstein,
Attorney-at-Law, Foley Hoag LLP, member of the Bar of Massachusetts, Boston, United States of America,

Ms Diem Huang Ho,
Attorney-at-Law, Foley Hoag LLP, Paris, France,

Mr Yuri Parkhomenko,
Attorney-at-Law, Foley Hoag LLP, Washington D.C., United States of America,

Ms Anjolie Singh,
Member of the Indian Bar, New Delhi, India,

as Counsel;

Ms Shiu Ching Young Kim Fat,
Minister Counsellor, Prime Minister's Office,

as Adviser;

Mr Scott Edmonds,
International Mapping, Ellicott City, United States of America,

Mr Thomas Frogh,
International Mapping, Ellicott City, United States of America,

as Technical Advisers;

Ms Lea Main-Klingst,
Germany,

as Assistant.

The Maldives is represented by:

Mr Ibrahim Riffath,
Attorney General,

as Agent;

and

Ms Khadeedja Shabeen,
Deputy Attorney General,

Ms Salwa Habeeb,
Senior State Counsel in the Office of the Attorney General,

as Representatives;

Mr Payam Akhavan, LL.M., S.J.D. (Harvard),
Professor of International Law; Senior Fellow, Massey College and Distinguished Visitor, Faculty of Law, University of Toronto; Member of the State Bar of New York and of the Law Society of Ontario; Member of the Permanent Court of Arbitration,

Mr Alan Boyle,
Emeritus Professor of International Law, University of Edinburgh; Member of the Bar of England and Wales, Essex Court Chambers, United Kingdom,

Mr Jean-Marc Thouvenin,
Professor at the University Paris-Nanterre; Secretary-General of The Hague Academy of International Law; Associate Member of the Institut de droit international; Member of the Paris Bar, Sygna Partners, France,

Ms Naomi Hart, Ph.D. (Cambridge);
Member of the Bar of England and Wales, Essex Court Chambers, United Kingdom,

as Counsel and Advocates;

Mr John Brown,
Law of the Sea Consultant, Cooley LLP, United Kingdom,

as Technical Adviser;

Ms Justine Bendel, Ph.D. (Edinburgh),
Vienna School of International Studies, Austria,

Mr Mitchell Lennan, LL.M.,
University of Strathclyde, United Kingdom,

Ms Melina Antoniadis, LL.M.,
Barrister and Solicitor, Law Society of Ontario, Canada,

as Assistants.

AUDIENCE PUBLIQUE TENUE LE 13 OCTOBRE 2020, 14 H 00

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges ad hoc* ; Mme HINRICHS OYARCE, *Greffière*.

Maurice est représentée par :

M. Dheerendra Kumar Dabee, G.O.S.K., S.C.,
Solicitor-General, Bureau de l'*Attorney General*,

comme agent ;

M. Jagdish Dharamchand Koonjul, G.O.S.K.,
ambassadeur et représentant permanent de la République de Maurice auprès de l'Organisation des Nations Unies, New York (États-Unis),

comme co-agent ;

et

M. Philippe Sands QC,
professeur de droit international au *University College* de Londres, avocat au cabinet Matrix Chambers, Londres (Royaume-Uni),

M. Paul S. Reichler,
avocat, Foley Hoag LLP, membre du barreau du District de Columbia (États-Unis),

M. Pierre Klein,
professeur de droit international à l'Université libre de Bruxelles, Bruxelles (Belgique),

comme conseils et avocats ;

M. Remi Reichhold,
avocat au cabinet 5 Essex Court, Londres (Royaume-Uni),

M. Andrew Loewenstein,
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Mme Diem Huang Ho,
avocate, Foley Hoag LLP, Paris (France),

M. Yuri Parkhomenko,
avocat, Foley Hoag LLP, Washington D.C. (États-Unis),

Mme Anjolie Singh,
membre du barreau indien, New Delhi (Inde),

comme conseils ;

Mme Shiu Ching Young Kim Fat,
Ministre conseillère, Bureau du Premier ministre,

comme conseillère ;

M. Scott Edmonds,
International Mapping, Ellicott City (États-Unis),

M. Thomas Frogh,
International Mapping, Ellicott City (États-Unis),

comme conseillers techniques ;

Mme Lea Main-Klingst (Allemagne),

comme assistante.

Les Maldives sont représentées par :

M. Ibrahim Riffath,
Attorney General,

comme agent ;

et

Mme Khadeedja Shabeen,
Attorney General adjointe,

Mme Salwa Habeeb,
Senior State Counsel au Cabinet de l'*Attorney General*,

comme représentantes ;

M. Payam Akhavan, LL.M., S.J.D. (Harvard),
professeur de droit international ; maître de recherche au *Massey College* et professeur invité à la faculté de droit de l'Université de Toronto ; membre du barreau de l'État de New York et du barreau de l'Ontario ; membre de la Cour permanente d'arbitrage,

M. Alan Boyle,
professeur émérite de droit international, Université d'Édimbourg ; membre du barreau d'Angleterre et du pays de Galles, cabinet Essex Court Chambers (Royaume-Uni),

M. Jean-Marc Thouvenin,
professeur à l'Université Paris-Nanterre ; secrétaire général de l'Académie de droit

international de La Haye ; membre associé de l'Institut de droit international ; membre du barreau de Paris, cabinet Sygna Partners (France),

Mme Naomi Hart, doctorat (Cambridge) ;
membre du barreau d'Angleterre et du pays de Galles, cabinet Essex Court Chambers (Royaume-Uni),

comme conseils et avocats ;

M. John Brown,
consultant en droit de la mer, Cooley LLP (Royaume-Uni),

comme conseiller technique ;

Mme Justine Bendel, doctorat (Édimbourg),
École de hautes études internationales de Vienne (Autriche),

M. Mitchell Lennan, LL.M.,
Université de Strathclyde (Royaume-Uni),

Mme Melina Antoniadis, LL.M.,
avocate, barreau de l'Ontario (Canada),

comme assistants.

Opening of the Oral Proceedings
[ITLOS/PV.20/C28/1/Rev.1, p. 1–4]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon and welcome. The Special Chamber of the Tribunal formed pursuant to article 15, paragraph 2, of the Statute of the Tribunal meets this afternoon to examine the preliminary objections raised by the Maldives in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean.*

Today's hearing takes place in exceptional circumstances. The past few months have been difficult for all States and the toll of the COVID-19 pandemic has been significant. The work of the Tribunal, like that of many other institutions, has been affected by the pandemic.

In light of travel, social distancing and other restrictions put in place by governments worldwide in response to the pandemic, the Tribunal has had to adapt its working methods so as to ensure the continued fulfilment of its mandate.

The Tribunal has recently amended its Rules to allow for new ways of working. On 25 September 2020, the Tribunal amended article 74 of its Rules to add a new paragraph which provides that, as an exceptional measure, for public health, security or other compelling reasons the Tribunal may decide to hold a hearing entirely or in part by video link. The Tribunal also amended article 112 of its Rules to add a new paragraph to provide that the reading of the Tribunal's Judgment in a case may take place by video link when necessary for public health, security or other compelling reasons.

In view of the COVID-19 pandemic, the Special Chamber has decided that the hearing on the preliminary objections raised by the Maldives will take place in a hybrid format, with a mix of virtual and in-person participation.

The following judges are present with me in the courtroom of the Tribunal: Judge Jesus, Judge Yanai, Judge Bouguetaia, Judge Heidar and Judge *ad hoc* Schrijver. On the other hand, Judge Pawlak, Judge Chadha and Judge *ad hoc* Oxman are participating in the hearing by video link.

Today's hearing is the first in the history of the Tribunal to take place with the participation of some Judges, Agents and Counsel by video link. The sitting of the Special Chamber will be accessible to the public by webstream and any interested person can follow our proceedings today either in the original language from the floor or through the interpretation to the other official language of the Tribunal.

While every effort has been made to ensure the smooth conduct of this hearing, it remains possible that a technical issue with the video link and simultaneous interpretation technology might arise. In the event that we experience a loss of video or audio input from the remote participants, I might have to interrupt the hearing briefly to allow the technical team to re-establish the connection. I appreciate your patience in this regard.

Turning to the case at hand, it should be recalled that, by Special Agreement concluded on 24 September 2019, and notified to the Tribunal on the same day, the representatives of the Republic of Mauritius and the Republic of Maldives agreed to submit their dispute concerning delimitation of the maritime boundary in the Indian Ocean to a special chamber of the Tribunal to be formed pursuant to article 15, paragraph 2, of the Statute of the Tribunal.

The Special Chamber was constituted by an Order of the Tribunal of 27 September 2019. The case was named "Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean" and was entered as No. 28 in the List of Cases.

On 18 December 2019, within the time-limit set by article 97, paragraph 1, of the Rules of the Tribunal, the Maldives raised preliminary objections to the jurisdiction of the Special Chamber and to the admissibility of Mauritius' claims.

With respect to the composition of the Special Chamber, I wish to note that Judge Cot resigned from the Special Chamber with effect as of 26 August 2020. On 15 September 2020, the Tribunal adopted an order determining, with the approval of the Parties, that Judge Pawlak should fill the vacancy created by the resignation of Judge Cot.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

THE REGISTRAR: Thank you, Mr President.

By Order of 19 December 2019, the President of the Special Chamber fixed 17 February 2020 as the time-limit for Mauritius to submit its written observations and submissions on the preliminary objections filed by the Maldives, and 17 April 2020 as the time-limit for the Maldives to file its written observations and submissions in reply. The two Parties lodged their statements within the prescribed time-limits. By the same Order, the Tribunal suspended the proceedings on the merits pursuant to article 97, paragraph 3, of the Rules of the Tribunal.

I will now read out the submissions of the Parties in the phase of the case relating to the preliminary objections.

The Republic of Maldives requests the Special Chamber to adjudge and declare that it is without jurisdiction in respect of the claims submitted to the Special Chamber by the Republic of Mauritius.

Additionally or alternatively, the Republic of Maldives requests the Special Chamber to adjudge and declare that the claims submitted to the Special Chamber by the Republic of Mauritius are inadmissible.

Mauritius requests the Special Chamber to rule that:

a The preliminary objections raised by the Maldives are rejected;
b. It has jurisdiction to entertain the Application filed by Mauritius;
c. There is no bar to its exercise of that jurisdiction; and
d. It shall proceed to delimit the maritime boundary between Mauritius and the Maldives.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam Registrar.

In accordance with the arrangements on the organization of the procedure decided by the Special Chamber, the hearings will comprise a first and second round of oral argument.

The first round of oral argument will begin today with the statement of the Maldives, and will close on Thursday, 15 October 2020, following Mauritius' first round of pleading. Each Party has been allocated a period of four hours for the first round.

The second round of oral argument will begin in the afternoon of Saturday, 17 October 2020 and conclude in the afternoon of Monday, 19 October 2020. Each Party will have one hour and a half to present its reply, with an additional hour available to each party if needed.

Now I note the presence at the hearing of Agents, representatives, Counsel and Advocates of Mauritius and the Maldives. I also note the remote attendance at the hearing of the Agent of Mauritius, and of Counsel and Advocates of both Parties.

I now call on the Agent of the Maldives, His Excellency Mr Ibrahim Riffath, Attorney General of the Republic of Maldives, to introduce the delegation of the Maldives.

You have the floor, sir.

MR RIFFATH: Mr President, honourable Members of the Tribunal, my name is Ibrahim Riffath. I am the Attorney General of the Republic of Maldives and the Maldives' Agent in these proceedings.

It is my pleasure to introduce the members of the Maldives' team. I am joined by Ms Khadeeja Shabeen, Deputy Attorney General of the Republic of Maldives, and Ms Salwa Habeeb, Senior State Counsel in the Office of the Attorney General.

Also in the delegation as Counsel and Advocates are: Professor Payam Akhavan of the University of Toronto, and a Member of the Permanent Court of Arbitration; Emeritus Professor Alan Boyle of the University of Edinburgh and Essex Court Chambers in London (who is participating in this hearing remotely); Professor Jean-Marc Thouvenin of the University Paris-Nanterre; and Dr Naomi Hart of Essex Court Chambers in London, who is also participating remotely.

Dr Justine Bendel and Ms Melina Antoniadis are assisting the delegation, as is Mr Mitchell Lennan, who is participating remotely.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Riffath.

I now call on the Co-Agent of Mauritius, Mr Jagdish Dharamchand Koonjul, Ambassador and Permanent Representative of Mauritius to the United Nations, to introduce the delegation of Mauritius.

You have the floor, sir.

MR KOONJUL: Mr President, distinguished Members of the Special Chamber, Madam Registrar, on behalf of the Government of Mauritius, I would like to express our sincere thanks and gratitude to you for organizing this hearing in these exceptional circumstances linked to the COVID-19 pandemic.

It is my distinct honour at this point to introduce the members of the Mauritius delegation. My name is Jagdish Koonjul. I am the Permanent Representative of Mauritius at the United Nations in New York and the Co-Agent for Mauritius.

The Agent for Mauritius is Mr Dheerendra Kumar Dabee, Solicitor General of Mauritius, who could not join us on this occasion because of the pandemic but, as you can see from the screen, is following the proceedings from Port Louis.

The members of the team are as follows: as Counsel and Advocates, Mr Philippe Sands QC, Professor of International Law at University College London, Barrister at Matrix Chambers, London, and he is present here in person.

Mr Paul Reichler, Attorney-at-Law from Foley Hoag LLP, member of the Bar of the District of Columbia, will participate via video conference from Washington DC.

Mr Pierre Klein, Professor of International Law at the University of Brussels, will also participate via video conference from Montreal, Canada.

As Counsel, we have Mr Remi Reichhold, Barrister at 5 Essex Court, London, and he is present here today in the Chamber.

We also have Mr Andrew Loewenstein, Attorney-at-Law, Foley Hoag LLP, member of the Bar of Massachusetts, who is following via video conference. Ms Diem Huang Ho, Attorney-at-Law from Foley Hoag LLP, is also following via video conference from Paris.

Mr Yuri Parkhomenko, Attorney-at-Law, Foley Hoag LLP, is also following via video conference from Washington DC; and Ms Angolie Singh, member of the Indian Bar, is following the proceedings from New Delhi.

As Adviser, we have Ms Shiu Ching Young Kim Fat, Minister Counsellor at the Prime Minister's Office in Mauritius, also following the hearing from Port Louis.

As Technical Advisers, we have Mr Scott Edmonds, from International Mapping, Ellicott City, Maryland, USA, following via video conference; and Mr Thomas Frogh, International Mapping, Ellicott City, Maryland, also following from Washington DC.

Finally, as Assistant, we have Ms Lea Main-Klingst, who is present here in person.

Mr President, I wish to conclude the introduction of my delegation by assuring you and the Maldives team of our full collaboration to ensure that the hearing proceeds as smoothly as possible.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Koonjul.

I now request the Agent of Maldives, Mr Riffath, to begin his statement.

First Round: Maldives

STATEMENT OF MR RIFFATH
AGENT OF THE MALDIVES
[ITLOS/PV.20/C28/1/Rev.1, p. 4–8]

Mr President, honourable Members of the Tribunal, honourable Agent and members of the delegation of the Republic of Mauritius.

It is a great privilege for me to appear before you today as Agent of my country, the Republic of Maldives, in this hearing on preliminary objections. I take this opportunity to express our sincere gratitude to the Special Chamber and Registry of the International Tribunal for the Law of the Sea for the efficient and well-organized arrangements of this hearing in such challenging circumstances. We are grateful for your courtesy and diligence.

Mr President, the Maldives is a small but ancient island nation, with 2,500 years of history. Our people were born with the sea and our fate is inextricably intertwined with the waters that surround us. Our territory consists of an archipelago of 1,190 small islands scattered over 90,000 square kilometres of the Indian Ocean. This special relationship with the ocean has profoundly shaped our identity. For centuries, ships sailed to distant lands in Asia and Africa, enriching our nation through commercial and cultural ties with diverse civilizations. Today, the livelihood of our people continues to depend on the sustainability and security of the oceans. Eco-tourism and fishing industries are the mainstays of the economy. This natural endowment is our greatest asset, and we are committed to its preservation for future generations. Safeguarding these resources has always been of the utmost importance to the Maldivian Government.

The Maldives signed the United Nations Convention on the Law of the Sea (UNCLOS) on 10 December 1982, and ratified it on 7 September 2000. It has adopted legislation to give effect to the provisions of the Convention. Regulating ocean affairs in accordance with international law is a central pillar of our foreign policy. The Maldives takes great pride in its strong international alliances, especially with regard to the interconnected regime of small island nations and climate change. It would be no exaggeration to say that, for us, addressing rising sea-levels is a matter of survival.

Mr President, the Maldives has a long history of support for multilateralism and respect for international law. We hold in the highest regard the far-reaching contributions of the International Court of Justice and UNCLOS tribunals in promoting the rule of law and the peaceful settlement of disputes. We regret that in this case we have been left with no choice but to make these preliminary objections to the jurisdiction of the Special Chamber. The Maldives has no dispute with Mauritius, a State with which we enjoy friendly relations. The only dispute is between Mauritius and the United Kingdom; and that dispute is about sovereignty over the Chagos Archipelago, not maritime boundary delimitation. The Maldives cannot be expected to take sides in that dispute, especially in proceedings before this Tribunal. The Special Chamber cannot rule on disputes over land territory, let alone where one of the Parties to the dispute is not even present to argue its case. If there was no dispute as to who is the coastal State of the Chagos Archipelago, there would be no issue with delimitation. The Maldives would eagerly negotiate an agreement on the maritime boundary.

It is unfortunate that Mauritius has decided to use these proceedings to settle its territorial dispute with the United Kingdom at the expense of the Maldives. We have been pushed into the middle of a conflict which is not of our making. It is especially regrettable that Mauritius attempts to portray us as opposing decolonization. Such accusations are offensive and unfair. Nothing could be further from the truth. The Maldives has been a strong advocate of upholding international principles and adhering to international obligations. We have always supported

decolonization and self-determination of countries in accordance with international law. We recognize the right to self-determination as an integral and fundamental element of international law. But this case is not about whether the Maldives supports decolonization or not. This case is about whether an ITLOS Chamber can hear a maritime delimitation claim that requires it to resolve a sovereignty dispute between Mauritius and the United Kingdom – a dispute in which the Maldives has repeatedly stated it does not wish to interfere.

Mr President, the Maldives' preliminary objections are simple and straightforward. They are consistent with the decisions of international courts and tribunals. Indeed, the question before you was already decided in 2015 by the Annex VII tribunal in the Chagos Marine Protected Area Arbitration between Mauritius and the United Kingdom. The tribunal in that case declined jurisdiction on the ground that a dispute over land territory was clearly a matter falling outside of UNCLOS. The Maldives respectfully submits that the exact same jurisdictional problem arises for Mauritius' claim in these proceedings, except that, unlike that previous arbitration, the United Kingdom is not even a party to this case.

Mauritius claims that the 2015 Award is irrelevant because the sovereignty dispute over the Chagos Archipelago has now been resolved. It invokes as its central argument – indeed its only argument – that the non-binding Advisory Opinion rendered by the International Court of Justice on 25 February 2019, in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, immediately extinguished British sovereignty over this territory. However, the Court clearly stated in that Opinion that the questions put to it by the United Nations General Assembly did not involve the bilateral territorial dispute. Instead, the Advisory Opinion related to matters of self-determination and decolonization. The Court said nothing about sovereignty.

On 22 May 2020, the United Nations General Assembly passed resolution 73/295. The Maldives did not believe that this resolution accurately reflected the Court's Advisory Opinion. Thus, it felt obliged to vote against the resolution, but it made the following statement to explain its position:

> The Maldives has always supported all processes concerning the decolonization of territories within the United Nations. We will not deny any peoples their right to self-determination. As a responsible Member of the United Nations, we abide firmly by the principles of the Charter of the United Nations, and express our support for a rules-based international order.[1]

The Maldives further stated that it "has always believed that the issue of the Chagos archipelago would best be addressed through dialogue between the States concerned."[2] The Maldives also made clear that it would welcome a resolution of the sovereignty dispute by the States involved. It emphasized that "[f]or the Maldives, any uncertainty concerning the issue of the Chagos archipelago will have serious implications for the sovereignty, territorial integrity and wider security of the Indian Ocean region."[3] These are, for a small island nation at the centre of a vital strategic region, entirely reasonable and legitimate concerns. The Maldives confirmed its "excellent relations" with Mauritius, despite its vote on the resolution.[4]

On 18 June 2019, less than a month after that General Assembly resolution, Mauritius initiated UNCLOS proceedings against the Maldives. It did so on the questionable premise that

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[1] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83 (The Maldives' explanation of vote), p. 24 (Written Preliminary Objections of the Maldives, Annex 18; Judges' Folder, Tab 35).

[2] Ibid.

[3] Ibid.

[4] Ibid.

the Advisory Opinion had immediately transformed Mauritius into the undisputed coastal State of the Chagos Archipelago. The Maldives can only observe that the long-standing sovereignty dispute has not suddenly disappeared. Without either an agreement or a binding decision on the competing sovereignty claims of Mauritius and the United Kingdom, it is not even possible for the Maldives to negotiate an agreement on delimitation, or to establish a specific maritime boundary dispute with Mauritius.

The Maldives can only conclude that Mauritius has rushed to bring these proceedings as a pretext for resolving its sovereignty dispute with the United Kingdom. This is not a maritime boundary dispute at all, and it is certainly not a dispute with the Maldives. It was not the intention of UNCLOS States Parties to use the dispute settlement procedures for such purposes.

The Maldives has, regrettably, found itself in the middle of this same bilateral sovereignty dispute before. On 26 July 2010, the Maldives made a submission to the Commission on the Limits of the Continental Shelf (CLCS). In a note verbale dated 9 August 2010, the United Kingdom stated that the Maldives' submission did not take full account of the Fisheries and Environment Zones of the British Indian Ocean Territory and the exclusive economic zone of the Chagos Archipelago. The United Kingdom, however, did not object to the Maldives' submission. It stated instead that it was committed to negotiating a maritime boundary. By contrast, on 24 March 2011, Mauritius submitted a formal objection to the Maldives' CLCS submission because it did not take into account Mauritius' sovereignty claim over the Chagos Archipelago. Since then, the Maldives has adopted a policy of refraining from bilateral talks with either party to the exclusion of the other. Mauritius is opposed to that policy. It is using the Special Chamber to force the Maldives to take sides.

The Maldives has always stressed its willingness to co-operate in resolving bilateral issues with other States in a spirit of good faith. But it is understandably reluctant to become entangled in a controversial dispute with two States with which it enjoys important and friendly relations. Beyond such diplomatic and policy considerations, the Maldives' position is also entirely consistent with international law. All that we ask is for the Special Chamber to uphold fundamental principles of jurisdiction. UNCLOS States Parties did not envisage that ITLOS and Annex VII tribunals would be exploited to settle territorial disputes, let alone without the consent of indispensable third parties. We look forward to the day when Mauritius and the United Kingdom resolve their dispute over the Chagos Archipelago. This would allow the Maldives to negotiate a maritime boundary with complete clarity as to which is the coastal State for the purposes of UNCLOS.

I note, Mr President, that if the Maldives did not make these preliminary objections, the Special Chamber would be placed in the unfortunate position of having to decline to exercise jurisdiction on its own initiative. It is not for Parties to these proceedings to expand your jurisdiction even by agreement among themselves. Beyond its own rights, therefore, the Maldives also seeks to uphold the integrity and legitimacy of UNCLOS tribunals. We sincerely hope that our preliminary objections will be considered in this light, rather than any reluctance whatsoever to submit valid disputes to these highly important compulsory procedures.

Mr President, with your permission, I shall now briefly introduce the first round of oral pleadings by Counsel and representatives of the Maldives. First, Professor Payam Akhavan will introduce the five preliminary objections and explain why the Advisory Opinion on the Chagos Archipelago did not resolve the bilateral sovereignty dispute between Mauritius and the United Kingdom.

He will be followed by Professor Alan Boyle, appearing remotely, who will explain why the Namibia and Western Sahara Advisory Opinions do not support Mauritius' contention that the bilateral sovereignty dispute has been resolved.

Next will be Professor Jean-Marc Thouvenin. He will address the Maldives' first preliminary objection, which is that the United Kingdom is an indispensable third party to this

dispute. He will also address the Maldives' second preliminary objection, which is that disputes over land territory fall outside the scope of UNCLOS.

He will be followed by Ms Salwa Habeeb who will address the third preliminary objection on the failure of Mauritius to satisfy the precondition of negotiations under articles 74 and 83 of UNCLOS.

Dr Naomi Hart (appearing remotely) will then address the fourth preliminary objection. This is that a dispute regarding maritime boundary delimitation had not crystallized between the parties at the time Mauritius commenced these proceedings. Finally, Professor Akhavan will once again take the floor and address the fifth preliminary objection on abuse of process, and conclude the Maldives' first round oral pleadings.

Mr President, honourable Members of the Special Chamber, that concludes the Agent's speech. I now ask that you give the floor to Professor Akhavan.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Riffath.

I now give the floor to Mr Payam Akhavan to make his statement. Mr Akhavan.

STATEMENT OF MR AKHAVAN
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/1/Rev.1, p. 8–19]

Mr President, distinguished Members of the Special Chamber, I am honoured to appear before you on behalf of the Maldives. It is a privilege to be pleading once more in this courtroom, in this hearing on preliminary objections. As I will explain, this is a case with far-reaching significance for the stability and predictability of ITLOS decisions. It is an important opportunity to confirm the settled jurisprudence on elementary principles of jurisdiction, upon which the legitimacy of UNCLOS compulsory procedures rests.

The case before you, Mr President, involves a territorial dispute between Mauritius and the United Kingdom. It is neither a dispute between Mauritius and the Maldives, nor a dispute regarding the interpretation or application of UNCLOS. This is an unprecedented case, with both an indispensable third party, and a territorial dispute, both of which fall outside the Chamber's jurisdiction. The fundamental principle is that "the land dominates the sea".[1] So long as there is a sovereignty dispute over the Chagos Archipelago, it is not even possible for Mauritius and the Maldives to meaningfully negotiate, let alone crystallize a dispute, in respect of a maritime boundary. These further preconditions to jurisdiction have not been, and cannot be, satisfied. In simple terms, Mauritius is using this Chamber to settle its territorial dispute with the UK, at the expense of the Maldives. This is the very definition of an abuse of process.

Mr President, it is my task to introduce the Maldives' preliminary objections. My presentation will be in three parts.

First, I will make some general observations regarding Mauritius' basic assertion that it is the "coastal State" in respect of Chagos and, in that context, I will summarize each of the five preliminary objections raised by the Maldives.

Second, I will explain the historical background to the bilateral sovereignty dispute between Mauritius and the UK, which emerged in the 1980s, and address the fundamental premise on which Mauritius' case on jurisdiction relies: namely, that its 40-year-old bilateral dispute was definitively resolved last year by the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and the subsequent UN General Assembly resolution 73/295. I will set out the Maldives' view that Mauritius has fundamentally misrepresented both the scope and effect of that Opinion, which is the only basis for its case on jurisdiction.

Third, I will explain the status of the sovereignty dispute today: namely, that, despite the Advisory Opinion and the General Assembly resolution, the UK maintains its claim over Chagos, which it continues to administer as the British Indian Ocean Territory. It is not the Maldives' role, or this Chamber's role, to say whether Mauritius has the better claim. As my colleagues will explain, the very existence of the territorial dispute, which involves a State that is not a party to these proceedings, is sufficient to deprive the Chamber of jurisdiction.

I turn first to an overview of each Party's case on jurisdiction.

Mauritius' case rests entirely on the premise that its sovereignty dispute with the UK has already been definitively resolved. If that premise is false, its case on jurisdiction necessarily fails. Mauritius accepts, as it must, that in 2015, the Annex VII tribunal in the *Chagos Marine Protected Area Arbitration* found that there was a bilateral territorial dispute with the United Kingdom. It found on that basis that it could not exercise jurisdiction over Mauritius' claim

[1] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3 at p. 51, para. 96 (Judges' Folder, Tab 6).

that it was the "coastal State".[2] The tribunal did not mince words. It held that Mauritius' interpretation of Part XV compulsory procedures

> as a warrant to assume jurisdiction over matters of land sovereignty on the pretext that the Convention makes use of the term "coastal State" would do violence to the intent of the drafters of the Convention.[3]

That argument, categorically rejected by the Annex VII tribunal in 2015, is exactly the same argument that Mauritius has recycled in these proceedings. It does so on the pretext that the ICJ's Advisory Opinion of 25 February 2019 overrides the Arbitral Award delivered four years earlier, because it supposedly confirmed Mauritius' sovereignty over Chagos; but, as I will explain, the ICJ said no such thing. To the contrary, it emphasized that the General Assembly "did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius."[4] It further clarified that it was not overriding the *res judicata* effect of the earlier Chagos Award. It emphasized that the questions before the Annex VII tribunal were "not the same as those that are before the Court".[5]

As I will elaborate shortly, it is plain and clear that the ICJ did not express an opinion on Mauritius' sovereignty; but the more obvious point is that even if it had, the Parties are in agreement that advisory proceedings do not have binding effect. It is elementary that a bilateral dispute cannot be resolved without the consent of relevant parties.

However, Mauritius proceeds to claim, on the basis of the Advisory Opinion alone, that you should simply ignore the British claim because, as of last year, it is no longer "plausible" or "arguable".[6] Aside from its misreading of a non-binding Opinion, Mauritius is trying to have this Chamber apply the wrong test. The plausibility or implausibility of a party's claim in a territorial dispute is irrelevant to whether this Chamber can exercise jurisdiction. The settled jurisprudence was affirmed as recently as 21 February of this year in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*. In its Award on Russia's preliminary objections, a distinguished Annex VII tribunal confirmed unanimously that the existence of opposing territorial claims is all that is required to deprive it of jurisdiction. It expressly rejected any "plausibility or other test in order to verify the existence of a dispute."[7] This is yet another fatal flaw in Mauritius' case before you. It is made worse because the State whose claim Mauritius says is implausible, the United Kingdom, is not even here to argue its case.

Mr President, the Maldives obviously cannot be expected to argue whether the British claim is right or wrong. Whether Mauritius has the better argument is irrelevant. Mauritius simply cannot litigate its territorial dispute before this Chamber.

That is the context in which the Maldives has raised its five preliminary objections, which I will now summarize in turn.

The Maldives' first preliminary objection is that the United Kingdom is an indispensable third party to these proceedings. The Special Chamber cannot resolve Mauritius' maritime

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[2] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, paras 209, 212 (Judges' Folder, Tab 12).

[3] Ibid., para. 219.

[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 129, para. 136 (Judges' Folder, Tab 19).

[5] Ibid., p. 116, para. 81.

[6] Written Observations of Mauritius, paras 3.6, 3.31.

[7] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 88 (Judges' Folder, Tab 21).

delimitation claim without, as an inevitable predicate, categorically rejecting the territorial claims of the UK over Chagos.

Mauritius has not challenged the so-called *Monetary Gold* principle, which confirms that it is beyond the jurisdiction of international courts and tribunals to resolve a dispute without the consent of an indispensable third State. Mauritius argues that *Monetary Gold* does not apply because the ICJ resolved the bilateral dispute in 2019. The Maldives' answer is that the dispute was not and could not have been resolved by the Advisory Opinion. I will shortly elaborate on both Mauritius' mischaracterization of what the ICJ did and did not say, and its questionable theory of the implicit binding effect of that non-binding Opinion.

But irrespective of what the Court opined, whether the British sovereignty claim is plausible or not is irrelevant, even if it implicates obligations in respect of decolonization. In *East Timor (Portugal* v. *Australia)* the ICJ made clear that the *Monetary Gold* principle applies even in the extreme circumstance of a third party's manifestly unlawful invasion and annexation of a non-self-governing territory; it applies even if both the General Assembly and Security Council have declared such conduct unlawful. In that case, the indispensable third party was Indonesia, which was not even the administering power of the territory. The Court made clear that the *erga omnes* character of the principle of self-determination did not circumvent the fundamental rule of consent to jurisdiction. It held:

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.[8]

In summary, the Chagos Advisory Opinion did not resolve the bilateral dispute. The *Monetary Gold* principle applies, and the Chamber has no jurisdiction. That is the Maldives' first preliminary objection.

The Maldives' second preliminary objection is that the question of whether Mauritius is the "coastal State" in respect of the Chagos Archipelago is clearly not a dispute concerning the interpretation or application of UNCLOS. Thus, aside from the United Kingdom being an absent indispensable third party, Mauritius' claim requires the Chamber to determine a matter that is manifestly outside of its jurisdiction under article 288 of UNCLOS. That is exactly why the tribunal in the Chagos Award rejected Mauritius' contention that it was the "coastal State", even though, unlike in this case, the UK was a party to those proceedings.

Mauritius tries to get around the 2015 Chagos Award by arguing once again that its bilateral dispute with the UK has been resolved by the Advisory Opinion. That argument requires the Chamber to find that the Chagos Opinion somehow overruled the earlier Chagos Award; something that the ICJ expressly disavowed.

Mauritius maintains further that the British claim is implausible. But the Coastal State Rights Award provides a complete answer to this argument. That case involved compelling facts. Upon its independence from the Soviet Union in 1991, Ukraine was the undisputed coastal State of Crimea. Ukraine argued that Russia's claim to territorial sovereignty beginning in 2014 was implausible because it was the result of armed aggression and annexation; it argued that it was manifestly unlawful, as confirmed by various resolutions of the General Assembly.

Even in those extreme circumstances, the Annex VII tribunal confirmed that it was solely concerned with whether a sovereignty dispute existed as a matter of fact, which, it noted, was

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[8] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 102, para. 29 (Judges' Folder, Tab 10).

a "rather low" threshold.[9] It specifically rejected Ukraine's argument that "the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute."[10] It further clarified that so long as a dispute had not been "fabricated solely to defeat [the tribunal's] jurisdiction", its mere existence was sufficient to uphold a preliminary objection.[11] Mauritius does not and cannot suggest that its notorious 40-year-old territorial dispute with the UK has been somehow "fabricated" by the Maldives to defeat the Chamber's jurisdiction.

The Tribunal in Coastal State Rights went even further. It held that it could not even accept "Ukraine's interpretation of [General Assembly resolutions] as correct", for to do so "would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory", which it had "no jurisdiction to do".[12] This applies equally to Mauritius' questionable interpretation of the Advisory Opinion and General Assembly resolution.

This brings me to the Maldives' third preliminary objection, which is that Mauritius has not satisfied a precondition to jurisdiction under articles 74 and 83 of UNCLOS, namely, the requirement of negotiations between the parties before a dispute is submitted for adjudication. Mauritius has not explained how there can be meaningful negotiations on maritime boundary delimitation where there is an unresolved territorial dispute with a third party over the relevant coast.

The Maldives' fourth preliminary objection follows – namely, that Mauritius has also failed to establish that there is an actual rather than speculative maritime boundary "dispute" between itself and the Maldives. A "dispute" is essential to the exercise of jurisdiction under article 288 of UNCLOS. Mauritius accepts that the parties must have had, at the time proceedings were instituted, "positively opposed"[13] claims in order for the Chamber to have jurisdiction. The jurisprudence is clear: "the claims of one party [must be] affirmatively opposed and rejected by the other."[14] But the evidence establishes that, beyond potential overlap of their maximum entitlements, neither Party made a claim that was affirmatively opposed and rejected by the other. There was no dispute before Mauritius commenced these proceedings.

The Maldives' fifth and final preliminary objection concerns Mauritius' abuse of the Part XV compulsory procedures for a purpose that is manifestly extraneous to UNCLOS. The Maldives' first four objections that I have summarized are blindingly obvious. The Special Chamber does not have jurisdiction to decide the territorial dispute between Mauritius and the UK, with or without an Advisory Opinion. Yet that is exactly what Mauritius seeks to achieve in these proceedings: a judgment that it is the "coastal State" to the exclusion of the UK, in proceedings against the Maldives. The fact that Mauritius is re-litigating the same arguments that failed before the Annex VII tribunal and the ICJ only aggravates this abuse of process.

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[9] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 188 (Judges' Folder, Tab 21).

[10] Ibid.

[11] Ibid., para. 189.

[12] Ibid., para. 176.

[13] Ibid., para. 163; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016*, p. 255 at p. 269, para. 34; *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 328.

[14] *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 159 (Judges' Folder, Tab 13).

I would add, Mr President, that Mauritius' accusation that the Maldives is "aid[ing] and abet[ting]"[15] colonialism merely by raising preliminary objections is particularly unfortunate; it is unbecoming of the dignity of these proceedings.

The second part of my speech concerns the historical background to the sovereignty dispute over the Chagos Archipelago since the 1980s, and whether that dispute was definitively resolved in 2019 as Mauritius maintains. As I have explained, the effects of the Advisory Opinion and subsequent General Assembly resolution are at the core of Mauritius' implausibility claim. It characterizes them as two "critical developments" which overruled the 2015 Chagos Award and conclusively established Mauritius' sovereignty as the coastal State.[16]

The basic facts are not in dispute. France ceded the Chagos Archipelago under the 1814 Treaty of Paris[17] and, since then, the United Kingdom has claimed continuous sovereignty over the territory.[18]

In 1965, that territory was separated from the British colony of Mauritius, prior to its independence three years later in 1968. On 9 October 1980, the Prime Minister of Mauritius stated before the UN General Assembly that the islands should be restored to Mauritius as part of its "natural heritage".[19] Subsequently, the 1992 Constitution defined Mauritius to include the Chagos Archipelago.[20]

Over the past forty years, Mauritius and the UK have never resolved this dispute, and never agreed to its adjudication. That is exactly why the Chagos Award of 18 March 2015 found that the tribunal could not exercise jurisdiction to determine that Mauritius was the "coastal State".[21]

It was against this backdrop that two years later, on 1 June 2017, the Permanent Representative of Mauritius to the UN wrote to the President of the General Assembly, proposing an advisory opinion from the ICJ.[22] Mauritius made clear that the request "contains two legal questions which are linked to the issue of decolonization – a matter of direct interest to the General Assembly."[23] Questions about decolonization: that was what the General Assembly submitted to the Court on 23 June 2017, not questions about a bilateral sovereignty dispute.[24] The Court rendered its Advisory Opinion on 25 February 2019, following extensive written and oral pleadings.

Mauritius' pleading on jurisdiction in this case repeats obsessively – in at least 22 paragraphs – that the Advisory Opinion conclusively resolved the bilateral dispute with the UK.[25] It goes so far as to state that

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[15] Written Observations of Mauritius, para. 2.35.

[16] Ibid., para. 3.71.

[17] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 107, para. 27 (Judges' Folder, Tab 19).

[18] UNGA, 54th session, 19th plenary meeting, 30 September 1999, A/54/PV.19 (Written Preliminary Objections of the Maldives, Annex 4), p. 39; UNGA, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83 (Written Preliminary Objections of the Maldives, Annex 20; Judges' Folder, Tab 36), pp. 10-11.

[19] UNGA, 35th session, 30th plenary meeting, 9 October 1980, A/35/PV.30 (Written Preliminary Objections of the Maldives, Annex 6), para. 40.

[20] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 104 (Judges' Folder, Tab 12).

[21] Ibid., paras 209, 212.

[22] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* Written Statement of Mauritius, 1 March 2018, para. 1.17 (Judges' Folder, Tab 24).

[23] Ibid., para. 1.21.

[24] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 101, para. 1 (Judges' Folder, Tab 19).

[25] Written Observations of Mauritius, paras 1.2, 1.4, 1.5, 1.6, 2.3, 2.21, 3.4, 3.5, 3.6, 3.11, 3.13, 3.15, 3.16, 3.27, 3.28, 3.31, 3.32, 3.37, 3.68, 3.70, 3.71, 3.72.

> Mauritius is recognized under international law, by the ICJ and the UN, as the coastal State that is opposite or adjacent to the Maldives for purposes of this maritime boundary delimitation.[26]

Mauritius' case on jurisdiction rests entirely on this mantra of definitive and exclusive sovereignty.

But this is, to say the least, a curious misreading of the Advisory Opinion. The questions posed to the Court made no mention of sovereignty whatsoever. The Court made that much clear itself. The Opinion emphasized that "[t]he General Assembly ha[d] not sought the Court's opinion to resolve a territorial dispute between two States."[27] The Court made the same point in different words when it said that the General Assembly "did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius."[28] Mauritius' claim that the ICJ decided the bilateral dispute could only be correct if the Court went beyond the legal questions put to it and exceeded its jurisdiction. That, Mr President, cannot be right.

The second question put to the Court is particularly instructive. It concerned the consequences, under international law, arising from the continuing British administration of the territory. The Court's answer was a short one. It said that:

> the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and ... all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.[29]

Those were the only legal consequences which the Court identified. At no point did the Court state that the UK suddenly lost sovereignty, let alone that Mauritius immediately became the exclusive sovereign and coastal State. The General Assembly had not asked for an opinion about sovereignty – only one about decolonization.

One needs to go no further than the Court's refusal to accept Mauritius' own pleadings to confirm that the Opinion did not resolve the sovereignty dispute. Despite the limited scope of the questions posed by the General Assembly, Mauritius had seized the opportunity to pursue a more far-reaching objective. It invited the Court to issue a sweeping opinion on territorial sovereignty and maritime boundary delimitation with the Maldives. There can be no question that the Court did not accept Mauritius' invitation. Yet Mauritius asks the Special Chamber to interpret the Advisory Opinion as if the ICJ had accepted those same arguments.

First, Mauritius had invited the Court to find that

> sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by the question of whether decolonization has or has not been lawfully completed.[30]

That is identical to Mauritius's assertion in these proceedings that "the matter of sovereignty was subsumed within and incidental" to the question of decolonization, and that "once the lawfulness of decolonization is determined, the question of territorial sovereignty no

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[26] Ibid., para. 1.4.

[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 117, para. 86 (Judges' Folder, Tab 19).

[28] Ibid., p. 129, para. 136.

[29] Ibid., pp. 139-140, para. 182.

[30] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.16 (Judges' Folder, Tab 25).

longer arises".[31] The ICJ evidently disagreed with this view; it declined to opine at all on the issue of sovereignty as Mauritius had requested. To the contrary, as I have already pointed out, it made clear that the General Assembly had not asked it to resolve the bilateral dispute with the UK.[32]

Second, Mauritius invited the Court to find that, among the legal consequences of continued British administration of the Chagos Archipelago, was the obligation of the United Kingdom to "consult and cooperate with Mauritius inter alia to … allow Mauritius to proceed to a delimitation of its maritime boundaries with the Maldives."[33] This, of course, is directly relevant to the present case. Unlike in these proceedings, Mauritius acknowledged before the ICJ that the UK was indispensable to maritime delimitation with the Maldives. Perhaps this was Mauritius' strategy: to persuade the ICJ that it could somehow opine that Mauritius was the coastal State without circumventing the consent of the UK. One would be forgiven for surmising that Mauritius' intention all along was to use such an opinion for a future UNCLOS case against the Maldives. Evidently, there was a great rush to litigate; Mauritius filed its Notification less than a month after the General Assembly resolution. But the ICJ did not accept Mauritius' arguments. It made no mention whatsoever of maritime boundary delimitation or which State was entitled to conduct such delimitation. And now Mauritius comes before the Special Chamber to argue, contrary to its own submissions before the ICJ, that it does not even require consultation and co-operation with the UK for delimitation with the Maldives.

It is difficult to understand how it is possible to arrive at such an interpretation of the Opinion. But Mauritius doesn't stop there. It goes even further, insisting that, unless its highly questionable interpretation is upheld, the Special Chamber would be in "direct conflict" with the ICJ; that it would "effectively overrule" the Advisory Opinion.[34] This is, of course, a thinly disguised scare tactic. Mauritius would have you believe that unless their misconceived arguments are upheld, there will be a fatal crash between ITLOS and the ICJ; a head-on collision on the autobahn between Hamburg and The Hague. Mauritius twists and distorts the Advisory Opinion beyond recognition. It is the Maldives that would have the Special Chamber give proper effect to what the Court said.

Perhaps there is no clearer indication of Mauritius' mischaracterization of the Opinion than its repeated assertion that the Court concluded that Chagos "is, and always has been, a part of the territory of Mauritius."[35] The Court simply did not say this. All it said was that "at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of" the British colony of Mauritius.[36] It did not say that there is no sovereignty dispute with the UK today. Surely, if that is what the Court meant to say, it would have found the right words.

In summary, the Court rejected both Mauritius' assertion that it has sovereignty over Chagos, as well as its assertion that it could effect a maritime delimitation with the Maldives. Those matters were not upheld by way of necessary implication either.[37] Professor Boyle will shortly address the Namibia and Western Sahara Advisory Opinions, neither of which support Mauritius' interpretation of the Chagos Opinion. To the contrary, Western Sahara confirms that the obligation to complete decolonization is not one and the same as territorial sovereignty; the

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[31] Written Observations of Mauritius, para. 3.5.

[32] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 117-118, para. 86, p. 129, para. 136 (Judges' Folder, Tab 19).

[33] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 4.145 (Judges' Folder, Tab 25).

[34] Written Observations of Mauritius, paras 1.2, 3.28.

[35] Ibid., paras 1.4, 1.6, 3.13, 3.37.

[36] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 136, para. 170 (Judges' Folder, Tab 19).

[37] Written Observations of Mauritius, paras 2.28, 3.5, 3.11.

Court can issue an opinion on the former without any necessary or implied consequences for the latter.

But there is yet another even more obvious answer to Mauritius' claim that the Advisory Opinion conclusively resolved the bilateral sovereignty dispute. Mauritius concedes, as it must, that advisory opinions are not binding.[38] The Court itself made clear that it was not circumventing the consent of the UK to its jurisdiction.[39] Yet, Mauritius invites the Special Chamber to transform the advisory proceedings into a contentious proceeding through the backdoor. This halfway house of non-binding binding effect is difficult to comprehend. It is simply not a serious argument.

Mauritius' invocation of General Assembly resolution 73/295 of 24 May 2019 is even less convincing. Even Mauritius, with its imaginative theories on the Opinion, stops short of asserting that General Assembly resolutions are somehow binding. It is entirely unclear, then, how it can rely on this document as being legally dispositive of the United Kingdom's sovereignty claim.

Resolution 73/295 expressed the view that Chagos "forms an integral part of the territory of Mauritius".[40] By contrast, the Court limited itself to the status of the territory in 1965. There is not much more that can be said about the resolution, except that the word "sovereignty" appears nowhere in the text. It did not purport to resolve, and was not capable of resolving, the sovereignty dispute.

Mr President, Mauritius' only argument as to why the Special Chamber can exercise jurisdiction – in disregard of the *Monetary Gold* principle, in disregard of the 2015 Chagos Award – is that the Advisory Opinion definitively settled its sovereignty dispute with the UK with binding effect. That contention is manifestly false. It is wholly without merit.

Mr President, I now wish to address the Chamber on the third and final part of my speech. This concerns the unambiguous evidence that, subsequent to the Advisory Opinion in February of last year and until the present day, the United Kingdom continues to claim the Chagos Archipelago as part of its sovereign territory. This much is common ground between the parties. Mauritius does not and cannot question the obvious fact that the bilateral dispute still exists.

On 30 April 2019, shortly after the Advisory Opinion, a British government minister issued a statement to the House of Commons claiming that Chagos "has been under continuous British sovereignty since 1814." He stated that "Mauritius has never held sovereignty" over the Archipelago and that the UK "does not recognize its claim."[41]

General Assembly resolution 73/295 of 22 May 2019 did not alter the British position either. In response, the UK representative to the UN stated bluntly that it was "not in doubt about our sovereignty over the British Indian Ocean Territory".[42] She reaffirmed the commitment to cede the territory to Mauritius when it was no longer required for defence purposes. She remarked that she "use[d] the word 'cede' here deliberately, not 'give back'".[43] This makes clear the British position that it continues to exercise sovereignty over Chagos.

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[38] Ibid., para. 3.18.

[39] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 118, para. 90 (Judges' Folder, Tab 19).

[40] UNGA Resolution 73/295, "Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", 24 May 2019, A/RES/73/295, para. 2(b) (Judges' Folder, Tab 37).

[41] Foreign and Commonwealth Office of the United Kingdom, "British Indian Ocean Territory: Written statement", Doc HCWS1528, 30 April 2019 <https://www.parliament.uk/business/publications/written-questions-answers-statements/writtenstatement/Commons/2019-04-30/HCWS1528/> (Written Preliminary Objections of the Maldives, Annex 21; Judges' Folder, Tab 34).

[42] UNGA, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83 (Written Preliminary Objections of the Maldives, Annex 20; Judges' Folder, Tab 36), p. 10.

[43] Ibid.

Other statements express the same view. On 19 June 2019, the day after Mauritius filed its UNCLOS Notification against the Maldives, the Minister of State for the Commonwealth and the United Nations reiterated that: "The UK has no doubt about our sovereignty over BIOT. The ICJ Advisory Opinion made no determination on sovereignty."[44]

In a statement dated 5 November 2019, the UK Minister of State for Foreign and Commonwealth Affairs specifically rejected Mauritius' arguments on the scope and effect of the Advisory Opinion. He stated:

> [W]hat is undisputed is that the opinion is advisory and not legally binding. Moreover, the Court itself recognized that its opinion is without prejudice to the sovereignty dispute over the BIOT between the UK and Mauritius.
>
> ... General Assembly resolution 73/295, adopted following the ICJ's advisory opinion, cannot and does not create any legal obligations for the Member States. Nor can or does General Assembly resolution 73/295 create legal obligations for other international actors such as a Special Chamber of the International Tribunal for the Law of the Sea. Neither the non-binding Advisory Opinion nor the non-binding General Assembly resolution alter the legal situation, that of a sovereignty dispute over the BIOT between the UK and Mauritius.[45]

The UK position is thus abundantly clear. It continues to claim sovereignty over Chagos. It considers that the Advisory Opinion had no legal effect on its claim. It considers that General Assembly resolution 73/295 changed nothing.

Mauritius takes a different view to the UK. But that is beside the point. The Special Chamber does not have jurisdiction to determine whether a third State that is not a party to these proceedings has a plausible or implausible argument in respect of a territorial dispute.

Mr President, you have heard the Agent's speech. The Maldives has made clear its support for decolonization of the Chagos Archipelago. But it cannot be forced to take sides in a sovereignty dispute between Mauritius and the UK – two States with which it enjoys friendly and important relations. Even if the Maldives did take sides, and accepted Mauritius' sovereignty claim, this Chamber would still have to decline jurisdiction *proprio motu*. The Maldives and Mauritius cannot override the UK's lack of consent by agreement among themselves. It would be no different if the Maldives and the UK were parties to a maritime delimitation before you. There can be no doubt that the Chamber does not have jurisdiction in the present case.

Mr President, distinguished Members of the Special Chamber, Mauritius would have you throw settled jurisprudence to the wind; it would have you discard elementary principles of jurisdiction in favour of a reckless judicial adventure. In upholding the Maldives' preliminary objections, the Special Chamber would not only affirm the stability and predictability of ITLOS decisions, but also render a decision consistent with both the award of the Chagos Annex VII tribunal and the Chagos Advisory Opinion of the ICJ.

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[44] Exchange of Letters between Tom Tugendhat MP and Lord Tariq Ahmad of Wimbledon, 29 May 2019 and 19 June 2019 <https://www.parliament.uk/documents/commons-committees/foreign-affairs/Correspondence/2017-19/Correspondence-with-FCO-on-Chagos-Islands.pdf> (Written Preliminary Objections of the Maldives, Annex 22; Judges' Folder, Tab 38).

[45] Foreign and Commonwealth Office of the United Kingdom, "British Indian Ocean Territory: Written statement", Doc HCWS90, 5 November 2019 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-11-05/HCWS90/> accessed 16 November 2019 (Written Preliminary Objections of the Maldives, Annex 3; Judges' Folder, Tab 39).

Mr President, that concludes the introduction to the Maldives' preliminary objections. I would now ask that you give the podium to Professor Alan Boyle, who will address the Namibia and the Western Sahara Advisory Opinions.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akhavan.

I now give the floor to Mr Alan Boyle, who is connected via video link, to make his statement.

STATEMENT OF MR BOYLE
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/1/Rev.1, p. 19; ITLOS/PV.20/C28/2/Rev.1, p. 1]

Mr President, distinguished Members of the Special Chamber. I am especially honoured to appear before you today as Counsel to the Republic of Maldives. It goes without saying that this is an important case because it raises difficult questions concerning the relationship between compulsory jurisdiction under Part XV of UNCLOS and disputes over territorial sovereignty. As Professor Akhavan has explained, it is the Maldives' contention that this case necessarily involves a sovereignty dispute between the United Kingdom and Mauritius.

Mr President, I have a little bit of a problem because in addition to hearing myself giving my own speech I am also hearing somebody else repeating what I have said in the background and it is making things rather difficult.

THE PRESIDENT OF THE SPECIAL CHAMBER: Mr Boyle, I think it may be best to take a break at this point. It is 3.20 p.m. This may be a convenient time for you and our technical team to sort out whatever problem you may have, so we will take a break for half an hour and we will resume at 3.50. You may restart your oral pleading when we resume.

(*Break*)

PUBLIC SITTING HELD ON 13 OCTOBER 2020, 4 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

For Mauritius: [See sitting of 13 October 2020, 2 p.m.]

For the Maldives: [See sitting of 13 October 2020, 2 p.m.]

AUDIENCE PUBLIQUE TENUE LE 13 OCTOBRE 2020, 16 HEURES

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour Maurice : [Voir l'audience du 13 octobre 2020, 14 h 00]

Pour les Maldives : [Voir l'audience du 13 octobre 2020, 14 h 00]

THE PRESIDENT OF THE SPECIAL CHAMBER: I understand that Mr Boyle is ready to start his oral pleading.

May I invite Mr Boyle, please.

First round: Maldives (continued)

STATEMENT OF MR BOYLE (CONTINUED)
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/2/Rev.1, p. 1–6]

Mr President, distinguished Members of the Special Chamber, I am especially honoured to appear before you today as Counsel for the Republic of Maldives.

It goes without saying that this is an important case because it raises difficult questions concerning the relationship between compulsory jurisdiction under Part XV of UNCLOS and disputes over territorial sovereignty. As Professor Akhavan has explained, it is the Maldives' contention that this case necessarily involves a sovereignty dispute between the United Kingdom and Mauritius.

It is also our contention that this sovereignty dispute has not been resolved either by the Advisory Opinion of the ICJ or by the UN General Assembly resolution adopted in 2019, and for that reason we argue that the Special Chamber has no jurisdiction to determine the merits of Mauritius's maritime boundary case because in order to do so it would, inter alia, necessarily have to give a ruling on territorial sovereignty over the Chagos Archipelago.

My speech today will address two advisory opinions of the ICJ which Mauritius has relied on in its written pleadings. These are the Namibia and the Western Sahara Advisory Opinions. According to Mauritius, both of these Opinions support its position that, in the case of the Chagos Archipelago, the ICJ's Advisory Opinion on decolonization had the result of resolving the bilateral sovereignty dispute between the United Kingdom and Mauritius. The Maldives disagrees. In its view, neither of these Advisory Opinions supports any attempt to read an incidental finding on sovereignty into the ICJ's Advisory Opinion.

Mr President, Members of the Chamber, let me turn first to the Namibia Advisory Opinion. Mauritius claims that, according to the ICJ, the United Kingdom is in a position no different to South Africa, in that its continued presence in the Chagos Archipelago is illegal and, as a result, Mauritius must therefore possess sovereignty over the Chagos Archipelago, so drawing a direct comparison between the UK's current position and South Africa's position in Namibia in the 1970s.

This is not the first time that Mauritius has invited an international court to liken the United Kingdom's administration to South Africa's illegal occupation of Namibia. But just as its previous attempts to draw this comparison failed, so should this one.

In the ICJ advisory proceedings, Mauritius, at numerous points, asked the Court to draw a comparison between South West Africa and the Chagos Archipelago.[1] It specifically relied on passages from the Namibia Advisory Opinion that referred to South Africa as an illegal occupier of South West Africa, inviting the Court to find, for example, that all States had an obligation to recognize the United Kingdom's continuing administration of the Chagos Archipelago as illegal and invalid.[2]

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[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* Written Statement of Mauritius, 1 March 2018, paras 6.5, 7.6, 7.11-7.12, 7.65 (Judges' Folder, Tab 24); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, paras 4.106, 4.142 (Judges' Folder, Tab 25).

[2] See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 54, para. 119 (Judges' Folder, Tab 7), cited at *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 4.142, p. 58, para. 132 (Judges' Folder, Tab 25). Also cited at *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statement of Mauritius, 1 March 2018, para. 7.11 (Judges' Folder, Tab 24).

But Mauritius wholly failed to persuade the Court that the two situations were analogous. The Court made no comparison between the situation in the Chagos Archipelago and the former situation in South West Africa. It did not refer to the United Kingdom as an illegal occupier. It made no mention at all of the Namibia Advisory Opinion when expressing its own opinion on the legal consequences of the United Kingdom's continued occupation of the Chagos Archipelago.

Mr President, for reasons which I will explain shortly, it would be very surprising if the Court had considered the two situations to be as indistinguishable as Mauritius would have the Chamber believe. The only explanation is that the Court did not accept that there was any likeness at all.

Its failure before the ICJ has not stopped Mauritius repeating the same argument in these proceedings. In its written observations Mauritius claims that the United Kingdom is an illegal occupier of the Chagos Archipelago "just as South Africa was an illegal occupier of South West Africa (Namibia) after the ICJ's 1971 Advisory Opinion",[3] and it goes on to claim that "[t]he Court's Advisory Opinion on the legal status of the Chagos Archipelago is as dispositive on the issue of sovereignty as its 1971 Advisory Opinion in relation to South West Africa."[4] Mr President, this is total nonsense.

It is yet another example of Mauritius reading into the Chagos Advisory Opinion more than is there – perhaps reading in what it would have liked to see. The Namibia Advisory Opinion is in no sense dipositive on sovereignty over South West Africa, and it has no relevance to the current status of the Chagos Archipelago either factually or legally. Allow me to identify the most obvious distinguishing features of these two cases to show that they are in no way comparable.

(a) Chagos Archipelago was ceded to the United Kingdom along with Mauritius in 1814.[5] In contrast, South West Africa was never a colony of South Africa but was instead a League of Nations mandated territory administered by South Africa under a mandate agreement of the League of Nations.

(b) South West Africa's status was defined by that agreement and by the Covenant of the League of Nations. In particular, the fundamental principle of non-annexation meant that South Africa administered the mandated territory as a "sacred trust". Under that relationship, South Africa never held sovereignty over the territory nor did the mandate system envisage a transfer of sovereignty.[6] It follows that, contrary to Mauritius' contention, the Namibia Advisory Opinion was concerned with sovereignty. It follows that that is an untenable position. South Africa had never claimed sovereignty over South West Africa and the case was not about sovereignty but about the obligations of a mandatory power.

(c) It was on that basis that one of the core findings of the Namibia Advisory Opinion was that, once the mandate had been lawfully terminated by the UN Security Council, South Africa had no further right to continue administering Namibia.[7] The right to administer was

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[3] Written Observations of Mauritius, para. 1.8.

[4] Ibid., para. 3.27.

[5] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 107, para. 27 (Judges' Folder, Tab 19).

[6] Covenant of the League of Nations, opened for signature 28 June 1919, entered into force 10 January 1920, article 22(1); *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 at p. 132; *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 28, para. 45 (Judges' Folder, Tab 7).

[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at pp. 50 and 54, paras 105 and 118 (Judges' Folder, Tab 7).

thereafter exercised by the United Nations Council for South West Africa.[8] That situation is very different from the British administration of the Chagos Archipelago.

(d) Moreover, unlike the Security Council resolution on South West Africa and the Advisory Opinion pertaining to Namibia, neither the International Court nor the General Assembly in the present case has referred to the United Kingdom as an illegal occupier of the Chagos Archipelago.

There is thus no legal basis for characterizing the United Kingdom as an illegal occupier and comparing it to the position of South Africa in South West Africa. It is a comparison which the International Court simply failed to make. For all of these reasons, Mauritius' attempts to assimilate the Namibia Advisory Opinion and the Chagos Advisory Opinion in order to strengthen its sovereignty claim must be dismissed as simply fallacious.

Mr President, Members of the Chamber, that brings me to the second part of my speech, to discuss the Western Sahara Advisory Opinion, which Mauritius also relies on in its written observations. But, Mr President, if the Advisory Opinion was irrelevant to the present case, the Western Sahara Opinion is positively damaging to Mauritius' claim because in this Opinion the Court once again affirmed that an opinion on decolonization is not an opinion on sovereignty.

Mauritius claims that in Western Sahara the International Court determined that it should give the opinion because the request, Mauritius says, "fundamentally raised a question of decolonization, and the matter of sovereignty was subsumed within and incidental to that question."[9] Simply put, that is also nonsense. In fact, it is exactly the opposite of what the Court actually said.

Both Spain and Morocco had both claimed that parts of Western Sahara formed part of their territory, so there was a territorial and sovereignty dispute between them.[10] Morocco had previously invited Spain to engage in contentious proceedings to resolve that dispute, and Spain had not consented.[11] Spain thus argued before the ICJ that Morocco's previous request for a bilateral resolution of the sovereignty dispute was substantially identical to the terms of the General Assembly's request for an advisory opinion, although the latter was explicitly directed towards questions of self-determination and decolonization.[12] Spain objected to the Court exercising advisory jurisdiction because it was concerned that an Advisory Opinion would raise issues concerning sovereignty over the Western Sahara, issues which it had not consented to have adjudicated by the Court.[13]

The Court rejected Spain's objection because it felt that rendering the opinion actually requested by the General Assembly would not resolve the bilateral dispute between Spain and Morocco or otherwise affect Spain's rights as the administering power in the Western Sahara. The Court said what you now see on screen:

> The object of the General Assembly has not been to bring before the Court, by way of a request for [an] advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy.

The key sentence is the following:

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[8] UNGA Resolution 2248, "Question of South West Africa" (19 May 1967), A/RES/2248.

[9] Written Observations of Mauritius, para. 3.5.

[10] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 at pp. 22, 25, paras 26, 35 (Judges' Folder, Tab 8).

[11] Ibid., pp. 22-23, paras 26-27.

[12] Ibid., p. 26, para. 38.

[13] Ibid., p. 22, para. 25.

> The object of the request is ... to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.[14]

That language is crucial. It is quite clear here that the Request for an advisory opinion concerned decolonization. The Court expressly made clear that that advisory opinion on decolonization could not later be used as a basis for trying to resolve the sovereignty dispute. In the light of the Court's statement, there can be no doubt that an opinion on decolonization is not the same as, is not shorthand for, is not a roundabout way of getting, is not incidental to, an opinion on sovereignty. The two are not the same at all.

The Court confirmed that position at other points in its Opinion. It said explicitly that "the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory."[15] It also confirmed that the proceedings "will not affect the rights of Spain today as the administering power in the Western Sahara"[16] or "convey any implication that the present case relates to a claim of a territorial nature."[17] Mr President, Members of the Special Chamber, so much for Mauritius' idea that the legal question of sovereignty was, in the Western Sahara case, "subsumed within" or "incidental to" the questions posed by the General Assembly. The Court rejected that and found the exact opposite.

It took precisely the same view in the Chagos Advisory Opinion. In the Chagos proceedings, Mauritius again invited the Court to find that

> sovereignty over the Chagos Archipelago is entirely ... subsumed within and determined by the question whether decolonization has or has not been lawfully completed.[18]

The Court rejected that invitation in no uncertain terms, stating that "[t]he General Assembly ha[d] not sought the Court's opinion to resolve a territorial dispute between two States",[19] and that the General Assembly's request "did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius."[20] The Court quoted and affirmed its own previous finding in the Western Sahara Opinion – the passages that I have already quoted to the Chamber, and repeat again – that the General Assembly's object in seeking an opinion on decolonization was not to submit a bilateral sovereignty dispute "in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute".[21] Therefore, the Court was entirely explicit: a request for an opinion on decolonization is not a request for an opinion on sovereignty. The two are not the same, and one does not implicate or subsume, incidentally or otherwise, the other. Once again, Mauritius is asking this Chamber to interpret the Court's Advisory Opinion in a way that was expressly disavowed by the Court itself.

Mr President, Members of the Chamber, the logic of Western Sahara and the Chagos Advisory Opinion is clear, and it does not help Mauritius. The key point is that the failure of a colonial State, whether Spain or the United Kingdom, to complete decolonization does not

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[14] Ibid., pp. 26-27, para. 39.
[15] Ibid., pp. 27-28, para. 43.
[16] Ibid., p. 27, para. 42.
[17] Ibid., pp. 27-28, para. 43.
[18] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.16 (Judges' Folder, Tab 25).
[19] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 117-118, para. 86 (Judges' Folder, Tab 19).
[20] Ibid., p. 129, para. 136.
[21] Ibid., pp. 117-118, para. 86.

result in a transfer of sovereignty from the administering colonial power to the territorial sovereignty claimant, as Mauritius appears to claim. Decolonization may in the end require a transfer of sovereignty, but we are not there yet and the Chagos Advisory Opinion does not take us there.

Mr President, that happily brings me to my conclusions. Mauritius would have liked the International Court to have said various things in its Advisory Opinions. It wants the Court to have said that the United Kingdom is an illegal occupier in the same way as South Africa was in South West Africa, but the Court did not say that or anything like it.

Mauritius also wants the Court to have said that, by issuing an opinion on decolonization and self-determination, it was implicitly and incidentally giving an opinion on a sovereignty dispute, but the Court did not do that either. It refused to do so quite explicitly in the Western Sahara Advisory Opinion, making clear that it could answer questions on decolonization without implicating current-day sovereignty claims, and went further in stating that the General Assembly could not use the Court's opinion on decolonization to suggest that the sovereignty dispute had been resolved, or how it might be resolved. Again, in the Chagos Opinion the Court made clear that nothing in the General Assembly's request for an opinion required it, or even enabled it, to resolve the sovereignty dispute between Mauritius and the United Kingdom. Mr President, Members of the Chamber, for this Chamber to find otherwise would be to repudiate the ICJ's express language and intention. Once again, the Chagos Advisory Opinion does not say or do what Mauritius claims it says and does.

Professor Akhavan has already explained that the bilateral sovereignty dispute continues to exist as a matter of fact, not having been resolved by the Court's Advisory Opinion or by the General Assembly; but neither the Namibia nor the Western Sahara Advisory Opinions assist Mauritius in escaping that reality.

Professor Thouvenin will shortly explain that the survival of the United Kingdom and Mauritius sovereignty dispute is a complete answer to Mauritius' assertion that the Special Chamber can exercise jurisdiction over this maritime boundary claim. The Maldives is not required to take a position on that sovereignty dispute save to recognize that it exists.

Mr President, I would now ask that you give the floor to Professor Thouvenin, who will address the Chamber on the first and second preliminary objections of the Maldives. I thank you for listening patiently to my speech this afternoon and for making it possible for me to appear remotely.

Mr President, that concludes my speech.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Boyle.

I now give the floor to Mr Jean-Marc Thouvenin to make his statement.

You have the floor.

EXPOSÉ DE M. THOUVENIN
CONSEIL DES MALDIVES
[TIDM/PV.20/A28/2/Rev.1, p. 7–17; ITLOS/PV.20/C28/2/Rev.1, p. 6–17]

Merci, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, c'est un privilège de paraître devant votre Chambre spéciale si prestigieusement composée, ici en personne, dans cette magnifique salle, pour exposer, pendant les 45 prochaines minutes – un peu moins peut-être –, certains des arguments de la République des Maldives. Je parlerai à un rythme permettant aux interprètes de faire leur difficile travail dans les meilleures conditions, mais si ce n'est pas le cas je les invite à faire un signe d'une manière ou d'une autre. Ma plaidoirie se concentrera sur les deux premières exceptions préliminaires des Maldives, comme cela a été annoncé par M. Boyle.

Monsieur le Président, s'il est un principe fondamental de droit international en matière contentieuse, c'est bien celui du consentement de l'État à la juridiction[1]. De cette exigence incontournable de « consensualisme »[2] découle que, en l'absence de consentement à ce qu'un tribunal tranche le différend dont il est saisi, ce tribunal n'a d'autre choix que de décliner sa compétence.

Ce principe de base s'applique bien entendu lorsque le consentement de l'État défendeur fait défaut, ce qui est le cas lorsque le différend allégué par le demandeur est en dehors du champ de ceux pour lesquels le tribunal a compétence *ratione materiae*. Mais il opère également lorsque l'instance dont le tribunal est saisi met en cause des droits et obligations d'un État tiers qui n'a pas consenti à ce que sa cause soit jugée.

C'est sur ces considérations fort simples que s'appuient fort logiquement les deux premières exceptions préliminaires des Maldives. Elles sont l'une et l'autre basées sur un constat d'évidence : pour pouvoir procéder à la délimitation maritime réclamée par Maurice, il est préalablement nécessaire de trancher le différend territorial qui oppose Maurice au Royaume-Uni quant à la question de savoir qui du Royaume-Uni ou de Maurice exerce les droits de l'État côtier sur l'archipel des Chagos.

La Chambre spéciale notera probablement que les parties ne sont pas en désaccord avec le principe de cette proposition. Maurice semble admettre que s'il était établi que la décision de la Chambre spéciale impliquait qu'elle se prononce sur les droits et obligations du Royaume-Uni, elle devrait décliner sa compétence. Toutefois, pour Maurice, son différend avec le Royaume-Uni est réglé ; ou en tout cas, il est sans emport sur la présente instance. À l'inverse, les Maldives constatent que ce différend n'est pas réglé – cela vient de vous être expliqué – et déduisent de son existence que la Chambre spéciale devrait se dire incompétente dans la présente espèce sur au moins deux fondements.

Cette incompétence s'impose d'abord parce que la Chambre spéciale n'est pas habilitée à exercer sa juridiction à l'égard d'un différend impliquant les droits et obligations d'un État tiers qui ne consent pas à sa juridiction. C'est pourtant ce que, Monsieur le Président, Madame et Messieurs de la Chambre, vous feriez si vous acceptiez de poursuivre la présente instance au fond, car vous devriez alors vous prononcer, nécessairement, et de manière préalable, sur les prétentions du Royaume-Uni.

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[1] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 71.

[2] *Appel concernant la compétence du Conseil de l'OACI en vertu de l'article 84 de la convention relative à l'aviation civile internationale (Arabie saoudite, Bahreïn, Egypte et Emirats arabes unis c. Qatar)*, arrêt du 14 juillet 2020, par. 55.

Mais ce n'est pas tout. L'incompétence de la Chambre spéciale s'impose également parce que, indépendamment de l'absence du Royaume-Uni, elle n'est pas habilitée à décider d'un différend territorial, qui sort manifestement du champ de sa compétence *rationae materiae.*

Ceci résume les deux premières exceptions préliminaires d'incompétence des Maldives, sur lesquelles je reviendrai tour à tour plus en détail.

En premier lieu, j'aborderai naturellement l'exception tirée du fait que le Royaume-Uni est une partie tierce indispensable, non présente à l'instance.

Monsieur le Président, Madame et Messieurs de la Chambre spéciale, il est bien connu que la pertinence de l'exception dite de la « partie tierce indispensable » a été consacrée par la Cour internationale de Justice dans son célèbre arrêt du 15 juin 1954 rendu dans l'*Affaire de l'Or monétaire pris à Rome en 1943*.

Cette affaire opposait l'Italie à trois défendeurs, la France, le Royaume-Uni et les États-Unis, et la question était de savoir si une quantité d'or appartenant à l'Albanie, qui se trouvait alors entre les mains des gouvernements défendeurs, devait être remise par ces derniers au Royaume-Uni en exécution de l'arrêt rendu par la Cour internationale de Justice contre l'Albanie dans l'*Affaire du détroit de Corfou*, ou bien plutôt à l'Italie, et ce, en réparation de dommages que l'Italie alléguait avoir subis du fait de l'Albanie.

La Cour reformula la question, et observa qu'elle n'était

> pas simplement appelée à dire si l'or devrait être remis à l'Italie ou au Royaume-Uni. Elle [était] invitée à trancher en premier lieu certaines questions juridiques de la solution desquelles dépend[ait] la remise de l'or.[3]

En effet et à l'évidence, dès lors que la demande de l'Italie reposait sur l'affirmation que l'Albanie lui était redevable des sommes dont elle réclamait aux défendeurs la remise, cette demande, selon les termes de la Cour, « gravit[ait] autour d'une réclamation de l'Italie contre l'Albanie »[4].

La Cour considéra qu'à propos de ces questions, qui

> concernent le caractère licite ou illicite de certains actes de l'Albanie vis-à-vis de l'Italie, deux États seulement, l'Italie et l'Albanie, sont directement intéressés. Examiner au fond de telles questions serait trancher un différend entre l'Italie et l'Albanie.[5]

Se référant alors – je cite à nouveau la Cour – au « principe de droit international bien établi et incorporé dans le Statut, à savoir que la Cour ne peut exercer sa juridiction à l'égard d'un État si ce n'est avec le consentement de ce dernier », la Cour constata que « les intérêts juridiques de l'Albanie seraient non seulement touchés par une décision, mais constitueraient l'objet même de ladite décision. »[6] La Cour conclut à l'unanimité qu'elle ne pouvait « trancher ce différend sans le consentement de l'Albanie. »[7]

Ceci devint le « principe de l'*Or monétaire* », ou parfois on dit la règle de la « partie tierce indispensable ». Le principe fut par la suite constamment réaffirmé, précisé et appliqué[8],

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[3] *Or monétaire pris à Rome en 1943 (Italie c. France, Royaume-Uni et Etats-Unis d'Amérique), question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 31 (dossier des juges, onglet 4).

[4] Ibid., p. 32.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] *Plateau continental (Jamahiriya arabe libyenne/Malte), requête à fin d'intervention, arrêt, C.I.J. Recueil 1984,* p. 25, par. 40 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 431, par. 88 ; *Différend frontalier (Burkina*

notamment dans l'affaire du *Timor oriental* sur laquelle je reviendrai en détail tout à l'heure, car elle présente des similitudes frappantes avec la présente espèce. À ce stade, il suffit de souligner que le « principe de l'*Or monétaire* » a été consacré sans réserve par le Tribunal du droit de la mer dans son récent arrêt sur les exceptions préliminaires dans l'*Affaire du navire « Norstar » (Panama c. Italie)*. Le Tribunal y affirme que

> la notion de partie indispensable est une règle bien établie de la procédure judiciaire internationale qui a été principalement élaborée par la jurisprudence de la CIJ. Conformément à cette notion, lorsque « la question essentielle à trancher a trait à la responsabilité internationale d'un État tiers » ou lorsque les intérêts d'un État tiers constitueraient « l'objet même » du différend, une juridiction ne saurait se déclarer compétente pour connaître du différend sans le consentement de cet État[9].

Les choses sont dites, elles sont bien dites, elles sont claires. Il est inutile d'en dire davantage sur ce principe puisque les plaidoiries écrites des parties révèlent leur concordance de vues sur son existence et sa pertinence. Pour autant, contrairement aux Maldives qui font valoir que ce principe prive la Chambre spéciale de compétence en l'espèce, Maurice allègue qu'il est sans emport.

Certes, Monsieur le Président, la République de Maurice ne vous demande pas frontalement de vous prononcer sur le différend territorial qui l'oppose au Royaume-Uni relativement à l'archipel des Chagos, puisque sa requête porte, en apparence, sur la délimitation des espaces maritimes qui séparent les côtes des Maldives de celles qu'elle réclame comme étant les siennes.

Mais Maurice postule qu'elle est souveraine sur les côtes de l'archipel des Chagos, laquelle souveraineté est également revendiquée – et à ce jour exercée – par le Royaume-Uni, et ce postulat est évidemment au cœur de sa requête. Ce n'est en effet que si Maurice, pas le Royaume-Uni, est souveraine sur l'archipel des Chagos, qu'elle peut prétendre prendre part à la délimitation des espaces maritimes attachés à ce territoire. Derrière les apparences, il ne fait donc aucun doute que l'affaire dont vous êtes saisis « gravite » – ce sont les termes de la Cour dans l'affaire de l'*Or monétaire* – « gravite » autour du différend territorial entre Maurice et le Royaume-Uni. Les observations écrites de Maurice sur les exceptions préliminaires rendent d'ailleurs compte à leur manière du caractère central de ce différend entre Maurice et le Royaume-Uni, puisqu'elles contiennent pas moins de 12 pages visant à démontrer que – je cite le titre qui surmonte ces 12 pages – *(Continued in English)* « [t]he United Kingdom has no right to claim sovereignty or sovereign rights over the Chagos Archipelago »[10].

(Poursuit en français) Certes encore, Monsieur le Président, il y a débat entre les parties sur l'existence actuelle ou non de ce différend entre le Royaume-Uni et Maurice. Mais un tel débat se résout, selon une jurisprudence constante, « objectivement [...] sur la base d'un examen des faits »[11]. Et on sait très bien quels faits caractérisent objectivement l'existence d'un différend. Depuis le fameux *dictum* de l'affaire des *Concessions Mavrommatis en Palestine*,

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Faso/République du Mali), arrêt, C.I.J. Recueil 1986, p. 579, par. 49 ; *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 114-116, par. 54-56 ; p. 122, par. 73 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 259-262, par. 50-55.

[9] *Navire « Norstar » (Panama c. Italie), exceptions préliminaires, arrêt, TIDM Recueil 2016*, p. 45, par. 172 (dossier des juges, onglet 17).

[10] Written Observations of Mauritius, Chapter 2.

[11] *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde), compétence et recevabilité, arrêt, C.I.J. Recueil 2016*, p. 270, par. 36 (dossier des juges, onglet 14), citant *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016*, p. 26, par. 50 (dossier des juges, onglet 16).

un différend se définit comme « un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts »[12].

Il en découle que pour qu'un différend existe – je cite maintenant l'affaire du *Sud-Ouest africain* –, « [i]l faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre »[13].

Autrement dit, selon les termes de l'arrêt sur les exceptions préliminaires dans l'affaire des *Violations alléguées de droits souverains* portée par le Nicaragua contre la Colombie, l'affaire est pendante, « les points de vue des deux parties, quant à l'exécution ou à la non-exécution » de certaines obligations internationales, « [doivent être] nettement opposés »[14].

En outre, et ceci est tiré de la récente affaire *Îles Marshall c. Inde*, « [l]e comportement des parties postérieur à la requête (ou la requête proprement dite) peut être pertinent à divers égards et, en particulier, aux fins de confirmer l'existence d'un différend »[15].

En l'occurrence, comme cela a déjà été amplement démontré par M. Akhavan, les déclarations, prises de position, réclamations et comportements du Royaume-Uni et de Maurice avant comme depuis le dépôt de la requête mauricienne dans la présente affaire confirment sans aucune ambiguïté que les deux États se disputent âprement la souveraineté sur l'archipel des Chagos, ce qui démontre l'existence objective d'un différend entre ces deux États.

Ces faits, les faits bruts, ne sont pas contestés par nos contradicteurs. Comment le pourraient-ils ? Pour autant, Maurice cherche à contourner le « principe de l'*Or monétaire* » en faisant valoir deux arguments.

En premier lieu, Maurice soutient que la Chambre spéciale devrait simplement ignorer le différend territorial entre Maurice et le Royaume-Uni, au motif, en substance, que ce différend serait déjà réglé par l'avis consultatif de la Cour internationale de Justice sur les *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*.

Mais ce n'est pas le cas. M. Akhavan a déjà rappelé ce que dit et ce que ne dit pas cet avis consultatif qui, en tout état de cause, ne veut, ni ne peut, régler un différend territorial bilatéral, comme le ferait par contraste un arrêt. J'ajouterai simplement ici que, contrairement à la thèse mauricienne selon laquelle cet avis consultatif donnerait à la présente instance un caractère inédit, elle est très comparable à l'affaire du *Timor oriental*.

En effet, dans l'affaire du *Timor oriental,* la partie requérante demandait à la Cour de considérer qu'elle n'avait pas à se prononcer sur la revendication territoriale d'un État tiers à la procédure, au motif que cette question avait déjà été tranchée par les principaux organes des Nations Unies. C'est le même argument que celui avancé ici par Maurice. La Cour internationale de Justice rejeta cette prétention, selon un raisonnement qui, remis dans son contexte, est très éclairant.

La Chambre spéciale, je n'en doute point, se souviendra qu'alors que le Timor oriental était une colonie portugaise depuis le XVI[e] siècle, le statut de territoire non autonome au sens du Chapitre XI de la Charte des Nations Unies lui fut reconnu par la résolution 1542(XV)

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[12] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I., série A n° 2*, p. 11 (dossier des juges, onglet 3).

[13] *Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328 (dossier des juges, onglet 5).

[14] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016*, p. 26, par. 50, citant *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74.

[15] *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Inde), compétence et recevabilité, arrêt, C.I.J. Recueil 2016*, p. 272, par. 40 (dossier des juges, onglet 14), citant *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 100, par. 22, p. 104, par. 32 (dossier des juges, onglet 11).

adoptée le 15 décembre 1960 par l'Assemblée générale des Nations Unies[16]. Le Portugal en accepta les conséquences 14 ans plus tard à la faveur de la « révolution des œillets ». Cependant, au moment où le pouvoir portugais se retirait du Timor oriental, l'Indonésie voisine l'occupa militairement, et l'annexa.

L'ONU s'opposa fermement à ce fait accompli, par la voix de ses principaux organes, le Conseil de sécurité et l'Assemblée générale.

Dans sa résolution 384 (1975), le Conseil de sécurité, se référant notamment à la résolution 1514 (XV) sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, demanda au Gouvernement indonésien de retirer sans délai toutes ses forces du territoire[17] et à tous les États et à toutes les autres parties concernées de coopérer avec l'ONU en vue de faciliter sa décolonisation[18]. Il réitéra son appel dans sa résolution 389 (1976)[19].

L'Assemblée générale adopta elle aussi une série de résolutions allant dans le même sens. Dans la résolution 3485 (XXX) du 12 décembre 1975, elle demandait

> au Gouvernement indonésien de cesser de violer l'intégrité territoriale du Timor portugais et de retirer sans délai ses forces armées du territoire, afin de permettre au peuple du territoire d'exercer librement son droit à l'autodétermination et à l'indépendance [...].

Elle appelait aussi tous les États à « respecter l'unité et l'intégrité territoriale du Timor portugais ; »[20]

Dans sa résolution 31/53 du 1er décembre 1976, elle rejetait

> l'allégation selon laquelle le Timor oriental a été intégré à l'Indonésie, dans la mesure où la population du territoire n'a pas été en mesure d'exercer librement son droit à l'autodétermination et à l'indépendance [...],

et demandait « au Gouvernement indonésien de retirer toutes ses forces du territoire [...] »[21].

De son côté, le Gouvernement australien, ou plutôt l'Australie reconnut l'incorporation du Timor oriental à l'Indonésie en 1978 et, par la suite, conclut un traité avec l'Indonésie à propos des espaces maritimes attachés au territoire du Timor oriental. C'est ce comportement de l'Australie que le Portugal dénonça devant la Cour internationale de Justice, au motif qu'en négociant, concluant et appliquant ce traité, l'Australie avait porté atteinte aux droits du peuple du Timor oriental à disposer de lui-même et à sa souveraineté permanente sur ses ressources naturelles [22].

L'Australie fit valoir l'exception de l'*Or monétaire* en soutenant que la décision que le Portugal demandait à la Cour de rendre conduirait inévitablement celle-ci à statuer sur la licéité du comportement d'un État tiers, l'Indonésie, en l'absence du consentement de cette dernière[23]. La Cour fut d'avis que

> l'objet même de la décision de la Cour serait nécessairement de déterminer si, compte tenu des circonstances dans lesquelles l'Indonésie est entrée et s'est

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[16] *Timor oriental (Portugal c. Australie), arrêt, C.I.J, Recueil 1995*, p. 95-96, par. 11-12 (dossier des juges, onglet 11).
[17] Conseil de sécurité, résolution 384 (1975) du 22 décembre 1975, par. 2.
[18] Ibid., par. 4.
[19] Conseil de sécurité, résolution 389 (1976), 22 avril 1976, par. 2 et 5.
[20] Assemblée générale, résolution 3485 (XXX), 12 décembre 1975, par. 5 et 7.
[21] Assemblée générale, résolution 31/53, 1er décembre 1976, par. 5 et 6.
[22] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 98, par. 19 (dossier des juges, onglet 11).
[23] Ibid., p. 100, par. 24.

> maintenue au Timor oriental, elle pouvait ou non acquérir le pouvoir de conclure au nom de celui-ci des traités portant sur les ressources de son plateau continental.[24]

Autrement dit, selon la Cour, les demandes portugaises soulevaient

> toutes une même question : celle de savoir si le pouvoir de conclure des traités concernant les ressources du plateau continental du Timor oriental appartient au Portugal ou à l'Indonésie et, partant, si l'entrée de l'Indonésie et son maintien dans le Territoire sont licites.[25]

En l'absence du consentement de l'Indonésie, la Cour ne put que se juger incompétente pour connaître de la requête portugaise.

Les parallèles que l'on peut tracer avec les principaux aspects de la présente affaire sont frappants, même si, bien entendu, les comportements des Maldives n'ont rien de comparable à ceux de l'Australie de l'époque. Mais ce sur quoi je souhaitais insister est que, de la même manière que Maurice le prétend devant la Chambre spéciale de céans à propos des revendications de souveraineté britanniques, le Portugal soutenait devant la Cour internationale de Justice que cette dernière n'avait pas à trancher les prétentions de souveraineté indonésienne, car selon le Portugal, elles avaient déjà été rejetées par les organes principaux des Nations Unies, le Conseil de sécurité et l'Assemblée générale. Le Portugal faisait valoir que leurs résolutions devaient être considérées comme un acquis juridique – un *acquis* juridique –, rejetant comme sans fondement les revendications indonésiennes sur le Timor oriental, et qu'il n'était donc pas nécessaire que la Cour se prononce elle-même à leur propos. Il lui suffisait, selon le Portugal, de considérer comme déjà acquis que les prétentions indonésiennes étaient juridiquement infondées. Le Portugal admit que « la Cour pourrait être amenée à devoir interpréter ces décisions », mais il soutenait qu'elle « n'aurait pas à statuer *de novo* sur leur contenu et [devait] donc les considérer comme des « données »[26].

Pour rejeter cet argument, la Cour était confrontée à une question un peu plus complexe qu'en la présente espèce puisqu'étaient invoqués non seulement des textes dénués de portée obligatoire comme des recommandations de l'Assemblée générale des Nations Unies, mais également des résolutions du Conseil de sécurité lesquelles, comme on le sait, peuvent avoir force obligatoire lorsqu'elles sont adoptées sur le fondement du Chapitre VII de la Charte des Nations Unies. Or il était loin d'être clair que les résolutions relatives au Timor oriental avaient été prises ou non sur ce fondement. La Cour n'entra cependant pas dans ce débat, se bornant à constater que ces résolutions ne prétendaient pas imposer « aux États l'obligation de ne reconnaître à l'Indonésie aucune autorité à l'égard du Territoire » du Timor oriental[27]. Et la Cour de conclure :

> Sans préjudice de la question de savoir si les résolutions à l'examen pourraient avoir un caractère obligatoire, la Cour estime en conséquence qu'elles ne sauraient être considérées comme des « données » constituant une base suffisante pour trancher le différend qui oppose les Parties.[28]

Monsieur le Président, c'est la même conclusion qu'il convient de tirer ici puisque, sans préjudice de la question de savoir s'il a un caractère obligatoire, ce qui n'est évidemment pas le cas, c'est à tort, comme nous l'avons déjà démontré, que Maurice lit l'avis consultatif de la

[24] Ibid., p. 102, par. 28.
[25] Ibid., p. 105, par. 35.
[26] Ibid., p. 103, par. 30.
[27] Ibid., p. 103, par. 31.
[28] Ibid., p. 104, par. 32.

Cour internationale de Justice comme tranchant le différend territorial concernant l'archipel des Chagos.

Le second argument opposé par Maurice est dans la même veine. Maurice soutient que l'avis consultatif aurait pour effet d'ôter toute plausibilité aux revendications britanniques sur l'archipel des Chagos[29], ce qui devrait conduire la Chambre spéciale à se sentir libre de les écarter.

Une telle approche n'emporte pas davantage la conviction, car comme je l'ai déjà rappelé, l'existence d'un différend entre deux États est une question de pur fait, qui ne dépend en rien de la plausibilité des revendications adverses.

Au demeurant, l'argument est d'autant plus intenable qu'il a été rejeté il y a seulement quelques mois par le tribunal établi en application de l'annexe VII de la Convention des Nations Unies sur le droit de la mer dans l'affaire des *Droits de l'État côtier en mer Noire, en mer d'Azov et dans le détroit de Kertch.*

Dans cette affaire, qui est très connue, l'Ukraine avait saisi le tribunal en qualité d'État côtier relativement aux côtes de la Crimée, et dénonçait les agissements de la Russie dans les eaux attachées à ce territoire. La Russie objecta que les questions soulevées par l'Ukraine supposaient que le tribunal tranche au préalable le différend qui oppose la Russie à l'Ukraine quant à la souveraineté sur la Crimée. L'Ukraine répliqua, entre autres, que la revendication de souveraineté russe sur la Crimée, clairement rejetée par l'Assemblée générale des Nations Unies et la communauté internationale, devait être considérée comme dénuée de toute plausibilité.

Le tribunal arbitral a refusé d'appliquer un quelconque test de plausibilité. Selon sa sentence, dont j'extrais les points importants – qui sont ici en anglais, je n'ai pas de traduction officielle, je vais donc faire les citations en anglais, voici donc les points clés *(Continued in English)* :

> The Arbitral Tribunal needs to assess the Russian Federation's claim of sovereignty to the extent necessary to determine the existence *vel non* of a dispute over land sovereignty in Crimea, as the claims submitted by Ukraine in its Notification and Statement of Claim rest on the premise that the territorial status of Crimea is settled.[30]
>
> The exercise of the Arbitral Tribunal's jurisdictional power in this regard should be limited to assessing the Russian Federation's claim of sovereignty for the sole purpose of verifying whether there exists a dispute as to which State has sovereignty over Crimea.[31]
>
> The Arbitral Tribunal is not convinced by the plausibility test as advanced by Ukraine.[32]
>
> In the view of the Arbitral Tribunal, the key question upon which it should focus is whether a dispute as to which State has sovereignty over Crimea exists.[33]

(Poursuit en français) Pour répondre à cette « question clé », le tribunal s'est borné à vérifier l'existence en fait du différend sans tenir le moindre compte de la plausibilité des revendications russes sur lesquelles il refusa de se prononcer, tout en précisant ne rien dire ni

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[29] Observations écrites de Maurice, par. 3.31.

[30] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 185 (Judges' Folder, Tab 21).

[31] Ibid., para. 186.

[32] Ibid., para. 187.

[33] Ibid., para. 188.

suggérer quant à la question de savoir si – je cite le tribunal à nouveau – *(Continued in English)* « the Russian Federation's claim of sovereignty is right or wrong. »[34]

(Poursuit en français) C'est la même question clé qui se pose à la Chambre spéciale dans la présente espèce, et la même réponse qu'il convient de lui apporter. Elle n'est pas de savoir si les revendications britanniques sont plausibles. Elle est seulement de savoir si, en fait, elles existent, et s'opposent à celles de Maurice quant à la souveraineté sur l'archipel des Chagos. En fait, c'est indubitablement le cas.

Voici, Monsieur le Président, les raisons pour lesquelles les Maldives maintiennent que, en l'espèce, la Chambre spéciale est « invitée à trancher en premier lieu certaines questions juridiques de la solution desquelles dépend » l'affaire dont Maurice l'a saisie[35], c'est-à-dire à trancher le différend territorial qui oppose la République de Maurice au Royaume-Uni. Si la Chambre spéciale devait procéder ainsi, « les intérêts juridiques [du Royaume-Uni] seraient non seulement touchés par une décision, mais constitueraient l'objet même de ladite décision. »[36] Les Maldives soutiennent que la Chambre spéciale ne saurait exercer cette compétence en l'absence du consentement du Royaume-Uni, et devrait donc se juger incompétente pour connaître de la requête mauricienne.

Monsieur le Président, j'en viens à la deuxième exception préliminaire des Maldives. Je serai plus bref – ce qui devrait nous conduire tout doucement à la pause –, car elle repose sur le même constat que la première, à savoir l'existence d'un différend territorial entre le Royaume-Uni et Maurice, qui devrait nécessairement être réglé avant que la délimitation maritime réclamée par Maurice puisse être engagée. Les Maldives soutiennent ici qu'indépendamment de l'absence du Royaume-Uni à l'instance, la Chambre spéciale devrait décliner sa compétence puisque cette dernière ne s'étend pas aux différends territoriaux.

À cet égard, s'il est indubitable que la Chambre spéciale a compétence pour connaître de « tout différend » relatif à l'interprétation ou l'application de la Convention, il est tout aussi incontestable qu'elle n'a compétence qu'à l'égard de ces différends-là.

Ceci n'inclut pas les différends territoriaux de la nature de celui qui oppose Maurice au Royaume-Uni[37], et ceci a déjà été expressément jugé par la sentence arbitrale de 2015 rendue dans l'affaire de l'*Aire marine protégée des Chagos*. Le tribunal arbitral a jugé dans cette affaire que – je cite en anglais, la version française n'est pas disponible *(Continued in English)* :

> The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention. Accordingly, the Tribunal finds itself without jurisdiction to address Mauritius' First Submission.[38]

(Poursuit en français) Cette conclusion n'est en rien contredite par l'avis consultatif de la Cour internationale de Justice sur les *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*. Non seulement cet avis ne peut avoir tranché, ni n'a prétendu trancher, le différend territorial entre Maurice et le Royaume-Uni, mais, en outre, la Cour a expressément souligné que son avis n'affectait en rien l'autorité de la chose jugée de la sentence arbitrale de 2015. Elle a en effet expressément précisé que – je cite la Cour internationale de Justice à propos de la sentence de 2015 – « les questions tranchées par le tribunal arbitral dans

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[34] Ibid., par. 178.

[35] *Or monétaire pris* à *Rome en 1943 (Italie c. France, Royaume-Uni et Etats-Unis d'Amérique), question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 31 (dossier des juges, onglet 4).

[36] Ibid., p. 32.

[37] Exceptions préliminaires écrites des Maldives, par. 60-61 ; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, sentence sur les exceptions préliminaires de la Fédération de Russie, 21 février 2020, par. 193–195 (dossier des juges, onglet 21).

[38] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, p. 90, para. 221 (Judges' Folder, Tab 12).

l'*Arbitrage concernant l'aire marine protégée des Chagos* [...] ne sont pas identiques à celles qui sont portées ici devant elle. »[39]

Il en découle que la sentence de 2015 selon laquelle le différend territorial entre Maurice et le Royaume-Uni ne concerne pas l'interprétation ou l'application de la Convention des Nations Unies sur le droit de la mer demeure pleinement pertinente. Elle a le « caractère définitif » des décisions revêtues de l'autorité de la chose jugée[40]. Maurice est donc mal fondée à réclamer de la Chambre spéciale de juger à nouveau sa prétention.

Maurice ne saurait contourner cet obstacle en invitant la Chambre spéciale à *interpréter* l'avis consultatif conformément à ses vues, c'est-à-dire comme réglant le différend territorial d'une manière ou d'une autre, puisque cela la conduirait à exercer sa compétence à l'égard d'un différend qui n'entre pas dans le champ de sa compétence. Le tribunal arbitral constitué dans l'affaire des *Droits de l'État côtier en mer Noire, en mer d'Azov et dans le détroit de Kertch* a d'ailleurs déjà rejeté une prétention comparable. Ce tribunal a admis que s'il était en principe dans son pouvoir d'interpréter les textes adoptés par les organes des organisations internationales – en l'espèce il s'agissait de résolutions de l'Assemblée générale –, il ne pouvait pas pour autant accepter l'interprétation ukrainienne de ces textes s'agissant de la question de la souveraineté sur la Crimée puisque, s'il le faisait, et je cite le tribunal *(Continued in English)* : « It would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory. However, it has no jurisdiction to do so. »[41]

(Poursuit en français) De la même manière, la Chambre spéciale de céans ne saurait interpréter l'avis consultatif de la Cour internationale de Justice de la manière souhaitée par Maurice, car, si elle le faisait, elle en viendrait alors à se prononcer au contentieux à la fois sur un différend territorial qui échappe à sa compétence, et sur la question de savoir qui, de Maurice ou du Royaume-Uni, est souverain sur l'archipel des Chagos, ce qui, là encore, échappe à sa compétence.

Monsieur le Président, Madame et Messieurs de la Chambre spéciale, ceci me conduit à la conclusion de ma plaidoirie. La situation dont vous êtes saisis est totalement inédite. L'État demandeur attend de vous rien moins que de faire fi des règles les mieux établies du droit international du contentieux, que reflète une jurisprudence constante, y compris celle de ce Tribunal : non seulement il vous appelle à vous prononcer sur les droits et obligations d'un État tiers qui n'est pas présent à l'instance, mais de surcroît, il vous met en demeure de vous prononcer sur un différend qui, par nature, échappe à votre compétence *ratione materiae*. Une démarche aussi profondément viciée ne saurait prospérer.

Je vous remercie, Monsieur le Président, Madame et Messieurs de la Chambre, de votre bienveillante attention. Avant d'appeler à la barre Mme Salwa Habeeb, peut-être, Monsieur le Président, voudrez-vous considérer que le moment est bien choisi pour la seconde pause de la journée, ce qui nous permettrait de rattraper un calendrier qui avait été établi par avance.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Thouvenin.

As we are now approaching 5 p.m. the Special Chamber will withdraw for a break of thirty minutes. We will continue the hearing at 5.25.

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[39] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019*, p. 116, par. 81 (dossier des juges, onglet 20).

[40] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016*, p. 125, par. 58.

[41] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 176 (Judges' Folder, Tab 21).

(*Break*)

THE PRESIDENT OF THE SPECIAL CHAMBER: Please be seated.
I now give the floor to Ms Salwa Habeeb to make her statement.
You have the floor.

STATEMENT OF MS HABEEB
REPRESENTATIVE OF THE MALDIVES
[ITLOS/PV.20/C28/2/Rev.1, p. 17–22]

Mr President, distinguished Members of the Special Chamber. I am honoured to appear before you today as a representative of the Republic of Maldives.

I will address you on the the Maldives' third preliminary objection. This concerns Mauritius' failure to satisfy the jurisdictional precondition of negotiations. The essential fact is that there have not been negotiations on delimitation of the maritime boundary between the Maldives and the Chagos Archipelago and that such negotiations cannot occur until the bilateral sovereignty dispute between the United Kingdom and Mauritius is resolved.

I will make submissions on three matters.

First, I will explain that articles 74 and 83 of UNCLOS establish 22a requirement to negotiate as a precondition to the exercise of jurisdiction by this Special Chamber. I will show why Mauritius' argument that these provisions contain no jurisdictional requirement of negotiations is not correct.

Secondly, I set out international jurisprudence on exactly what is required by way of negotiations before an international court or tribunal can exercise jurisdiction. Mauritius made no submissions on this point in its written pleadings, so the Maldives can only assume that its position is agreed. That is to be expected because the case law is clear and consistent.

Thirdly, I will explain why the precondition of negotiations has not been satisfied in this case. I explain that Mauritius' unilateral attempts to force the Maldives to agree a maritime delimitation in circumstances where the identity of the coastal State is in dispute do not satisfy the negotiation precondition.

Mauritius' claim is brought pursuant to articles 74 and 83 of UNCLOS. The text of these two provisions is nearly identical.

Article 74 states:

> The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
>
> If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

Article 83 differs only in that the words "exclusive economic zone" are instead the words "continental shelf".

The meaning of these provisions could not be clearer. States must attempt to "effect by agreement" their maritime boundary. They are entitled to resort to the Part XV dispute settlement procedures only "[i]f no agreement can be reached within a reasonable period of time", that is, after negotiations have been attempted, and the attempt to reach an agreement has failed.

Mauritius argues that articles 74 and 83 do not impose an obligation to negotiate prior to invoking the jurisdiction of a court or tribunal under Part XV. It says that these provisions impose a substantive obligation to negotiate. But its reasoning is wholly unpersuasive.

Mauritius claims, for example, that articles 74 and 83 must not impose any preconditions to jurisdiction because they are not located in Part XV of UNCLOS.[1] That argument is unconvincing. Mauritius has not pointed to any rule of treaty interpretation – and there is none

[1] Written Observations of Mauritius, para. 3.53.

– that says that all jurisdictional requirements must be contained in the same part of a treaty that sets out the dispute resolution procedures. In this case, the text of articles 74 and 83 is clear: States shall resort to dispute resolution under Part XV only "[i]f no agreement can be reached". These provisions spell out in plain and ordinary language the circumstances in which Part XV procedures may be invoked.

The provisions on the exclusive economic zone and continental shelf are in Parts V and VI of UNCLOS, respectively. The fact that the precondition of negotiation appears outside of but before Part XV does not help Mauritius' argument. If anything, it strengthens the Maldives' argument that the subsequent Part XV procedures are only relevant where negotiations under Parts V and VI have been first exhausted. That was the clear intention of the drafters. States Parties should not rush to adversarial litigation. They are entitled to invoke Part XV, and, in particular, compulsory procedures entailing binding decisions under Section 2, only where negotiations have failed.

Mauritius then refers to a number of cases which deal with the obligation in article 283 of UNCLOS, which is within Part XV. It claims that article 283 imposes "the procedural precondition for the submission of a dispute to a Part XV court or tribunal"[2] but it does not substantiate why there can be only a single procedural precondition to jurisdiction set out in a single term of the treaty. As it happens, article 283 is directed towards a different matter. It states in the relevant part:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties … shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

Clearly, article 283 concerns a different obligation. It requires States to exchange views once a dispute has arisen. It does not contain an obligation to negotiate. If it was concerned with an obligation to negotiate, as Mauritius claims, that would require that States negotiate regarding the settlement of the dispute by negotiation. That would be absurd. It is almost always the case that a dispute emerges only after the parties have first negotiated; only after one side has made a specific claim that the other side has opposed or rejected. This has not occurred in this case, as Dr Hart will set out in relation to the Maldives' fourth preliminary objection, following my presentation.

It is not surprising that other provisions of UNCLOS, unlike article 283, do impose an obligation to negotiate. In respect of delimitation of the exclusive economic zone and continental shelf, those provisions are articles 74 and 83. The sequence of these provisions and Part XV makes perfect sense.

The Maldives' view is supported by the jurisprudence of the International Court of Justice. In *Somalia* v. *Kenya*, the Court clarified that article 83 of UNCLOS,

> in providing that delimitation shall be effected by way of agreement, requires that there be negotiations conducted in good faith, but not that they should be successful.[3]

The Court specifically clarified that article 83 did not "preclude recourse to dispute settlement procedures in case agreement could not be reached."[4] In that case, Judge Bennouna confirmed that articles 74(2) and 83(2) of UNCLOS

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[2] Ibid., para. 3.52.

[3] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3 at p. 37, para. 90 (Judges' Folder, Tab 18).

[4] Ibid., p. 38, para. 91.

> are indeed in the realm of negotiation as a dispute settlement procedure that must be conducted in good faith and within a reasonable time before resorting to more complex procedures and which involve third parties.[5]

This is the Maldives' view exactly: recourse to the Part XV dispute settlement procedures is permissible, provided that there have been prior negotiations conducted in good faith and that agreement could not be reached.

The second matter I address is precisely what the jurisdictional precondition of negotiations entails. The Maldives sets out the relevant jurisprudence in its first written pleading on preliminary objections. Mauritius made no response. These can therefore be taken as agreed, and I will recite the relevant principles only briefly.

The overarching requirement under international law is that negotiations must be conducted in good faith. This was affirmed by the Special Chamber in the *Ghana/Côte d'Ivoire* case, which dealt specifically with the obligation to negotiate under article 83.[6] It has been affirmed on numerous occasions by the International Court of Justice.[7]

Conducting negotiations "in good faith" requires that the negotiations be "meaningful", according to the International Court in the *North Sea Continental Shelf* cases.[8] From the same judgment, we see that this requires States "to enter into negotiations with a view to arriving at an agreement".[9] The International Court made the same point in the *Gulf of Maine* case, referring to the "duty to negotiate with a view to reaching agreement, and to do so in good faith, with a genuine intention to achieve a positive result".[10]

Of course, none of this is to say that negotiations must be successful or that an agreement must be reached.[11] The obligation relates to the conduct of negotiations – the spirit in which they are entered into and carried out. It is not an obligation of result.

The third and final question I address is this: has the mandatory procedural requirement of meaningful negotiations, carried out in good faith and with a view to reaching agreement, been satisfied in this case? The answer, in the Maldives' submission, is that it clearly has not.

As a matter of fact, no negotiations have ever taken place concerning the delimitation of the maritime zones that are now the subject of Mauritius' claim. There is a very simple reason for this. Articles 74 and 83 of UNCLOS require delimitation over these zones to be effected by agreement "between States with opposite or adjacent coasts". Mauritius is entitled to effect this agreement by negotiating with the Maldives only if it is the relevant coastal State in respect of the Chagos Archipelago. Mauritius' claim to be the relevant coastal State is, by its own admission, predicated on it having sovereignty over the islands. But the United Kingdom

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[5] Ibid., p. 60 (Dissenting Opinion of Judge Bennouna).

[6] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4, para. 604.

[7] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303 at p. 424, para. 244; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 507 at p. 538, para. 86; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3 at p. 37, para. 90 (Judges' Folder, Tab 18).

[8] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3 at pp. 46-47, para. 85 (Judges' Folder, Tab 6).

[9] Ibid.

[10] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246 at p. 292, para. 87 (Judges' Folder, Tab 9). See also *Case concerning claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Between Greece and the Federal Republic of Germany)*, 26 January 1972, RIAA XIX, p. 27 at p. 57.

[11] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303 at p. 424, para. 244.

claims sovereignty over the same land territory, and the United Kingdom still administers the islands as a matter of fact. It is not a question of whether Mauritius has the better argument, or whether the United Kingdom is wrong. The fact is that there is a bilateral sovereignty dispute – a dispute as to whether Mauritius is the coastal State of the Chagos Archipelago. The Maldives cannot negotiate delimitation under such circumstances. Indeed, when Mauritius expressly invited the International Court in the *Chagos* advisory proceedings to opine that it should be entitled to carry out maritime delimitation with the Maldives,[12] the Court declined to do so. Professor Akhavan has already addressed you on this.

The Maldives has made clear its position that no meaningful negotiations can take place as long as the bilateral sovereignty dispute remains alive. As you can see from the projected text, as long ago as July 2001, the Maldives stated in a note verbale to Mauritius:

> As jurisdiction over the Chagos Archipelago is not exercised by the Government of Mauritius, the Government of Maldives feels that it would be inappropriate to initiate any discussions between the Government of Maldives and the Government of Mauritius regarding the delimitation of the boundary between the Maldives and the Chagos Archipelago.[13]

Mauritius' stance is that, if there is a precondition of negotiations, it has been fulfilled. It bases its submission on its own attempts to commence negotiations. These attempts reach as far back as 2001[14] and continued until as late as 2019, shortly after the International Court issued its Advisory Opinion and just two months before Mauritius commenced the present proceedings.[15]

But no amount of unilateral attempts by Mauritius to commence maritime delimitation negotiations can change the fact that those negotiations, as things stand today, would not be meaningful and could not achieve an agreement. In the Chagos Advisory Proceedings, even Mauritius itself asked the Court to opine only that Mauritius should be allowed to delimit a maritime boundary with the Maldives in consultation with the United Kingdom. In other words, even Mauritius recognized that it could not hold purely bilateral negotiations with the Maldives, without the participation of the United Kingdom. That is exactly the position of the Maldives before the Special Chamber.

In circumstances where Mauritius has not been determined to be the relevant coastal State and as a matter of fact does not control the Archipelago today, it would be impossible to conduct meaningful negotiations or to say that negotiations have been approached "with a view to reaching agreement" or "with a genuine intention to achieve a positive result".[16]

Mr President, distinguished Members of the Special Chamber, there are two main conclusions arising from my speech.

First, contrary to Mauritius' submissions, articles 74 and 83 do impose an obligation to negotiate. It is only if negotiation does not lead to agreement that States are entitled to have

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[12] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 4.145 (Judges' Folder, Tab 25).

[13] Diplomatic Note Ref. (F1) AF-26-A/2001/03 from the Ministry of Foreign Affairs of the Republic of Maldives to Ministry of Foreign Affairs of the Republic of Mauritius, 18 July 2001 (Written Preliminary Objections of the Maldives, Annex 25; Judge's Folder, Tab 28).

[14] Letter No. 19057/3 from A.K. Gayan, Minister of Foreign Affairs and Regional Cooperation, Republic of Mauritius, to H.E. Mr Fathulla Jameel, Minister of Foreign Affairs, Republic of Maldives, 19 June 2001 (Written Preliminary Objections of the Maldives, Annex 24; Judges' Folder, Tab 27).

[15] Diplomatic Note No. 08/19 from the Permanent Mission of the Republic of Mauritius to the United Nations to the Permanent Mission of the Republic of Maldives to the United Nations, 7 March 2019 (Written Preliminary Objections of the Maldives, Annex 16; Judges' Folder, Tab 33).

[16] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246 at p. 292, para. 87 (Judges' Folder, Tab 9).

recourse to dispute settlement under Part XV, including in particular the Section 2 compulsory procedures entailing binding decisions.

Secondly, in this case, there not have been any meaningful negotiations. Indeed, there cannot be any meaningful bilateral negotiations between the Maldives and Mauritius for as long as there is a bilateral dispute between Mauritius and the United Kingdom over which of them is the proper coastal State.

On those grounds, the Maldives' third preliminary objection therefore stands and prevents the Special Chamber from exercising jurisdiction over Mauritius' claim.

I would now ask that you give the floor to Dr Hart, who will address the Chamber on the Maldives' fourth preliminary objection.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Habeeb.

I now give the floor to Ms Naomi Hart, who is connected by video link, to make her statement.

You have the floor, madam.

STATEMENT OF MS HART
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/2/Rev.1, p. 22–31]

Mr President, distinguished Members of the Special Chamber, it is an honour to appear before you today as Counsel for the Republic of Maldives to present the Maldives' fourth preliminary objection.

This fourth objection is that there is no "dispute" between Mauritius and the Maldives falling within this Chamber's jurisdiction. Article 288 of UNCLOS is unequivocal: it confers on the Chamber "jurisdiction over any dispute concerning the interpretation or application of this Convention". In light of this text, there must exist a dispute, and this dispute must concern "the interpretation or application" of UNCLOS.

The requirement of a dispute as an essential precondition to jurisdiction is a cornerstone of international dispute settlement, and there are compelling reasons for this. In exercising their contentious jurisdiction, international courts and tribunals must ensure that there is, in fact, a difference of views between the parties to a claim. States should not be subject to the jurisdiction of an international court or tribunal before they have had the case against them explained to them and have had the opportunity to respond. In the words of the International Court in the *Marshall Islands* cases, a State must not be "deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct."[1] It is not enough to suppose that any difference of views may emerge over the course of proceedings; they must have crystallized prior to a claim being commenced.

Mauritius, quite rightly, doesn't dispute that as a matter of principle. Where the Parties differ is on whether it is possible for there to be a dispute between Mauritius and the Maldives on maritime delimitation, when Mauritius' own claim to be the relevant coastal State remains in dispute with a third State. Even aside from that question, they also differ on whether Mauritius has established that the Parties had positively opposed claims relating to the interpretation or application of UNCLOS prior to the institution of these proceedings.

My speech contains three parts. First, I will briefly recall the requirements for a dispute within the meaning of article 288, which are largely a matter of common ground. Secondly, I will set out the Maldives' argument that there is and can be no dispute between the Parties as to maritime delimitation for as long as Mauritius has not been conclusively established as the relevant coastal State, which has not happened to date. Thirdly, I will explain that, quite apart from Mauritius' bilateral territorial dispute with the United Kingdom, Mauritius has not established that a maritime delimitation dispute had crystallized between itself and the Maldives prior to its notification of claim. There were no positively opposed claims, advanced by one Party and affirmatively rejected by the other, before that point.

Mr President, I wish to emphasize that the argument raised in the third part of my speech is entirely free-standing from the other submissions raised on behalf of the Maldives. It is not dependent on there being an extant dispute between Mauritius and the United Kingdom. Even if Mauritius had already resolved its bilateral dispute with the United Kingdom over the Chagos Archipelago, which the Maldives does not accept, it would still need to prove that another dispute, concerning the interpretation or application of UNCLOS, had crystallized between itself and the Maldives before it instituted these proceedings. A careful examination of the evidence shows that Mauritius has not discharged this burden.

I address, first, the legal principles concerning the existence of a dispute as a prerequisite to jurisdiction. As the Annex VII tribunal held in the *South China Sea* arbitration, this is a

[1] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833 at p. 851, para. 43 (Judges' Folders, Tab 15).

requirement that is "well-established in international law" as a "threshold requirement for the exercise of ... jurisdiction".[2] According to ITLOS in *Saint Vincent and the Grenadines* v. *Spain*, the absence of a dispute is a bar to the exercise of jurisdiction *ratione materiae*.[3]

The international jurisprudence is clear that the requirement of a dispute is not satisfied simply because one party asserts that there is a dispute.[4] Rather, according to the International Court, the existence of a dispute "is a matter for objective determination"[5]. That objective determination requires the party asserting that a dispute exists to prove three matters.

First, it must show that the parties have so-called "positively opposed" claims.[6] The International Court articulated this requirement in the *South West Africa* cases, in which it stated that a dispute does not exist simply because "the interests of two parties to such a case are in conflict" in an abstract sense.[7]

The Annex VII tribunal in the *South China Sea* arbitration confirmed that "'positive opposition' between the parties" meant that "the claims of one party are affirmatively opposed and rejected by the other".[8] It stated that such positive opposition will "normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected."[9] This echoes the finding of the International Court in *Georgia* v. *Russia* that "negotiations may help demonstrate the existence of the dispute and delineate its subject matter."[10]

Secondly, there must be sufficient clarity as to the dispute and precisely what is positively opposed between the parties. The Annex VII tribunal in the *Chagos Marine Protected Area* arbitration found that "a dispute [must] have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed".[11] The requirement of sufficient clarity was more thoroughly enunciated by the International Court in the *Marshall Islands* cases. As you can see, there, the Court affirmed that it must be

> demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant.[12]

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[2] *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 148 (Judges' Folder, Tab 13).

[3] See *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, *Judgment, ITLOS Reports 2013*, p. 4, para. 151.

[4] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 270-271, para. 55; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 810, para. 16; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 74.

[5] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 74.

[6] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 at p. 328.

[7] Ibid.

[8] *South China Sea Arbitration (Philippines* v. *China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 159 (Judges' Folder, Tab 13).

[9] Ibid.

[10] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at pp. 84-85, para. 30.

[11] See *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 382 (Judges' Folder, Tab 12).

[12] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833 at pp. 850-851, para. 41 (Judges' Folder, Tab 15).

There must have been, by one party, a statement or conduct which "specif[ied] the conduct" that was the subject of the dispute.[13] It is not enough for one State to make statements that lack "any particulars regarding [the other party's] conduct".[14]

Thirdly, it is essential that the dispute existed at the critical date of the filing of an application.[15] The mere act of filing the application cannot in itself be taken as evidence of a dispute or as an act that crystallized an incipient dispute. Neither can a difference of legal views which emerges only during the course of proceedings.[16]

Those are the principles which will determine whether, in this case, a relevant dispute existed at the time Mauritius instituted these proceedings.

I now turn, secondly, to the Maldives' argument that no dispute concerning the interpretation or application of UNCLOS can exist for as long as Mauritius' status as the relevant coastal State is unresolved.

Mauritius' position is that there is a dispute over the interpretation or application of articles 74(1) and/or 83(1) of UNCLOS. But that presupposes that Mauritius has a coast opposite or adjacent to the coast of the Maldives. My colleagues have already established, and I need not repeat, that this Chamber cannot either determine or assume that Mauritius is the coastal State over the disputed Chagos territory. It follows that the Chamber cannot either determine or assume that Mauritius is a State with an opposite or adjacent coast to the Maldives, which would be a necessary predicate to any finding that there is a maritime delimitation dispute between these two parties.

This explains why, as Ms Habeeb has addressed, there have not been and cannot be meaningful negotiations on maritime delimitation. It also explains why there is not, and cannot be, a crystallized maritime boundary dispute. In fact, Mauritius has never made a claim in respect of maritime delimitation that is "affirmatively opposed and rejected" by the Maldives. Instead, its only claim to date is that it has sovereignty over the Chagos Archipelago, and that is not a claim on which the Maldives has taken any position and not one that is within the jurisdiction of this Special Chamber.

In those circumstances, there is and can be no dispute between the Maldives and Mauritius concerning the interpretation or application of articles 74 and 83 of UNCLOS, as is mandatory for the Chamber to exercise jurisdiction under article 288.

I now turn, thirdly, to the Maldives' additional and alternative argument that Mauritius has not established that the Parties held positively opposed views before it instituted these proceedings.

I say "additional and alternative" because this argument is not predicated on the previous one. Even if, contrary to the Maldives' position, this Chamber could accept uncritically that Mauritius is the relevant coastal State, that would not relieve Mauritius of the burden of proving that the parties held positively opposed claims by the critical date. As the international jurisprudence makes clear, a dispute did not exist at the critical date simply because Mauritius asserts that it did. It is a matter that this Chamber must determine objectively. Mauritius must be able to convince the Chamber that it had made a specific claim to a maritime boundary that the Maldives had affirmatively opposed and rejected. It is insufficient merely to show that there

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[13] Ibid., pp. 853-854, para. 50.

[14] Ibid., pp. 855-856, para. 57.

[15] See *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 382 (Judges' Folder, Tab 12); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at pp. 84-85, para. 30; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833 at pp. 847, 851, 855, paras 29, 43, 54 (Judges' Folder, Tab 15).

[16] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at pp. 84-85, para. 30.

could be a potential dispute because of notional overlap between the Parties' maximum possible entitlements. There must have been an actual dispute in the form of a claim by one Party affirmatively opposed and rejected by the other.

I note in particular that, even on Mauritius' own theory that the International Court's Advisory Opinion somehow granted it sovereignty, less than four months elapsed before Mauritius filed its Notification and Statement of Claim. A dispute would need to have crystallized during this brief window.

Mauritius relies on three categories of evidence which it claims establish a dispute. But, examined carefully, none of the evidence, taken either separately or cumulatively, reaches the relevant thresholds.

First, Mauritius relies on what it describes in its written pleading as "official depictions of overlapping boundary claims".[17] But it presents only one map that is either "official" or that predates these proceedings. That is the map which accompanied the Maldives' submission to the Commission on the Limits of the Continental Shelf (CLCS) in 2010.[18] But, of course, this was almost a decade before the Advisory Opinion that, according to Mauritius, determined its status as the coastal State. On top of that, this map does not show overlapping boundary claims. In fact, in a subsequent diplomatic exchange, which I will address in a few minutes, the Maldives made clear that, in formulating its submission to the CLCS, it had "not taken into consideration" the exclusive economic zone (EEZ) claimed by Mauritius.[19] Further, all the map shows is the Maldives' maximum entitlement when it comes to its EEZ. It is clearly not the case that whenever a State presents a maximum entitlement that may potentially overlap with the maximum entitlement of another State that this is sufficient to create a "dispute" triggering the jurisdiction of a Part XV tribunal. Where there are overlapping maximum maritime boundary zones, the parties must articulate a positive claim as to where they consider the maritime boundary should lie between those maximum entitlements. Mauritius has never done so.

The second category of evidence on which Mauritius relies is legislation passed by each of itself and the Maldives.[20] But again, this legislation does not establish the existence of a dispute, let alone one that predated these proceedings.

For one thing, the legislation did not create a dispute of sufficient clarity to ground the Special Chamber's jurisdiction. This much is evident from the Parties' subsequent diplomatic exchanges, which again I will address shortly. In those exchanges the Parties spoke of a potential dispute which they may attempt to pre-empt through negotiations. There were no claims affirmatively opposed and rejected. If the legislation had created a sufficiently clear dispute of the sort required for compulsory dispute settlement under Part XV of UNCLOS, the Parties would simply have referred to that dispute, not to an unspecified potential dispute.

But, Mr President, there is another point. The legislation of the Maldives does not purport to set down an immutable maritime boundary claim either in respect of its EEZ or its continental shelf. It merely sets out as a point of departure the maximum extent of the Maldives' entitlement to an EEZ under UNCLOS, subject to agreement with relevant opposing or adjacent coastal States. As you can see, section 6 of the Maldives' Act sets out the default

[17] Written Observations of Mauritius, para. 3.39.

[18] Ibid., p. 32, Figure 3.

[19] Minutes of First Meeting on Maritime Delimitation and Submission regarding the Extended Continental Shelf between the Republic of Maldives and Republic of Mauritius, 21 October 2010, signed by Ahmed Shaheed, Minister of Foreign Affairs, Republic of Maldives and S.C. Seeballuck, Secretary to Cabinet & Head of Civil Service, Republic of Mauritius (Written Preliminary Objections of the Maldives, Annex 26; Judges' Folder, Tab 30).

[20] Written Observations of Mauritius, paras 3.40-3.42.

position that the Maldives' EEZ shall extend 200 nautical miles beyond its archipelagic baselines. However, section 7 expressly states as follows:

> In the event that the exclusive economic zone of Maldives as determined under section 6 of this Act overlaps with the exclusive economic zone of another State, this Act does not prohibit the Government of Maldives from entering into an agreement with that State as regards the area of overlapping and delimiting the exclusive economic zone of Maldives for the said area of overlapping.[21]

In other words, the Maldives' maximum entitlement to an EEZ extending 200 nautical miles from its baselines is expressly subject to its ability to delimit a different maritime boundary taking into account an overlapping entitlement by another State. In these circumstances, Mauritius cannot claim that the Maldives has a definite positive claim that it, Mauritius, has affirmatively opposed and rejected. All the Maldives has asserted is a maximum entitlement, expressly subject to a potential delimitation agreement.

Thirdly and finally, Mauritius relies on a number of diplomatic exchanges between the Parties which it says reveal a crystallized dispute predating these proceedings. To recap, Mauritius can succeed in this assertion only if it can show that, on the basis of these exchanges, the Maldives was aware, or could not have been unaware, of an affirmative claim by Mauritius that was positively opposed to its own claim.[22] The exchanges must have (in the words of the International Court) "specif[ied]" exactly what the dispute consisted of, and could not be mere statements lacking "particulars" of the alleged dispute.[23]

Do any of the diplomatic exchanges in question meet these requirements? In the Maldives' submission: no.

Mauritius has pleaded that it "objected to the maritime claims depicted in the Maldives' submission to the CLCS" in a diplomatic note of 21 September 2010.[24] Of course, even if the document met this description, it would not necessarily crystallize a "dispute", because an objection that is inadequately clear and particularized and which does not contain a positive claim does not suffice for these purposes. As it happens, the diplomatic note in question does not even express an objection. All it states is that Mauritius had "taken note" of the Maldives' submission to the CLCS and, in light of that submission, was

> agreeable to holding formal talks with the Government of the Republic of Maldives for the delimitation of the exclusive economic zones … of Mauritius and Maldives.[25]

No objection, and certainly no affirmative claim which the Maldives could positively oppose. This is aside from the fact that this note was sent some nine years before the Court's Chagos Advisory Opinion, which, even on Mauritius' own case, was when its sovereignty dispute with the United Kingdom was resolved.

Next, Mauritius refers to a meeting between representatives of the Parties on 21 October 2010.[26] This meeting concerned the Maldives' submission to the CLCS a few months earlier.

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[21] Maritime Zones of Maldives Act No. 6/96, section 6 (Written Observations of Mauritius, Annex 16; Judges' Folder, Tab 26).

[22] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833 at p. 850, para. 41 (Judges' Folder, Tab 15).

[23] Ibid., pp. 853-854, para. 50, p. 856, para. 57.

[24] Written Observations of Mauritius, para. 3.45, citing Diplomatic Note from the Ministry of Foreign Affairs, Regional Integration and International Trade, Republic of Mauritius, to the Ministry of Foreign Affairs, Republic of Maldives, 21 September 2010 (Written Observations of Mauritius, Annex 12; Judges' Folder, Tab 29).

[25] Ibid.

[26] Minutes of First Meeting on Maritime Delimitation and Submission regarding the Extended Continental Shelf

In its written pleading in this proceeding, Mauritius claims that in this meeting the Maldives "confirmed the existence of a dispute over the maritime boundary" and "[r]ecogniz[ed] the existence of overlapping claims".[27] Neither of these assertions is true.

(a) In this meeting, Mauritius stated only that

> to the north of the Chagos Archipelago there is an area of potential overlap of the extended continental shelf of the Republic of Maldives and the Republic of Mauritius.[28]

"Potential overlap" – hardly an expression of a positive claim. Mauritius did not confirm an actual overlap, just a possible one.

(b) During the meeting, both sides agreed that they would "exchange coordinates of their respective base points ... in order to facilitate the eventual discussions on the maritime boundary".[29] A mere expression of intention to discuss a maritime boundary in the future. No affirmative claim by one side. No rejection by the other; and Mauritius has never suggested that this exchange was ever followed up by, for example, an exchange of coordinates.

(c) The Maldives stated that it had prepared its submission to the CLCS without taking into consideration any EEZ claimed by Mauritius, and that the Maldives would in due course amend its submission "in consultation with the Government of the Republic of Mauritius".[30] Now, these statements run actively against Mauritius' case. They show that the Maldives' submission to the CLCS was not intended to be any sort of rejection of a maritime claim by Mauritius. They also show that the Parties had not yet established any disagreement and simply that they would consult on a future amendment to the Maldives' submission to the CLCS.

Mauritius then refers to a diplomatic note which it sent to the Secretary-General of the United Nations on 24 March 2011.[31] In this note, Mauritius "protest[ed] formally" against the Maldives' submission to the CLCS. But did the note contain an affirmative claim to which the Maldives could be positively opposed? It did not. Instead, it simply made a vague complaint that the Maldives had not taken into account the maximum EEZ that Mauritius asserted around the Chagos Archipelago, without clarifying what it said was the area of any overlapping maximum entitlements.[32] To suggest that in this note Mauritius advanced any sort of positive claim which the Maldives affirmatively opposed and rejected is just wrong.

Aside from the fact that they contain no evidence of a "dispute", those communications all predated the International Court's Chagos Advisory Opinion. Mauritius' case, of course, is that it was that Advisory Opinion which conclusively resolved that it has sovereignty over the islands. That is a position which the Maldives does not accept. However, even if it were right,

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between the Republic of Maldives and Republic of Mauritius, 21 October 2010, signed by Ahmed Shaheed, Minister of Foreign Affairs, Republic of Maldives and S.C. Seeballuck, Secretary to Cabinet & Head of Civil Service, Republic of Mauritius (Written Preliminary Objections of the Maldives, Annex 26; Judges' Folder, Tab 30).

[27] Written Observations of Mauritius, para. 3.46.

[28] Minutes of First Meeting on Maritime Delimitation and Submission regarding the Extended Continental Shelf between the Republic of Maldives and Republic of Mauritius, 21 October 2010, signed by Ahmed Shaheed, Minister of Foreign Affairs, Republic of Maldives and S.C. Seeballuck, Secretary to Cabinet & Head of Civil Service, Republic of Mauritius (Written Preliminary Objections of the Maldives, Annex 26; Judges' Folder, Tab 30) (emphasis added).

[29] Ibid.

[30] Ibid.

[31] Written Observations of Mauritius, para. 3.47, citing Diplomatic Note No. 11031/11 from the Permanent Mission of the Republic of Mauritius to the Secretary-General of the United Nations, 24 March 2011 (Written Preliminary Objections of the Maldives, Annex 27; Judges' Folder, Tab 31).

[32] Diplomatic Note No. 11031/11 from the Permanent Mission of the Republic of Mauritius to the Secretary-General of the United Nations, 24 March 2011 (Written Preliminary Objections of the Maldives, Annex 27; Judges' Folder, Tab 31).

then one would expect that, after the Advisory Opinion, Mauritius would have ensured that it made a positive maritime boundary claim to which the Maldives could respond. Only then could it be said that a dispute had crystallized between the two relevant coastal States.

But Mauritius has not done so. The only evidence on which Mauritius relies since the Court issued its Advisory Opinion is a diplomatic note of 7 March 2019 transmitted just a few days after the Opinion.[33] All that Mauritius did in that note was indicate that the Parties' previous discussions over maritime delimitation had been "inconclusive".[34] As it pointed out itself in the note, this was not due to the existence of positively opposed maritime claims, but (as you can see) because of

> the position taken by the Maldives to the effect that the United Kingdom and Mauritius should first sort out the issue of sovereignty over the Chagos Archipelago.[35]

This confirmed that there was no maritime boundary dispute as such, but only a dispute concerning the predicate question of territorial sovereignty. In the same note, Mauritius proceeded to "invite the Maldives authorities to a second round of discussions" on maritime delimitation.[36] An invitation to negotiate without more, however, is not evidence of a crystallized dispute. Within just a few weeks, Mauritius had filed its Notification and Statement of Claim under the Part XV procedures, without a specified maritime boundary dispute.

At the end of these exchanges, is the Maldives "aware of the issues in respect of which [the parties] disagree", as the Annex VII tribunal in the Chagos Marine Protected Area arbitration said was necessary for a dispute?[37] It could not be. Prior to commencing proceedings, Mauritius never communicated to the Maldives a positive claim. There was therefore nothing for the Maldives to reject. All that these exchanges show is that there has been occasional contact between the Parties regarding possible negotiations over maritime delimitation that may occur at an unspecified future time in respect of yet to be articulated maritime boundary claims. That does not satisfy the requirement of a crystallized dispute. In its rush to litigate its sovereignty dispute with the United Kingdom before this Chamber, Mauritius has overlooked even this basic jurisdictional precondition.

Mr President, the Maldives' fourth preliminary objection is made out on two alternative grounds.

First, there is an unresolved dispute between Mauritius and the United Kingdom over whether Mauritius is entitled to exercise the powers of a coastal State in respect of the Chagos Archipelago. Until that dispute has been resolved, there is and can be no dispute between Mauritius and the Maldives concerning the interpretation and application of provisions of UNCLOS which are predicated on there being States with opposite or adjacent coasts.

Secondly, quite apart from that sovereignty dispute with a third State, Mauritius has not pointed to any evidence establishing that it had made a particularized, sufficiently certain, positive claim which the Maldives had affirmatively opposed and rejected prior to these

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[33] Written Observations of Mauritius, para. 3.48, citing Diplomatic Note No. 08/19 from the Permanent Mission of the Republic of Mauritius to the United Nations to the Permanent Mission of the Republic of Maldives to the United Nations, 7 March 2019 (Written Preliminary Objections of the Maldives, Annex 16; Judges' Folder, Tab 33).

[34] Diplomatic Note No. 08/19 from the Permanent Mission of the Republic of Mauritius to the United Nations to the Permanent Mission of the Republic of Maldives to the United Nations, 7 March 2019 (Written Preliminary Objections of the Maldives, Annex 16; Judges' Folder, Tab 33).

[35] Ibid.

[36] Ibid.

[37] See *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 382 (Judges' Folder, Tab 12).

proceedings. On well settled authority, that means the requirements of a "dispute" have not been satisfied.

Mr President, I would now ask that you give the podium once again to Professor Akhavan, who will address the Chamber on the Maldives' fifth preliminary objection and otherwise conclude the first round of oral submissions on behalf of the Maldives.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Hart.

I now give the floor to Mr Akhavan to make his statement.

You have the floor, sir.

STATEMENT OF MR AKHAVAN
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/2/Rev.1, p. 31–36]

Mr President, distinguished Members of the Special Chamber, it is an honour to address you once again. In this final speech, I will first make some brief concluding remarks on each of the Maldives' four preliminary objections that have now been elaborated by my colleagues. Second, I will address you on the Maldives' fifth preliminary objection, namely that Mauritius' initiation of these proceedings, to settle its territorial dispute with the United Kingdom under the guise of a maritime delimitation with the Maldives, constitutes an abuse of process.

I turn first to a summary of the Maldives' first four preliminary objections addressed by my colleagues.

Mauritius agrees with the Maldives that it is impossible for the Special Chamber to delimit the maritime boundary without accepting that Mauritius has sovereignty over the Chagos Archipelago, to the exclusion of the UK. This is an essential and inescapable premise of Mauritius' claim that it has an "opposite or adjacent coast" with the Maldives within the meaning of articles 74 and 83 of UNCLOS. Mauritius leaves no doubt that its delimitation claim is predicated entirely on its sovereignty claim, namely that "the territory of Mauritius includes, in addition to the main island, inter alia, the Chagos Archipelago".[1]

Mauritius does not and cannot deny that the UK continues to claim sovereignty over Chagos. Its only argument is that the Chagos Advisory Opinion definitively established Mauritius' sovereignty to the exclusion of the UK. However, that is a legal argument on a territorial dispute and one which, in my earlier speech today, I showed to be entirely without merit. Mauritius' position is also that it is the undisputed sovereign of Chagos because the British claim is not "arguable" or "plausible";[2] but that is yet another legal argument, not a statement of fact.

Mr President, there can be no doubt that what Mauritius asks this Chamber to do is to settle its territorial dispute with the UK based on these legal arguments. It asks you to find that it is the coastal State; it asks you to reject the British sovereignty claim; all this in a case against the Maldives. My colleagues today have addressed four different reasons why doing so would be manifestly beyond the jurisdiction of the Special Chamber.

The Chagos Advisory Opinion does not help Mauritius escape this jurisdictional conundrum. I have explained why Mauritius' interpretation of that Opinion does not withstand scrutiny. I will only recall the most critical points:

(a) First, the Court stated in no uncertain terms that it was not determining any bilateral dispute that may exist between Mauritius and the UK, and that it had not been requested to do so by the General Assembly.[3]

(b) Second, the Court did not accept Mauritius' invitation to find that sovereignty was "entirely derivative of, subsumed within, and determined by the question of decolonization"[4] – an assertion that Mauritius has recycled, nearly verbatim, before this Chamber.[5]

(c) Third, the Court did not accept Mauritius' invitation to find that it should be allowed to delimit a maritime boundary with the Maldives, even in consultation with the UK.[6]

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[1] Notification and Statement of Claim and Grounds on which it is based of the Republic of Mauritius, 18 June 2019, para. 11 (Written Preliminary Objections of the Maldives, Annex 1).
[2] Written Observations of Mauritius, paras 3.6, 3.16.
[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 117-118, para. 86, p. 129, para. 136 (Judges' Folder, Tab 19).
[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.16 (Judges' Folder, Tab 25).
[5] Written Observations of Mauritius, para. 3.5.
[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,*

(d) Fourth, contrary to Mauritius' repeated claim in its written pleading, the Court did not find that Chagos "is, and always has been, a part of the territory of Mauritius."[7] It went no further than finding that the territory was an integral part of the British colony of Mauritius at the time of its detachment in 1965.[8]

Professor Boyle explained why the Namibia and Western Sahara Advisory Opinions do not help Mauritius' case either. To the contrary, they confirm that obligations concerning decolonization are not necessarily one and the same as questions of sovereignty. That is exactly why the Chagos Advisory Opinion carefully avoided any reference whatsoever to sovereignty in opining on the consequences of continuing British administration of the Chagos Archipelago. Even the General Assembly resolution which followed the Opinion failed to mention sovereignty.

But at the end of the day, the Maldives does not even need to convince the Special Chamber that Mauritius' interpretation of the Chagos Opinion is wrong. Mauritius agrees that the UK continues to claim sovereignty; there is no doubt that the UK does not accept that the territorial dispute has been resolved. Where such a dispute exists as a matter of fact, there is no plausibility threshold, as the Tribunal affirmed in Coastal State Rights. The Special Chamber has no jurisdiction to resolve a territorial dispute. Mauritius cannot get a better result than it got before the Chagos Annex VII tribunal by litigating the same issue before this Chamber.

Also, there is, of course, the proverbial "elephant in the room"; or perhaps I should say "elephant in the courtroom", which is the non-binding character of Advisory Opinions. Even if the ICJ had expressly opined on territorial sovereignty, it could not circumvent the consent of the UK to jurisdiction. Mauritius' imaginative theory of the Advisory Opinion's non-binding binding effect is simply hopeless.

It is in this light that the Maldives has submitted its preliminary objections, which I shall now summarize.

In respect of the first preliminary objection, resolving Mauritius' legal arguments on territorial sovereignty requires the Special Chamber to rule on the legal rights and obligations of the UK – an indispensable third State which is neither a party nor has consented to these proceedings. As Mr Thouvenin has explained, this would be manifestly contrary to the *Monetary Gold* principle. The ICJ *East Timor* case leaves no doubt that the principle applies with equal force even in the extreme case of aggression and annexation of a non-self-governing territory, in flagrant violation of obligations *erga omnes*. The context of decolonization is simply irrelevant; whether the UK is right or wrong is irrelevant; its consent to jurisdiction cannot be circumvented. The Special Chamber cannot exercise jurisdiction over the British sovereignty claim, with or without an Advisory Opinion; with or without a General Assembly resolution. This is the settled jurisprudence of all international courts and tribunals, including ITLOS and Annex VII tribunals.

Mauritius has no answer to the Maldives' first preliminary objection.

In respect of the second preliminary objection, Mauritius' claim to be the coastal State requires the Special Chamber to rule on a territorial dispute which is clearly not about the interpretation or application of UNCLOS. This would necessarily take the Chamber outside the limit of its jurisdiction under article 288, paragraph 1, of UNCLOS.

This jurisdictional limitation would apply equally even if the UK was a party to these proceedings. That is exactly why, in its 2015 award, the Annex VII tribunal in *Chagos Marine Protected Area* rejected Mauritius' submissions that it was the coastal State. The participation

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Written Statement of the Republic of Mauritius, 1 March 2018, paras 1.42(vi), 7.3(3), 7.61, 7.69 (Judges' Folder, Tab 24).

[7] Written Observations of Mauritius, paras 1.4, 1.6, 3.13, 3.37.

[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 136-137, para. 170 (Judges' Folder, Tab 19).

of the UK in that case was irrelevant. The tribunal dismissed Mauritius' "coastal State" arguments as a "pretext" to resolve a territorial dispute that was outside of its jurisdiction.[9]

The same was true in the Coastal State Rights case. Russia was a party to the proceedings, but the Tribunal did not exercise jurisdiction despite Ukraine's argument that Russia's Crimean claim was implausible

Mauritius responds yet again that the 2019 Chagos Opinion has somehow overruled the 2015 Chagos Award; that it has conclusively rejected the British claim. Aside from the fact that the ICJ neither purported to resolve nor could have resolved the bilateral dispute, it made clear that it was not overruling the Chagos Award. To the contrary, it affirmed that the 2015 Award had *res judicata* effect and remained unaffected by the Advisory Opinion.

Mauritius has no answer to the Maldives' second preliminary objection.

In light of the bilateral sovereignty dispute, the Maldives' third preliminary objection is entirely unsurprising. Articles 74 and 83 of UNCLOS enable maritime delimitation claims to be submitted to the Part XV compulsory procedures only where, following attempts among the relevant coastal States, "no agreement can be reached within a reasonable period of time". There is a precondition of negotiation, and it is clear that it cannot be satisfied if delimitation is made impossible by a territorial dispute with a third State.

As Ms Habeeb demonstrated, there have been no meaningful negotiations between Mauritius and the Maldives on maritime delimitation. UNCLOS does not impose an obligation on the Maldives to take sides in the bilateral dispute between Mauritius and the UK in order to carry out such negotiations.

The Maldives' fourth preliminary objection follows because, where a territorial dispute with a third State makes negotiations impossible, there can be no "dispute" over a maritime boundary. Mauritius does not question that the existence of a dispute is an essential precondition to the Special Chamber's jurisdiction. As Dr Hart demonstrated, until the dispute as to whether Mauritius or the UK is the "opposite or adjacent" coastal State is resolved, there can be no maritime delimitation dispute between the Maldives and Mauritius.

Even putting the British sovereignty claim aside, there is a lack of "positively opposed" maritime boundary claims between the Maldives and Mauritius. The jurisprudence is clear: the claims of one party must be "affirmatively opposed and rejected by the other." As Dr Hart has carefully detailed, none of the documents annexed to Mauritius' pleadings provide evidence of such affirmative opposition and rejection. There is at best a vague reference to a potential rather than an actual dispute. The expression of potential maximum entitlements of coastal States do not constitute a "dispute". They merely present, as the parties themselves recognized, an opportunity to negotiate with a view to concluding an agreement.

Mauritius has no answer either to the Maldives' third and fourth preliminary objections.

Having summarized the Maldives' first through fourth preliminary objections, I turn now to its fifth preliminary objection on abuse of process.

There is, Mr President, a thread that binds all of the first four objections together: namely, that the dispute which Mauritius asks the Special Chamber to resolve is neither a dispute with the Maldives nor a dispute regarding maritime boundary delimitation. Rather, it is a dispute with the United Kingdom, and one that concerns land territory.

It is that common thread that gives rise to the Maldives' fifth preliminary objection: namely, that Mauritius' claim is inadmissible because it constitutes an abuse of process.

Mr President, the existence of a bilateral territorial dispute is inescapable. No amount of creative lawyering will make that fact go away. Our learned friends on the opposite side, for whom I have the highest regard, are reputable scholars and skilled practitioners. They are no

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[9] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 219 (Judges' Folder, Tab 12).

strangers to the settled jurisprudence on jurisdiction. In fact, they are well aware that the very same arguments they have made in these proceedings were rejected by both the Annex VII tribunal in the Chagos arbitration, and by the ICJ in its Advisory Opinion. They are well aware because the same Counsel made the same arguments in those two prior cases. "Third time lucky", the expression goes; except that this is a court, not a casino! Legal reasoning is not a game of chance; judicial decisions are not made by a roll of the dice. The facts, the law, remain exactly the same as before. Re-litigating Mauritius' sovereignty claim before the Special Chamber cannot obtain a different result from the Chagos Award or the Chagos Opinion.

Mauritius has publicly indicated that it will advance its sovereignty claim in whatever forum it can. Some months after the 2015 Chagos Award, Mauritius stated before the General Assembly that it was committed to making every effort "to enable it to effectively exercise its sovereignty over the Chagos Archipelago, including the possibility of having further recourse to judicial or arbitral bodies"; but in the present proceedings it has demonstrated that it will have such recourse even when its claim is manifestly *ultra vires*. Using UNCLOS compulsory procedures to obtain a ruling on a territorial dispute with a third State is the very definition of an abuse of process. It is exactly the sort of conduct that the doctrine seeks to eliminate.

This is not an objection which the Maldives has raised lightly. We are mindful – in the words of the South China Sea Arbitration – that a finding of abuse of process is "appropriate in only the most blatant cases of abuse or harassment." We are mindful of the ICJ's position that it takes "exceptional circumstances" to ground such a finding.

It is well established that those "exceptional circumstances" arise when the purpose of the legal proceedings is wholly extraneous to the purpose of the procedures that are invoked. As one distinguished scholar has explained, abuse of process occurs when a claimant litigates "for aims alien to the ones for which the procedural rights at stake have been granted". It is blindingly obvious that this is exactly what Mauritius aims to do. It seeks a ruling on its territorial dispute with the UK. This purpose is manifestly inconsistent with the purposes of the UNCLOS compulsory procedures.

Mauritius has already tried this once – in the Chagos arbitration, in which the Tribunal ruled that Mauritius' UNCLOS claim was in truth a sovereignty claim that "[did] violence to the intent of the drafters of the Convention". It tried once again before the ICJ, attempting to transform the advisory proceedings into a contentious proceeding against the UK. But the Court exercised meticulous restraint. It made clear that its Opinion on decolonization did not resolve the bilateral territorial dispute.

Mauritius now blatantly misrepresents that Advisory Opinion as a conclusive decision on territorial sovereignty. It is effectively asking this Special Chamber to give the Chagos Opinion an effect which the Court rejected, and to do so for purposes that are wholly alien to UNCLOS, and further to ignore the *Monetary Gold* principle. Mauritius is inviting this Chamber to pursue a perilous path that will profoundly harm its credibility and legitimacy among UNCLOS States Parties.

Mauritius' response to the Maldives' fifth preliminary objection is deeply regrettable. It adds insult to injury, with the incredible accusation that it is the Maldives, not Mauritius, which is guilty of an abuse of process, merely because it has dared to raise preliminary objections. Mauritius demands nothing less than blind obedience to its highly questionable case on jurisdiction. It condemns the Maldives, a small island nation, as an accessory to colonialism, as an enemy of self-determination. Mr President, the hostile hyperbole speaks for itself. It is nothing less than harassment and intimidation. It confirms the abusive nature of these proceedings.

Like any other nation, the Maldives does not want to be used as a pawn in someone else's chess game. It is under no obligation to become entangled in the bilateral dispute between

Mauritius and the UK. Like other UNCLOS States Parties, the Maldives did not consent to the exploitation of Part XV compulsory procedures for matters wholly extraneous to UNCLOS.

Accordingly, we respectfully submit that, in addition to upholding the first four preliminary objections, this Special Chamber should also uphold the Maldives' fifth preliminary objection and deter such manifest abuse of process. The integrity of these proceedings calls for nothing less.

Mr President, distinguished Members of the Special Chamber, that concludes my speech and the first round of oral submissions by the Republic of Maldives. I thank you for your kind attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akhavan.

This brings us to the end of this evening's sitting. The hearing will resume on Thursday at 2 p.m. to hear Mauritius' first round of pleading. The sitting is now closed.

(*The sitting closed at 6.40 p.m.*)

PUBLIC SITTING HELD ON 15 OCTOBER 2020, 2 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

For Mauritius: [See sitting of 13 October 2020, 2 p.m.]

For the Maldives: [See sitting of 13 October 2020, 2 p.m.]

AUDIENCE PUBLIQUE TENUE LE 15 OCTOBRE 2020, 14 HEURES

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour Maurice : [Voir l'audience du 13 octobre 2020, 14 h 00]

Pour les Maldives : [Voir l'audience du 13 octobre 2020, 14 h 00]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. Today the Special Chamber will hear Mauritius' first round of pleading regarding the preliminary objection raised by the Maldives. I now give the floor to the Co-Agent of Mauritius, His Excellency Mr Jagdish Dharamchand Koonjul, Ambassador and Permanent Representative of Mauritius to the United Nations, to deliver his statement on behalf of the Agent of Mauritius, Dheerendra Kumar Dabee.

You have the floor, sir.

First Round: Mauritius

STATEMENT OF MR KOONJUL
CO-AGENT OF MAURITIUS
[ITLOS/PV.20/C28/3/Rev.1, p. 1–5]

Honourable Members of the Special Chamber, Honourable Agent and members of the delegation of the Republic of Maldives, it is a privilege and an honour to appear before you, in my capacity as Co-Agent of the Republic of Mauritius, to open the oral pleadings on behalf of the Republic of Mauritius.

I sincerely thank you, Mr President and Members of the Special Chamber, for holding this hearing and for making it possible for some counsel to appear virtually in these incredibly special and difficult circumstances because of the COVID-19 pandemic. We are also grateful to the International Tribunal for the Law of the Sea and, in particular, to its Registrar and her staff for the exemplary manner in which they have been carrying out their mandate, not least in arranging this hearing during such trying times. We welcome the opportunity that this hearing offers to engage with our colleagues from the the Maldives delegation.

Mr President, Members of the Special Chamber, these proceedings, which are aimed at settling a friendly dispute between the Republic of Mauritius and the Republic of Maldives, touch upon a matter of high importance to both countries, namely the delimitation of their maritime boundaries. This matter has remained unsettled for more than a decade, and that is why proceedings were instituted before an UNCLOS Annex VII arbitral tribunal, prior to their transfer to this Special Chamber.

Such transfer to a special chamber of ITLOS is in line with the strong support expressed by developing countries for ITLOS, which itself is a creation of the post-colonial era, one that reflects the recognition of the role of States that have emerged in the process of decolonization.

Mr President, on Tuesday last, the Maldives, throughout their oral presentation, repeated one refrain to the effect that Mauritius has come to this Special Chamber to resolve, or to achieve what it failed to achieve at the Annex VII proceedings concerning the "Marine Protected Area" and at the International Court of Justice in respect of what they call, the "territorial dispute" between Mauritius and the United Kingdom. Allow me to set the record straight. Mauritius does not seek, nor has it ever sought, to use these proceedings to settle a territorial dispute. In fact, there is no territorial dispute because the Chagos Archipelago is recognized under international law as forming an integral part of the territory of Mauritius.

Our Application makes this very clear. We have requested only one thing from this Special Chamber: that it delimit our maritime boundary with the Maldives. We have not brought before you any territorial issue. If that issue is before you, it is because it was raised by the Maldives in their preliminary objections, not by Mauritius. There was no need for them to have done so. The overwhelming majority of States, in fact all but a very small handful, clearly understand the ICJ to have determined that the Chagos Archipelago is, and always has been, an integral part of the territory of Mauritius.

It has also been alluded by the Honourable Agent of the Maldives that Mauritius has incorrectly and unjustifiably portrayed the Maldives as being opposed to decolonization. He has attempted to demonstrate his country's commitment to the principles of self-determination, decolonization and to international law by referring to the explanation of vote by the Permanent Representative of the Maldives at the United Nations after the adoption, by an overwhelming majority, of UN General Assembly resolution 73/295. That resolution affirmed the determinations of the ICJ and set out the responsibilities, under international law, of States, UN Agencies and specialized bodies in respect of the decolonization process of Mauritius. It is unfortunate that the Maldives was the only developing country in the world to vote against that

resolution as well as resolution 71/292, which requested an advisory opinion of the ICJ precisely on the question of the decolonization of Mauritius. Mr President, actions speak louder than words.

Let me also express my delegation's disappointment with the tone and content of the Maldives' concluding presentation, which accused Mauritius and its Counsel of bad faith. Such comments are not in keeping with the spirit of friendliness and co-operation that characterizes our bilateral relationship, and are beneath the dignity of this Special Chamber. We will not respond further to them. As the former First Lady of the United States has said: when they go low, we go high.

Mr President, Members of the Special Chamber, let me now briefly describe the geographical setting of Mauritius.

As you can see from the map which is on the screen, the Republic of Mauritius consists of a group of islands located in the Indian Ocean. The main Island of Mauritius is about 900 kilometres east of Madagascar. In addition to the main Island, in the Republic of Mauritius we have:

(a) Cargados Carajos, which lie 402 kilometres to the north;
(b) Rodrigues, situated at 560 kilometres to the north-east;
(c) Agalega, located at 933 kilometres to the north;
(d) Tromelin, situated at 580 kilometres to the north-west; and
(e) The Chagos Archipelago, including Diego Garcia, which is about 2,200 kilometres to the north-east. The Chagos Archipelago is about 517 kilometres from the Maldives, with which it has an undelimited overlapping maritime claim.

Mr President, Members of the Special Chamber, Mauritius and the Maldives enjoy very friendly and cordial relations. We are both Small Island Developing States. We face common challenges, such as the effects of climate change, vulnerabilities – both economic and environmental – as well as inherent structural handicaps such as distance from the markets, and dependence on tourism which, as we are all aware, have been compounded by the COVID-19 pandemic.

Both Mauritius and the Maldives belong to the Commonwealth as well as other international organizations. More often than not, we take a common position on world issues. Relations between Mauritius and the Maldives have been growing over the years with an increasing level of Mauritian investments in the banking and tourism sectors in the Maldives.

High-level visits have also been taking place, the highest one being the State visit of former President Nasheed in 2011, during which he was presented with the highest Mauritian Award – the Grand Commander of the Order of the Star and Key of the Indian Ocean (GCSK). Other visits by dignitaries from the Maldives have followed, the latest one being that of the President of the Maldives in July of last year in the context of the Indian Ocean Island Games hosted by Mauritius.

As small island countries, we both appreciate the value of marine and ocean resources for our economy. For many decades, because of lack of capacity, islands have not been able to fully exploit their resources for the benefit of their peoples. Despite these challenges, Mauritius has, over the past decades, endeavoured to conclude negotiations with neighbouring countries towards the delimitation of our maritime boundaries. In the same vein, in line with article 76 of UNCLOS, Mauritius has made submissions for an extended continental shelf in different regions of Mauritius. In the Mascarene Plateau region, in 2009, Mauritius and Seychelles, as two mid-ocean small island States, made a joint submission to the Commission on the Limits of the Continental Shelf (CLCS), and in 2011, the Commission endorsed an area of

396,000 square kilometres of extended continental shelf, which Mauritius and Seychelles are currently managing jointly.

Mauritius has also made a submission in respect of the southern region of the Chagos Archipelago and another one in respect of the Rodrigues region, both of which are awaiting consideration by the CLCS.

What remains for Mauritius is the preparation of a submission in respect of the northern region of the Chagos Archipelago, where there exists an overlap with the extended continental shelf claimed by the Maldives. As a prerequisite for such a submission, it is necessary to delimit the maritime boundary between Mauritius and the Maldives. The conclusion of such boundaries may also lead to the possibility of making – should the two States agree – a joint submission in respect of the extended continental shelf. The absence of such a boundary stops this process. It is unsettling and it undermines the rule of law.

As Counsel for Mauritius will elaborate in their presentations, Mauritius and the Maldives held discussions on delimitation in 2010. At that time, the Maldives raised no concern about it being "expected to take sides" in a dispute, as the Honourable Agent for the Maldives now appears to claim.[1] In fact, following those discussions, Mauritius has been expecting that the Maldives would take certain steps which would enable Mauritius to withdraw its objections to the Maldives' extended continental shelf submission and which would allow for the continuation of the delimitation talks. Unfortunately, despite several attempts, it has not been possible to move further from this longstanding stalemate. The Maldives continues to elude all discussions pertaining to maritime delimitation. That is why we are here today.

We consider that the Special Chamber plainly has the jurisdiction to hear this matter, and that there exists, equally plainly, no bar to the exercise of that jurisdiction. It is our hope that the Special Chamber will, in due course, apply the appropriate provisions of UNCLOS to delimit our maritime boundaries. In so doing, it will resolve the dispute between Mauritius and the Maldives. It will enhance the rule of law, offering respect for the International Court of Justice, as well as the rules and principles that the Court applied to complete the decolonization of Mauritius. To accede to the request of the Maldives, and to decline to exercise jurisdiction, will, we fear, diminish the standing of the Court and the Tribunal, undermine the rule of law, and give rise to fragmentation among international courts and tribunals. At a time when the International Court of Justice and the Tribunal have enhanced a common vision for matters of international law, including the law of the sea, and are sharing a commonality of judges, and even a Registrar, it would be dispiriting indeed to see these two international judicial bodies taking different approaches.

Mr President, Members of the Special Chamber, Counsel for Mauritius will go into greater details on the premise of our request, including the determinations of international law made by the ICJ in its Advisory Opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965.

Mauritius considers the ICJ findings to be unambiguous: the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius. Therefore, as the lawful sovereign over the Chagos Archipelago, Mauritius is the only State lawfully entitled to conclude maritime boundaries with its neighbours. The Maldives has characterized Mauritius' position in terms that the ICJ "resolved" a 40-year-old sovereignty dispute. That is not our position. The ICJ was not asked to do so nor was it required to do so. The Court made it clear that there is no, nor has there ever been, an "unresolved sovereignty dispute". Instead, the Court determined that the Chagos Archipelago was unlawfully detached from the territory of Mauritius in 1965, three years prior to its independence. It follows that there is no basis for the Special Chamber to

[1] ITLOS/PV/20C28/1, p. 5, line 42 (Mr Riffath).

decline to exercise its jurisdiction, or to refrain from delimiting the maritime boundary between the two Parties.

Before I conclude, I wish to record the objection of Mauritius to the contents of a document entitled "List of Issues in Dispute", which was included in the Judges' folder submitted to you by the Maldives on Tuesday. We only saw that document for the first time that evening, when the Judges' folder was sent to us at 8:28pm, almost two hours after the adjournment of the hearing. That document purports to set out a list of issues that, according to the Maldives, are agreed between the Parties. This is absolutely not the case. That document reflects only the erroneous views of the Maldives on various matters. The position of Mauritius is clearly set out in the written pleadings, and will be elaborated upon in the presentations that follow.

Let me also place on record that we have given copies of our own Judges' folder to the Maldives delegation shortly before the beginning of today's proceedings.

Mr President, Members of the Special Chamber, let me end my presentation by setting out the order in which Counsel for Mauritius will be making their presentations. First, Professor Philippe Sands QC will address the legal status of the Chagos Archipelago following the Advisory Opinion of the International Court of Justice. He will be followed by Mr Paul Reichler, who will present by video conference the arguments on why the Special Chamber should reject the preliminary objections of the Republic of Maldives. He will respond to the first two preliminary objections, which are, in their own words: (1) that you have no jurisdiction to determine what they call an "unresolved sovereignty dispute" over the Chagos Archipelago between Mauritius and the United Kingdom; and (2) that, in such circumstances, the United Kingdom is an indispensable party, whose absence from these proceedings deprives you of jurisdiction. Finally, Professor Pierre Klein will respond, also by video conference, to the last three preliminary objections and demonstrate that there is indeed a dispute between Mauritius and the Maldives which the Parties have thus far been unable to resolve and that the request made by Mauritius does not in any manner constitute an abuse of process.

Mr President, Members of the Special Chamber, it is a distinct privilege for Mauritius to participate in these hearings. My Delegation will remain available to provide any such assistance as you might need. We will be pleased to offer our fullest co-operation to the delegation of the Maldives in making these proceedings as helpful as possible to the Special Chamber. We welcome, of course, questions from the Special Chamber at any time during the course of the proceedings, and we will do our utmost to respond to those questions in a timely and comprehensive manner.

To assist the Special Chamber, we have made available a folder for each Judge, to which your attention will be directed during our presentations.

Mr President, I now respectfully request that you invite Professor Philippe Sands QC to make his presentation. Thank you, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Koonjul and now give the floor to Mr Philippe Sands to make his statement.

You have the floor, sir.

STATEMENT OF MR SANDS
COUNSEL OF MAURITIUS
[ITLOS/PV.20/C28/3/Rev.1, p. 5–25]

Mr President, Members of the Special Chamber, it is a privilege to appear before you on behalf of Mauritius and, I should say, a personal happiness to be here in person.

Mr President, in its written pleadings the Maldives has conjured up five supposedly distinct preliminary objections. Tuesday's restatement repeated them, although it did so with so many mischaracterizations and selective uses – on the process of decolonization, on the ICJ Advisory Opinion, on the General Assembly resolutions that preceded and followed that Opinion – that it is necessary for us to spend a little more time this afternoon on some rather basic matters. We know this to be a most diligent Tribunal and Special Chamber, sir, and we know that you will look at each act and each decision with the great care they deserve, but we do need this afternoon, given what you heard on Tuesday, to set the record straight.

At the heart of the Maldives' five objections – and of just about every statement it made on Tuesday – is the reality that they have, each of them, one thing in common: each is based on a "core" premise, as the Maldives puts it, that there is an "unresolved sovereignty dispute between Mauritius and the United Kingdom … with respect to the Chagos Archipelago."[1] If the Maldives is wrong on its "core" premise, then each and every one of its preliminary objections collapses. Mr President, the Maldives is wrong. There is no "unresolved sovereignty dispute" before you which you are asked to, or must, decide before proceeding to the delimitation of the maritime boundaries. There is no interest of any other State which could "constitute the very subject-matter of the judgment to be rendered on the merits of our Application".[2] There is no bar to the Special Chamber proceeding with the task entrusted to it under the Special Agreement, namely to delimit the maritime boundary between Mauritius and the Maldives in the Indian Ocean.

There is no "unresolved sovereignty dispute", as the Maldives puts it, for the reason made clear by the International Court of Justice in The Hague, the principal judicial organ of the United Nations, without a single dissent on the merits, not even by one judge: the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius, the Court made clear. It was an integral part of Mauritius before the British conquest of 1810, and it continued to be so through British colonial rule, until that ended in 1968, and it continued to be so at all times thereafter, as the ICJ explicitly found. It continues to be so today, as the ICJ also expressly found. This is not because Mauritius says so, or because the African Union says so, or anyone else of a political nature; this is because the International Court of Justice has said so. Its Advisory Opinion has been endorsed by the United Nations General Assembly, and subsequently applied by the United Nations Secretary-General. Without ambiguity, without blinking, the Court made it absolutely clear that the Chagos Archipelago has always been a part of the territory of Mauritius, and that it remains an integral part of the territory of Mauritius today. Before 1968 it was part of the colony of Mauritius, and since 1968 it has been part of the territory of the independent sovereign State of Mauritius, even if it has been under the "administration" of the United Kingdom. The question of the territorial status of the Chagos Archipelago is not a matter that requires judicial determination. That has been done. It has been done definitively and authoritatively. It is a settled matter under international law, not as a

[1] Written Preliminary Objections of the Republic of Maldives under article 294 of the United Nations Convention on the Law of the Sea and article 97 of the Rules of the International Tribunal for the Law of Sea (18 December 2019) (hereinafter "Maldives' Preliminary Objections"), para. 5.

[2] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 24, at para. 55.

political matter, but as a consequence of the expression of the principal judicial organ of the United Nations.

Let us be clear. This case is totally different from any of the ones cited by the Maldives on Tuesday, including, for example, *Ukraine* v. *Russia*. That is because this case is about decolonization, and it is also because, unlike any of those cases, there is an Advisory Opinion of the ICJ, a determination by the ICJ, that addresses the core issue. In none of the cases referred to by Professor Thouvenin – none – was there any ICJ determination directly on point.[3] Nor was there such a determination back in 2015 when the Annex VII arbitral tribunal gave its award. This case is not one in which the Tribunal is required to make a determination on competing territorial claims over the Chagos Archipelago, because last year the ICJ conclusively determined that the Archipelago is part of the territory of Mauritius, that the attempt at dismemberment in 1965 was unlawful, and that the subsequent colonial "administration" is an international legal wrong of a continuing character that must be terminated as rapidly as possible.[4] I hope you will forgive me for belabouring these points but you heard nothing about any of this from the Maldives earlier this week. It was though they were taking you to a completely different advisory opinion.

The determination of the Court has been adopted and affirmed by the United Nations General Assembly, in resolution 73/295, just last year, by an overwhelming vote.[5] Mr President, you have already heard there is only a single developing country in the whole world that voted against that resolution on decolonization: it was the Maldives, which, incidentally, also voted against the initial resolution requesting the Court to give an opinion on decolonization. Remarkably – even more remarkably – the Maldives, a former British colony, is alone among all the States in the world that have achieved independence since 1945 to have voted against either resolution. Mr President, on Tuesday we heard the Maldives profess its commitment to self-determination, to decolonization and to territorial integrity: its actions, its votes, and its arguments this week all offer a very different impression.

In the eyes of the world – the Court in The Hague, the General Assembly, the United Nations Secretary-General, every African country, every developing country – under international law the situation of Mauritius is entirely without any ambiguity: its territory includes the Chagos Archipelago, period. As the International Court made clear, self-determination, decolonization, independence and territorial integrity are, in international law, a part of a seamless whole. They go together.

In other words, in applying the law of self-determination and decolonization, as it did, the International Court necessarily had to and did express an opinion on the territorial integrity of Mauritius. It did so explicitly. Did the Court get it wrong? No. Did the Court lack authority? No. Does the Maldives disagree with what I have just said? No. Let us look at what they said in their Written Observations of 15 April 2020: "The Maldives does *not* suggest that the advice rendered by the ICJ in the *Chagos* Advisory Opinion was wrong or lacking in authority."[6] That is a huge concession. It is dispositive, in fact, because the ICJ got it absolutely right.

Mr Reichler and Professor Klein will address you specifically on the five preliminary objections. I will just address the factual and legal framework within which these questions fall to be considered, in more detail than I expected because the Maldives on Tuesday drove a coach

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[3] ITLOS/PV.20/C28/2, Mr Thouvenin, pp. 6-16.

[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 (hereinafter "*Advisory Opinion on the Chagos Archipelago*").

[5] United Nations General Assembly, resolution 73/295, *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (24 May 2019) (hereinafter "UNGA Res. 73/295").

[6] Written Observations of the Republic of Maldives in reply to the Written Observations of the Republic of Mauritius (15 April 2020), para. 4 (emphasis in the original).

and horses through that legal framework. First, I will offer you a reminder of the broad legal context, the law of self-determination and decolonization, matters on which the Maldives has said virtually nothing in its written pleadings, and even less on Tuesday. Then I will return to the factual background of this case and the circumstances in which it reaches you, including, significantly, the circumstances in which Mauritius achieved independence. This too the Maldives has totally ignored. Third, I will summarize the legal developments post-independence that put beyond doubt the territorial integrity of Mauritius, including the Chagos Archipelago.

I turn to the law of decolonization and self-determination. It is part of the applicable law to be applied by this International Tribunal, which we say should follow exactly the decision of the International Court of Justice. The origins of that law may be found in the mandate system embodied in article 22 of the Covenant of the League of Nations. This provided for certain territories which had become detached from defeated powers following the end of the First World War to come under the "tutelage" of Mandatory States on behalf of the League, which would then hold them as part of a "sacred trust of civilization" until such time as they would be "able to stand by themselves under the strenuous conditions of the modern world".[7] The mandate system envisaged self-determination as the ultimate outcome of that "sacred trust".

At the time of the San Francisco Conference in 1945, nearly one third of the world's population, more than 750 million human beings, lived in non-self-governing territories – words that offer a euphemism for colonies.[8] The Conference galvanized a significant shift in attitude, a move to an anti-colonialist sentiment. It applied the principles of the Atlantic Charter, signed by British Prime Minister, Winston Churchill, and United States President, Franklin Roosevelt, in August 1941. You can see it on your screen. I might just say, Mr President and Members of the Tribunal, that you will find all these documents at tab 12 of the Judges' folder, and this one is figure 2. The third paragraph, at tab 12, figure 2, the Atlantic Charter, is a commitment that the peoples shall "choose the form of government under which they will live".[9] Those words are the origins of what followed.

In 1945 – we are now at figure 3 of tab 12 – the League's mandate system was replaced by the trusteeship system, and Chapters XII and XIII of the Charter. "[S]elf-determination of peoples" was explicitly identified as one of the four purposes of the United Nations, in article 1, paragraph 2 ; and article 76 promotes what it calls the "progressive development towards self-government or independence … and the freely expressed wishes of the peoples concerned".[10]

By 1960, many countries had achieved independence, as the move to decolonization accelerated. In that year alone, 18 countries gained their independence, including 17 from Africa.[11] There are many people on this bench who are far more aware than I am of what happened in that period. In the autumn of 1960, self-determination reached centre stage at the General Assembly. In November, a draft "Declaration on the granting of independence to colonial countries and peoples" was debated, over two intense weeks.[12] On 14 December 1960, resolution 1514 (XV) was adopted. You will find it at figure 4 of tab 12.

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[7] Covenant of the League of Nations, article 22.

[8] United Nations Department of Public Information, *What the UN Can Do to Assist Non-Self-Governing Territories* (June 2017), p. 8, available at: https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/what_the_un_can_do_1.pdf (last accessed 19 September 2020).

[9] The Atlantic Charter (14 August 1941), available at: https://www.un.org/en/sections/history-united-nations-charter/1941-atlantic-charter/index.html (last accessed 19 September 2020).

[10] Charter of the United Nations, articles 1(2) and 76.

[11] *Advisory Opinion on the Chagos Archipelago*, para. 150.

[12] Letter to President of the General Assembly (A/4501, 23 September 1960). See: https://digitallibrary.un.org/record/1304736?ln=ne (last accessed 15 September 2020).

Resolution 1514 set out the key principles, of which, for today's purposes, three are paramount: first, that "[a]ll peoples have the right to self-determination"; second, that self-determination requires the free and genuine consent of the population concerned, namely the "[i]mmediate steps" to transfer "all powers to the peoples ... without any conditions or reservations, in accordance with their freely expressed will and desire"; and, critically for our purposes, third, that the right to self-determination prohibits "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country". "Territorial integrity"; the words come alive in 1960.

On its terms, resolution 1514 set out "the basis for the process of decolonization". Eighty-nine Member States voted in favour; not one voted against. There were nine abstentions, including the United Kingdom. In the years that followed, in the 1960s, a further 28 non-self-governing territories exercised the right to self-determination.[13] One of those was Mauritius. Another, we thought, was the Maldives.

Six decades later, the International Court of Justice, in the *Advisory Opinion on the Chagos Archipelago*, noted that resolution 1514 represented, as it put it, "a defining moment in the consolidation of State practice on decolonization", and that it "clarifie[d] the content and scope of the right to self-determination."[14] The Court also made clear, at paragraph 160 of its Opinion, that the maintenance of territorial integrity is a key element of the right to self-determination and the law on decolonization – a "key element" – and that "any detachment ... is contrary to the right of self-determination". In other words, self-determination, territorial integrity, decolonization and independence with territorial integrity are part of a seamless process, at the end of which an independent State emerges with undisputed sovereignty over the entirety of its territory.

As resolution 1514 was being debated in 1960, the situation of South West Africa came into view. Colonized by Germany in the late nineteenth century, South West Africa – which, of course, today is known as Namibia – was occupied by South Africa in 1915. The League of Nations conferred a mandate for the territory upon "His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa."[15]

After 1945, South West Africa could, and some say should, have become a trust territory under Chapter XII of the UN Charter. But South Africa stopped that and insisted that it would "continue to administer the Territory ... [under] the Mandate",[16] and also "to seek international recognition for the Territory of South-West Africa as an integral part of the Union." The UN General Assembly turned to the Court, which gave three advisory opinions on the matter, in 1950, 1955 and 1956.[17] The Court found that South Africa's obligation to submit to supervision had not disappeared, that the supervisory functions should be exercised by the United Nations, and that the status of that territory could only be modified "with the consent of the United Nations."[18]

In November 1960, at the precise moment that resolution 1514 emerged, Ethiopia and Liberia filed two cases at the International Court, alleging violations by South Africa of its obligations to the UN under the mandate. The focus was South Africa's practice of apartheid

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[13] *Advisory Opinion on the Chagos Archipelago*, para. 150.

[14] Ibid.

[15] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128 (hereinafter "*International Status of South-West Africa*") at p. 132.

[16] Ibid., pp. 134-135.

[17] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *South-West Africa – Voting Procedure, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23.

[18] *International Status of South-West Africa*, p. 144.

and the suppression of the rights and liberties of inhabitants of the territory essential to their orderly evolution towards self-government.[19]

The International Court joined the two South West Africa cases.[20] South Africa filed preliminary objections. It argued that Ethiopia and Liberia had no legal interest in the rights of the population of South West Africa. "Stop this case", they said.[21] But, in 1962 the Court rejected the preliminary objections of South Africa.[22] Then things changed. The composition of the Court changed. In 1966, on the casting vote of the President, Percy Spender, an Australian, supported by Sir Gerald Fitzmaurice, from the United Kingdom, the Court totally unexpectedly revisited its earlier decision, departed from it, and rejected the claims of Ethiopia and Liberia. Colonialism was back, it might be said, with a vengeance. The Court ruled that Ethiopia and Liberia had no standing to bring the cases that only the League had standing.[23] The Court had no jurisdiction to exercise. The judgment was widely seen as an outrage, and it plunged the Court into a controversy. I commend to you in particular the dissenting opinion of Judge Jessup. It is the only dissenting opinion that he ever wrote. It castigates the Court for, as he put it, "stopping at the threshold of the case" and "avoiding a decision" on a "fundamental question".[24] In this case, our case, at this stage, the "fundamental question" is analogous. The effect of the Advisory Opinion is centre stage. Will the International Tribunal for the Law of the Sea depart from the determination of the International Court of Justice? Is the Special Chamber of the Tribunal going to give effect to the Opinion or is it going to ignore the Opinion, as the Maldives asks you to do? Is the Special Chamber going to recognize and give effect to Mauritius' right to self-determination or is it going to stop at the threshold, as the Maldives asks you to do?

As you ponder that question, it is perhaps worth recalling what happened after the Court made its fateful judgment in 1966. The UN General Assembly adopted resolution 2145. You can see it on the screen; it is figure 5 at tab 12. By 114 votes to two, the Assembly reaffirmed "the inalienable right of the people of South West Africa to freedom and independence" in accordance with the UN Charter and resolution 1514.[25] It declared that "South Africa has failed to fulfil its obligations", and it terminated the mandate, putting South West Africa under the "direct responsibility of the United Nations."[26] The following year the Assembly created the UN Council for South West Africa (later renamed the Council for Namibia).[27] In 1973 the Council began to represent Namibia in the negotiations for the Law of the Sea Convention.[28] It did so despite South Africa's continued unlawful administration of the territory.

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[19] Application Instituting Proceedings by the Government of Ethiopia (4 November 1960), available at: https://www.icj-cij.org/files/case-related/46/9261.pdf (last accessed on 20 September 2020); Application Instituting Proceedings by the Government of Liberia (4 November 1960), available at: https://www.icj-cij.org/files/case-related/47/10723.pdf (last accessed on 20 September 2020).

[20] *South West Africa Cases (Ethiopia* v. *Union of South Africa; Liberia* v. *Union of South Africa), Order of 20 May 1961, I.C.J. Reports 1961*, p. 13.

[21] Preliminary Objections filed by the Government of the Republic of South Africa (30 November 1961), available at: https://www.icj-cij.org/files/case-related/46/9267.pdf (last accessed 20 September 2020), para. 49.

[22] *South West Africa Cases (Ethiopia* v. *Union of South Africa; Liberia* v. *Union of South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319.

[23] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

[24] *South West Africa, Second Phase*, Dissenting Opinion of Judge Jessup, available at: https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-07-EN.pdf (last accessed 20 September 2020), p. 1.

[25] United Nations General Assembly, resolution 2145 (XXI), *Question of South West Africa* (27 October 1966), preamble.

[26] Ibid., paras 3 and 4.

[27] United Nations General Assembly, resolution 2248, *Question of South West Africa* (19 May 1967).

[28] See e.g. Report of the United Nations Council for Namibia, Official Records: Twenty-Eighth Session, Supplement No. 24 (A/9024) (April 1974), at pp. 35 and 82, available at: https://digitallibrary.un.org/record/724946/files/A_9624%5EVol-I%5E-EN.pdf (last accessed 20 September 2020).

In 1970, the Security Council requested an advisory opinion from the Court on the legal consequences of the occupation.[29] You can see that at figure 6 of tab 12. By a large majority, and with a changed composition, the Court confirmed that South Africa's continued presence in Namibia was illegal, that South Africa "is under obligation to withdraw its administration from Namibia immediately" – I pause there to ask whether those words are familiar to you – and that all Member States were obliged to refrain from any acts "implying recognition of the legality of, or lending support or assistance to, such presence and administration".[30] Again, as you will see, those are very familiar words. The Court also decided that the termination of the mandate by the Assembly was binding and dispositive. Again, we are dealing here with an advisory opinion. You may wish in due course to remind yourselves of Sir Gerald Fitzmaurice's bitter dissent because, I have to say, in terms and in tone it sounded remarkably similar to what we heard on Tuesday from Counsel for the Maldives.[31]

Mr President, Members of the Special Chamber, contrary to what Professor Boyle told you,[32] the case before you today does raise analogous issues to those faced by the International Court in the *South West Africa* cases: the law of self-determination and decolonization, the dispositive effect of an ICJ advisory opinion, and the fact of an unlawful or illegal occupation or administration not being treated in any way that it could give rise to any legal rights whatsoever. We say, not with any happiness, that the situation of the United Kingdom in relation to the Chagos Archipelago today is akin to that of South Africa in relation to South West Africa after the 1971 Advisory Opinion. Back then, one might ask oneself the question: would South Africa have had a right under international law to be engaged in the delimitation of Namibia's maritime boundary with, let us say, Angola? You only have to pose the question for the obvious answer to appear. Having decided that Britain's administration in Chagos was unlawful and that it must be ended forthwith, do we really think that the Court was saying that the unlawful administrator nevertheless had a right under international law to delimit the maritime boundary between Chagos and the Maldives? Is that really what the Court said in February 2019, as we are being told here? Again, you only have to pose that question to recognize the implications – and, frankly, the absurdity – of the path that the Maldives is inviting you to take. When the Court says that a State has no right to administer a territory, it follows inexorably, as night follows day, that it can have no right to be involved in the delimitation of the maritime boundaries of that territory.

Any other conclusion risks casting this Tribunal into a wilderness, just as the International Court, after 1966, in failing to exercise jurisdiction in a matter of decolonization, was cast for many years into a legal wilderness. It took two decades for the Court in The Hague to regain the trust of many States. The Maldives urges you on a path that leads to the wilderness. We have trust in the International Tribunal for the Law of the Sea and for its respect for the rule of law, for the law on decolonization and self-determination and for its wisdom.

Mr President, if I may, I will move to the circumstances in which Mauritius obtained its independence – again something that the Maldives chose to ignore completely. I hope you might forgive me this short discursus into history. However, since the Maldives invites you to ignore history and since history is important, we have no choice. Mauritius was initially a French colony, and after 1810 a British colony.[33] Throughout colonial rule, and for as long as

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[29] United Nations Security Council, resolution 284 (29 July 1970).

[30] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 46.

[31] Ibid., at p. 220.

[32] ITLOS/PV.20/C28/2, Prof. Boyle, pp. 1-6.

[33] Written Statement of the Republic of Mauritius (1 March 2018), *Advisory Opinion on the Chagos Archipelago* (hereinafter "Written Statement of Mauritius ICJ"), para. 2.13.

there was human settlement, the Chagos Archipelago was always governed as an integral part of the territory of Mauritius.[34] That is a finding of law and fact by the International Court.

By the early 1960s, the process of decolonization of Mauritius was firming up. A series of constitutional conferences reflected a gradual move towards internal autonomy. But, unknown to Mauritius' elected representative at the time, the United Kingdom was devising a secret plan to detach a part of the territory of Mauritius – the Chagos Archipelago – to keep certain islands for defence purposes.[35] Against the background of resolution 1514 – you can see the relevant internal documents from the United Kingdom on your screen was and at figure 7 - the British Government recognized nevertheless that it would be, as it put it, "desirable to secure [Mauritian Ministers'] positive consent, or failing that, at least their acquiescence", to the detachment of the Chagos Archipelago.[36] These secretive minutes of the British Government proceed to state that "it would suit us better to confront the Mauritians with a *fait accompli* or at most tell them at the last moment what we are doing."[37]

As Mauritius moved closer to independence, the secret plan to detach the Chagos Archipelago proceeded. In June 1964, Dr Ramgoolam, the then Premier of Mauritius, was first told about the plan to detach the Chagos Archipelago. The British Governor, Sir John Rennie, reported that Premier Ramgoolam had "reservations on detachment".[38] The locally elected Mauritian Council of Ministers was consulted in July 1965 and strongly objected to detachment.[39]

In September 1965, as a fourth Constitutional Conference was held in London, the prospects for the independence of Mauritius remained uncertain.[40] The International Court's Advisory Opinion sets out in very considerable detail what happened next.[41] In short, the British Government made the independence of Mauritius conditional on Mauritian Ministers "agreeing" to detachment, linking "both matters in a possible package deal".[42] On the penultimate day of the Conference, Premier Ramgoolam was invited to a one-on-one meeting with the British Prime Minister, Harold Wilson. A note was prepared by Mr Wilson's Private Secretary, which you will be able to find at figure 8 of tab 12. This sets out in the starkest possible terms what colonialism means and what the object of that meeting was, and I will read it full.

> PRIME MINISTER
> Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago.[43]

The British Prime Minister received advice: "make some oblique reference" he was told "to the fact that [Her Majesty's Government] have the legal right to detach Chagos by Order in

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[34] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom*), PCA Case No. 2011-03, (hereinafter "Chagos MPA Award"), paras 58-60.
[35] Written Statement of Mauritius ICJ, para. 3.15 et seq.
[36] UK Foreign Office, Colonial Office and Ministry of Defence, US Defence Interests in the Indian Ocean, DO (O)(64)23, FCO 31/3437 (23 Apr. 1964), at p. 4 (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-01-EN.pdf). Judges' Folder, Tab 8.
[37] Ibid.
[38] Written Statement of Mauritius ICJ, para. 3.21.
[39] Ibid., para. 3.36.
[40] Ibid., para. 3.40.
[41] *Advisory Opinion on the Chagos Archipelago*, paras 94-131.
[42] Ibid., para. 102.
[43] UK Colonial Office, Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, PREM 13/3320 (22 Sept. 1965) (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-01-EN.pdf). Judges' Folder, Tab 9.

Council, *without* Mauritius' consent ...".[44] This Harold Wilson did, and in this way procured the supposed but reluctant "agreement" of Premier Ramgoolam and two of his colleagues to the detachment of the Chagos Archipelago. You will be aware that, in the later Annex VII Arbitration, Judges Kateka and Wolfrum of this Tribunal described the "agreement", if it can be called that, as having been obtained by "duress".[45]

Back in 1965 the Mauritians returned home and the British turned to the timing and modality of detachment. At figure 10 of tab 12 you will find a note from the British Colonial Secretary warning the Prime Minister, Harold Wilson, in the following terms:

> From the United Nations point of view the timing is particularly awkward. ... We shall be accused of creating a new colony in a period of decolonization ... The Fourth Committee of the United Nations has now reached the item on Miscellaneous Territories and may well discuss Mauritius and Seychelles next week. If they raise the question of defence arrangements on the Indian Ocean Islands before we have detached them, the Mauritius Government will be under considerable pressure to withdraw their agreement to our proposals. Moreover we should lay ourselves open to an additional charge of dishonesty if we evaded the defence issue in the Fourth Committee and then made the Order in Council immediately afterwards. It is therefore important that we should be able to present the U.N. with a *fait accompli*.[46]

And so, create a new colony is exactly what the British purported to do. Just three days later, on 8 November 1965, the Privy Council passed an Order in Council which purported to detach the Chagos Archipelago from Mauritius, to create what it called the "British Indian Ocean Territory", or BIOT. The Order in Council also amended the Constitution of Mauritius and deleted the words "Chagos Archipelago" from the definition of "Mauritius".[47] There is here one important point to make: the British claim to create the colony, and the supposed rights over the territory of the Chagos Archipelago, of which our friends from the Maldives make so much, were premised exclusively on that moment in 1965, on that supposed "agreement" of the Mauritians. Strip that away and there is no other basis for a claim. With its preliminary objections, the Maldives, which claims to be so committed to decolonization and self-determination, is actually in effect saying that what happened in 1965 was either lawful, plausible or arguable. The ICJ found otherwise, with no dissent on the merits. I can be crystal clear: what the Maldives is asking you to do is to set yourselves apart from the prior determination of the International Court of Justice.

Britain's actions in 1965 were immediately criticized by the international community, which saw straight through the subterfuge. In December 1965 – this is figure 10A – the UN General Assembly adopted resolution 2066. It expressed "deep concern" about the detachment and invited the United Kingdom "to take no action which would dismember the territory of Mauritius and violate its territorial integrity".[48] The British simply ignored the resolution.

On 30 December 1966, by a secret exchange of notes, the UK and the US concluded an agreement providing for the Chagos Archipelago to be made available for an initial period of 50 years to "meet the needs of both Governments for defense."[49] Shortly thereafter, between

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[44] *Advisory Opinion on the Chagos Archipelago*, para. 106 (emphasis in the original).

[45] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Dissenting and Concurring Opinion (18 March 2015), para. 77.

[46] UK Foreign Office, Minute from Secretary of State for the Colonies to the Prime Minister, FO 371/184529 (5 Nov. 1965) (available at: https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-02-EN.pdf). Judges' Folder, Tab 10.

[47] Written Statement of Mauritius ICJ, para. 3.96.

[48] United Nations General Assembly, resolution 2066 (XX), *Question of Mauritius* (16 December 1965). Judges' Folder, Tab 2.

[49] Written Statement of Mauritius ICJ, para. 3.98.

1967 and 1973, the British Government forcibly removed and deported the entire population of the Chagos Archipelago, approximately 1,500 men, women and children, many of whom had spent their entire lives living on the islands of the Archipelago. To deal with that, the British Government would assert in the UN and in its own Parliament – directly contrary to the facts that were known to it – that there was no "permanent population" in the Chagos Archipelago.[50]

Let us look at a note of a senior British official dating to that time – figure 11 of tab 12:

> We must surely be very tough about this. The object of the exercise is to get some rocks which will remain *ours*; there will be no indigenous population except seagulls.[51]

It continues with a response:

> Unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done, I agree we must be very tough.[52]

Many Chagossians have expressed a desire to return to their homes ever since then, and that wish remains unfulfilled. The forcible removal by the United Kingdom has been followed by a continuing denial of their right to return, and that continues even after last year's Advisory Opinion.

In the decades after the purported detachment, there has been sustained criticism directed at the UK, from Mauritius and around the world, including at the UN. As early as December 1966 the General Assembly adopted resolution 2232. That resolution reiterated that:

> any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories ... is incompatible with the purposes and principles of the Charter of the United Nations and ... resolution 1514 (XV).[53]

Over the intervening 50 years, five decades of international condemnation, you will find at figure 12 of tab 12 a list of all the resolutions condemning what has happened – from the African Union, before that the OAU, the non-Aligned Movement, the Group of 77 and China, the Africa-South America Summit and the Africa, Caribbean and Pacific Group of States.[54]

Mr President, that brings me to the circumstances that led to us to being before you today. In April 2010, the British Government purported to create a new "marine protected area" around the Chagos Archipelago, spanning some 640,000 square kilometres of Indian Ocean, on which there would be no activity and no right for anyone to return. Mauritius learned about the "MPA" from a newspaper article. In December 2010, it began proceedings under UNCLOS, seeking declarations on two points: first, that the UK had no right to create the MPA because it was not a coastal State; and, second, that the MPA was fundamentally incompatible with the rights and obligations provided for by the Convention.

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[50] Ibid., para. 3.102.

[51] Ibid., para. 3.103 (emphasis in the original).

[52] Ibid.

[53] United Nations General Assembly, resolution 2232 (XXI), *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands* (19 December 1967), para. 4. Judges' Folder, Tab 3.

[54] Written Statement of Mauritius ICJ, para. 4.42 et seq. The Africa, Caribbean and Pacific Group of States is now known as the Organisation of African, Caribbean and Pacific States (OACPS).

Unanimously, the Annex VII tribunal ruled that the MPA was indeed illegal, and that its creation violated numerous provisions of the 1982 Convention. By a narrow majority, the Annex VII tribunal declined to exercise jurisdiction in relation to the first request. It made no findings on the question of who was the coastal State. But, two of the five arbitrators, ITLOS Judges Kateka and Wolfrum, concluded that the majority had fallen into error, that the tribunal could and should have concluded that under the applicable law of self-determination and decolonization, Mauritius was indeed "the coastal State" within the meaning of the Convention, so that the UK had no right to create an MPA.[55] They made clear that their view was limited to the exercise of jurisdiction in a case concerning decolonization: it went no further than that. The majority expressed no view on the merits of this question. The fact is that no other international judge, court or tribunal has ever expressed any disagreement with the views of Judges Kateka and Wolfrum. Their Dissenting Opinion is at tab 4 of your folders.

But let me be clear, as Ambassador Koonjul said: Mauritius is not inviting the Special Chamber to revisit the matter or to express any views on the conclusion of the majority; nor are we asking you to express any views on the questions that arose in *Ukraine* v. *Russia*, which is entirely distinguishable from this case because, as I said, it was not about decolonization, and because there was no prior judicial determination of the underlying issues. There is therefore no need for you at all to reconsider the Annex VII tribunal's Award: the Advisory Opinion is an intervening legal fact; it postdates that Award, and it has definitively identified and applied the relevant rules of international law, and concluded that Chagos is an integral part of the territory of Mauritius, and only Mauritius.

The ICJ Advisory Opinion could be said to have its roots in the joint opinion of Judges Kateka and Wolfrum, which offered clear support for Mauritius' position on self-determination, decolonization and territorial integrity. Two judges of ITLOS – a body whose history is steeped in the law and practice of decolonization – catalysed the inclusion of an item on the agenda of the 71st session of the UN General Assembly in 2017, under the heading "Promotion of justice and international law". Agenda item 87 was titled "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."[56] The General Assembly debated the item on 22 June 2017, and it adopted resolution 71/292, which you will find at tab 5 of your folders. One of the very few States to vote against the resolution was the Maldives, which, as I have said, is a curious act indeed for a State that claims to be so deeply committed to decolonization. The resolution referred two questions to the ICJ: first,

> 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…?

And secondly:

> 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

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[55] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Dissenting and Concurring Opinion (18 March 2015), paras 92-94. Judges' Folder, Tab 4.

[56] United Nations General Assembly, *Agenda of the seventy-first session of the General Assembly: Adopted by the General Assembly at its 2nd plenary meeting on 16 September 2016*, A/71/251 (16 September 2016). Judges' Folder, Tab 5.

> resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?[57]

Thirty-one UN Member States, as well as the African Union speaking on behalf of the entire continent – 55 African States - filed written statements with the International Court. The UN Secretariat furnished the Court with a dossier of 6,150 pages, "documents likely to throw light upon" the General Assembly's two questions.[58] In September 2018 the Court heard oral arguments from 22 UN Member States and the African Union. On 25 February 2019, the Court delivered its Advisory Opinion. Its conclusions were absolutely crystal clear. Not a single judge – not one – dissented from the substance of the findings of the Court. Judge Donoghue declined to address the merits, but for reasons entirely related to jurisdiction; he did not dispute the findings on the merits. You will find the Advisory Opinion at tab 6 in your Judges' folder.

The Court unanimously concluded that it had jurisdiction to give the Advisory Opinion.[59] By 12 votes to two it concluded that there was no reason to decline to exercise its discretionary power to give the Opinion. It rejected the argument that the General Assembly's questions raised complex and disputed factual issues which were not suitable for determination in advisory proceedings.[60] It rejected the argument that an Advisory Opinion would not assist the General Assembly.[61] It rejected the argument that the Advisory Opinion "would reopen the findings of the [Annex VII] arbitral tribunal"[62] as the principle of *res judicata*, it concluded, did not preclude it from proceeding, and the issues determined by the UNCLOS Annex VII arbitral tribunal were "not the same as those before the Court".[63] And, most significantly for our purposes, it rejected the argument, led by the United Kingdom – and which you have heard repeated *ad nauseam* by the Maldives – that, "there is a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and that this dispute is at the core of the advisory proceedings."[64] No, said the Court: the Opinion requested was "on the matter of decolonization which is of particular concern to the United Nations", and the issues raised by the request were, as it put it, "located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable".[65] In other words, on this last point, the Court recognized, as Mauritius, the African Union and virtually every State that had participated had argued, that once the matter of decolonization is resolved, any issues about territorial sovereignty simply melt away. Even the United Kingdom recognized that reality. It accepted that if the Court was able to answer the General Assembly's questions, it would, in effect and *de facto*, be making a determination on sovereignty over the Chagos Archipelago. This is because the matter of sovereignty is inextricably embedded in the issue of decolonization. Once decolonization is resolved, the former issue just disappears. In its written statement to the Court, the United Kingdom recognized this:

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[57] United Nations General Assembly, resolution 71/292, *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* (22 June 2017).

[58] See Introductory Note, List of Documents and Parts I-III (Documents received from the Secretariat of the United Nations) (30 November 2017), available at: https://www.icj-cij.org/en/case/169/request-advisory-opinion (last accessed 20 September 2020).

[59] *Advisory Opinion on the Chagos Archipelago*, paras 59, 62.

[60] Ibid., para. 69 (Australia, Israel and the United Kingdom).

[61] Ibid., para. 75 (Australia and the United States).

[62] Ibid., para. 79 (Australia, France, the UK and the US).

[63] Ibid., para. 81.

[64] Ibid., para. 83 (the UK, Australia, Chile, Israel, France and the United States).

[65] Ibid., para. 88.

> If the current Request could be answered without *de facto* determining the longstanding bilateral dispute over sovereignty and related matters, the United Kingdom could and would have no objection. However, this does not appear to be possible (or intended).[66]

So the Court did answer the Request, and it did "*de facto* determine" that the United Kingdom claim was, as the United Kingdom expected, entirely without merit. The Court engaged in a detailed and thorough examination of the historical and legal record. Thousands of pages of contemporaneous documents, put before it by participating States as well and the UN Secretariat, legal pleadings from nearly three dozen countries, and more if you include the African Union, the Court was nothing if not thorough. The judges affirmed that "[i]t is for the Court to state the law applicable to the factual situation".[67] That is what it did: it gave the right to self-determination centre stage, the foundation of the law of decolonization. It is "a fundamental human right" that "has a broad ... application", the Court stated.[68] And it made clear that one key aspect of the right of self-determination, in assessing whether the decolonization of Mauritius had been completed, was the matter of territorial integrity and whether that had been maintained. The Court emphasized that resolution 1514 (XV) provides that – you can see it now on the screen, figures 14 and 15 of your folder at tab 12 -

> the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory ... . Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law.[69]

You did not hear a word from our friends about that passage in the Advisory Opinion; they just would prefer to ignore it. It was a key element of the Court's approach, which then turned to the application of the law to the facts. A first and decisive question was whether the Chagos Archipelago was, in 1965, an integral part of Mauritius – figure 15 at tab 12. Yes, the Court concluded, without ambiguity or dissent: "At the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory." Mauritius included Chagos, which was at that time "a colony, under the authority of the United Kingdom."[70]

The Court then turned to the question of whether the people of Mauritius had given their consent to the detachment of a part of their territory. The Court concluded, without ambiguity, that they did not. It was, the Court found,

> not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter.[71]

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[66] Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 February 2018), *Advisory Opinion on the Chagos Archipelago*, para. 7.15.
[67] *Advisory Opinion on the Chagos Archipelago*, para. 137.
[68] Ibid., para. 144.
[69] Ibid., para. 160.
[70] Ibid., para. 172.
[71] Ibid.

From this it followed that "heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony."

The Court then engaged in heightened scrutiny. It reviewed the contemporaneous evidence from the time, the internal papers and documents – some of which I have taken you to. It "reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago". What did the International Court of Justice conclude? Without dissent, "[T]his detachment was not based on the free and genuine expression of the will of the people concerned."[72] That is a finding of law and fact by the principal judicial organ of the United Nations.

So the Court found that the detachment was unlawful in 1965, and continued to be unlawful in 1968, and at all times thereafter. The *dispositif* reads:

> As a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.[73]

Mr President, Members of the Special Chamber, there is here not a hint of any ambiguity whatsoever. There is no dissent on the substance, and it is simply not possible to read the Advisory Opinion in any other way than to conclude that the purported detachment of the Chagos Archipelago was unlawful and without legal effect on the territorial integrity of Mauritius. It follows from this that the Chagos Archipelago was part of Mauritius in 1965, in 1968, and at all times thereafter, including, for your purposes, today. It follows from this, as the Court concluded, that the United Kingdom is in unlawful occupation of the territory, as it has been since 8 November 1965. Mr Reichler will take you to the text of the Court's Opinion on this – again, something which the Maldives failed to do in its rather selective approach to the Advisory Opinion, an Opinion which we say deserves to be treated with considerable respect.

I turn to the second question addressed by the Court, the consequences under international law arising from the continued administration by the United Kingdom of Chagos. On this the Court made three findings that we say are absolutely central to this case. You will find this material at figure 17 of tab 12.

First, the Court declared that because

> the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.

And the Court went further, stating that the United Kingdom's illegal administration "is an unlawful act of a continuing character".[74] It is plain from this that the Court concluded that the purported detachment of the Archipelago was without legal effect on the territorial integrity of Mauritius *ab initio*. It was unlawful in 1965, and at no point since 1965 has that unlawfulness disappeared – not a single dissent in the Opinion to that view.

Second, the Court declared that it followed from its conclusions that

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[72] Ibid.
[73] Ibid., para. 174.
[74] Ibid., para. 177.

> the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.[75]

You will note, Mr President – and let us go slowly through this – that the Court used the present tense. It did not refer to the obligation as one that was limited to a past moment; it spoke of "enabling Mauritius to complete the decolonization of its territory". "Its territory" encompasses the Chagos Archipelago. It is part of the "territorial integrity" of Mauritius, not of the United Kingdom, not of any other State, the Court has stated – again, without any dissent on the merits. You will note that the Court did not say that, having ended its administration, the United Kingdom was under an obligation to cede back the territory it had taken. The only reasonable reading of the *dispositif* is that Chagos remains today, and has always been, a part of the territory of Mauritius, and that what is needed is only an end to British "administration" and the start of Mauritian "administration". The territory, its territory, is part of Mauritius.

And third, the Court found that the right to self-determination is an obligation *erga omnes*, and because of this "all States have a legal interest in protecting that right" and

> [e]very State has the duty to promote ... the principle of ... self-determination of peoples ... and to render assistance to the United Nations in carrying out the responsibility entrusted to it by the Charter regarding the implementation of the principle.[76]

Mr President, "all States" includes the Maldives. By making these preliminary objections, the Maldives is manifestly failing in its duty to promote the self-determination of the people of Mauritius. It is wilfully failing to respect the territorial integrity of Mauritius. This is deeply regrettable. Professor Klein will have more to say on the consequences for this Special Chamber of what the Maldives is trying to do. Again, across more than four hours of statements on Tuesday, you heard not a word about any of this material.

With the authoritative, definitive and unambiguous Advisory Opinion handed down by the Court, the legal status of the Chagos Archipelago admits of no ambiguity whatsoever. It is a part of the territory of Mauritius. Period. And as a part of the territory of Mauritius, to Mauritius and Mauritius alone, falls the responsibility of, and the right to, administration, which includes the delimitation of the maritime boundaries pertaining to the entirety of its territory, including the Chagos Archipelago. As they say, the land dominates the sea. Mauritius is the coastal State in respect of the Chagos Archipelago, for the purposes of articles 74 and 83 of the Convention. It is the only coastal State. As noted, the United Kingdom today has no more right to delimit the maritime boundary between Mauritius and the Maldives than would South Africa, back after 1971, to seek to delimit the maritime boundary between Namibia and Angola.[77]

The Court's Advisory Opinion is, of course, not the end of the story. Three months later, in May 2019, the General Assembly adopted resolution 73/295.[78] It did so by an overwhelming majority, with 116 in favour, just six against. A copy of that resolution is at tab 7 of your folders. Somehow, the United Kingdom was joined by the Maldives, in circumstances that evidently raise questions beyond any of our mandates; but it may be that you, like us, noted

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[75] Ibid., para. 178.
[76] Ibid., para. 180.
[77] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.
[78] UNGA Res. 73/295, (22 May 2019).

Professor Akhavan's closing words on Tuesday, his expression of fear of being "used as a pawn in someone else's chess game".[79]

After the vote, the Permanent Representative of the Maldives told the General Assembly: "We fully respect the ICJ Advisory Opinion."[80] Really? So what on earth are they doing here? Perhaps the respect is not so full – partial respect. Well, it is plain that they do not. The representative continued that it "prejudged" the 2010 submission by the Maldives to the Commission on the Limits of the Continental Shelf, and "does not provide clarity". Really? No clarity? Let's take a quick look at resolution 73/295, yet another thing the Maldives simply failed to take you to. You can see it on your screen. This is figure 19 of tab 12.

The General Assembly welcomed and affirmed the findings of the Court. It confirmed that "[t]he Chagos Archipelago forms an integral part of the territory of Mauritius."[81] Again you will note the use of the word "forms", in the present tense, not "formed", in the past tense, or "will form", in the future tense. The words are crystal clear. The Assembly demanded that the UK

> withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months … thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible.

In other words, the administration must end by November 2019 – and to "pose no impediment" to "the resettlement of Mauritian nationals … in the Chagos Archipelago."[82] We ask the question: where is the lack of clarity there? There is no requirement, again, to transfer title, cede sovereignty, because all this is totally unnecessary: sovereignty inevitably pertains to the State of which the territory is an integral part. The Assembly called on all Member States to "cooperate with the United Nations to ensure the completion of the decolonization of Mauritius as rapidly as possible". That looks pretty clear to us. As a matter of international law, the Maldives is under an obligation to cooperate.

The General Assembly also addressed the obligations of other entities, the UN and its Specialized Agencies, and, in the resolution, all other international, regional and intergovernmental organizations, including those established by treaty. We would submit that the International Tribunal for the Law of the Sea is one such organization. It too is asked to do that which is laid out at paragraphs 6 and 7 of the resolution, namely:

> to recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius, to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the "British Indian Ocean Territory".[83]

On Tuesday we heard nothing from the Maldives to explain its view as regards the ambiguity of those words. They didn't tell us why they believe that the Special Chamber and ITLOS should not be required to – or should not – "recognize that the Chagos Archipelago forms an integral part of the territory of Mauritius". Perhaps they will tell us on Saturday. Nor did the Agent or Counsel explain how their submissions could be said to be supportive of the

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[79] ITLOS/PV.20/C28/2, p. 36, line 22 (Professor Akhavan).

[80] See: http://maldivesmission.com/statements/statement_by_the_maldives_at_the_general_assembly_plenary_meeting_on_advisory_opinion_of_the_international_court_of_justice_on_the_legal_consequences_of_the_separation_of_the_chagos_archipelago_from (last accessed 30 August 2020). See also: https://www.un.org/press/en/2019/ga12146.doc.htm (last accessed 20 September 2020).

[81] United Nations General Assembly, resolution 73/295, para. 2(b).

[82] Ibid., paras 3 and 4.

[83] Ibid., paras 6 and 7.

completion of the decolonization of Mauritius. Again, we look forward to hearing that on Saturday.

If we go back to 1971 and the Court's Advisory Opinion on Namibia, was there any doubt, any lack of clarity, as to the rights of South Africa in respect of the territory of Namibia? There was none. Could South Africa, which continued to occupy the territory, negotiate Namibia's boundaries with its neighbours? Of course it could not. Could South Africa negotiate the Law of the Sea Convention on behalf of Namibia? Of course it could not, and it did not. Those negotiations were conducted by the UN Council for Namibia, on behalf of Namibia. Was the Law of the Sea Convention signed by South Africa? It was, on 5 December 1984. Was it signed in respect of the territory of Namibia that it continued to occupy unlawfully? No, it was not because two years earlier, on 10 December 1982, the Convention was signed for Namibia by the UN Council for Namibia.[84]

Following the adoption of resolution 73/295, and in application of the ICJ Advisory Opinion, the practice of the United Nations has conformed to its requirements. In his report to the General Assembly on the implementation of resolution 73/295, the UN Secretary-General noted a change in the "designation of the Chagos Archipelago … on the maps produced by the Secretariat".[85] Earlier UN maps (this is from figure 22 of tab 12) depicting the Chagos Archipelago contained an accompanying footnote, which stated - as you will see on the screen – that "this appears without prejudice to the question of sovereignty." Here is the map from June 2018, a year before the International Court's determination and the General Assembly resolution – you can see the footnote next to the Chagos Archipelago – the two stars, Chagos Archipelago, Diego Garcia – and it states, as appears on the map "without prejudice to the question of sovereignty".[86] Now let us look at the new UN map issued in February 2020, where the Chagos Archipelago is depicted, as it must be, as part of the territory of Mauritius.[87] The two stars are gone; the accompanying words have gone, they have been removed; and instead, the words have been replaced with the following designation: "Chagos Archipelago (Mauri.)", Mauritius.

In the coming months and years all the Specialized Agencies and other bodies are expected to continue to take steps, as they are doing, to implement the conclusions of the ICJ and the decisions of the General Assembly.

Mr President, the findings of the Court have been affirmed by the subsequent practice of the UN General Assembly, the Secretariat, the vast majority of its Member States and several Specialized Agencies. The response is reflective of the crystal clarity of the matter; further confirmation, although none is needed, of the *erga omnes* obligation to respect the territorial integrity of Mauritius. In proceeding to delimit the overlapping maritime zones of Mauritius and the Maldives, the International Tribunal for the Law of the Sea is asked to do no more than respect the territorial integrity of Mauritius, as confirmed by the Court. The Court has stated what the law is, and it has applied the law to the facts. A Special Chamber of ITLOS too is required to apply that same law, under article 293 of the 1982 Convention. For it to apply that law and then reach a different conclusion from the International Court, or no conclusion, as the Maldives wishes, would sow the seeds of discontent. It would mean turning a blind eye to the continued colonization of Mauritius. It would mean perpetuating an administration that should

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[84] See UNCLOS, article 305(1)(b).

[85] United Nations General Assembly, Seventy Fourth Session, Item 86 of the Agenda, Advisory Opinion of the International Court of Justice on the separation of the Chagos Archipelago from Mauritius in 1965, Report of the Secretary General, UN doc. A/74/834 (18 May 2020), para. 6.

[86] United Nations, *The World* (June 2018), available at: https://digitallibrary.un.org/record/3810838?ln=en (last accessed 20 September 2020).

[87] United Nations, *The World* (February 2020), available at: https://www.un.org/Depts/Cartographic/map/profile/world.pdf (last accessed 20 September 2020).

have ended last November. It would mean failure to allow Mauritius to enjoy its territorial integrity. It would mean divergence from the International Court of Justice. There is no way around that. Legal harmony would be replaced by legal discord.

That raises some obvious questions. Is ITLOS, an institution created in the aftermath of the Court's disastrous 1966 judgment, and itself existing as an expression of the world's commitment to decolonization, really going to accede to the arguments of the Maldives? Is it really imaginable that a special chamber of ITLOS, applying the law which the drafters of UNCLOS directed it to apply, could, as Judge Jessup put it, stop at the threshold?

The legal status of Chagos has been definitively settled by the principal judicial organ of the United Nations. Thirteen of the Court's judges supported the conclusion explicitly. A fourteenth dissented only on the matter of jurisdiction, not on the merits. A fifteenth, the author of *The Creation of States Under International Law*, could not sit on the case because he was conflicted. Mr President, 19 international judges and arbitrators have now had an opportunity to consider the question of decolonization, territorial integrity and Mauritius. Fifteen of them – including a majority of the ITLOS judges who have expressed a view on the matter – have concluded that the Chagos Archipelago was, is and has always been a part of the territory of Mauritius. Not a single judge or arbitrator out of the 19 – not at the ICJ, not at ITLOS, not anywhere else – has reached a different conclusion – not one judge.

In its written and oral pleadings, the Maldives has offered a selective and partial account of history, of the facts, of the ICJ Advisory Opinion and of the UN General Assembly resolutions. To reach the conclusion it seeks – that ITLOS does not have jurisdiction to delimit the maritime boundaries of Mauritius and Maldives – would undermine and frustrate the decolonization of Mauritius. It would amount to a decision that the Court got the law of self-determination wrong, or that its findings can be ignored. It would open the door to an unlawful administering power continuing to claim that the Chagos Archipelago is not a part of the territory of Mauritius, or that Mauritius is not entitled to delimit its maritime boundaries in respect of a part of its territory, namely the Chagos Archipelago. The Court's judgment in 1966 in South West Africa offers a salutary reminder of the consequences of what happens when an international court embraces the perpetuation of unlawful colonial administration.[88]

Mr President, Members of the Special Chamber, that concludes my presentation. I thank you for your kind attention. It may be that this is a good moment for a well-deserved coffee break, after which you may wish to invite Mr Reichler to beam in from Washington DC to address the first two of the Maldives' preliminary objections.

I thank you very much for your kind attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Sands.

At this stage the Special Chamber will withdraw for a break of thirty minutes. We will continue the hearing at 4.05 – five past four.

(*Break*)

[88] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

PUBLIC SITTING HELD ON 15 OCTOBER 2020, 4 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

For Mauritius: [See sitting of 13 October 2020, 2 p.m.]

For the Maldives: [See sitting of 13 October 2020, 2 p.m.]

AUDIENCE PUBLIQUE TENUE LE 15 OCTOBRE 2020, 16 HEURES

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour Maurice : [Voir l'audience du 13 octobre 2020, 14 h 00]

Pour les Maldives : [Voir l'audience du 13 octobre 2020, 14 h 00]

THE PRESIDENT OF THE SPECIAL CHAMBER: I now give the floor to Mr Paul Reichler, who is connected via video link, to make his statement.

Mr Reichler, you have the floor.

First Round: Mauritius (continued)

STATEMENT OF MR REICHLER
COUNSEL OF MAURITIUS
[ITLOS/PV.20/C28/4/Rev.1, p. 1–23]

Mr President, Members of the Special Chamber, it is an honour for me to appear before you, and a privilege for me to represent the Republic of Mauritius. My only regret is that I cannot appear before you physically, but I greatly appreciate the accommodation that you have made in allowing me to appear virtually.

Although all you can see of me are my head and shoulders, I assure you that I have dressed properly for the occasion, in a full, formal morning suit, just as I would have if I had been able to appear before you in the courtroom. Whether the appearance is virtual or physical, the occasion is solemn and serious, and my attire reflects my utmost respect for this Tribunal and the important purpose for which it has been convened.

Mr President, I have been asked by the Co-Agent of Mauritius to respond to the first two of the Maldives' preliminary objections, which are, in their words: (1) that you have no jurisdiction to determine what they call an "unresolved sovereignty dispute" over the Chagos Archipelago; and (2) that, in such circumstances, the United Kingdom, allegedly, is an indispensable party, whose absence from these proceedings deprives you of jurisdiction.

Although these are framed as two separate objections, they are actually one and the same. The objection that the United Kingdom is an indispensable party to these proceedings depends entirely on it being a party to a supposedly "unresolved sovereignty dispute" with Mauritius. If there is no unresolved sovereignty dispute over Chagos because, as a matter of international law, that territory is, and has always been, an integral part of the territory of Mauritius, then the UK cannot be indispensable to these proceedings, and both of the Maldives' preliminary objections must fail.

Mauritius submits that, whether viewed singly or in combination, the Maldives' preliminary objections have no merit whatsoever. Our position in response to both of them is reflected in Professor Sands' remarks, and can be summarized as follows: The issue of whether the Chagos Archipelago is an integral part of the territory of Mauritius or whether it is a lawful colonial possession of the UK was resolved definitively, and as a matter of international law, by the International Court of Justice in its Advisory Opinion of 25 February 2019.

As a consequence, Mauritius is the only State entitled to claim sovereignty over Chagos; the United Kingdom has no sovereignty in respect of the Archipelago; and, insofar as these proceedings are concerned, it has no legal rights that could be affected by a delimitation of the maritime boundary between the Archipelago and the Maldives. The United Kingdom is neither indispensable nor even relevant to the delimitation of the maritime boundary that Mauritius asks you to delimit in these proceedings.

Mauritius does not ask, and has never asked, the Special Chamber to make a determination on which State is sovereign over the Archipelago, and there is no reason for you to do so. The ICJ has already confirmed that, as a matter of international law, the Chagos Archipelago is an integral part of Mauritius, and only Mauritius, and that the UK's ongoing colonial administration is a continuing wrong under international law which the UK is obligated, under international law, to terminate as rapidly as possible. The Special Chamber is called upon only to recognize and respect the ICJ's authoritative determination of this issue, and then proceed to delimit the maritime boundary between Mauritius and the Maldives, which is all that Mauritius has requested of you.

The Maldives makes three specific arguments in its effort to support its case that, notwithstanding the ICJ's determination that the Chagos Archipelago is an integral part of the

territory of Mauritius, there still exists a so-called "unresolved sovereignty dispute". Their arguments are: first, that the ICJ did *not determine* who is sovereign over the Chagos Archipelago, so that sovereignty allegedly remains unresolved; second, even if the ICJ determined that Mauritius is sovereign, its determination is *not binding*; and third, even if the ICJ determined the sovereignty issue, and even if its determination is binding, the United Kingdom *does not accept it*. All three of these arguments are manifestly erroneous or misguided, and they fail to support the Maldives' preliminary objections. I will spend the balance of my presentation today demonstrating this for you, by refuting each of their three arguments in turn, and then showing you why the *Monetary Gold* principle, invoked by the Maldives, has no application to this case.

I begin with the Maldives' argument that the ICJ did not determine which State is sovereign over the Chagos Archipelago. As a starting point, I call your attention, as Professor Sands did, to a very significant admission that the Maldives has made on the first page of its Written Observations of 15 April 2020, at paragraph 4:

> the Maldives does *not* suggest that the advice rendered by the ICJ in the *Chagos* Advisory Opinion was wrong or lacking in authority.[1]

This is quite helpful. It recognizes that the Court's Opinion is both correct and authoritative. Although the Maldives did not repeat this statement on Tuesday, they made no effort to retract it either. So, we can say that both sides are in agreement that the Advisory Opinion is correct, and that it is authoritative.

The disagreement between us in these proceedings is over what it was that the ICJ correctly and authoritatively determined. You have heard them repeat over and over again, in every speech, and even several times within a speech, that the Court did not determine that Mauritius is sovereign over Chagos. But what you did not hear from them on Tuesday, from any of them, is any kind of textual analysis of the Court's Opinion. You won't find one in their written pleadings either. For a party that purports to be so convinced of the correctness of its interpretation of that Opinion, they are remarkably – we would say, revealingly – silent about what the Court actually said. In this, they have taken social distancing to a new extreme, running as far away as possible from the Court's actual words, as if by reading them they might contract a potentially lethal virus.

In fact, their entire argument that the Court did not determine which State is sovereign is based on their reading of a single sentence in the Opinion, not even an entire paragraph. Both Professor Akhavan and Professor Boyle quoted this sentence and built their arguments entirely upon it. Professor Thouvenin did not quote or cite even that much from the actual Opinion; his speech made no reference whatsoever to what anything that the Court said. The magic sentence – at least for Professors Akhavan and Boyle, is found in the middle of paragraph 86 of the Opinion. It reads as follows: "The General Assembly has not sought the Court's Opinion to resolve a territorial dispute between two States."[2]

This turns out to be an astonishingly weak foundation for the argument that Counsel for the Maldives have attempted to construct. First, it doesn't mean what they say it means, even if interpreted in isolation from the rest of the Opinion. And second, the rest of the Advisory Opinion – which they entirely ignore – makes it crystal clear that the Court determined, in no

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[1] Written Observations of the Republic of Maldives in Reply to the Written Observations of the Republic of Mauritius (15 April 2020) (hereinafter "Maldives' Written Observations"), para. 4.

[2] Maldives' Written Observations, para. 31, citing *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 86; ITLOS/PV.20/C28/1, p. 14, lines 33-34 (Mr Akhavan); ITLOS/PV.20/C28/2, p. 5, lines 12-16 (Mr Boyle).

uncertain terms, that the Chagos Archipelago belongs exclusively to Mauritius as an integral part of its territory.

Let us first examine the Maldives' favourite sentence in context. Instead of surgically removing it from the middle of paragraph 86, as the Maldives have done, let us look at it and read it, together with the sentences immediately before and after it.

In sequence, the three sentences read as follows:

> The Court notes that the questions put to it by the General Assembly relate to the *decolonization* of Mauritius. The [UNGA] has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius.[3]

This was the Court's response to the United Kingdom's objection that the questions submitted by the General Assembly improperly sought to have the Court rule on a bilateral territorial dispute, and the UK's request that the Court exercise its discretion to decline to answer the questions on this basis. Here, the Court was rejecting the UK's objection by distinguishing a request for an Opinion on *decolonization*, specifically whether the decolonization of Mauritius had been lawfully completed, which it considered appropriate as a subject of an Advisory Opinion, from a purely bilateral territorial dispute between two States, unrelated to decolonization. It is instructive in this regard that the paragraph in question falls squarely within the section of the Opinion addressing the nature of the questions presented by the General Assembly, and whether the Court should answer them, or exercise its discretion not to do so, and not in the part of the Opinion where the Court gives its answers to the Assembly's questions.

Significantly, the Court goes on to further explain in the same section of its Opinion that, because the UNGA's questions related to decolonization, it was appropriate to answer them, even though answering those questions required the Court to address other legal issues that were related to and inseparable from the issue of decolonization.

These related and inseparable issues included whether the Chagos Archipelago, at the time of its purported separation from Mauritius in 1965, and thereafter, was and is an integral part of the territory of Mauritius. This is evident from the paragraphs that immediately follow the one I just showed you, but which the Maldives has completely ignored and would bury deep underground, if it could. For example, the Court wrote in paragraph 88:

> The Court therefore concludes that the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable.[4]

The Court left no doubt about which issues it regarded as inseparable from one another. In particular, it recognized that the issue of whether the Chagos Archipelago forms an integral part of Mauritius was inseparable from the issue of the lawfulness of Mauritius' decolonization, and that its Opinion on decolonization would necessarily address and resolve both issues. This was unavoidable, and it was not regarded as a problem by the Court. As it continued in the next paragraph, paragraph 89:

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[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 86 (emphasis added). Judges' Folder, Tab 6.

[4] Ibid., para. 88.

> the Court observes that there may be differences of views on legal questions in advisory proceedings ... . However, the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute.[5]

Inevitably, in replying to the General Assembly's request, and deciding whether the decolonization of Mauritius had been lawfully completed, the Court was also determining which State is sovereign over Chagos. Simply put, if the Court had answered the question on decolonization in the manner proposed by the UK and found that its decolonization of Mauritius had been lawfully completed, then there would be no question but that the UK's retention of Chagos, and its exercise of sovereignty over that territory, would be lawful. In contrast, an Opinion that the decolonization of Mauritius had not been lawfully completed, because of the UK's failure to include Chagos in the decolonization of Mauritius in 1968, could only mean that Chagos was and still is an integral part of Mauritius, and therefore subject to its sovereignty.

Tellingly, and not at all helpful to the Maldives' arguments here, the UK itself recognized that the issue of sovereignty over Chagos was inextricably linked to the lawfulness of Mauritius' decolonization, so that the Court's answer on decolonization would unavoidably determine which State is sovereign. Indeed, this is exactly what the UK told the Court. As Professor Sands pointed out, in its written pleadings to the Court, at paragraph 7.15, the UK made this perfectly clear, and it is worth seeing what they said again:

> The United Kingdom has no wish to contest the suitability of the Court addressing matters of decolonization in general. If the current request could be answered without *de facto* determining the longstanding bilateral dispute over sovereignty and related matters, the United Kingdom could and would have no objection. *However, this does not appear to be possible (or intended).*[6]

Mr President, Members of the Special Chamber, it was not possible for the Court to address decolonization without determining what the UK called a longstanding dispute over sovereignty, and this was what the UK itself told the Court.

The United Kingdom was not the only State to recognize that the Court's Opinion on decolonization would necessarily determine sovereignty over Chagos. This was Mauritius' position as well. Counsel for the Maldives have egregiously mischaracterized that position. Contrary to the insistence of Professors Akhavan and Boyle, Mauritius did not "invite" the Court to find that the sovereignty issue was subsumed within the question of decolonization, such that deciding the one would also decide the other; nor did the Court reject an "invitation" from Mauritius that it never received.[7] Rather, Mauritius' argument to the Court was similar to that of the UK: that the underlying sovereignty dispute could not be separated from the question of decolonization, and that by answering the UNGA's questions on decolonization – which was the foundational and dispositive issue – the sovereignty issue would inevitably be resolved. The difference between the UK and Mauritius was that, for the UK, this was a reason for the Court to refrain from answering the UNGA's questions; while for Mauritius, this was a reason for it to answer them. It is of paramount significance, therefore, that, faced with these entirely

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[5] Ibid., para. 89.

[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom of Great Britain and Northern Ireland (15 February 2018), para. 7.15 (emphasis added), available at: https://www.icj-cij.org/files/case-related/169/169-20180215-WRI-01-00-EN.pdf (last accessed 15 October 2020).

[7] ITLOS/PV.20/C28/1, p. 15, lines 23-26 (Mr Akhavan); ITLOS/PV.20/C28/2, p. 5, lines 12-14 (Mr Boyle).

congruent views by the two main protagonists in the Advisory Proceedings, on the consequences of answering the questions, the Court chose to do so.

Indeed, it was obvious to everyone that the issuance of an Opinion on the lawfulness of decolonization would necessarily determine sovereignty over Chagos. The representative of India, for example, stated:

> The Court, in our view, in the making of its advisory opinion on the questions referred to it, would need to analyze certain factors, *inter alia*, that with which country the sovereignty of the Chagos Archipelago rests ...[8]

According to the representative of Zambia:

> [T]hat the advisory proceedings will have implications for sovereignty over territory in no way makes it a purely bilateral matter... [D]ecolonization always implicates sovereignty over territory. This is because the law relating to decolonization is about the right of a people to govern themselves and the territory within which they live.[9]

Zambia got it exactly right. Decolonization always implicates sovereignty, because the end result of decolonization is independence, and the exercise of sovereignty by the newly independent State over the entirety of the former colonial territory. This is hardly a novel proposition. The Max Planck Encyclopedia of International Law, among many authoritative sources, states that decolonization is defined as "[t]he process by which a colonial power divests itself of sovereignty over a colony ..."[10]

Thus, in answering the General Assembly's first question, whether the decolonization of Mauritius had been lawfully completed, the Court clearly understood that, in so doing, it was determining which State was the lawful sovereign over Chagos. The Court began its analysis at paragraph 170, by finding that "at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was an integral part of" Mauritius. In paragraph 172, the Court determined that "this detachment was not based on the free and genuine expression of the will of the people concerned." In the next paragraph, the Court found that international law "require[d] the United Kingdom, as the administering power, to respect the territorial integrity of that country, including the Chagos Archipelago." Finally, in paragraph 174:

> The Court concludes that, as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.

Thus, what made the decolonization of Mauritius incomplete, in the Court's words, was the UK's failure to fulfill its legal obligation "to respect the territorial integrity of that country, including the Chagos Archipelago." There can be no clearer determination that, as a matter of international law, the Archipelago is an integral part of the territory of Mauritius.

But there are equally clear determinations, as I will show you now, in the Court's answer to the General Assembly's second question, regarding the legal consequences that flow from

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[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Verbatim Record 2018/24 of Public Sitting held on 5 September 2018, p. 49.

[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Verbatim Record 2018/25 of Public Sitting held on 6 September 2018, p. 10.

[10] The Max Planck Encyclopedia of International Law, *Decolonization: British Territories* (by Pietro Sullo), February 2013, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e924 (last accessed 15 October 2020).

the failure of completion of the decolonization of Mauritius. The Court was very blunt, some might even say uncharacteristically so, in setting out these consequences. Nevertheless, they appear to have escaped notice by the Maldives, or at least they have pretended not to notice them. It therefore falls to me to call them out for you.

We begin with paragraph 177. Here, the Court determines that because the UK continued to occupy and administer Chagos after Mauritius achieved independence as a sovereign State, the UK was engaged in "an unlawful act of a continuing character."[11] As a consequence, "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State."[12]

This meant that, under international law, as the Court declared in paragraph 178:

> The United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling *Mauritius* to complete the decolonization of *its* territory in a manner consistent with the right of peoples to self-determination.[13]

Mr President, Members of the Special Chamber, in light of this language, the only conclusion that can be drawn is that in the Court's view Mauritius alone is sovereign over Chagos, as it is over all the other integral parts of its territory.

Conspicuously, in its oral presentations on Tuesday, as well as in its written submissions, the Maldives has completely ignored all of these determinations by the Court. It has made no mention at all of the discussion at paragraphs 173-178 of its Opinion, which we have just reviewed. Having no response to any of this, they put their pens down and turn their microphones to mute, but they cannot make this part or any part of the Opinion disappear by choosing to ignore it. Talk about an elephant in the room!

On Tuesday Professor Akhavan told you that the Court's answer to the UNGA's second question, about the legal consequences of the failure to lawfully complete decolonization, was "a short one", consisting, in his presentation, of a single sentence from paragraph 182, the last paragraph of the Opinion before the *dispositif*.[14] Mr President, the Court's answer to the question is certainly a lot shorter when you completely ignore five-sixths of it, as Professor Akhavan did, including the first five paragraphs, which is where the Court determines that the UK's administration is unlawful, reiterates that the Chagos Archipelago is an integral part of Mauritius' territory and concludes that the unlawful administration of Chagos must be terminated so that Mauritius is enabled to complete the decolonization of its territory. This is another typical example of the other side's refusal to address the text of the Advisory Opinion and their failure to interpret it on the basis of what it actually says.

Mr President, Members of the Special Chamber, what the Court determined in regard to the legal status of the Chagos Archipelago could not possibly be clearer, as everyone who has read it – except apparently the Maldives – recognizes. The detachment of the Chagos Archipelago from Mauritius was unlawful because international law requires the UK to respect the territorial integrity of Mauritius, including the Chagos Archipelago. The UK's colonial administration of that integral part of Mauritius is an ongoing wrongful act entailing that State's international responsibility. The UK must terminate its unlawful administration as rapidly as possible so that Mauritius can recover "its territory".[15] I repeat the words "its territory". There

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[11] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 177. Judges' Folder Tab 6.

[12] Ibid.

[13] Ibid., para. 178.

[14] ITLOS/PV.20/C28/1, p. 15, lines 7-12 (Mr Akhavan).

[15] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95, para. 178.

can be no doubt whatsoever that the Court determined that the Chagos Archipelago is part of Mauritius' territory, not just in 1965 but every day since, right up to the present day and beyond.

As if to put an exclamation point at the end of this determination, in the *dispositif* the Court declared – without any dissent on the merits, as Professor Sands has explained, and by a vote of 13 to a solitary one – that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible."[16] The one contrary vote was based on that Judge's view that the Court should not have answered the General Assembly's questions.[17] Not a single judge expressed the view that the UK's administration of the Chagos Archipelago was lawful. Not a single judge disagreed that Chagos forms an integral part of the territory of Mauritius.

In the face of such clarity, the Maldives is compelled to resort to a series of spurious arguments on what the Court purportedly decided. They are all far-fetched and entirely lacking in credibility. Most importantly, none of them has any basis in the text of the Court's Opinion. Indeed, as I have pointed out, they don't even attempt to ground any of their arguments in what the Court actually said; or, in the one case where they do, they blatantly mischaracterize the Court's finding. Here is an example. Professor Akhavan argued that the ICJ determined *only* that the Chagos Archipelago was part of Mauritius in 1965, at the time it was detached by the UK, and he told you that the Court made no finding as to its status thereafter.[18] In the event that you find it hard to believe me about this and are tempted to think that I must be mischaracterizing the Maldives' argument, I refer you to what the Maldives wrote in its submission of 15 April 2020, at paragraph 43: The Court "did not express any opinion that the Chagos Archipelago remained a part of Mauritius after 1965 ..."[19] This is what Counsel repeated this on Tuesday.

For this astonishing assertion, the Maldives cites the following statement in the Court's opinion, at paragraph 170: "at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory."[20] True enough. Both Parties agree that the Chagos Archipelago was an integral part of Mauritius in 1965, but the Maldives somehow reads this language as saying that was it an integral part of Mauritius *only in 1965* and not thereafter; and that is certainly not what the Court found.

Contrary to the Maldives' assertion, just three paragraphs later, in paragraph 173, the Court found, as shown on the previous slides, that at the time Mauritius achieved independence in 1968, the UK was required by international law "to respect the territorial integrity of [Mauritius], including the Chagos Archipelago." Four paragraphs after that, in paragraph 177, the Court found that the UK's retention and administration of Chagos after Mauritius' independence, is a "wrongful act" and an "unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius." Lest there be any doubt, the UK was deemed to be under an obligation to terminate its unlawful administration of the territory, thus "enabling Mauritius to complete the decolonization of *its* territory..."[21] in 2019, not 1965. It is simply absurd for the Maldives to make this argument. That they do suggests that they have nothing better to say.

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[16] Ibid., para. 183(4).

[17] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Dissenting Opinion of Judge Donoghue, available at https://www.icj-cij.org/files/case-related/169/169-20190225-ADV-01-06-EN.pdf (last accessed 15 October 2020).

[18] ITLOS/PV.20/C28/1, p. 16, lines 32-34 (Mr Akhavan).

[19] Maldives' Written Observations, para. 43.

[20] Maldives' Written Observations, para. 43, citing *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 170.

[21] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 178.

As if to say that this is the case, the Maldives, even more erroneously, argues that the ICJ recognized the UK's sovereignty over Chagos by allowing it to continue as administering power. Again, strange as it may seem, I am telling you the truth about what the Maldives is arguing in these proceedings. This is from paragraph 51 of their submission of 15 April 2020:

> As a matter of international legal principle, it is not the case that an administering State which bears an obligation to complete the process of decolonization of a given territory is immediately stripped of sovereignty over this territory.[22]

And, again, at paragraph 54 of the same submission: "The Chagos Advisory Opinion makes clear that the right of administration remains with the United Kingdom until it departs."[23]

Unsurprisingly, the Maldives cites not a single authority for the existence of an alleged "legal principle" that an administering power whose administration has been declared unlawful somehow continues to enjoy sovereignty over the territory that it unlawfully administers. Nor has Maldives been able to supply any authority for a so-called continuing "right of administration" of a territory that is being unlawfully administered.

To the contrary, in its Namibia Opinion, the ICJ found that South Africa had no right of administration of South West Africa after its mandate was terminated and that its ongoing presence in that territory was unlawful, conferring on it no rights. Professor Boyle strains to distinguish that case from this one on the ground that, in his words, repeated at least three times on Tuesday, the ICJ did not label the UK an "illegal occupier".[24] He does not dispute, however, that the Court found the UK's administration of Chagos a "wrongful", "unlawful act of a continuing character", "entailing its international responsibility" and requiring it, as a matter of international law, to terminate that administration as quickly as possible. Perhaps in the second round Professor Boyle will explain to us the difference.

Whatever that might be, the ICJ most certainly did not, in 2019, state or imply that the UK had a "right" of administration in respect of the unlawfully-detached and unlawfully-administered Chagos Archipelago. We can safely assume that the Court was well aware of the international principle of *ex injuria non oritur jus*. We referred to this principle in our written pleadings. Counsel for the Maldives chose to ignore it on Tuesday.

The UK's situation with regard to Mauritius may be contrasted with that of lawful decolonization processes, such as those followed in many parts of the world, including by the UK itself, especially in the 1950s and 1960s. Colonial powers, which were entrusted under the United Nations system with preparing their subject peoples for independence, and which more or less faithfully carried out their obligations in this regard, retained the right to administer their colonial territories until independence was achieved. But that is not the case for the UK and the Chagos Archipelago. As the ICJ found, and the Maldives has not disputed, the UK's detachment of the Archipelago and its continuing administration of the territory were unlawful. An unlawful administration is exactly that: unlawful. It is simply not sustainable to argue that, in spite of its unlawfulness, maintaining such an unlawful administration generates any rights or entitlements, let alone sovereignty over an integral part of another State's territory. Plainly, the UK neither had nor acquired sovereignty or rights of administration over Chagos, after its unlawful separation of the Archipelago from the territory of Mauritius.

Having determined the legal consequences of the failure to complete the lawful decolonization of Mauritius, as requested by the General Assembly, the Court considered that the specific "modalities" for bringing the decolonization to an end should be left for the General

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[22] Maldives' Written Observations, para. 51.
[23] Maldives' Written Observations, para. 54.
[24] ITLOS/PV.20/C28/2, p. 1, line 44; p. 2, lines 6-7, 18-19; p. 3, lines 18-21; p. 5, lines 38-39 (Mr Boyle).

Assembly to determine, given its longstanding remit over decolonization matters.[25] The UNGA, in resolution 73/295, determined that the UK's administration of the Chagos Archipelago should be brought to an end within six months. That is, by 22 November 2019. That date has come and gone without any steps taken by the UK to terminate its unlawful administration. There can thus be no question whatsoever in regard to any putative "administrative rights" of the UK. What interest could it possibly have, even if *quod non* it had any such rights temporarily, in the delimitation of a permanent maritime boundary between Mauritius and the Maldives. The answer is clear: absolutely none.

In an even less supportable attempt to buttress its argument that the Court's Opinion did not resolve the territorial issue in regard to Chagos, the Maldives contends that the Court could not have intended to resolve it, because that would have required it to overrule the arbitral award rendered in 2015, in the Annex VII case between Mauritius and the UK. This is another baseless argument, which did not benefit from its seemingly endless repetition by Counsel for the Maldives on Tuesday.

The Maldives appears to be arguing that the 2015 arbitral award has *res judicata* effect on the territorial issue.[26]

This is the very same argument that was made by the UK in the ICJ Advisory Proceedings: and it was soundly rejected by the Court. The ICJ found, expressly, that the arbitral award did not have *res judicata* effect in respect of any of the issues that were submitted to it by the General Assembly.[27] Not only the issues, but the parties and the relief sought, were different, all of which precluded the application of *res judicata*, in the Court's view.[28]

In any event, it should be indisputable that the arbitral award could not have had *res judicata* effect on the question of who is the "coastal State" in respect of the Chagos Archipelago, because the Annex VII tribunal did not make any decision on that issue. To the contrary, it decided, by a 3-2 vote, that it would not rule on that issue because it had no jurisdiction under the 1982 Convention to decide questions of land sovereignty.[29] As Professor Sands recalled for you, the two arbitrators who constituted the minority – both of whom were sitting ITLOS judges at the time – would not only have exercised jurisdiction but found that Mauritius, and not the UK, was the "coastal State" because the UK's separation of Chagos from Mauritius violated the right of self-determination, and the concomitant obligation not to impair the territorial integrity of a colonial possession absent the freely expressed will of the people.[30] In any event, the fact remains that the tribunal made no ruling on this question. In short, sovereignty over Chagos was not the *res* that was *judicata* in the Annex VII case.

Contrary to what you heard from Professor Akhavan on Tuesday, Mauritius has never argued that the ICJ overrode or overruled the Annex VII tribunal's Award.[31] The Court had no need to do so because, as it found, the issues decided by the arbitral tribunal were not the same as those before the Court. The Court was thus free to opine on the lawfulness of Mauritius' decolonization and whether the Chagos Archipelago was an integral part of Mauritius' territory, before and after independence, without treading on the arbitral tribunal's turf. The fact that the Annex VII tribunal decided not to decide the "coastal State" issue only underscores

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[25] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 179.

[26] Maldives' Written Observations, paras 73-75. Thouvenin, ITLOS/PV.20/C28/2, p.14, lines 34-38.

[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 81.

[28] Ibid.

[29] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award of 18 March 2015, para. 221.

[30] See *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Dissenting and Concurring Opinion of Judge Wolfrum and Judge Kateka, paras 45, 70-80. Judges' Folder, Tab 4.

[31] ITLOS/PV.20/C28/1, p. 10, lines 11-13 (Mr Akhavan).

that there was no decision on this issue for the ICJ to overrule. The jurisdictional limitation on the Annex VII tribunal, which the narrowest of majorities found to exist, had no application to the ICJ, whose jurisdiction was not, in any event, derived from the Law of the Sea Convention.

On our side, we fail to see why our learned opponents keep making such a fuss about the 2015 arbitral award. It plainly has no application to these proceedings. At the time that case was argued and decided, there was no Opinion, by any international court or tribunal, let alone the ICJ, on the legal status of the Chagos Archipelago. The Annex VII tribunal would have had to rule on it for the first time, as two prominent ITLOS judges were prepared to do. But that is most definitely not the situation here. Now you have the ICJ's Advisory Opinion before you. We say it settles the question of whether the Chagos Archipelago is an integral part of Mauritius' territory, hence subject to its sovereignty, so that you are not called upon to make this determination. Mauritius asks you only to respect the determination that the ICJ has already made.

The Maldives' invocation of another arbitral tribunal's award, in *Ukraine* v. *Russia*, is of no assistance to it either.[32] That case, with which you are quite familiar, turned on whether Ukraine was sovereign over Crimea or whether sovereignty was disputed. The tribunal declined to exercise jurisdiction because it regarded an underlying sovereignty dispute as unresolved.[33] That is what distinguishes the case from the one we are addressing here. Unlike Mauritius, Ukraine could not point to any authoritative judicial or legal determination to support a claim that its sovereignty was undisputed. Unlike this Special Chamber, the Annex VII tribunal in that case would have had to determine for itself which State was sovereign over the territory; it considered the question without any prior judicial determination of this issue to rely upon. And, unlike Mauritius, Ukraine could not argue that its case was premised on a matter of decolonization.

Counsel for the Maldives argued on Tuesday that *Ukraine* v. *Russia* is identical to this case, because Ukraine argued there that the sovereignty dispute had been resolved by a resolution of the General Assembly and by international opinion. That is plainly a false paradigm. Mauritius relies here on what both sides have agreed is an authoritative and correct legal determination by the ICJ. There is a world of difference between relying on the Opinion of the world's supreme judicial authority, except, perhaps for ITLOS, and relying on the resolutions of the political organs of the United Nations. As the distinguished Annex VII tribunal observed: "The UNGA resolutions [on which Ukraine relied] were framed in hortatory language" and "were not adopted unanimously or by consensus, but with many States abstaining or voting against them."[34]

Mr President, Members of the Special Chamber, the Maldives does not challenge the jurisdiction of the ICJ to issue its Advisory Opinion on the lawfulness of the decolonization of Mauritius. Nor does it challenge the correctness of the Opinion or its authoritativeness.[35] Rather, the Maldives' challenge is to the interpretation of the Opinion. They argue over what the Opinion says, but they base themselves on an interpretation that entirely avoids reading it. For them, the Court's Opinion does not speak to, let alone resolve, the issue of whether the Chagos Archipelago is an integral part of Mauritius' territory, and therefore subject only to Mauritian sovereignty. I have now addressed all of their arguments in support of this proposition, and, with all due respect, they are completely wrong.

In consequence, Mauritius respectfully submits that the ICJ's Opinion can only be read as an authoritative, and correct, determination, under international law, that the Chagos

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[32] See: Maldives' Written Observations, paras 99-101.

[33] *Dispute Concerning Coastal States' Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine* v. *Russian Federation*), PCA Case No. 2017-06, Award of 21 February 2020.

[34] Ibid., para. 175.

[35] Maldives' Written Observations, para. 4.

Archipelago is an integral part of the territory of Mauritius – and only of Mauritius – and therefore, that only Mauritius can be said to have an interest in, and rights in respect of, the delimitation of the relevant maritime boundary with the Maldives

With one eye on the clock, Mr President, I am prepared to continue or to suspend here, if that is your decision, for the next coffee break. I will, in any event, continue into the next session with the remainder of my speech.

THE PRESIDENT OF THE SPECIAL CHAMBER: Mr Reichler, you may continue to finish your statement, although it may go beyond the time planned. You may continue.

MR REICHLER: That is fine, Mr President, but just so that I am entirely transparent here, I have at least 20 more minutes of my speech, so that I can continue until whatever point that you would like, or we can break at any point that you would like – but it will require at least another 20 minutes. I want to underscore that Mauritius will finish today well within its allotted time, but my speech, unless you prefer that I continue and deliver it now, would commence our next session and then lead in to Professor Klein's speech. I just want to be entirely clear with you about that, and I will follow whatever instruction you give me. I am happy to continue if you would like.

THE PRESIDENT OF THE SPECIAL CHAMBER: Yes, you may continue.

MR REICHLER: Thank you very much.

I am now going to address the Maldives' argument that even if the ICJ determined as a matter of law that the Chagos Archipelago is an integral part of the territory of Mauritius, they say that that determination is not binding under international law.

The Maldives argues that Advisory Opinions are not legally binding, and therefore, the ICJ's conclusions (i) that the Chagos Archipelago is an integral part of the territory of Mauritius, (ii) that the UK's administration is unlawful and constitutes an ongoing violation of international law, and (iii) that the UK is under a legal obligation to terminate its administration as rapidly as possible – they say that all of these determinations lack binding force. With respect, our friends on the other side misstate the nature of Advisory Opinions – whether rendered by the ICJ or ITLOS – and again misinterpret the Court's Opinion in the Chagos case.

To be sure, Advisory Opinions themselves, per se, are not legally binding as such in the same way as judgments in contentious cases. But – and this is where the Maldives goes off track – they constitute authoritative declarations of international law, and all States are obligated to comply with the law. Thus, although compliance may not be obligatory in respect of an opinion itself, States are bound and obliged to comply with the law, as declared and defined by the world's supreme judicial authorities, whether in contentious cases or advisory opinions. This is hardly a novel concept, although the Maldives professes not to be aware of it. On Tuesday, they called our position on the significance of Advisory Opinions "hopeless".[36] So, let's look at what others have had to say.

Rosenne, for example, wrote that Advisory Opinions are authoritative statements of the law, which most definitely have legal consequences.

> The fact that an Advisory Opinion has no binding force … nevertheless does not confer upon the statement of law contained in the Advisory Opinion characteristics any different from those of the statement of law contained in a judgment.[37]

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[36] ITLOS/PV.20/C28/2, p. 31, lines 13-14 (Mr Akhavan).

[37] S. Rosenne, The International Court of Justice: An Essay in Political and Legal Theory (1961), p. 113.

To the contrary, Rosenne wrote: "In both instances, the Court has declared the law."[38]

Like Rosenne, Professor Pellet and his co-authors underscore the legal, as well as moral, authority that Advisory Opinions carry:

> In practice, advisory opinions are generally required because of their moral authority. Moreover, they contain one of the components of any judicial act, namely, the establishment of the law in force. Thus, advisory opinions are placed on the same level as judgements in the determination of the Court's jurisprudence.[39]

Are Rosenne and Pellet to be regarded as hopeless? Apparently not everyone believes they are, because they are not alone in underscoring the legal force and obligatory character of judicial declarations of law in Advisory Opinions. According to Sir Arthur Watts, the ICJ Advisory Opinion in the *Wall* case

> was more than just a restatement of the pre-existing positions adopted by the political organs of the United Nations; it was a legally reasoned exposition, lending the full weight of the UN's "principal judicial organ" to propositions which hitherto had been grounded almost as much in politics as in law.[40]

Professor Dugard, also addressing the *Wall* Opinion, similarly described the significance of the Court's advisory jurisprudence:

> While not bound by the Opinion itself, Israel and States are nonetheless bound by the obligations upon which it relies. The Opinion has simply elucidated and confirmed their obligations.[41]

The same is true of the Chagos Opinion. It is replete with references to the legal obligations by which the United Kingdom, and other States, are legally bound. At paragraph 173, for example, it declares that:

> the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering power, to respect the territorial integrity of that country, including the Chagos Archipelago.[42]

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[38] Ibid., p. 492.

[39] P. Daillier, M. Forteau & A. Pellet, Droit International Public (2009), p. 1010 ("Dans la pratique, les avis consultatifs s'imposent généralement en raison de leur autorité morale. Ils contiennent au surplus l'une des composantes de tout acte juridictionnel, à savoir la *constatation du droit* en vigueur. Aussi les avis sont-ils placés sur le même plan que les arrêts dans la détermination de la 'jurisprudence' de la Cour"). See also: I. Hussain, Dissenting and Separate Opinions at the World Court (1984), p. 38; B. Raïs Monji, *Le règlement judiciare des différends internationaux*, in Règlement Pacifique des Diffèrends Internationaux (Horchani, ed., 2002), p. 370; A. Peeters, *Has the Advisory Opinion's finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?* in The Law and Politics of the Kosovo Advisory Opinion (M. Milanovic & M. Wood, eds., 2015), p. 296.

[40] Sir A. Watts & R. Jorritsma, *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, Max Planck Encyclopedias of International Law (2019), para. 44.

[41] J. Dugard, *Advisory Opinions and the Secretary General with Special Reference to the 2004 Advisory Opinion on the Wall* in International Law and the Quest for Implementation/Le Droit International Et La Quête De Sa Mise En Oeuvre (L. Boisson de Chazournes & M. Kohen, eds., 2010), p. 403, at p. 410.

[42] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, para. 173.

At paragraph 178: "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible."[43] And, at paragraphs 180 and 182: "Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right …" and "all Member States must co-operate with the United Nations in order to complete the decolonization of Mauritius."[44]

The Maldives entirely overlooks, or, again, chooses to ignore, these paragraphs in the Advisory Opinion. It never once, in its written or oral pleadings, makes mention of the Court's references to the legal obligations identified and defined in the Advisory Opinion, including in these paragraphs. Such legal obligations are, indeed, binding, even if the Advisory Opinion itself, per se, is not. This is manifest in article 2(2) of the UN Charter, which provides: "All members … shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." These obligations include not only those arising under the Charter itself but also under general international law. As explained by Professor Kolb:

> The Charter obligations as well as other obligations of international law in accordance – or at least not incompatible – with the Charter … fall within the reach of art 2(2).[45]

The same principle, that States must fulfill their obligations under international law, is also reflected in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter: "Every State has the duty to fulfill in good faith its obligations under generally recognized principles and rules of international law."[46]

There can thus be no doubt that the ICJ's determinations regarding the unlawfulness of the UK's purported detachment of the Chagos Archipelago from Mauritius, the ongoing unlawfulness of its colonial administration, and the obligations on the United Kingdom to terminate its unlawful administration and enable Mauritius to complete the decolonization of its territory, are authoritative determinations of binding legal obligations by the supreme judicial authority of the United Nations. The President of the Court, Judge Yusuf, described them exactly as such – "authoritative" – in his annual presentation to the General Assembly in September 2019.[47] And, as we have seen, the Maldives itself concedes, at paragraph 4 of its 15 April 2020 submission, that these determinations by the Court are not "lacking in authority."

Nevertheless, the Maldives argues, against the grain of the ICJ's own jurisprudence, that, even if the determinations of law in Advisory Opinions are authoritative and binding in most situations, they are neither, when they address a dispute that, they say, is about territorial sovereignty.[48] This is a thoroughly contrived and meritless argument. No such exception to the rule can be found in the jurisprudence of the Court, or any court, or in the writings of leading legal authorities. Plainly, when the Court determined that the Chagos Archipelago is – and has always been – an integral part of Mauritius, and that the UK is under an obligation to terminate its unlawful administration and enable Mauritius to complete the decolonization of its territory,

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[43] Ibid., para. 178.

[44] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, paras 180, 182.

[45] R. Kolb, *Chapter I. Purposes and Principles* in Charter of the United Nations: a Commentary (B. Simma, D. Khan, G. Nolte, A. Paulus, N. Wessendorf, eds., 2012), p. 107, at 168-169.

[46] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (General Assembly Resolution 2625 (XXXV) of 24 October 1970).

[47] Speech by H.E. Mr Abdulqawi A. Yusuf, President of the International Court of Justice, on the occasion of the seventy-fourth session of the United Nations General Assembly (30 October 2019), pp. 10-11, available at https://www.icj-cij.org/files/press-releases/0/000-20191030-STA-01-00-BI.pdf (last accessed 15 October 2020).

[48] Maldives' Written Observations, paras 29(c), 61-63.

it intended these determinations to be authoritative and legally binding. There is not the slightest bit of language in the Opinion to suggest otherwise; and the Maldives points to none.

The Maldives' efforts to derive a contrary interpretation from the Western Sahara and Namibia Advisory Opinions are contorted and unpersuasive. In neither of these cases did the Court state, or even hint, that it could not make an authoritative or binding determination of the law on an issue related to territorial sovereignty. To the contrary, as the Maldives itself is forced to concede, at paragraph 59 of its submission of 15 April 2020, in regard to the Court's Advisory Opinion on *Western Sahara*:

> the ICJ's opinion on historical sovereignty was explicit: the evidence did not establish "any legal tie of sovereignty between Western Sahara and the Moroccan State".[49]

Apparently, Professor Boyle ignored, or forgot about, his own written pleading when he told you on Tuesday that the *Western Sahara* opinion was about decolonization, but had nothing to do with, and had no implications for, sovereignty.[50]

The significance of the ICJ's Advisory Opinions, and, in particular, of the legal obligations defined by the Court, had been underscored not only by prominent legal authorities, but also by the Court of Justice of the European Union, precisely in respect of matters of territorial sovereignty. I refer to that Court's application of the ICJ's legal determinations in both the *Western Sahara* and *Wall* cases.

In the case of *Council of the European Union* v. *Polisario Front*, the CJEU, after concluding that the Members of the European Union were obligated to comply with international law, found that, under the ICJ's *Western Sahara* Opinion, Morocco could not be considered sovereign over Western Sahara, and therefore an agreement between the EU and Morocco had no application to Western Sahara.[51] In the case of *Organisation Juive Européenne* v. *Ministry of Economy and Finance*, the same Court found that, under the authority of the ICJ's *Wall* opinion, the EU acted lawfully in determining that products originating in the occupied Palestinian territories, over which the ICJ found that Israel had no rightful claim of sovereignty, could not be labelled as coming from Israel.[52] These cases close the door on the Maldives' argument that the ICJ's determinations on territorial sovereignty, expressed in Advisory Opinions, are somehow not to be regarded as authoritative, or as not having binding consequences under international law, or as not capable of being relied on by other international courts on the basis that the findings of law are dispositive.

I would add to this one more point that further underscores the weakness, the emptiness, of the Maldives' case. Mauritius, as you know, commenced these proceedings as an Annex VII arbitration, because that was the only vehicle available for compulsory dispute resolution. But shortly after doing so, Mauritius offered the Maldives an opportunity to transfer the case to either the ICJ or ITLOS, in lieu of arbitration. The Maldives' response was, in effect, "anywhere but the ICJ". Of course that would be their response! The Maldives had no desire to put before the ICJ the question of whether its determinations in the Chagos case were authoritative and legally binding. It knew very well what the Court's answer would be. We say the answer given by this Special Chamber can be no different.

This brings me to the Maldives' third and final argument that there is somehow an unresolved territorial dispute over Chagos, which is that, even if the ICJ determined that

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[49] Maldives' Written Observations, para. 59.

[50] ITLOS/PV.20/C28/2, p. 4, lines 37-42 (Mr Boyle).

[51] *Council of the European Union* v. *Front Polisario*, CJEU Case C-104/16 P, Judgment (21 December 2016), paras 92, 104-105.

[52] *Organisation juive européenne & Vignoble Psagot Ltd* v. *Ministre de l'Economie et des Finances,* CJEU Case C-363/18, Judgment (12 November 2019), paras 35, 48, 56-58.

Mauritius is sovereign over the Archipelago, and even if that determination is authoritative and legally binding, there is still an unresolved sovereignty dispute because the United Kingdom refuses to accept or comply with the obligations set out in the Court's Opinion.

This argument is not only wrong, it is dangerous. If accepted, it would set a very destabilizing precedent.

First, the alleged territorial dispute is not unresolved. It has been resolved. By the ICJ. In the Chagos Opinion. Based on that Opinion, as a matter of international law, the Chagos Archipelago is recognized by the ICJ – the principal judicial organ of the UN – as an integral part of the territory of Mauritius. That is an authoritative determination of international law, and the law is binding on the UK.

In fact, the Maldives itself all but concedes this to be the case when it states, at paragraph 50 of its submission of 15 Aril 2020, curiously but revealingly, that:

> [Mauritius] cannot deny that there is a dispute between itself and the UK over the consequences of the Advisory Opinion for the sovereignty dispute between them.[53]

If that is their definition of the purported dispute between Mauritius and the United Kingdom, then it is plainly not a legal dispute about sovereignty over the Chagos Archipelago. It is a dispute, in their words, over "the consequences of the ICJ's Advisory Opinion", that is, whether it is authoritative and legally binding on the UK. But that is an issue over which this Special Chamber very much has jurisdiction here. Indeed, it is the very question the Maldives itself has placed before you in its preliminary objections, which invite the Special Chamber to interpret the ICJ's Opinion and determine whether it is authoritative and has legally binding consequences. If the Special Chamber finds that it is and does (and we respectfully submit that it must), then there is no unresolved sovereignty dispute before you, and no basis for the Chamber to abdicate its jurisdiction in this case. If, on the other hand, it does not so find, it will undermine the authority and effect of the ICJ Advisory Opinion. That is precisely what the Maldives invites you to do, whether on its own behalf or some third party.

To that end, the Maldives parrots the UK's assertions of sovereignty made after the ICJ's Advisory Opinion. As George Orwell once said, nothing is gained when a parrot is taught a new word. In any event, these words, whether uttered by the UK or echoed by the Maldives, are, in the end, only assertions. They cannot, as a matter of law, establish the existence of a dispute, especially after the dispute has been resolved by the authoritative pronouncement of an international court or tribunal. As the Annex VII tribunal in *Ukraine* v. *Russia* recognized: "Certainly a mere assertion would be insufficient in proving the existence of a dispute."[54] The Maldives appears to accept this principle, at paragraph 100 of their submission of 15 April 2020.

In regard to the UK's assertions, the Maldives attributes to us an argument that we have never made. And then they proceed to beat down that non-existent argument, repeatedly. So let me be very clear. We do not contend that the UK's continued assertion of sovereignty over Chagos should be disregarded because it is implausible – though it is. We argue that it is irrelevant because the issue of sovereignty has already been resolved by the ICJ's determination that Chagos is an integral part of the territory of Mauritius, and that the UK's ongoing administration is unlawful, and must be terminated. There is thus no "unresolved sovereignty dispute".

To hold otherwise, that is, that an unresolved sovereignty dispute exists because the UK stubbornly persists in asserting its sovereignty in defiance of the ICJ and in defiance of

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[53] Maldives' Written Observations, para. 50.

[54] *Dispute Concerning Coastal States' Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine* v. *Russian Federation*), PCA Case No. 2017-06, Award of 21 February 2020, para. 188.

international law, would turn the law on its head. It would mean that no dispute could ever be considered finally resolved, as long as a recalcitrant State, dissatisfied with an international tribunal's reasoned and authoritative resolution of it, refused to accept the result.

It would mean, for example, that China could continue to argue that a legal dispute still exists over the lawfulness of its so-called nine-dash line, notwithstanding the well-reasoned rejection of that claim by a unanimous arbitral tribunal, which included four sitting or former ITLOS Judges. On the same basis, Colombia, which defiantly rejected the ICJ's unanimous 17-0 Judgment delimiting its maritime boundary with Nicaragua, could claim that a legitimate dispute still exists simply by insisting, without any basis in law, that the continental shelf and exclusive economic zone that the Court awarded to Nicaragua are Colombian; or that Israel could argue that the wall it has constructed to separate itself from Palestinian territories is completely lawful under international law.

Regrettably, there are occasionally other defiant States which have employed a similar strategy of refusal to accept judicial determinations contrary to their liking.

As Professor Dugard wrote in 1985:

> Since 1971, when the ICJ held in its Advisory Opinion on Namibia that South Africa is in illegal occupation of Namibia ... the South African government's propaganda machine has waged a relentless campaign, both at home and abroad, to show that the Court did not make such a finding or that, if it did, it was wrong and biased.[55]

Surely, South Africa's obstreperous behaviour could not, as a matter of law, unresolve a dispute that the ICJ had resolved. In that very regard, the States Parties to UNCLOS refused to recognize South Africa's efforts to keep the dispute over the lawfulness of its administration alive, or they would not have allowed representatives of Namibia to negotiate and then sign the 1982 Convention.

A defiance of international judicial authority, in the form of a refusal by a State to accept or comply with its legal obligations, as defined in an authoritative determination by a competent tribunal, is a breach of international law that cannot be rewarded. When a disputed issue has been resolved by an international court or tribunal, whether by way of Judgment or Advisory Opinion, the parties are bound by the legal obligations identified therein; the court's legal determination cannot be annulled, and the dispute cannot suddenly become unresolved, and the obligations set aside, by one party's unlawful rejection and defiance. In the words of Judge Nagendra Singh, the distinguished former ICJ President:

> The findings of law contained in Advisory Opinions have of course the authority and prestige of the Court behind them to the same extent as a judgment, and the State which chooses to contravene what has been defined by the court as a rule of law in an advisory opinion will find it difficult to claim that it is not in breach of international law.[56]

THE PRESIDENT OF THE SPECIAL CHAMBER: Mr Reichler, although I said you may continue to finish your statement, I realize that you have already spoken for 80 minutes. If I ask you to continue, although you may have only four or five pages to go, I will be accused of infringing upon your basic human rights, so I would suggest we take a coffee break of thirty minutes; and then after some rest you may continue to finish your conclusions.

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[55] John Dugard, *The Revocation of the Mandate for Namibia Revisited*, South African Journal on Human Rights (1985).

[56] N. Singh, The Role and Record of the International Court of Justice (1989), p. 26.

MR REICHLER: Thank you very much, Mr President. I would never make such an accusation of you in particular, given your career's devotion to the cause of human rights and rule of law – but I will defer to your judgment and stop here at this time.

THE PRESIDENT OF THE SPECIAL CHAMBER: We will pause for a break of 30 minutes and we will continue the hearing at six o'clock.

(*Break*)

THE PRESIDENT OF THE SPECIAL CHAMBER: I give the floor to Mr Reichler to continue and finish his statement.

MR REICHLER: Mr President, Members of the Special Chamber, just before the break I had read you the words of former ICJ President Judge Nagendra Singh.

Thank you, Mr President, I can think of no better place to conclude my remarks today than with those of Judge Nagendra Singh.

Mr President, Members of the Special Chamber, there can be no serious question about what the ICJ determined in its Chagos Opinion, or about the authoritativeness of what it determined, or about the legal obligations it imposed, especially on the United Kingdom. The Court left no doubt that, as a matter of international law, the Chagos Archipelago is and has always been an integral part of the territory of Mauritius. It necessarily follows from this that Mauritius alone is sovereign over the Archipelago, just as it is sovereign over all of the other territory that forms an integral part of the country. That is why the ICJ found that the detachment of the Archipelago from Mauritius was unlawful, and the ongoing colonial administration is a continuing breach of international law, entailing the international responsibility of the United Kingdom, such that the UK is under a legal obligation – obligation – to terminate its unlawful administration as rapidly as possible. This is, expressly, in order to enable Mauritius to finally complete the decolonization of "its territory", which is an unambiguous, unmistakable declaration by the Court that the Chagos Archipelago is Mauritius' territory.

The United Kingdom is plainly not an indispensable party in this case. It is not even an interested party, because it has no legal interest in the Chagos Archipelago, and therefore none that can be affected by a delimitation of the maritime boundary separating the Archipelago from the Maldives, which is the object of this case. This is not the *Monetary Gold* case, where the ICJ was required to adjudicate the legal rights of Albania, an absent party. Nor is this the *East Timor* case, where the Court would have had to pass judgment on the lawfulness of the conduct of Indonesia, an absent party.

The bar for declining to exercise jurisdiction is very high. As the Court explained in *Monetary Gold*, "[i]n the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[57]

The same high bar was underscored in *East Timor*, 41 years later:

> [I]n this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful … Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgement made in the absence of that State's consent.[58]

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[57] *Case of the Monetary Gold removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment of 15 June 1954, I.C.J. Reports 1954*, p. 19, at p. 32.
[58] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, para. 34.

In the Nauru case, which the Maldives conspicuously fails to cite or discuss, the Court made it even clearer just how high the bar is for sustaining a preliminary objection based on the absence of a purported indispensable party. Nauru brought the case against Australia claiming that the Respondent State breached its obligations under the Trusteeship Agreement between Nauru and the Administering Authority. The Administering Authority was actually a tripartite arrangement that included Australia, New Zealand and the United Kingdom. As such, all three had interests that were implicated by Nauru's claims. On this basis, Australia claimed that New Zealand and the United Kingdom were absent indispensable parties. The Court disagreed, and it rejected Australia's objection.

It explained that:

> [T]he interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim.[59]

In this light, we ask: after the ICJ has determined that Chagos is an integral part of Mauritius' territory, that the UK's administration of that territory constitutes an ongoing international wrong of a continuing character, and that this unlawful administration must be terminated as rapidly as possible, what legitimate interest could the UK possibly have in the delimitation of a maritime boundary between Chagos and the Maldives? The question answers itself: absolutely none.

The Maldives' reliance on the *Monetary Gold* and *East Timor* cases is therefore entirely misplaced. Unlike Albania and Indonesia in those cases, the United Kingdom has no cognizable legal interests that would be affected by a delimitation of the maritime boundary between the Chagos Archipelago and the Maldives. And it certainly has no legal interests that would form the very subject matter of the decision by the Special Chamber, or constitute a prerequisite for that decision. The only thing the United Kingdom has in common with the absent parties in *Monetary Gold* and *East Timor* is its absence. But more than 190 other States are also absent from these proceedings. And the United Kingdom has no greater legal interest in respect of the maritime boundaries of the Chagos Archipelago than any of them might have, which is to say again: it has absolutely none.

Professor Thouvenin pointed to what he called "striking similarities" between the present case and East Timor.[60] He devoted almost his whole speech to that case, but what were these similarities? In *East Timor*, Portugal argued that Indonesia was not an indispensable party because the Court did not have to determine the lawfulness of its seizure of East Timor; instead, according to Portugal, it needed only to accept as "givens" the decisions of the UN's political bodies, the Security Council and General Assembly, as reflected in their resolutions.

Mr President, Members of the Special Chamber, there is nothing "strikingly similar" between the resolutions of the UN's political bodies, and the legal determinations made by the ICJ in its Advisory Opinion. Plainly, in *East Timor* the Court could not treat the resolutions of political organs, without more, as having resolved a dispute about the lawfulness of Indonesia's conduct and on that basis alone proceed to adjudicate Indonesia's rights in its absence. In

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[59] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 55.

[60] ITLOS/PV.20/C28/2, p. 8, lines 31-33 (Mr Thouvenin).

contrast, here we have the ICJ's authoritative, and correct, by admission, judicial determinations that directly address, and resolve, the legal status of the Chagos Archipelago as an integral part of Mauritius' territory. There is nothing left of this alleged territorial dispute for the Special Chamber to resolve. You do not need the UK in order to go forward and delimit a maritime boundary in which the UK could have no legitimate interest.

There is absolutely no merit, therefore, to the challenge to this Special Chamber's jurisdiction that the Maldives has raised in its first two preliminary objections. Professor Klein will now show you that there is likewise no merit to any of their other objections.

I thank you, Mr President, and Members of the Chamber, for your kind courtesy and patient attention, and I ask that you call upon my dear colleague, Professor Pierre Klein, to continue and complete Mauritius' first round presentation.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Reichler and now give the floor to Mr Klein, who is connected by video link, to make his statement.

Mr Klein, please.

EXPOSÉ DE M. KLEIN
CONSEIL DE MAURICE
[TIDM/PV.20/A28/4/Rev.1, p. 24–36; ITLOS/PV.20/C28/4/Rev.1, p. 23–34]

Merci, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, c'est un honneur pour moi d'intervenir dans la présente instance au nom de la République de Maurice. En sus de leur exception fondée sur l'absence d'un prétendu État tiers indispensable, les Maldives font valoir que votre Chambre ne pourrait se prononcer sur le fond du litige que lui a soumis la République de Maurice pour deux autres raisons. D'une part, parce qu'il n'existerait pas de véritable différend entre les parties au sujet de la délimitation de leurs espaces maritimes. D'autre part, parce qu'à supposer même que l'existence de ce différend puisse être établie, Maurice n'aurait pas satisfait à l'obligation de tenter de le régler par la voie de la négociation avant d'enclencher les procédures de règlement des différends prévues par la partie XV de la Convention sur le droit de la mer. Enfin, les Maldives vous invitent également à déclarer la demande de la République de Maurice irrecevable, en raison du fait qu'en introduisant la présente instance, Maurice aurait commis un abus de droit et de procédure. Je voudrais vous montrer, dans ce dernier volet des plaidoiries de Maurice, qu'aucune de ces exceptions ne possède de fondement et que s'il peut être question d'abus dans le cadre des présentes procédures, ce n'est certainement pas dans l'attitude de la République de Maurice que l'on peut le trouver. Permettez-moi donc, tout d'abord, de revenir avec vous sur la question de l'existence d'un différend en matière de délimitation maritime entre les Parties.

Selon les Maldives, il ne saurait exister de différend en matière de délimitation maritime entre les parties à la présente instance, tant que le différend qui continuerait prétendument à opposer la République de Maurice et le Royaume-Uni au sujet de la souveraineté sur l'archipel des Chagos n'est pas résolu[1]. Ce n'est en effet, d'après la partie adverse, qu'une fois cette étape franchie et la souveraineté de Maurice sur l'archipel des Chagos éventuellement reconnue, que Maurice pourrait prétendre au statut d'État dont les côtes sont opposées à celles des Maldives, au sens des articles 74 et 83 de la Convention de Montego Bay. C'est, dans cette logique, à ce moment-là seulement qu'un véritable différend de délimitation entre les deux États pourrait voir le jour[2]. Mes collègues Philippe Sands et Paul Reichler viennent de vous montrer par le menu à quel point la thèse de la prétendue perpétuation d'un différend de souveraineté sur l'archipel des Chagos est indéfendable au vu de l'avis rendu par la Cour internationale de Justice en février 2019. Je ne reviendrai donc pas sur cette démonstration. Plus rien ne permet, à ce stade, de remettre en cause la qualité d'État côtier de la République de Maurice dans le contexte du présent différend.

Mais les Maldives vont plus loin dans leur contestation de l'existence d'un différend. Nos contradicteurs ont, en effet, fait valoir avant-hier qu'un « examen attentif » du dossier de la présente affaire ne ferait pas apparaître de différend, car on n'y trouverait pas de revendications opposées des parties sur la délimitation de leurs zones économiques exclusives ou de leurs plateaux continentaux[3]. De toute évidence, Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, nous n'avons pas la même conception de ce qu'est un examen attentif du dossier. Car quand on l'examine vraiment attentivement, comme je voudrais maintenant le faire avec vous, le dossier montre précisément le contraire de ce que prétendent les Maldives sur ce point.

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[1] Exceptions préliminaires, par. 74 ; observations écrites de la République des Maldives, par. 130-131 ; TIDM/PV.20/A28/2, p. 32, lignes 26-31 (Mme Hart).

[2] TIDM/PV.20/A28/2, p. 32, lignes 26-31 (Mme Hart) ; voir également exceptions préliminaires, par. 74 ; observations écrites de la République des Maldives, par. 130-131.

[3] TIDM/PV.20/A28/2, p. 27, ligne 38 (Mme Hart).

Le point de départ, à cet égard, est constitué par les législations adoptées par les deux parties en vue de la détermination de leurs espaces maritimes respectifs. En 1977, la République de Maurice a adopté sa loi sur les zones maritimes, par laquelle sont déclarés une zone économique exclusive et un plateau continental d'une largeur de 200 milles marins à partir des lignes de base (ou jusqu'au rebord externe de la marge continentale pour ce qui est du plateau continental)[4]. La loi de 1977 a été remplacée par une nouvelle loi sur les zones maritimes en 2005, qui prévoit les mêmes limites[5]. Cette législation s'applique à l'ensemble du territoire de Maurice, y compris l'archipel des Chagos. La carte que vous avez sous les yeux permet de visualiser la zone de 200 milles marins entourant l'archipel des Chagos, mesurée à partir des lignes de base de l'archipel. Comme l'ensemble des documents qui seront présentés dans le cours de ma plaidoirie cette après-midi, cette carte est reprise dans vos dossiers de juge. En mai 2009, Maurice a soumis à la Commission des limites du plateau continental des informations complémentaires concernant le plateau continental étendu dans la région de l'archipel des Chagos[6].

En 1996, les Maldives ont, elles aussi, adopté une loi relative à leurs espaces maritimes, affirmant pareillement l'existence d'une zone économique exclusive et d'un plateau continental d'une largeur de 200 milles marins, mesurés à partir des lignes de base archipélagiques de cet État[7]. Voici la représentation graphique des zones concernées. Et à l'instar de Maurice, les Maldives ont soumis, en juillet 2010, des informations à la Commission des limites du plateau continental sur les limites de leur plateau continental au-delà de 200 milles marins. Cette soumission était accompagnée d'une carte qui montre tant les zones de plateau concernées que la zone économique exclusive revendiquée par les Maldives.

La superposition des revendications maritimes formulées par les deux États, telles qu'elles ressortent de leurs législations respectives, ne laisse aucun doute quant au fait qu'elles créent nécessairement un conflit affectant une zone de près de 96 000 kilomètres carrés, que vous voyez maintenant représentée à l'écran.

Les Maldives tentent d'écarter ces représentations graphiques d'un revers de la main, en arguant qu'elles n'ont aucun caractère officiel[8]. Mais il ne s'agit nullement ici de prétendre que ces cartes, à l'exception de celle déposée par les Maldives à l'appui de sa soumission à la Commission des limites du plateau continental, seraient d'une quelconque façon l'expression de la position des Maldives. Le seul but de Maurice, en s'y référant, est simplement d'illustrer la portée des revendications des parties, et le fait que ces revendications créent inévitablement une situation de conflit.

Cet état de choses a d'ailleurs été confirmé sans la moindre ambiguïté par les parties elles-mêmes au fil des échanges qu'elles ont eus sur la question de la délimitation de leurs espaces maritimes. Les termes mêmes des documents qui consignent ces échanges ne laissent subsister aucun doute à cet égard et contredisent clairement la présentation bien incomplète que nos contradicteurs vous en ont faite en début de cette semaine.

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[4] Maritime Zones Act 1977 (loi n° 13, 3 juin 1977) ; consultable à l'adresse : https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MUS_1977_Act.pdf.

[5] Loi sur la zone maritime (loi n° 2 de 2005) (observations écrites de la République de Maurice, annexe 15).

[6] Convention des Nations Unies sur le droit de la mer : Informations préliminaires soumises par la République de Maurice concernant le plateau continental étendu dans la région de l'archipel des Chagos en vertu de la décision contenue dans le document SPLOS/183 (mai 2009), consultable à l'adresse : https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/mus_2009_preliminaryinfo.pdf (consulté le 15 octobre 2020).

[7] Loi n° 6/96 relative aux zones maritimes des Maldives (observations écrites de la République de Maurice, annexe 16).

[8] TIDM/PV.20/A28/2, p. 27, lignes 41-44 (Mme Hart) ; voir aussi observations écrites de la République des Maldives, par. 133 a).

En octobre 2010, des délégations de haut niveau des Maldives et de Maurice se rencontrent pour une première réunion sur la question de la délimitation maritime entre les deux États et sur la soumission que les Maldives ont présentée à la Commission des limites du plateau continental. Dans le compte rendu de cette rencontre, son objet est défini comme suit : (*interprétation de l'anglais*) « débattre d'un potentiel chevauchement en cas d'extension du plateau continental »[9]. (*Poursuit en français*) Un chevauchement donc présenté alors comme seulement « potentiel », un terme que vous avez entendu nos contradicteurs répéter avec beaucoup d'insistance, et même d'enthousiasme, dans leurs plaidoiries mardi[10]. Pour reprendre les termes de M. Akhavan, on ne trouverait ainsi dans les échanges entre les parties qu'« au mieux [...] une vague référence à un différend potentiel »[11]. Pourtant, même à ce stade très préliminaire des échanges entre les deux parties, cette affirmation est inexacte. À la fin du document, en effet, le Ministre des affaires étrangères des Maldives exprime son accord pour que les deux parties travaillent conjointement sur la zone de chevauchement. Exit, donc, le terme « potentiel ». Dès ce moment, le chevauchement est présenté comme bien réel, et il est reconnu comme tel par les plus hautes autorités des Maldives elles-mêmes. En tout état de cause, l'histoire ne s'arrête pas là, loin s'en faut.

Dans les échanges suivants entre les parties, en effet, la disparition du qualificatif « potentiel » se confirme et il est clairement – et exclusivement – fait référence à une zone de chevauchement avérée entre les espaces maritimes des deux États. Ainsi, dans le communiqué conjoint publié en mars 2011, à l'issue de la visite à Maurice du Président des Maldives, il est exposé *(Continued in English)* « [b]oth leaders agreed to make bilateral arrangements on the overlapping area of extended continental shelf of the two States around the Chagos Archipelago »[12].

(*Poursuit en français*) Vous remarquerez au passage que les Maldives n'évoquent à aucun moment, dans cette période, un quelconque intérêt juridique d'un État tiers qui se trouverait mis en cause par l'amorce du processus de négociation. Les Maldives étaient toutes prêtes à aller de l'avant dans cette voie, en prenant pour acquis que c'était bien Maurice qui devait être considérée comme l'État côtier concerné par ce processus.

Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, je pourrais certainement m'arrêter là dans cette démonstration de l'existence d'un différend. Les deux parties se sont explicitement accordées pour reconnaître l'existence d'une zone de chevauchement entre leurs zones économiques exclusives et leurs plateaux continentaux respectifs. Et s'il existe une telle zone de chevauchement, c'est évidemment parce que les parties ont exprimé des revendications opposées sur les espaces maritimes en cause. Je ne crois pas avoir besoin d'un très long discours pour vous rappeler que des revendications opposées, en fait ou en droit, c'est précisément ce qui caractérise, selon les définitions les plus classiques, l'existence d'un différend en droit international. Nos contradicteurs vous ont eux-mêmes renvoyés avec insistance à ces définitions du concept de différend il y a deux jours[13].

Mais si le moindre doute devait encore subsister dans vos esprits à ce sujet, je pense qu'il sera levé de façon définitive par la note diplomatique adressée par la République de Maurice au Secrétaire général de l'Organisation des Nations Unies en date du 24 mars 2011. L'objet de cette note était de protester contre le fait que, contrairement à ce qu'elles avaient laissé entendre, les autorités des Maldives n'avaient apporté aucun amendement à leurs soumissions

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[9] Observations écrites de Maurice, annexe 13.

[10] TIDM/PV.20/A28/1, p. 14, ligne 25 (M. Akhavan) ; TIDM/PV.20/A28/2, p. 28, ligne 19-27 et p. 30, lignes 20-21 (Mme Hart) ; TIDM/PV.20/A28/2, p. 36, ligne 46 (M. Akhavan).

[11] TIDM/PV.20/A28/2, p. 36, ligne 46 (M. Akhavan) ; voir également Observations écrites des Maldives, par. 135 b).

[12] Written Observations of the Republic of Mauritius, Annex 14.

[13] Voir, notamment, TIDM/PV.20/A28/2, p. 10, lignes 26-34 (M. Thouvenin).

à la Commission des limites du plateau continental, de façon à prendre en compte les coordonnées de la zone économique exclusive de Maurice dans la région des Chagos. Les termes de la note sont particulièrement tranchés *(Continued in English)* :

> The Republic of Mauritius hereby protests formally against the submission made by the Republic of Maldives in as much as the Extended Continental Shelf being claimed by the Republic of Maldives encroaches on the Exclusive Economic Zone of the Republic of Mauritius.[14]

(*Poursuit en français*) Dans leur argumentation écrite, nos contradicteurs n'avaient pas grand-chose à dire de cette note. Ils se limitaient à affirmer, à son sujet, qu'elle ne contient que de « vagues déclarations » au sujet de la soumission des Maldives, sans offrir de clarification quant à une zone de revendications qui se chevauchent[15].

Une fois encore, cette analyse est assez étonnante. Cette note n'a rien de vague. Elle constitue une protestation, en bonne et due forme, contre ce que Maurice identifie clairement comme un empiétement sur sa zone économique exclusive. Il est difficile d'être plus clair. Quant au fait que la zone exacte de chevauchement des revendications ne soit pas précisée dans la note, il n'a aucune importance ici. Ce que la note de Maurice confirme de manière éclatante, c'est l'existence d'un désaccord avéré entre les deux États sur l'étendue de leurs espaces maritimes respectifs. Quand un État proteste formellement, au sein de la plus importante instance multilatérale qui soit, contre les prétentions avancées par un autre État sur des espaces maritimes qu'il estime relever de sa compétence, il proclame – à la face du monde, qui plus est – l'existence d'un différend entre les États concernés.

Dans leur argumentation orale en début de cette semaine, les Maldives ont, cette fois, tenté de prétendre que ce document ne posséderait aucune pertinence pour avérer l'existence d'un différend entre les parties, parce qu'on n'y retrouverait aucune revendication de la République de Maurice à laquelle les Maldives auraient pu s'opposer[16]. Mais en vous livrant une telle lecture de la note, nos contradicteurs inversent entièrement les rôles. En l'occurrence, ce sont les Maldives qui ont émis une revendication préalable, manifestée par leur soumission à la Commission des limites du plateau continental. Et c'est Maurice qui s'y est opposée dans des termes on ne peut plus clairs par le biais de la note de 2011. Lorsque l'on reprend les éléments du dossier dans le bon ordre, il ne fait aucun doute que les éléments constitutifs d'un différend sont bien présents, selon la définition qu'en retiennent nos contradicteurs eux-mêmes. On est bien ici en présence d'une prétention d'une partie – les Maldives – à laquelle l'autre partie s'oppose et qu'elle rejette[17].

Le différend qui existe entre les deux parties à la présente instance au sujet de l'étendue de leurs espaces maritimes ne date donc pas d'hier, ou même du dépôt de l'acte introductif d'instance par la République de Maurice, comme la partie adverse semble l'avoir laissé entendre[18]. Les éléments du dossier montrent que l'existence de ce différend est clairement établie, et que le chevauchement de leurs revendications respectives a été reconnu par les parties elles-mêmes dès 2010. L'exception préliminaire des Maldives, fondée sur la prétendue absence d'un différend entre les parties à la présente instance, ne peut donc manifestement qu'être écartée.

Il doit en aller de même, comme je voudrais vous le montrer maintenant, de l'exception fondée sur la prétendue absence de négociations préalables entre les parties.

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[14] Preliminary Objections, Annex 27.
[15] Observations écrites des Maldives, par. 135 c).
[16] TIDM/PV.20/A28/2, p. 31, lignes 11-18 (Mme Hart).
[17] TIDM/PV.20/A28/1, p. 14, lignes 23-24 (M. Akhavan).
[18] Exceptions préliminaires, par. 75.

Selon les Maldives, la Chambre spéciale ne pourrait, par ailleurs, exercer sa compétence à l'égard du litige que lui ont soumis les parties, en raison du fait que l'obligation de procéder à des négociations préalables, qui résulterait des articles 74 et 83 de la Convention sur le droit de la mer, n'aurait pas été satisfaite. Les parties sont doublement en désaccord à cet égard. Le premier volet de ce désaccord est d'ordre juridique : est-il exact d'affirmer, comme le fait la partie adverse, que ces deux dispositions imposent des négociations comme préconditions procédurales, conditionnant l'exercice de leur compétence par les instances de règlement des différends prévues par la partie XV de la Convention ? Le second volet de la controverse est, quant à lui, clairement factuel : peut-on dire, sur la base des faits de la cause, que les parties n'ont pas tenté de régler leur différend par la voie de la négociation ? Je voudrais approfondir ces deux points pour vous montrer qu'à l'égard de l'un comme de l'autre, la thèse des Maldives ne saurait être acceptée.

Je ne m'attarderai pas longtemps aux questions de droit et à l'affirmation selon laquelle les articles 74 et 83 énonceraient des préconditions procédurales. Les parties se sont déjà exprimées en détail à ce sujet dans leurs écritures et il n'est pas utile d'y revenir maintenant par le menu[19].

Je rappellerai seulement la position de base de Maurice à cet égard, selon laquelle c'est à la partie XV de la Convention sur le droit de la mer – et à cette partie exclusivement – qu'il convient de se référer pour apprécier si les conditions de la saisine d'une des juridictions visées à l'article 287 sont remplies. Comme l'expose très clairement l'article 288, paragraphe premier :

> [u]ne cour ou un tribunal visé à l'article 287 a compétence pour connaître de tout différend relatif à l'interprétation ou à l'application de la Convention qui lui est soumis conformément à la présente partie.

Je précise, à toutes fins utiles, que contrairement à ce que paraissent penser nos contradicteurs[20], un différend portant sur une question de délimitation maritime est bel et bien un différend relatif à l'interprétation et à l'application de la Convention sur le droit de la mer. L'article 286 se réfère quant à lui à la compétence d'une de ces juridictions à l'égard de tout différend qui « n'a pas été réglé par l'application de la section 1 » de la partie XV. La principale obligation qui résulte de la section 1 est celle, formulée à l'article 283, de procéder « à un échange de vues concernant le règlement du différend par la négociation ou par d'autres moyens pacifiques »[21]. C'est au regard de ces dispositions, et non des articles 74 et 83, dont nos contradicteurs tentent de faire rien moins que des éléments d'une clause compromissoire, ce qu'ils ne sont évidemment pas, que doit s'apprécier la compétence d'une juridiction saisie d'un différend relatif à l'interprétation ou à l'application de la Convention.

Or il ne fait aucun doute que, dans notre espèce, ces conditions ont été satisfaites et que le différend dont vous êtes aujourd'hui saisis ne pouvait être réglé par la voie de la négociation. L'historique des échanges entre les parties montre en effet très clairement que leurs tentatives d'arriver à un accord sur la délimitation de leurs espaces maritimes sont restées totalement infructueuses. J'en viens donc maintenant, vous l'aurez compris, au volet factuel de cette question des négociations préalables.

La première démarche entreprise par la République de Maurice en ce sens remonte à 2001. Le Ministre des affaires étrangères de Maurice écrit alors à son homologue des Maldives

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[19] Voir, en particulier, Observations écrites de Maurice, par. 3.50 et suiv.

[20] TIDM/PV.20/A28/2, p. 19, lignes 38-39 (Mme Habeeb).

[21] Voir, notamment, *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires, ordonnance du 23 décembre 2010, TIDM Recueil 2008-2010,* p. 67, par. 57 ; *Navire « Norstar » (Panama c. Italie), arrêt, TIDM Recueil 2018-2019,* par. 208.

pour lui proposer des négociations sur la question de la délimitation maritime entre les deux pays. La question qui est mise sur la table et la manière d'y apporter une solution y sont exposées de manière très claire *(Continued in English)* :

> As we are embarking on the exercise to delimit the Continental Shelf around the Chagos Archipelago, we would appreciate it if you could agree to preliminary negotiations being initiated at an early date.[22]

(Poursuit en français) Cette démarche se heurte à l'époque à un refus très net de la part des Maldives, qui estiment que de telles négociations ne sont pas appropriées, eu égard au fait que Maurice n'exerçait alors pas sa juridiction sur l'archipel des Chagos[23].

Cette position des Maldives va cependant évoluer au fil du temps. En 2010, un véritable dialogue s'amorce entre les parties. Ce sont d'ailleurs les Maldives elles-mêmes qui en prennent l'initiative, comme le montre la lettre adressée par le Ministre mauricien des affaires étrangères à son homologue des Maldives. Le Ministre des affaires étrangères de Maurice y dit ce qui suit *(Continued in English)* : « I appreciate your proposal that Mauritius and Maldives hold discussions for the delimitation of the exclusive economic zones of our two countries. »[24]

(Poursuit en français) En septembre 2010, le Gouvernement de la République de Maurice indique qu'il considère que la tenue de discussions sur la délimitation de la zone économique exclusive se révèle plus pertinente encore au vu de la soumission des Maldives à la Commission des limites du plateau continental[25]. Que se passe-t-il ensuite ? Les Maldives opposent-elles à cette proposition une fin de non-recevoir ? Absolument pas. Ainsi que je l'ai déjà mentionné plus tôt, une première rencontre entre les représentants des deux États a lieu à Malé, aux Maldives, en octobre 2010 au sujet de la délimitation maritime et de la soumission. Comme la conclusion du compte rendu de la rencontre le reflète bien, celle-ci est, de toute évidence, perçue à l'époque comme l'amorce d'un processus de négociation appelé à s'inscrire dans la durée : du côté des Maldives *(Continued in English)* :

> Minister Shaheed … stated that this is only the beginning of an era of cordial relationship between the two sides and that further meetings would have to be held to finalize the pending issues.[26]

(Poursuit en français) Et pour Maurice *(Continued in English)* : « Mr Seeballuck … expressed the wish that more talks should be held between the two sides to resolve issues to their mutual benefit. »[27]

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[22] Letter No. 19057/3 from A.K. Gayan, Minister of Foreign Affairs and Regional Cooperation, Republic of Mauritius, to H.E. Mr Jathulla Jameel, Minister of Foreign Affairs, Republic of Maldives, 19 June 2001 (Preliminary Objections, Annex 24).

[23] Note diplomatique réf. (F1) AF-26-A/2001/03 du Ministère des affaires étrangères de la République des Maldives au Ministère des affaires étrangères de la République de Maurice, 18 juillet 2001 (exceptions préliminaires, annexe 25).

[24] Letter from Dr the Hon. Arvin Boolell, Minister of Foreign Affairs, Regional Integration and International Trade, Republic of Mauritius, to H.E. Dr A. Shaheed, Minister of Foreign Affairs, Republic of Maldives, 2 March 2010, Written Observations of the Republic of Mauritius, Annex 11.

[25] Note diplomatique du Ministère des affaires étrangères, de l'intégration régionale et du commerce international, République de Maurice, au Ministère des affaires étrangères, République des Maldives, 21 septembre 2010 (observations écrites de Maurice, annexe 12).

[26] Minutes of First Meeting on Maritime Delimitation and Submission regarding the Extended Continental Shelf between the Republic of Maldives and the Republic of Mauritius, 21 October 2010, Preliminary Objections, Annex 26.

[27] Minutes of First Meeting on Maritime Delimitation and Submission regarding the Extended Continental Shelf between the Republic of Maldives and the Republic of Mauritius, 21 October 2010, Preliminary Objections, Annex 26.

(Poursuit en français) Permettez-moi de m'arrêter un moment sur ces documents. Tout d'abord pour relever que la volonté exprimée à l'époque par les deux États de s'engager dans un processus de négociation est, en elle-même, révélatrice de l'existence d'un différend. Quel serait en effet le sens d'entamer de telles discussions si les deux parties n'avaient pas conscience d'un problème à régler en ce qui concerne la délimitation de leurs espaces maritimes ? Ensuite, il convient de mettre ces pièces en parallèle avec la manière dont nos contradicteurs vous ont présenté avant-hier l'état du dossier sur cette question des négociations. Vous trouverez deux dates seulement dans leurs plaidoiries relatives aux négociations : 2001 et 2019, en référence aux tentatives faites ces années-là par Maurice pour ouvrir ou reprendre des négociations avec les Maldives[28]. Rien, pas un mot, sur les échanges particulièrement significatifs entre les parties qui sont survenus en 2010. Serait-ce, par le plus pur des hasards, parce que ces échanges mettent à néant la thèse des Maldives, à la fois en ce qui concerne la prétendue absence d'un différend, comme je viens de le rappeler, et la prétendue absence de négociations ? Et sur le fond, la présentation de la dynamique qui existait alors entre les parties, qui vous a été faite par nos contradicteurs, est tout aussi problématique. Le dossier ne montrerait, selon eux, que des « efforts déployés par Maurice pour entamer des négociations en vue d'une délimitation maritime »[29]. Mais en réalité, je devrais plutôt me référer à la version originale de la plaidoirie de Mme Habeeb, à la vigueur de laquelle la traduction officielle ne rend qu'imparfaitement justice. Mme Habeeb y évoquait les *(Continued in English)* « Mauritius' unilateral attempts to force the Maldives to agree to a maritime delimitation »[30]. *(Poursuit en français)* « Tentatives unilatérales de Maurice de forcer un règlement de la question de délimitation maritime » selon les Maldives. Offres de négociations formulées par les Maldives elles-mêmes selon le dossier. Ce sont là deux propositions qui apparaissent plutôt difficiles à réconcilier. Mais peut-être nos collègues de l'autre côté de la barre nous expliqueront-ils ce samedi comment y parvenir.

Dans leur argumentation écrite, les Maldives avaient pareillement fait valoir que *(Continued in English)* :

> it is acknowledged that Mauritius has in the past requested that the Maldives meet to discuss a maritime boundary delimitation. But in the present circumstances, such negotiations between Mauritius and the Maldives would not be meaningful. This has been the consistent and clear position of the Maldives.[31]

(Poursuit en français) Eh bien non, Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, cette position n'a été ni constante ni claire, comme les échanges de 2010 le montrent. Elle a varié au fil du temps, en fonction de considérations avant tout politiques. Et ceci montre qu'il n'y avait, en ce qui concerne les possibilités de mettre en œuvre de telles négociations, aucun problème de l'ordre de ce que l'on appelle, dans la jurisprudence la plus classique dans ce domaine, un *non possumus*. De toute évidence, ce qui a fait défaut dans ce registre, c'est uniquement la volonté de s'engager plus avant dans de telles négociations.

En effet, les bonnes intentions exprimées par les deux États à l'issue de leur rencontre de 2010 resteront lettre morte. En février 2011, le Ministère des affaires étrangères de Maurice, faisant référence à la rencontre d'octobre 2010, reprend contact avec les autorités des Maldives pour s'enquérir de la possibilité de discussions sur la zone de chevauchement des plateaux continentaux au nord de l'archipel des Chagos et, plus généralement, sur la frontière maritime

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[28] TIDM/PV.20/A28/2, p. 22, lignes 20-21 (Mme Habeeb).
[29] TIDM/PV.20/A28/2, p. 22, ligne 25 (Mme Habeeb).
[30] ITLOS/PV.20/C28/2 (13 October 2020), p. 17 lines 41-43(Ms Habeeb).
[31] Preliminary Objections, paras 71 and 72; see also Written Observations of the Republic of Maldives, para. 128.

entre les deux États[32]. Mais cette démarche restera sans réponse. Tout comme, d'ailleurs, celle entamée dans le même sens par Maurice en mars 2019, invitant les Maldives à une deuxième ronde de négociations pour la délimitation de la frontière maritime, à la suite de l'avis consultatif rendu par la CIJ peu de temps auparavant[33].

C'est donc, Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, depuis près de vingt ans que la République de Maurice s'efforce de régler la question de la délimitation maritime entre les deux États par la voie de la négociation. Avec, on vient de le voir, des fortunes diverses. Une réelle amorce de dialogue qui débute en 2010, mais qui restera sans suite. Et surtout, un refus répété des Maldives de s'engager dans de telles discussions, en raison du fait que, selon cet État, la question de la souveraineté sur l'archipel des Chagos était et restait contestée, ce qui aurait rendu de telles négociations impossibles. Cela reste d'ailleurs le principal argument de la partie adverse pour prétendre que Maurice a manqué à l'obligation de négociation préalable que lui imposerait la Convention sur le droit de la mer avant de recourir aux procédures juridictionnelles de règlement des différends[34].

D'une certaine manière, nos contradicteurs s'affirment comme de vrais experts du recyclage. D'un seul point de départ – l'affirmation d'un conflit de souveraineté persistant sur l'archipel des Chagos –, ils parviennent à nourrir l'ensemble de leurs exceptions préliminaires, y compris celle relative à la prétendue absence de négociations entre les parties. Mais une fois l'inanité de cet argument de départ démontrée, comme vient de le faire avec l'efficacité qu'on lui connaît mon collègue Paul Reichler, il ne reste évidemment rien de l'exception préliminaire fondée sur un prétendu manquement à une obligation de négocier.

Comme les Maldives le notent elles-mêmes, les parties ne sont pas en désaccord sur le contenu de l'obligation de négocier[35]. Et l'on peut donc, sans problème, se référer à quelques « classiques » dans ce domaine, en reprenant par exemple la citation de la CIJ dans l'affaire du *Golfe du Maine*, que la partie adverse mentionne dans ses propres écritures[36]. La Cour s'y réfère à « l'obligation de négocier en vue de la réalisation d'un accord, et de négocier de bonne foi, avec le propos réel de parvenir à un résultat positif »[37]. Comme le montre le dossier, les Maldives se sont, dans un temps, engagées dans cette voie avant d'y renoncer. Ce à quoi la République de Maurice s'est plus généralement trouvée confrontée, avant et après cet épisode de 2010, c'est à un *non volumus* ferme de la part de sa voisine. Et lorsqu'on se heurte à tel *non volumus*, la conséquence la mieux établie c'est – et j'ose à peine vous le rappeler – que l'obligation de négocier peut être considérée comme étant épuisée[38]. Ainsi que votre Tribunal l'a énoncé à un nombre considérable de reprises, « un État partie n'a pas l'obligation de poursuivre un échange de vues lorsqu'il arrive à la conclusion que les possibilités de parvenir à un accord ont été épuisées »[39]. C'était manifestement à une telle situation que la République

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[32] Note nº 1311 du Ministère des affaires étrangères, de l'intégration régionale et du commerce international, République de Maurice, au Ministère des affaires étrangères, République des Maldives, 10 février 2011.

[33] Note diplomatique n° 08/19 de la Mission permanente de la République de Maurice aux Nations Unies à la Mission permanente des Maldives aux Nations Unies, 7 mars 2019 (Exceptions préliminaires, annexe 16).

[34] Voir, notamment, Observations écrites des Maldives, par. 126.

[35] TIDM/PV.20/A28/2, p. 18, lignes 25-26 (Mme Habeeb) ; Observations écrites des Maldives, par. 125.

[36] Exceptions préliminaires, par. 68.

[37] *Délimitation de la frontière maritime dans la région du golfe du Maine, arrêt, C.I.J. Recueil 1984*, p. 292, par. 87.

[38] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2.*

[39] *Usine MOX (Irlande c. Royaume-Uni), mesures conservatoires, ordonnance du 3 décembre 2001, TIDM Recueil 2001*, p. 107, par. 60 ; *Travaux de poldérisation à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour), mesures conservatoires, ordonnance du 8 octobre 2003, TIDM Recueil 2003*, p. 19 et 20, par. 47 ; *« Ara Libertad » (Argentine c. Ghana), mesures conservatoires, ordonnance du 15 décembre 2012, TIDM Recueil 2012*, p. 345, par. 71 ; *« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires, ordonnance du 22 novembre 2013, TIDM Recueil 2013*, p. 247, par. 76 ; *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires, ordonnance du 23 décembre 2010,*

de Maurice avait à faire face lorsqu'elle a décidé d'introduire la présente instance. Le différend en matière de délimitation maritime qui l'oppose aux Maldives en est manifestement un qui ne peut être résolu par voie d'accord. Et cet état de choses justifie pleinement le recours aux modes de règlement juridictionnel des différends établis par la partie XV. Tout comme l'exception fondée sur la prétendue absence d'un différend entre les parties, celle basée sur l'absence alléguée de négociations préalables est manifestement contredite par les éléments mêmes du dossier et doit donc être rejetée.

Je voudrais enfin vous montrer, dans un dernier temps, qu'il doit en aller de même de l'ultime exception formulée par les Maldives et fondée sur un prétendu abus de procédure.

Nos contradicteurs, de toute évidence soucieux de ne négliger aucun obstacle qui permettrait d'éviter que vous vous prononciez sur le fond de la demande qui vous a été soumise par la République de Maurice, estiment donc que l'introduction de la présente instance constitue un abus de procédure. Selon cette approche, Maurice aurait commis un véritable abus de procédure, en recourant aux mécanismes de règlement des différends prévus par la Convention sur le droit de la mer pour tenter de régler ce qui serait, avant tout, un différend de souveraineté sur l'archipel des Chagos avec un État tiers[40]. Mais cette dernière exception s'avère tout aussi peu convaincante que celles dont mes collègues et moi-même avons traité jusqu'ici.

L'abus de procédure est manifestement un concept qui rencontre beaucoup de succès – auprès des plaideurs, en tout cas. On le retrouve invoqué dans pas moins de 11 affaires devant la Cour permanente de Justice internationale ou la Cour internationale de Justice.[41] Mais là où la notion a beaucoup moins de succès, par contre, c'est devant les juges. Pas une seule fois l'argument n'a été accepté par la Cour actuelle ou sa prédécesseure. La raison en est extrêmement simple. Elle réside dans le fait que ces juridictions ont défini un seuil particulièrement élevé pour qu'il puisse être question d'abus de procédure. Comme les juges de La Haye l'ont rappelé à de nombreuses reprises – et tout récemment encore dans l'*Affaire relative à certains actifs iraniens*,

> seules des circonstances exceptionnelles peuvent justifier [que la Cour] rejette pour abus de procédure une demande fondée sur une base de compétence valable. Il doit exister, à cet égard, des éléments attestant clairement que le comportement du demandeur procède d'un abus de procédure[42].

Ces circonstances exceptionnelles, les Maldives estiment qu'elles sont présentes dans notre affaire. Il en serait ainsi parce que la République de Maurice répéterait ici ce qu'elle avait

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TIDM Recueil 2008-2010, p. 68, par. 63 ; *Navire « Norstar » (Panama c. Italie), exceptions préliminaires, arrêt, TIDM Recueil 2016*, par. 216.

[40] TIDM/PV.20/A28/2, p. 37, lignes 14-16 (M. Akhavan) ; exceptions préliminaires, par. 96.

[41] *Certains intérêts allemands en Haute-Silésie polonaise, arrêt, 1925, C.P.J.I., série A, n° 6*, p. 3738 ; *Ambatielos (Grèce c. Royaume-Uni), fond, arrêt, C.I.J. Recueil 1953*, p. 23 ; *Droit de passage sur territoire indien (Portugal c. Inde), exceptions préliminaires, arrêt, C.I.J. Recueil 1957*, p. 148 ; *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, par. 27 ; *Certaines terres à phosphate à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, par. 38 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II)*, par. 46 ; *Incident aérien du 10 août 1999 (Pakistan c. Inde), compétence de la Cour, arrêt, C.I.J. Recueil 2000*, par. 40 ; *Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, par. 27-28 ; *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018*, par. 150-152 ; *Certains actifs iraniens (République islamique d'Iran c. États-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019*, par. 113-114 ; *Jadhav (Inde c. Pakistan), arrêt, C.I.J. Recueil 2019*, par. 49.

[42] *Certains actifs iraniens (République islamique d'Iran c. États-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019*, par. 113.

déjà tenté, selon nos contradicteurs, dans l'arbitrage relatif à l'*Aire maritime protégée des Chagos*. En l'occurrence, il s'agirait de forcer la résolution du différend de souveraineté qui l'oppose au Royaume-Uni au sujet de l'archipel des Chagos, en sachant parfaitement que les litiges de souveraineté territoriale n'entrent pas dans la compétence d'une juridiction telle que le Tribunal international du droit de la mer[43].

Ici encore, nos contradicteurs refusent obstinément de voir que la roue de l'histoire a tourné et que nous ne sommes plus en 2015, au moment où le tribunal arbitral a rendu sa sentence. Ce que Maurice a fait en introduisant la présente instance, ce n'est pas, comme l'en accusent les Maldives, d'utiliser une procédure à des fins étrangères à celles pour lesquelles elle a été conçue[44]. C'est tout simplement de tirer les conséquences de l'avis consultatif rendu par la CIJ en février 2019, qui confirme que le Royaume-Uni ne dispose d'aucun titre de souveraineté sur l'archipel des Chagos et que le principe de la *res judicata* qui s'attache à la sentence arbitrale de 2015 ne fait en rien obstacle à cette conclusion[45]. Ainsi que mes collègues vous l'ont rappelé par le menu cet après-midi, vous n'êtes, Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, aucunement appelés à trancher un quelconque différend de souveraineté dont l'avis consultatif de 2019 a confirmé l'inexistence. Dans ces conditions, il est évidemment parfaitement logique pour Maurice d'aller de l'avant dans le règlement de la question de la délimitation maritime avec les Maldives, une question qui se pose dans leurs relations bilatérales depuis près de vingt ans maintenant. Il n'y a, ici, pas l'ombre d'une « circonstance exceptionnelle » qui justifierait que l'exception fondée sur l'abus de procédure soit retenue.

Il est en réalité assez extraordinaire que ce soient les Maldives qui avancent cette prétention, alors que la manière même dont elles ont choisi de répondre à l'introduction de la présente instance par Maurice révèle une relation pour le moins détachée avec la légalité internationale. La Cour a affirmé on ne peut plus clairement que l'administration continue de l'archipel des Chagos par un autre État constitue un fait illicite continu qui doit prendre fin dans les plus brefs délais[46]. Mais les Maldives maintiennent que le prétendu titre de souveraineté auquel continue à s'accrocher cet autre État fait obstacle à la poursuite de la présente procédure. La Cour a indiqué que « tous les États membres sont tenus de coopérer avec l'Organisation des Nations Unies aux fins du parachèvement de la décolonisation de Maurice »[47] et cet appel a été renouvelé par l'Assemblée générale[48]. Mais les Maldives estiment qu'il s'agit là d'un prononcé qui ne leur impose d'adopter aucune démarche particulière[49]. Il est donc plutôt singulier, dans de telles circonstances, que ce soit à la République de Maurice qu'il est reproché d'abuser du droit et des procédures internationales. Et il est plus singulier encore que la République de Maurice se voie accusée de harcèlement et d'intimidation pour le simple fait d'avoir rappelé l'importance de se conformer à la légalité internationale[50].

Les Maldives tentent de justifier leur position à ce sujet en expliquant qu'elles ne souhaitent pas prendre parti dans un différend bilatéral[51] – une position qui n'était nullement, je le rappelle, celle adoptée par les Maldives en 2010. Mais cette défense montre, s'il le fallait encore, à quel point l'analyse de nos contradicteurs est erronée. Ainsi que mes collègues vous l'ont rappelé, l'avis consultatif de 2019 a confirmé avec la plus grande clarté que ce qui était

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[43] TIDM/PV.20/A28/2, p. 38, lignes 14-17 (M. Akhavan) ; exceptions préliminaires, par. 105.
[44] Exceptions préliminaires, par. 106.
[45] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019*, par. 81.
[46] Ibid., par. 177 et 178.
[47] Ibid., par. 183 5).
[48] Assemblée générale des Nations Unies, résolution 73/295, par. 5.
[49] Observations écrites des Maldives, par. 141.
[50] TIDM/PV.20/A28/2, p. 38, ligne 38 (M. Akhavan).
[51] TIDM/PV.20/A28/1, p. 6, lignes 15-16 (M. Riffath) ; Observations écrites des Maldives, par. 141.

en cause, c'était une question de décolonisation[52], mettant en jeu des principes de droit international de portée beaucoup plus large. Une fois la question relative à la décolonisation réglée, il n'existait tout simplement plus de différend de souveraineté. En défendant la position qui est la leur dans le cadre de la présente instance, les Maldives prennent donc bel et bien position. Non pas dans un différend bilatéral, mais bien à l'encontre de la légalité internationale, en vous invitant à refuser de prendre acte des conclusions atteintes par la Cour dans son avis consultatif et, par là, à perpétuer une situation de violation continue d'un des principes les plus fondamentaux de l'ordre juridique international, celui du droit des peuples à l'autodétermination. C'est là une bien étrange invitation à adresser à un tribunal et je vous invite respectueusement à en tirer toutes les conséquences qui s'imposent en rejetant l'ensemble des exceptions préliminaires formulées par la République des Maldives.

Monsieur le Président, ceci conclut les exposés oraux de la République de Maurice pour ce premier tour de plaidoiries. Je vous exprime tous mes remerciements, Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, pour votre écoute attentive.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Klein.

This brings us to the end of this evening's sitting and the first round of oral pleadings. The hearing will resume on Saturday, 17 October at 2 p.m. to hear the Maldives' second round of pleading. The sitting is now closed.

(*The sitting closed at 6.56 p.m.*)

[52] *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, avis consultatif, C.I.J. Recueil 2019*, par. 86-88.

PUBLIC SITTING HELD ON 17 OCTOBER 2020, 2 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

For Mauritius: [See sitting of 13 October 2020, 2 p.m.]

For the Maldives: [See sitting of 13 October 2020, 2 p.m.]

AUDIENCE PUBLIQUE TENUE LE 17 OCTOBRE 2020, 14 HEURES

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour Maurice : [Voir l'audience du 13 octobre 2020, 14 h 00]

Pour les Maldives : [Voir l'audience du 13 octobre 2020, 14 h 00]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber meets this afternoon to hear the second round of oral argument of the Maldives on its preliminary objections. I would like to recall that, in view of the hybrid nature of the hearing in this case, the following Judges are present with me in the courtroom of the Tribunal: Judge Jesus, Judge Yanai, Judge Bouguetaia, Judge Heidar and Judge *ad hoc* Schrijver; while Judge Pawlak, Judge Chadha and Judge *ad hoc* Oxman are present via video link.

I shall now give the floor to Mr Payam Akhavan to make his statement.

You have the floor.

Second Round: Maldives

STATEMENT OF MR AKHAVAN
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/5/Rev.1, p. 1–10]

Mr President, distinguished Members of the Special Chamber. On the first day of the oral proceedings, we voiced the Maldives' view that this case is about a territorial dispute between Mauritius and the United Kingdom. You have now heard the oral pleadings of Mauritius. Over four hours, their Counsel delivered an eloquent lecture on the law of decolonization; on the League of Nations, the Atlantic Charter, the UN Charter, the struggle for self-determination, the ICJ *South West Africa* cases, the UN Council for Namibia; in short, everything except UNCLOS. This was followed by the history of British colonialism, the detachment of the Chagos Archipelago in 1965, the territorial integrity of Mauritius; in short, a re-litigation of Mauritius' case against the UK. Unfortunately, our learned friends were wasting their precious breath. They were litigating against the wrong respondent in the wrong courtroom. In case there was any doubt, Mauritius has now confirmed that its case is about everything except a maritime boundary dispute with the Maldives.

Mr President, the Maldives' second round of oral submissions will proceed as follows. In this introductory speech, I will address Mauritius' position, on which all its submissions rest — namely that in its Chagos Advisory Opinion the ICJ purported to conclusively resolve a bilateral sovereignty dispute. I will also explain why Mauritius' claim that the earlier 2015 Chagos Marine Protected Area Arbitration is no longer relevant is wrong. Next, Professor Thouvenin will address the Maldives' first and second preliminary objections, and Mauritius' total failure to unsettle the settled jurisprudence on jurisdiction. He will also address Mauritius' spurious argument that the Advisory Opinion is a "judicial determination" with binding effect on the UK. After the break, I will then take the floor again to address the Maldives' third, fourth and fifth preliminary objections, and to answer the three questions helpfully put to the Parties by the Special Chamber. Ms Khadeeja Shabeen, Deputy Attorney General of the Maldives, will deliver the Maldives' closing statement. Finally, the Agent of the Maldives will make brief concluding remarks and read the Maldives' final submissions.

Mr President, Professor Sands claimed, rightly, that the Maldives' preliminary objections are based on the "core premise … that there is an unresolved sovereignty dispute between Mauritius and the United Kingdom … with respect to the Chagos Archipelago".[1] Equally, Mauritius' entire position on jurisdiction is based on the "core premise" that, as of last year, that same sovereignty dispute has been definitively resolved by the Chagos Advisory Opinion. It has never suggested that this Chamber can exercise jurisdiction if that premise fails. The Parties are in agreement on this fundamental point.

1Mauritius' position is that the Maldives has misunderstood the Advisory Opinion. The Maldives stands accused of not undertaking a "textual analysis" of what the Court said.[2] And yet, oddly enough, despite pleading for almost three hours between them, ostensibly taking you through the Opinion in detail, there was one paragraph that Professor Sands and Mr Reichler studiously avoided — text that, to use their words, they "surgically"[3] removed from their so-called "textual" analysis. That neglected and unwanted text is found in paragraph 136, in which the Court categorically rejected that it had been asked to resolve a sovereignty dispute. The Court stated:

[1] ITLOS/PV.20/C28/3, p. 6, lines 1-3 (Mr Sands).
[2] ITLOS/PV.20/C28/4, p. 2, lines 42–43 (Mr Reichler).
[3] Ibid., lines 21–22 (Mr Reichler).

> the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius.[4]

There was no ambiguity in the Opinion of the Court. But, if there had been, it would have been wholly dispelled by multiple declarations in which individual Judges confirmed that the Maldives' reading of the Opinion in this proceeding is entirely correct.

Take for example the declaration of Judge Iwasawa, which states:

> The Court gives an opinion on the questions requested by the General Assembly to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization. Giving the opinion in this way does not amount to adjudication of a territorial dispute between the United Kingdom and Mauritius.[5]

Another example is the declaration of Judge Gevorgian, which states at paragraph 3:

> One cannot deny that the Request concerns a situation in which two States claim sovereignty over a territory; indeed, Mauritius has repeatedly attempted to bring the matter of Chagos to the attention of this Court, but the United Kingdom has not consented to the Court's jurisdiction — a decision that it is free to make in accordance with Article 36 of the Statute.[6]

He states further at paragraph 4:

> In such circumstances, the Court's task in the present Opinion is limited to considering the lawfulness of Mauritius' decolonization process (and to stating any legal consequences arising therefrom) without dealing with the bilateral aspects of the pending dispute.[7]

As Mauritius has repeatedly pointed out, the Judges were not in dissent. They agreed with the Court's Opinion and confirmed that it was not adjudicating the territorial dispute.

Given that Mauritius accused the Maldives of taking quotations from the majority Opinion out of context, its own treatment of the relevant text of paragraph 86 is also striking. In reading, and even putting on the screen, the first three sentences of that paragraph,[8] Mr Reichler "surgically" removed the rest of the paragraph with his sharp scalpel. As we have already pointed out, the Court stated that "[t]he General Assembly has not sought the Court's opinion to resolve a territorial between two States."[9]

That text is clear and unambiguous in its own right. But, as if to put beyond doubt its meaning, the Court went on to state:

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[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 129, para. 136 (Judges' Folder, Tab 19).

[5] Ibid., p. 342, para. 10 (Declaration of Judge Iwasawa) (Supplementary Judges' Folder, Tab 17).

[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 335–336, para. 3 (Declaration of Judge Gevorgian) (Supplementary Judges' Folder, Tab 17).

[7] Ibid., para. 4.

[8] ITLOS/PV.20/C28/4, p. 3, lines 21–32 (Mr Reichler).

[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 117–118, para. 86 (Judges' Folder, Tab 19).

> The Court has emphasized that it may be in the interest of the General Assembly to seek an advisory opinion which it deems of assistance in carrying out its functions in regard to decolonization

before quoting an important passage from the *Western Sahara* Advisory Opinion, as follows:

> The object of the General Assembly has not been to bring before the Court, by way of a request for [an] advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.[10]

Apparently, Mauritius tried to turn your attention away from that passage because it knows precisely how unhelpful it is for its position. Indeed, before the ICJ, Mauritius had strained to distinguish the Chagos Advisory Proceedings from the *Western Sahara* Opinion. It had stated:

> Here, in contrast to *Western Sahara*, sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonization issue. There is no basis for a separate consideration or determination of any question of territorial sovereignty.[11]

But the Court rejected that argument. It found that, just like in *Western Sahara*, the General Assembly's questions did not intend or require it to opine on, let alone resolve, a sovereignty dispute.

On Tuesday, my colleague Professor Boyle addressed *Western Sahara* at length. The ICJ could not have been more clear; that it could address the question of decolonization without resolving, either expressly or as a matter of implication, a sovereignty dispute:

> The settlement of this issue [i.e. questions of decolonization] will not affect the rights of Spain today as the administering Power.[12] ... [T]he request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory.[13]

Nothing in the proceedings "conveys any implication that the present case relates to a claim of a territorial nature."[14]

Mr Reichler's complete failure to deal with these passages speaks volumes.

This is certainly not the only time that Mauritius has pleaded something before the ICJ that it now seeks to hide from the Special Chamber. On Thursday, Mr Reichler stated:

> Contrary to the insistence of Professors Akhavan and Boyle, Mauritius did not "invite" the Court to find that the sovereignty issue was subsumed within the question of decolonization, such that deciding the one would also decide the other.[15]

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[10] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 at pp. 26–27, para. 39 (Judges' Folder, Tab 8).
[11] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.47 (Supplementary Judges' Folder, Tab 19).
[12] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 at p. 27, para. 42 (Judges' Folder, Tab 8).
[13] Ibid., pp. 27–28, para. 43 (Judges' Folder, Tab 8).
[14] Ibid.
[15] ITLOS/PV.20/C28/4, p. 5, lines 20-23 (Mr Reichler).

Those are his words. It is a curious litigation strategy to make statements that are demonstrably false. When we described Mauritius' submissions to the ICJ, we were literally quoting them word by word. Let's be clear. Mauritius explicitly invited the ICJ to find that "sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by the question of whether decolonization has or has not been lawfully completed."[16]

That is a verbatim quote that I already showed you on Tuesday. There are yet others, which you can see on the screen and which are contained in tab 19 of the supplementary Judges' folders[17] but, in the interests of time, I will not read them for you.

The ICJ had the opportunity to agree with Mauritius' submission that, if decolonization was not lawfully completed, then the sovereignty dispute was also resolved. But it did not do so.

Of course, the Court also had the opportunity to accede to Mauritius' express submissions about its status as the coastal State of Chagos — a matter of direct relevance to these proceedings.

As I already highlighted for you on Tuesday, Mauritius invited the Court to find that, among the legal consequences of continued British administration of the Chagos Archipelago was the obligation of the United Kingdom to "consult and cooperate with Mauritius inter alia to … allow Mauritius to proceed to a delimitation of its maritime boundaries with the Maldives."[18]

Separately, it also stated:

> [T]he maritime boundary between Mauritius and the Republic of the Maldives remains to be delimited. The administering power is required to allow Mauritius to take all reasonable steps to proceed to the delimitation of those boundaries by agreement with the Maldives in accordance with Articles 74(1) and 83(1) of UNCLOS, and to refrain from seeking to negotiate such an agreement itself.[19]

We referred to these passages numerous times on Tuesday. And what was Mr Reichler's response to them? Here it is. Precisely nothing. The silence was deafening.

It adds nothing to Mauritius' case to point to submissions made by the UK itself before the ICJ. It's true that, in objecting to the exercise of the Court's advisory jurisdiction, the UK had expressed concern that the Opinion would make a de facto ruling on sovereignty.[20] But the Court addressed that concern by making clear that in opining on decolonization it would not

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[16] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.16 (Judges' Folder, Tab 25).

[17] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.17 ("*the territorial dimension here is completely and fully resolved exclusively by reference to the rules of international law on decolonization and self-determination. … Rather, in this decolonization matter, in particular, the lawful completion of the decolonization process, in and of itself, brings to an end the issues relating to territorial sovereignty*"), para. 4.73 ("*in these proceedings … the answer to the questions posed by the General Assembly is dispositive of all other matters. The Court's answer to the first question, and its determination of whether decolonization has been lawfully completed, in and of itself determines whether the administering power or Mauritius is lawfully entitled to act as the sovereign over the Chagos Archipelago, and to exercise sovereignty*") (Supplementary Judges' Folder, Tab 19).

[18] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 4.145 (Judges' Folder, Tab 25).

[19] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statement of Mauritius, 1 March 2018, para. 7.61 (Judges' Folder, Tab 24).

[20] ITLOS/PV.20/C28/3, p. 21, line 40 – p. 22, line 1 (Mr Sands).

be making such a ruling. It was the same reason the Court had rejected Spain's objection to its jurisdiction in the *Western Sahara* Advisory Proceedings some four decades earlier.

Mauritius has sought to persuade the Chamber that the Maldives' interpretation of the Opinion is shared only by the UK. But even if we disregard the text of the Opinion and the Judges' Declarations, this reading is clearly supported by numerous States from across the world. Let us consider, for example, the explanations of vote on UN General Assembly resolution 73/295.

Let's start with the United States, whose representative said:

> The Court did not say that today Mauritius is sovereign over the British Indian Ocean Territory, or suggest that States or international organizations must recognize it as such.[21]

Australia, too, made clear its "long-standing position that the Court's advisory jurisdiction should not be used to adjudicate bilateral disputes" and that "binding judicial settlement of this matter did not have the consent of both Parties."[22]

We can already hear our friends on the opposite side complaining that these States don't count because they are part of the same "axis of evil" as the United Kingdom; so let's venture to States considerably further afield, many of whom expressed identical views despite voting in favour of the General Assembly resolution.

For example, Sweden's representative said:

> We note that the Court has underlined that the General Assembly did not submit a bilateral dispute over sovereignty that may exist between the United Kingdom and Mauritius, and that the Court has restricted itself to responding to the questions as formulated in the request for an advisory opinion.[23]

Another example is the Turkish representative who said that

> bilateral disputes over sovereignty cannot and should not be referred to the International Court of Justice for an advisory opinion without the clear consent of both parties concerned.[24]

China observed that the Court "acknowledge[d] the need to abide by the principle of consent of the countries concerned in its advisory proceedings."[25]

Chile's representative said:

> [W]e should recall that advisory opinions of the International Court of Justice are not binding on States and that it does not therefore follow that the General Assembly can use a resolution to order the implementation of the Court's conclusions. Considering the advisory nature of the opinion, matters and issues of a purely bilateral nature between the States concerned should be addressed through the appropriate bilateral channels, in accordance with international law. The Court recognized in the advisory opinion that the parties directly involved in the non-completion of the decolonization process should

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[21] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83, p. 17 (Supplementary Judges' Folder, Tab 21).
[22] United Nations General Assembly, 73rd session, 84th plenary meeting, 22 May 2019, A/73/PV.84, p. 2 (Supplementary Judges' Folder, Tab 22).
[23] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.84, p. 1 (Supplementary Judges' Folder, Tab 22).
[24] Ibid., p. 7.
[25] Ibid., p. 3.

> engage by diplomatic means and in accordance with international law in order to complete that process.[26]

Mauritius has repeated *ad nauseam* that the Maldives was one of only six States to vote against resolution 73/295; but what it fails to tell you is that many States that voted in favour shared the Maldives' view that the Advisory Opinion did not resolve the sovereignty dispute. Furthermore, a considerable number of States — 56 in total — abstained. This included developing countries ranging from El Salvador to Fiji to Timor-Leste to Sri Lanka, to name but a few. Fifteen others, from Liberia to Haiti, chose not even to attend the vote.

It goes without saying that the Maldives considers its interpretation of the Advisory Opinion to be correct. But here's the truly fatal blow for Mauritius: it doesn't matter — it doesn't matter — whether the Maldives has interpreted the Advisory Opinion correctly or not. This is for three reasons.

First, the correct interpretation of the Advisory Opinion is not a matter concerning the interpretation or application of UNCLOS. It is plainly outside the scope of this Chamber's jurisdiction. Professor Thouvenin will expand on this point in relation to the first and second preliminary objections.

Secondly, advisory opinions are not binding, even on the organs which request them, let alone on States in a bilateral dispute. Mauritius has done its best to blur the distinction between the ICJ's advisory and contentious jurisdictions. This is a point on which Professor Thouvenin will elaborate. At this point, it suffices to say that, whatever authority advisory opinions may have in jurisprudence as abstract statements of international law, they are not a means of binding States in specific disputes through the backdoor.

Thirdly, whatever the position of Mauritius or even that of the Maldives, the fact remains that the United Kingdom substantively disagrees with the Advisory Opinion. In recent statements, the United Kingdom has once again confirmed that

> we do not share the Court's approach and have made known our views on the content of the opinion, including the insufficient regard for significant material facts and legal issues[27]

and has stated clearly that the Opinion "is not a legally binding judgment."[28]

Mauritius complains that the UK is a "recalcitrant"[29] State in respect of its obligations; but that is not the Maldives' problem, and it is most certainly not a matter within this Chamber's jurisdiction. Mr Reichler denigrated the Maldives as parroting the UK's assertions of sovereignty.[30] "[N]othing is gained when a parrot is taught a new word", he said, quoting George Orwell; a rather insulting thing to say to a nation in inter-State proceedings; but he chooses to ignore that the Maldives takes a different position to the UK in respect of the Advisory Opinion, in that it accepts the Court's pronouncements insofar as they relate to decolonization. If a quote from George Orwell is appropriate, it is that, in concealing inconvenient truths, "one turns, as it were, instinctively to long words and exhausted idioms,

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[26] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.84, p. 4 (Supplementary Judges' Folder, Tab 22).

[27] United Nations General Assembly, 74th session, Item 86, Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Report of the Secretary-General, 18 May 2020, UN Doc A/74/834, p. 14 (Supplementary Judges' Folder, Tab 23).

[28] United Nations General Assembly, Letter dated 28 September 2020 from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, 28 September 2020, A/75/359, p. 1 (Supplementary Judges Folder, Tab 24).

[29] Maldives' Written Observations, para. 22.

[30] ITLOS/PV.20/C28/4, p. 18, lines 24-26 (Mr Reichler).

like a cuttlefish squirting out ink." Indeed, in Mr Reichler's speech, there was plenty of ink, spilled across the numerous pages of an exhausting and repetitive speech that seriously infringed on the coffee break, and said everything — everything — except how it is possible for a non-binding advisory opinion to definitively adjudicate a bilateral sovereignty dispute.

On the theme of creative licence, it is also instructive to briefly address Professor Sands' rendition of the Chagos Marine Protected Area Award. He stated that the Annex VII tribunal "ma[de] no findings on the question of who was the coastal State", except that Judges Kateka and Wolfrum suggested, in dissent, that Mauritius was the coastal State. Of course, he did not take you to the text of that award, because that would demonstrate that neither of his statements are true.

As to the majority Opinion, as the Maldives has pleaded before,[31] although the tribunal declined jurisdiction over Mauritius' first submission in that case (namely, that the United Kingdom was not entitled to act as coastal State at all), it found that it could exercise jurisdiction over Mauritius' fourth submission — namely, that, in exercising some of the powers of the coastal State, the United Kingdom had failed to comply with its obligations under UNCLOS. In that context, the majority of the Tribunal found that the United Kingdom was entitled to exercise the rights of the coastal State. It found, for instance, that "Mauritius enjoyed rights to fish in the waters of the Chagos Archipelago ... subject to licences issued freely by the BIOT administration to Mauritian-flagged vessels".[32] As well, although the Tribunal found that the UK had breached certain obligations incumbent on coastal States in declaring the Marine Protected Area, its findings were premised on the fact that the UK was entitled to exercise the powers of the coastal State, provided that it complied with UNCLOS in doing so.[33] Unlike the Advisory Opinion, these findings have *res judicata* effect as between Mauritius and the UK. As we have already said,[34] and as Mauritius itself accepted,[35] the ICJ acknowledged that it was not overriding the *res judicata* effect of that earlier award and that the questions before the Annex VII tribunal were "not the same as those that are before the Court".[36]

In other words, an Opinion in respect of decolonization did not resolve the extant bilateral sovereignty dispute and did not overrule the Annex VII tribunal's findings on the power of the United Kingdom to act as a coastal State.

And what about the distinguished ITLOS Judges Kateka and Wolfrum? Professor Sands would have you believe that their Dissenting Opinion provided the "roots"[37] of the Chagos Advisory Opinion. What he told you was that, in their view, the view of those two judges,

> the majority had fallen into error, that the tribunal could and should have concluded that under the applicable law of self-determination and decolonization, Mauritius was "the coastal State" within the meaning of the Convention.[38]

Mr President, that is simply not true. Like the majority, the dissenters found only that "the manner in which the United Kingdom proclaimed the MPA did not take into account the

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[31] Maldives' Written Observations, para. 22.
[32] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 455 (Supplementary Judges' Folder, Tab 13).
[33] Ibid., paras 503, 516, 518, 535.
[34] ITLOS/PV.20/C28/1, p. 10, lines 17-18 (Mr Akhavan); ITLOS/PV.20/C28/2, p. 35, lines 7–9 (Mr Akhavan).
[35] ITLOS/PV.20/C28/3, p. 19, lines 26–28 (Mr Sands).
[36] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 116, para. 81 (Supplementary Judges' Folder, Tab 17).
[37] ITLOS/PV.20/C28/3, p. 20, lines 27–28 (Mr Sands).
[38] ITLOS/PV.20/C28/3, p. 20, lines 6–8 (Mr Sands).

rights and interests of Mauritius".[39] They proceeded to find that the rights of the coastal State are subject to

> obligations arising from commitments by the coastal State bilaterally or even unilaterally, as well as commitments based upon customary international law or the binding decisions of an international organization.[40]

They went on to find that,

> the undertakings of the United Kingdom [i.e., the State exercising the power of the coastal State] in the Lancaster House Understanding have to be read directly into Article 2(3) of the Convention

and therefore affect the United Kingdom's exercise of its powers as the coastal State.[41]

In other words, the Annex VII tribunal found unanimously in 2015 that the UK was entitled to exercise the powers of a coastal State in respect of the Chagos Archipelago in accordance with UNCLOS. The Advisory Opinion of 2019 did not change that fact, irrespective of obligations in respect of decolonization. There continues to be, beyond any doubt, a sovereignty dispute between Mauritius and the UK. The plausibility of the UK's claim, with or without an Advisory Opinion, is irrelevant. The Special Chamber cannot exercise jurisdiction over a territorial dispute with a third State.

Mr President, distinguished Members of the Special Chamber, that concludes my speech. I now ask that you give the podium to Professor Thouvenin, who will address the Maldives' first and second preliminary objections.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akhavan.

I now give the floor to Mr Jean-Marc Thouvenin to make his statement.

You have the floor.

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[39] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, para. 89.

[40] Ibid., para. 94.

[41] Ibid.

EXPOSÉ DE M. THOUVENIN
CONSEIL DES MALDIVES
[TIDM/PV.20/A28/5/Rev.1, p. 10–23; ITLOS/PV.20/C28/5/Rev.1, p. 10–21]

Merci beaucoup, Monsieur le Président. Avant de commencer, j'aimerais rendre hommage à M. Boyle, mon ami, qui a bien voulu partager ses lumières avec moi dans la préparation de cet exposé.

Monsieur le Président, Madame et Messieurs de la Chambre spéciale, à ce stade du débat contradictoire, au dernier tour des plaidoiries orales des Maldives, alors que les arguments ont été échangés, il serait de bon aloi que j'essaie de faire le point de ce qui sépare encore les parties. Mais, à vrai dire, j'ai peine à trouver quoi que ce soit qui, à propos de la compétence de la Chambre spéciale – seule question qui nous réunit cette semaine –, recueille leur accord.

Nous convergeons certainement sur bien d'autres points qui sont sans rapport avec la Convention des Nations Unies sur le droit de la mer, et qui en ont encore moins avec la question de la compétence de la Chambre spéciale. Et je ne peux, à cet égard, que féliciter M. Sands d'avoir offert un beau cours sur « *the law of self-determination and decolonisation* » et de nous avoir rappelé par le menu l'accession de Maurice à l'indépendance. Je ne peux d'ailleurs que regretter, à titre personnel, qu'il n'ait pas réservé sa fresque historique au podium de la plus belle salle d'une faculté ou académie de droit, car ici, alors que se discute la compétence de la Chambre spéciale, il est hors sujet.

Monsieur le Président, Madame et Messieurs de la Chambre spéciale, on a voulu vous faire croire, jeudi, que la question qui se discute cette semaine est plus complexe qu'elle ne l'est. On a voulu, alternativement, vous aguicher un peu en vous faisant croire que si vous vous dites compétents, vous prendrez place dans la grande fresque historique de la décolonisation, et surtout vous faire peur en vous disant que si vous vous dites incompétents, vous ne serez rien moins que complices du maintien de la domination coloniale britannique[1], empêcherez Maurice de retrouver son intégrité territoriale[2], et peut-être même serez ostracisés pour les vingt prochaines années au moins.

Rien de cela n'est vrai, bien entendu. J'y reviendrai. Mais, pour le moment, je souhaite, si vous le voulez bien, rappeler la question qui se pose ici et maintenant. Elle est celle de votre compétence, ou de votre incompétence, pour vous saisir du différend territorial que Maurice a choisi de porter devant vous contre le Royaume-Uni, en prenant les Maldives comme prétexte.

Je sais bien qu'il n'y a rien de lyrique dans la règle du consentement à la juridiction. C'est un droit très « technique », largement jurisprudentiel, parfois frustrant, car se juger incompétent, c'est se priver d'une affaire, mais cela ne saurait, bien sûr, conditionner l'application ou l'inapplication de la règle de droit. D'autant que le respect de cette règle est essentiel au système de règlement judiciaire des différends difficilement consolidé depuis les premiers frémissements que l'on positionne généralement à l'affaire de l'*Alabama*. Ce n'est pas pour rien que la règle du consentement à la juridiction est un principe bien établi du droit du contentieux international, comme l'a souligné la Cour internationale de Justice[3]. C'est parce qu'il est le garant de la confiance des États dans les mécanismes de règlement judiciaire des

[1] TIDM/PV.20/A28/3, p. 25 (ligne 25-26) (Sands) (« perpétuer une administration qui aurait dû prendre fin en novembre dernier »).
[2] Ibid., p. 25 (ligne 26-27) (Sands) (« empêcher Maurice de jouir de son intégrité territoriale »).
[3] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 71 (Dossier supplémentaire des juges, onglet 1) ; *Appel concernant la compétence du Conseil de l'OACI en vertu de l'article 84 de la convention relative à l'aviation civile internationale (Arabie saoudite, Bahreïn, Égypte et Émirats arabes unis c. Qatar), arrêt du 14 juillet 2020*, par. 55 (Dossier supplémentaire des juges, onglet 18).

différends, laquelle confiance n'existe que si les limites de leur consentement à la juridiction sont scrupuleusement respectées.

À cet égard, le Tribunal du droit de la mer n'est pas moins scrupuleux que les autres juridictions. Pas plus tard qu'il y a quatre ans, il a expressément tenu à formuler solennellement, à l'attention de tous, un *obiter dictum*, sous la forme d'une observation générale destinée à rappeler les limites de la juridiction des tribunaux en charge du droit de la mer. Le Tribunal a posé – je cite cet *obiter dictum* qui est très connu :

> [U]ne distinction doit être opérée entre, d'une part, la question de sa compétence et, de l'autre, le droit applicable. Il relève à cet égard que l'article 293 de la Convention, qui porte sur le droit applicable, ne saurait servir à étendre la compétence du Tribunal.[4]

Voilà qui répond à la curieuse invocation, jeudi, par M. Sands[5], de l'article 293 de la Convention, comme en écho à l'interprétation qui en a été donnée, de manière fondamentalement erronée, dans l'affaire *Guyana/Suriname*[6]. La position est claire : l'article 293 est sans emport dans la présente procédure incidente qui ne concerne que la compétence.

Mais à l'évidence, le consentement à la juridiction n'est pas la tasse de thé – excusez-moi cette expression trop impériale pour cette affaire, mais elle est désormais partagée par le monde entier – de nos contradicteurs.

Laissez-moi illustrer la thèse centrale de Maurice, Monsieur le Président, en rappelant la séquence dans laquelle nous nous trouvons.

En 2015, il y avait un différend territorial non réglé entre Maurice et le Royaume-Uni. Ceci est incontestable, c'est incontesté, et c'est expressément constaté, et jugé, dans la sentence arbitrale de 2015, que Maurice ne remet pas en cause[7]. Vous lirez, au paragraphe 209 de cette sentence – qui est reproduite pour votre confort –, que *(Continued in English)* "[i]n the Tribunal's view, the record … clearly indicates that a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago."[8]

In paragraph 212:

> the Tribunal concludes that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago.[9]

In paragraph 219: "The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention."[10]

(*Poursuit en français*) C'était la situation constatée en droit en 2015. Cinq ans après, en 2020, Maurice affirme qu'il n'y a plus de « *sovereignty dispute* » et que, pour cette raison, contrairement au Tribunal arbitral de 2015, la Chambre spéciale devrait se dire compétente.

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[4] *Navire « Norstar » (Panama c. Italie), exceptions préliminaires, arrêt, TIDM Recueil 2016*, par. 136 (Dossier supplémentaire des juges, onglet 14). Voir aussi *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, sentence sur le fond, 14 août 2015, notamment par. 188–192 et 197–198 (Dossier supplémentaire des juges, onglet 12); *MOX Plant (Ireland* v. *United Kingdom)*, ordonnance procédurale n°3, 24 juin 2003, par. 19 (Dossier supplémentaire des juges, onglet 7).

[5] TIDM/PV.20/A28/3, p. 25 (ligne 21) (Sands).

[6] *Guyana v. Suriname,* sentence, 17 septembre 2007, par. 405–406 (Dossier supplémentaire des juges, onglet 9).

[7] Ibid., p. 19 (lignes 13-21) (Sands).

[8] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, p. 90, para. 209 (Judges' Folder, Tab 12).

[9] Ibid., para. 212.

[10] Ibid., para. 219.

Il est parfaitement vrai que le différend aurait pu se résoudre, depuis 2015, par une des méthodes mentionnées à l'article 33 de la Charte des Nations Unies, mais les Maldives ne peuvent que constater que cela ne s'est pas produit. L'avis consultatif de la Cour internationale de Justice n'est pas un mode de règlement des différends auquel les parties au différend territorial, Maurice et le Royaume-Uni, auraient consenti. Pas plus que la résolution subséquente de l'Assemblée générale des Nations Unies, pas plus que le cumul des deux, pas même en y ajoutant la carte du monde projetée par M. Sands jeudi. La Cour internationale de Justice a récemment rejeté sans réserve « l'hypothèse qu'une obligation peut se faire jour par l'effet cumulatif d'une série d'actes » qui, pris isolément, ne créent aucune obligation[11].

Pourtant, sans l'ombre d'une hésitation, Maurice vous demande de juger qu'un avis consultatif, ou une résolution de l'Assemblée générale, ou leur cumul, est un authentique mode de règlement judiciaire définitif et obligatoire des différends entre États, qui a exactement le même effet juridique qu'un arrêt doté de l'autorité de la chose jugée, la *res judicata*. La thèse de M. Reichler est sans détour et fort audacieuse. Je lis l'extrait de la plaidoirie clé de M. Reichler *(Continued in English)*:

> the issue has been already resolved by the ICJ's determination that Chagos is an integral part of the territory of Mauritius ... There is thus no "unresolved sovereignty dispute" ... To hold otherwise ...would mean that no dispute could ever be considered finally resolved, as long as a recalcitrant State, dissatisfied with an international tribunal's reasoned and authoritative resolution of it, refused to accept the result ... It would mean, for example, that China could continue to argue that a legal dispute still exists over the lawfulness of its so-called nine-dash line ... On the same basis, Colombia, which defiantly rejected the ICJ's unanimous 17-0 Judgment delimiting its maritime boundary with Nicaragua, could claim that a legitimate dispute still exists simply by insisting, without any basis in law, that the continental shelf and exclusive economic zone that the Court awarded to Nicaragua are Colombian.[12]

(*Poursuit en français*) Je le lis beaucoup moins bien que M. Reichler, mais je vais demander à mon assistant de bien vouloir laisser cette planche à l'écran pour que vous puissiez bien vous imprégner de ce raisonnement.

Il suffit de rappeler que les deux effets de la *res judicata* attachés à des arrêts sont d'interdire de rouvrir inlassablement le même litige, et de figer la situation litigieuse dans les termes arrêtés par le juge – *res judicata pro veritate habetur* – pour constater que c'est exactement ces deux effets-là que mon éminent contradicteur vous demande d'attacher à un avis consultatif. Or je rappelle que seul – et je cite l'arrêt de la Cour internationale de Justice – « [l]e dispositif des arrêts [...] est revêtu de l'autorité de la chose jugée »[13].

C'est pour que vous changiez cette règle de base du contentieux international que Maurice vous a saisis. Pour que vous jugiez, dans un arrêt signé de vos noms, que, contrairement à ce qui est établi dans tous les ordres juridiques, et tout particulièrement dans l'ordre international, un avis consultatif est, comme un arrêt, *res judicata* à l'égard des parties à un différend qui n'y ont pas consenti.

Monsieur le Président, comme on dit chez moi, « on se pince pour croire » que l'on a réellement pu entendre de telles – et j'emprunte ce mot à mon ami, M. Klein – inanités ici, dans ce prétoire : que le différend sur la délimitation du plateau continental *Nicaragua/Colombie*

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[11] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), arrêt, C.I.J. Recueil 2018*, p. 563, par. 174 (Dossier supplémentaire des juges, onglet 16).

[12] ITLOS/PV.20/C28/4, pp. 19, lines 11–27 (Mr Reichler).

[13] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 94, par. 123 (Dossier supplémentaire des juges, onglet 10).

aurait pu être décidé par un avis consultatif, tout comme le différend territorial entre Maurice et le Royaume-Uni a été tranché par un avis consultatif ? Que le différend entre les Philippines et la Chine, dans la *Mer de Chine,* aurait pu être tranché par un avis consultatif, tout comme le différend entre Maurice et le Royaume-Uni a été tranché par un avis consultatif ?

On l'a bien compris : c'est bien là la thèse de nos contradicteurs. Ils n'en ont pas d'autre depuis qu'ils ont abandonné celle de l'absence de plausibilité de la revendication britannique à la lumière de l'avis consultatif[14], argument devenu intenable, dans le cadre d'une discussion sur la compétence – et j'y insiste –, après la sentence arbitrale dans *Ukraine c. Russie.* M. Reichler a dit, avec l'autorité qu'on lui connaît, que Maurice n'a « *never made* » l'argument de plausibilité[15], mais je crois qu'il serait plus juste de dire « *makes no more* » cet argument que l'on trouvait en toutes lettres – *black letters* –au paragraphe 3.6 des écritures mauriciennes[16].

Monsieur le Président, même si la Chambre n'en a évidemment pas besoin pour délibérer sur cette thèse et la rejeter, permettez-moi de faire un bref point de droit.

Les avis consultatifs demandés par les organes des Nations Unies, dans le but de les aider à s'acquitter de leurs fonctions, ne sont pas des avis « conformes », mais des avis « consultatifs ». Ils ne sont pas contraignants pour l'organe qui les requiert. Selon la doctrine la plus qualifiée : « L'organe demandeur reste libre d'examiner les conséquences à tirer d'un avis »[17].

Évidemment, si l'organe requérant l'avis n'est pas lié par celui-ci, les États, à qui il n'est pas destiné, le sont encore moins, tout particulièrement à propos de leurs différends. Comme l'a jugé la Cour :

> Le consentement des États parties à un différend est le fondement de la juridiction de la Cour en matière contentieuse. Il en est autrement en matière d'avis, alors même que la demande d'avis a trait à une question juridique actuellement pendante entre États. La réponse de la Cour n'a qu'un caractère consultatif : comme telle, elle ne saurait avoir d'effet obligatoire. Il en résulte qu'aucun État, Membre ou non membre des Nations Unies, n'a qualité pour empêcher que soit donné suite à une demande d'avis dont les Nations Unies, pour s'éclairer dans leur action propre, auraient reconnu l'opportunité. L'avis est donné par la Cour non aux États, mais à l'organe habilité pour le lui demander ; la réponse constitue une participation de la Cour, elle-même « organe des Nations Unies », à l'action de l'Organisation et, en principe, elle ne devrait pas être refusée.[18]

Personne, de ce côté-ci de la barre, ne songe à dire que les avis consultatifs n'ont aucune valeur juridique. Mais Maurice peut se référer à tous les auteurs de la planète, d'Alain Pellet à John Dugard, en passant par Shabtai Rosenne : aucun n'a jamais eu l'idée saugrenue de soutenir qu'un avis consultatif peut résoudre, comme le ferait un arrêt, un différend existant entre des États qui n'ont pas consenti à ce que l'avis ait un tel effet. Un avis consultatif peut, bien entendu, aider un tribunal à juger un différend pour lequel il a compétence, comme moyen auxiliaire de détermination de la règle de droit. Mais un avis consultatif ne peut se prononcer sur un différend de telle sorte qu'un tribunal international, dont la juridiction est fondée sur le consentement, devrait le juger tranché à l'égard d'un État qui n'a pas consenti à sa juridiction.

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[14] TIDM/PV.20/A28/4, p. 21 (lignes 1-6) (Reichler).

[15] Ibid.

[16] Observations écrites de Maurice, par. 3.6.

[17] K. Oellers-Frahm, Article 96, *in* Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams, Maral Kashgar (rédactrice adjointe), David Diehl (rédacteur adjoint), *Le Statut de la Cour internationale de justice : A Commentary* (2e édition), 2012, p. 1987.

[18] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 71 (Dossier supplémentaire des juges, onglet 1).

Et je note au passage que la référence faite par M. Reichler à la Cour de Justice de l'Union européenne ne fait que confirmer que, si les mystères du système judiciaire des États-Unis sont parfaitement impénétrables pour les juristes européens – je ne m'y risquerais pas –, l'inverse est tout aussi vrai. À l'évidence, la Cour de Justice de l'Union européenne, dans les affaires citées, agissait comme juge du droit interne de l'Union européenne, pas comme tribunal international. Je me permets de renvoyer, sur ce point, aux paragraphes 65 à 72 des observations écrites des Maldives sur la réplique de Maurice.

Quant à l'Assemblée générale des Nations Unies elle-même, elle est, bien sûr, un organe politique, pas un organe judiciaire. Pour reprendre les mots de la Cour internationale de Justice : « La Charte n'a pas conféré de fonctions judiciaires à l'Assemblée générale »[19].

D'ailleurs, même lorsqu'il est établi par l'Assemblée générale des Nations unies elle-même, un tribunal international ne peut être considéré – je reprends les mots de la Cour – comme « un organe subsidiaire, subordonné ou secondaire »[20]. Car fondamentalement, aucune cour ou tribunal ne peut, dans l'exercice de sa fonction contentieuse dans une affaire concernant deux parties qui ont consenti à sa juridiction, juger – *juger* – comme acquis ce que dit une résolution de l'Assemblée générale à propos des droits et obligations d'un État tiers qui n'a pas consenti à sa juridiction.

Ceci posé, permettez-moi de revenir sur les deux exceptions préliminaires d'incompétence soulevées par les Maldives, et plus particulièrement sur les deux jurisprudences clés que sont l'arrêt du *Timor oriental* et la très récente sentence rendue dans *Ukraine c. Russie*.

Je commence par l'affaire du *Timor oriental*. J'y ai consacré une partie de ma plaidoirie de mardi parce qu'elle présente des similitudes frappantes avec la présente espèce. M. Reichler a peiné à distinguer les deux cas, son argument clé étant qu'ici le différend territorial aurait déjà été réglé par un avis consultatif, alors que dans l'affaire du *Timor oriental (Continued in English)*

> the Court could not treat the resolutions of political organs, without more, as having resolved a dispute about the lawfulness of Indonesia's conduct and, on that basis alone, proceed to adjudicate Indonesia's rights in its absence.[21]

(*Poursuit en français*) Cette explication ne correspond aucunement à la réalité. Dans l'affaire du *Timor Oriental*, la Cour a vérifié les termes et la portée des résolutions qui étaient invoquées par le Portugal pour justifier de l'absence de titre de souveraineté de l'Indonésie. Elle a constaté que les termes de ces textes ne tranchaient pas le différend territorial de manière claire, ce qui lui suffisait à rejeter l'argument portugais. Mais si les termes des résolutions avaient été clairs, la Cour aurait alors dû se demander si ces résolutions étaient obligatoires. Et si tel avait été le cas, elle aurait également été contrainte de se demander quel accueil il lui incombait de réserver à ces textes au titre de sa fonction de Cour de justice statuant au contentieux et dont le pouvoir est tiré du consentement.

À ce stade, j'ouvre une parenthèse, Monsieur le Président, pour aborder cette question posée par M. Sands jeudi, qui a plus ou moins de rapport avec cette partie de ma plaidoirie, dans la forme suivante *(Continued in English)* :

> We say … that the situation of the United Kingdom in relation to the Chagos Archipelago is akin to that of South Africa in relation to South West Africa after the

[19] *Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité, avis consultatif, C.I.J. Recueil 1954*, p. 61 (Dossier supplémentaire des juges, onglet 2).
[20] Ibid.
[21] ITLOS/PV.20/C28/4, p. 22, lines 33-34 (Mr Reichler).

> 1971 Advisory Opinion. Back then, would South Africa have had a right under international law to be engaged in the delimitation of Namibia's maritime boundary with Angola?[22]

(*Poursuit en français*) Conclure des accords avec l'Afrique du Sud à propos de la Namibie était, à l'époque, interdit non pas par l'avis consultatif, mais par la résolution 276 du Conseil de sécurité des Nations Unies. Par conséquent, il ne fait aucun doute que si l'Angola avait conclu un accord avec l'Afrique du Sud à propos de la frontière avec la Namibie, il aurait violé la résolution du Conseil de sécurité et aurait pu être poursuivi, pour cette raison, devant une juridiction internationale compétente même en l'absence de l'Afrique du Sud, dès lors que la source de l'obligation violée n'aurait pas été le comportement illicite de l'Afrique du Sud, mais la résolution du Conseil de sécurité. De même, il est évident que l'Afrique du Sud aurait également pu être poursuivie devant un tribunal compétent pour violation de la résolution du Conseil de sécurité.

En la présente espèce, au-delà du fait qu'il n'y a pas de résolution du Conseil de sécurité susceptible d'être violée, les Maldives n'ont – je crois que les choses sont claires – aucune intention de négocier un accord avec le Royaume-Uni. Par conséquent, aussi dramatique soit-elle, la comparaison de Maurice est sans objet, si ce n'est qu'elle est un habillage des thèses selon lesquelles les revendications territoriales du Royaume-Uni ont été rejetées de manière obligatoire et définitive par un avis consultatif, ou encore qu'elles sont dénuées de fondements juridiques, donc de plausibilité juridique, deux thèses que j'ai eu ou aurai l'occasion de réfuter aujourd'hui.

Pour en revenir à la jurisprudence de l'affaire du *Timor oriental*, mon contradicteur a aussi suggéré que l'affaire que nous discutons cette semaine serait davantage comparable à l'affaire de *Nauru*, dans le cadre laquelle le principe de l'*Or monétaire* avait été écarté[23]. Ce n'est pas le cas.

Dans l'affaire de *Nauru*, la question était de savoir si la Cour pouvait constater la responsabilité de l'Australie alors qu'une telle décision pouvait avoir des « incidences sur la situation juridique » de la Nouvelle-Zélande et du Royaume-Uni, l'une et l'autre non parties à l'instance[24]. La Cour observa qu'elle n'avait pas à prendre position sur la responsabilité de la Nouvelle-Zélande et du Royaume-Uni *avant* de pouvoir prendre sa décision quant à la responsabilité de l'Australie, et écarta donc la règle de l'*Or monétaire*.

C'est totalement différent de la présente espèce, où ce n'est que si la prétention de souveraineté du Royaume-Uni sur l'archipel des Chagos est jugée sans fondement – est *jugée* sans fondement – par la Chambre spéciale que cette dernière pourrait s'engager dans la délimitation maritime réclamée par Maurice. La Chambre spéciale ne peut pas le faire en l'absence du Royaume-Uni, dont les droits seraient l'objet même de la décision.

Un dernier aspect déterminant de la jurisprudence du *Timor oriental* doit encore être évoqué.

Le Portugal faisait valoir, pour échapper à la règle de l'*Or monétaire*, que ce qui était en cause était le droit du peuple du Timor oriental à disposer de lui-même, lequel est opposable *erga omnes*. Ici, Maurice invoque le même droit, aux mêmes fins. Le Portugal en déduisait que l'Australie avait l'obligation de s'y conformer et de s'abstenir de traiter avec un État qui n'avait manifestement aucun titre à exercer sa souveraineté sur le Timor oriental, sans qu'il soit besoin que la Cour se prononce sur les revendications de souveraineté indonésiennes sur le Timor

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[22] ITLOS/PV.20/C28/3, pp. 11, line 36 to 12, line 4 (Mr Sands).

[23] TIDM/PV.20/A28/4, p. 22 (lignes 35-45) – 23 (lignes 1-12) (Reichler).

[24] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 261–262, par. 55 (Dossier supplémentaire des juges, onglet 5).

oriental. Maurice développe la même thèse[25]. La Cour jugea que s'il ne faisait aucun doute, premièrement, que le droit des peuples à disposer d'eux-mêmes est un des principes essentiels du droit international contemporain, deuxièmement, qu'il était reconnu au peuple du Timor oriental, et troisièmement, qu'il était *erga omnes*, pour autant

> l'opposabilité *erga omnes* d'une norme et la règle du consentement à la juridiction sont deux choses différentes. Quelle que soit la nature des obligations invoquées, la Cour ne saurait statuer sur la licéité du comportement d'un État lorsque la décision à prendre implique une appréciation de la licéité du comportement d'un autre État qui n'est pas partie à l'instance. En pareil cas, la Cour ne saurait se prononcer, même si le droit en cause est opposable *erga omnes*.[26]

La Cour internationale de Justice a réaffirmé cette jurisprudence en 2006, dans l'affaire des *Activités armées sur le territoire du Congo*[27], et elle l'a fait d'autant plus fermement qu'elle l'a dite applicable, non seulement aux normes *erga omnes*, mais également aux normes de *jus cogens.* Selon la Cour :

> Il en va de même quant aux rapports entre les normes impératives du droit international général (jus cogens) et l'établissement de la compétence de la Cour : le fait qu'un différend porte sur le respect d'une norme possédant un tel caractère, ce qui est assurément le cas de l'interdiction du génocide, ne saurait en lui-même fonder la compétence de la Cour pour en connaître. En vertu du Statut de la Cour, cette compétence est toujours fondée sur le consentement des parties.[28]

La Cour a encore martelé cette jurisprudence, en 2012, dans l'affaire des *Immunités juridictionnelles de l'État*[29].

Ce qu'il faut en conclure dans la présente affaire est que, quelles que soient les obligations rappelées par l'avis consultatif qui s'imposent au Royaume-Uni s'agissant de l'archipel des Chagos, quelle qu'en soit la nature *erga omnes* ou de *jus cogens*, la Chambre spéciale n'a pas compétence pour trancher le différend qui oppose ce pays à Maurice à propos de l'archipel des Chagos en l'absence de son consentement.

Monsieur le Président, je me tourne maintenant vers la sentence dans l'affaire *Ukraine c. Russie*.

Ses enseignements sont clairs, directs, et d'autant plus fermes qu'ils ont été adoptés à l'unanimité des cinq arbitres, tous spécialistes du droit de la mer, quatre d'entre eux siégeant ou ayant siégé au Tribunal du droit de la mer, deux d'entre eux l'ayant présidé.

Je résume ces enseignements.

Premièrement, si, dans le cadre d'une affaire présentée comme relative à l'interprétation ou l'application de la Convention, un tribunal constate qu'un différend de souveraineté territoriale, sur lequel il n'a pas compétence, doit nécessairement être résolu avant qu'il puisse connaître de l'affaire dont il est saisi, alors il ne peut que décliner sa compétence. Sauf erreur, Maurice ne conteste pas cette règle ou ce principe, cette conclusion, mais nous en saurons peut-être plus lundi.

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[25] TIDM /PV.20/A28/4, p. 22 (lignes 26-33), p. 23 (lignes 36-47) – 24 (lignes 1-8) (Reichler).

[26] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 102, par. 29 (Dossier des juges, onglet 11).

[27] *Activités armées sur le territoire du Congo (nouvelle requête: 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 32, par. 64, et p. 52, par. 125 (Dossier supplémentaire des juges, onglet 8).

[28] Ibid., p. 32, par. 64.

[29] *Immunités juridictionnelles de l'État (Allemagne c. Italie; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012*, p. 141, par. 95 (Dossier supplémentaire des juges, onglet 11).

Deuxième enseignement : afin de s'assurer qu'un différend de souveraineté territoriale existe, le tribunal doit seulement vérifier si, en fait, des prétentions contradictoires sont exprimées. Et sur ce point, je cite le tribunal *(Continued in English)* : « the threshold for establishing the existence of a dispute is rather low. »[30]

(Poursuit en français) Bien sûr, le tribunal doit constater l'existence de revendications contraires. De « simples affirmations » (« *mere assertion* ») ne suffiraient pas[31]. Le tribunal de l'affaire *Ukraine c. Russie* n'a pas inventé cette formule. Elle reflète la jurisprudence de la Cour internationale de Justice dans l'affaire du *Sud-Ouest africain*, selon laquelle

> [l]a simple affirmation ne suffit pas pour prouver l'existence d'un différend, tout comme le simple fait que l'existence d'un différend est contestée ne prouve pas que ce différend n'existe pas. [...] Il faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre.[32]

M. Reichler affirme que la prétention de souveraineté britannique est une simple « affirmation » – « *assertion* » – parce que, selon lui, l'avis consultatif la prive de fondement juridique[33]. Ce faisant, il prétend ne pas vous demander de soumettre la revendication britannique à un test de plausibilité[34]. Mais c'est beaucoup plus que cela ! C'est à un test de validité qu'ils vous demandent de la soumettre. Ce que vous avez entendu jeudi ressemble à un test de plausibilité, de « plausibilité + », qui est, en réalité, un test de validité.

Or, et c'est la troisième règle, le troisième enseignement porté par la sentence arbitrale dans *Ukraine c. Russie*, l'existence d'un différend n'est en rien liée à la validité ou la plausibilité des prétentions contraires.

Le tribunal a été clair sur ce point *(Continued in English)* : « it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute. »[35]

(Poursuit en français) La « plausibilité », l'implausibilité ou la validité juridique des prétentions, qui constituent le différend, sont donc sans aucune pertinence pour décider de son existence ; le Tribunal ne peut en tenir aucun compte, car se prononcer sur ce point serait précisément trancher une question sur laquelle il n'a pas compétence.

Dans l'affaire *Ukraine c. Russie*, le tribunal, fort logiquement, s'est borné à constater que *(Continued in English)* « since March 2014, both Parties have held opposite views on the status of Crimea and this situation persists today. »[36]

(Poursuit en français) En la présente espèce, le différend entre Maurice et le Royaume-Uni est ancien, et c'est un fait qui persiste aujourd'hui, les deux parties se disputant âprement la souveraineté sur l'archipel des Chagos.

Quatrième enseignement de l'arrêt *Ukraine c. Russie* : si une résolution de l'Assemblée générale des Nations Unies, ou un quelconque autre texte, a pris position sur le différend territorial, le Tribunal ne peut pas l'interpréter comme résolvant ce différend territorial, car s'il

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[30] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 188 (Judges' Folder, Tab 21).

[31] Ibid.

[32] *Sud-Ouest africain (Éthiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328 (Dossier supplémentaire des juges, onglet 3).

[33] TIDM/PV.20/A28/4, p. 19 (ligne 45) (Reichler).

[34] Ibid., p. 19 (lignes 42-47) – 20 (lignes 1-3) (Reichler).

[35] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 188 (Judges' Folder, Tab 21).

[36] Ibid., para. 189.

le faisait, il exercerait sa compétence contentieuse à l'égard d'un différend sur lequel il n'a pas compétence.

Là encore, le tribunal a été clair *(Continued in English)* :

> Ukraine's argument that the Arbitral Tribunal must defer to the UNGA resolutions and need only treat Ukraine's sovereignty over Crimea as an internationally recognized background fact is equivalent to asking the Arbitral Tribunal to accept the UNGA resolutions as interpreted by Ukraine. Apart from the question of the legal effect of the UNGA resolutions, if the Arbitral Tribunal were to accept Ukraine's interpretation of those UNGA resolutions as correct, it would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory. However, it has no jurisdiction to do so.[37]

(Poursuit en français) La Chambre spéciale sera peut-être intéressée de savoir que le juge Shahabuddeen avait déjà posé ce raisonnement, à vrai dire imparable, dans son opinion individuelle dans l'affaire du *Timor*. Je cite cette opinion individuelle très inspirée du juge Shahabuddeen :

> [C]e que le Portugal demande à la Cour d'accepter comme des données n'est pas le simple texte des résolutions, mais bien le texte desdites résolutions tel qu'il les interprète.
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> [...]
>
> [M]ême si l'interprétation que donne le Portugal des résolutions était correcte [...], [s]i la Cour devait accepter l'interprétation que donne le Portugal des résolutions, elle déciderait en effet, sans entendre l'Indonésie sur une question d'interprétation portant sur le fond, que c'est le Portugal et non l'Indonésie qui détenait le pouvoir de conclure des traités [...] En fait, il s'agit de savoir non seulement si l'interprétation du Portugal est juste, mais également si, en concluant qu'elle l'est, la Cour se prononcerait sur les intérêts juridiques de l'Indonésie.
>
> De surcroît, comme la Cour ne pourrait pas se prononcer, en vertu du principe de l'*Or monétaire*, même *si* l'interprétation que le Portugal donne des résolutions était correcte, il est possible d'écarter la requête du Portugal sans que la Cour ait à déterminer si oui ou non les résolutions doivent être interprétées comme l'indique le Portugal ; la Cour pourrait parvenir à sa décision en présumant que l'interprétation du Portugal est correcte, sans pourtant se prononcer à ce sujet.[38]

La Chambre spéciale est dans la même situation ici : si elle acceptait l'interprétation donnée de l'avis consultatif par Maurice, quelle que soit la valeur juridique de cet avis consultatif, cela impliquerait *ipso facto* que la Chambre spéciale tranche le différend territorial à propos duquel elle n'a aucune compétence.

J'en arrive à ma conclusion. Monsieur le Président, Madame et Messieurs de la Chambre spéciale, l'encre de cette sentence dont je viens de présenter les enseignements lumineux, même si frustrants – frustrants, mais *dura lex sed lex* –, l'encre de la sentence dont je viens de présenter les enseignements est à peine sèche. Elle reflète l'état le plus incontestable du droit qu'il vous revient d'appliquer, afin de déterminer votre compétence. M. Sands a enjoint la juridiction de maintenir l'harmonie juridique[39]. J'en suis d'accord : il serait dramatique, pour

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[37] Ibid., para. 176.

[38] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995* (opinion individuelle de M. Shahabuddeen), p. 123–124 (Dossier supplémentaire des juges, onglet 6).

[39] TIDM/PV.20/A28/3, p. 25 (ligne 28) (Sands).

la crédibilité du système cohérent de règlement des différends établi par la Convention sur le droit de la mer, que votre formation de jugement change déjà de jurisprudence, comme si la cause de l'Ukraine valait moins que celle de Maurice.

C'est pourtant ce que M. Sands a suggéré. Dans *Ukraine c. Russie*, a-t-il souligné, il n'était pas question de colonisation ou de décolonisation. Certes, il est question d'agression armée, de déplacement de population, de violation des droits des l'homme, d'une situation qui se perpétue. Il est question de la violation du même principe d'intégrité territoriale que celui qui est au cœur de l'affaire mauricienne et qui revient plus de 20 fois dans la plaidoirie de M. Sands de jeudi.

Je terminerai alors par là où j'ai commencé, en revenant sur la menace qui a été proférée à maintes reprises par nos contradicteurs jeudi, et que M. Klein a résumée dans sa conclusion de la manière suivante : si vous vous jugez incompétents, vous, Chambre spéciale, « perpétuer[ez] une situation de violation continue d'un des principes les plus fondamentaux de l'ordre juridique international, celui du droit des peuples à l'autodétermination. »[40]

Si des inanités ont été proférées devant cette Chambre, alors celle-ci est sans doute la plus patente. À entendre nos contradicteurs, lorsque la Cour internationale de Justice s'est dite incompétente pour connaître de la violation des droits du peuple du Timor oriental à l'autodétermination, elle s'est rangée aux côtés de l'Indonésie et a perpétué une situation de violation du droit à l'autodétermination. Lorsque le juge Shahabuddeen a développé le raisonnement que j'ai rappelé à l'instant, il a également perpétué la violation du droit à l'autodétermination du peuple du Timor. Lorsque la Cour internationale de Justice s'est jugée incompétente dans l'affaire *Géorgie c. Russie*, elle s'est rendue complice de la perpétuation de violations des droits de l'homme en Géorgie. Et lorsque le tribunal, dans l'affaire *Ukraine c. Russie*, dont j'ai rappelé la composition à l'instant, s'est jugé incompétent, ses arbitres se sont unanimement rangés aux côtés de la Russie en perpétuant une situation d'agression armée et de violation continue de l'intégrité territoriale d'un État souverain : l'Ukraine.

Il est à peine besoin de contredire cette thèse qui s'effondre sur elle-même, dès que formulée. Il suffira de rappeler que, dans la sentence *Ukraine c. Russie*, le tribunal a souligné *(Continued in English)*

> the Arbitral Tribunal's recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognizing any alteration of the status of Crimea from the territory of one Party to the other, or to "any action or dealing that might be interpreted as recognizing any such altered status." Neither would it imply that the Russian Federation's actions toward and in Crimea were lawful ... The Arbitral Tribunal recognizes this reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong. In this regard, the Arbitral Tribunal recalls the statement of the ICJ in *East Timor* that Portugal, similarly to the Russian Federation in this case, "has, *rightly or wrongly* formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute."[41]

(*Poursuit en français*) Les Maldives ne disent pas autre chose. Elles ne prennent pas davantage position dans le différend bilatéral qui existe entre Maurice et le Royaume-Uni relativement à l'archipel des Chagos que ne le ferait la Chambre spéciale en se bornant à appliquer la règle de droit qui conduit à son incompétence.

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[40] TIDM/PV.20/A28/4, p. 36 (lignes 17-19) (Klein) ; TIDM/PV.20/A28/3, p. 25 (lignes 25–26) (Sands).

[41] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 178 (Judges' Folder, Tab 21).

Monsieur le Président, Madame et Messieurs de la Chambre spéciale, j'en termine en indiquant que les Maldives maintiennent leurs deux premières exceptions préliminaires d'incompétence.

Je vous remercie de votre attention et, si vous le voulez bien, ce serait probablement le moment pour la pause bien méritée.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Thouvenin.

At this stage, the Special Chamber will withdraw for a break of 30 minutes. We will continue the hearing at 3.45 p.m.

(*Break*)

THE PRESIDENT OF THE SPECIAL CHAMBER: Please be seated. I now give the floor to Mr Akhavan to make his statement.

You have the floor, Mr Akhavan.

STATEMENT OF MR AKHAVAN
COUNSEL OF THE MALDIVES
[ITLOS/PV.20/C28/5/Rev.1, p. 21–30]

Thank you. Mr President, distinguished Members of the Chamber. In this final speech, I will address you on Mauritius' responses to the third, fourth and fifth preliminary objections, before responding to the three questions posed to the Parties by the Chamber. I will then make some concluding observations before the Maldives' closing statement and final submissions.

I turn first to the Maldives' third preliminary objection, concerning the jurisdictional precondition of negotiations.

Mauritius' first response is that there is no requirement of negotiations. My learned friend Professor Klein told you that any jurisdictional requirements are to be found "exclusively" [1] in Part XV of UNCLOS. Ms Habeeb explained on Tuesday that there is no rule of treaty interpretation stipulating that all jurisdictional preconditions must be located in the same part of a treaty.[2] There is no reason why Parts V and VI of UNCLOS might not contain additional jurisdictional preconditions in respect of maritime delimitation in the EEZ and continental shelf. Articles 74 and 83 make clear that States may resort to dispute resolution under Part XV only "[i]f no agreement can be reached". The text is plain and clear, and Ms Habeeb referred to jurisprudence supporting this interpretation.[3] Professor Klein failed to respond to that case law.

Mauritius' second contention is that, if there is a precondition of negotiations, it has been satisfied. Professor Klein stated, quite correctly, that the Maldives' position since as long ago as 2001 is that negotiations are not possible so long as the UK continues to administer the Chagos Archipelago.[4] As Ms Habeeb explained, the Maldives stated that since Mauritius did not exercise jurisdiction over the islands,

> it would be inappropriate to initiate any discussions between the Government of Maldives and the Government of Mauritius regarding the delimitation of the boundary between the Maldives and the Chagos Archipelago.[5]

Professor Klein did not suggest that, as a matter of fact, any negotiations occurred at that time.

Professor Klein proceeded to refer to certain exchanges in 2010 when the Parties held initial meetings in which they envisaged that negotiations may occur in the future.[6] But he stops short of saying that negotiations actually occurred. He describes the exchanges as being "the start of a negotiation process"[7] and an expression of "good intentions".[8]

In any event, the truly problematic point for Mauritius is its central argument that its sovereignty dispute with the UK was resolved by the Advisory Opinion in 2019. On that basis,

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[1] ITLOS/PV.20/C28/4, p. 27, line 41 (Mr Klein).
[2] ITLOS/PV.20/C28/2, p. 18 (line 29) (Ms Habeeb).
[3] ITLOS/PV.20/C28/2, p. 19, line 22 – p. 20, line 13 (Ms Habeeb).
[4] ITLOS/PV.20/C28/4, p. 27, lines 15–25 (Mr Klein).
[5] Diplomatic Note Ref. (F1) AF-26-A/2001/03 from the Ministry of Foreign Affairs of the Republic of Maldives to the Ministry of Foreign Affairs of the Republic of Mauritius, 18 July 2001 (Written preliminary objections of the Maldives, Annex 25; Judge's Folder, Tab 28).
[6] ITLOS/PV.20/C28/4, p. 27, lines 26–45 (Mr Klein).
[7] Ibid., p. 29, line 14 (Mr Klein).
[8] Ibid., p. 30, line 30 (Mr Klein).

any "meaningful"[9] negotiations that could lead to the Parties "arriving at an agreement"[10] must have taken place after that time last year. But they did not, because Mauritius rushed to file its claim against Mauritius just four months later, and in any event, there could be no meaningful agreement, because the UK continues to assert sovereignty and to administer Chagos as a matter of fact.

As to the Maldives' fourth preliminary objection, the Parties disagree on two matters. First, there is disagreement on whether Mauritius' territorial dispute with the UK remains unresolved to this day. Without an undisputed coastal State, there can be no dispute on maritime delimitation between Mauritius and the Maldives. The Maldives' position on this point was fully set out by Dr Hart in her speech on Tuesday[11] and I will not repeat those points.

Secondly, the Parties disagree on whether, irrespective of the UK's sovereignty claim, there existed a dispute, consisting of a specific, particularized maritime boundary claim by one Party which had been affirmatively opposed and rejected by the other,[12] before Mauritius initiated these proceedings. On this point, we received one helpful clarification from Professor Klein, which is that, contrary to the suggestion in its written pleadings,[13] Mauritius does not contend that any of the illustrative maps produced by its consultants are evidence of a dispute.[14]

Instead, Professor Klein turned to the Parties' legislation as the starting point for establishing a dispute. He spoke about the fact that each State had claimed a maximum entitlement to an EEZ of 200 nautical miles from its baselines, and that these maximum entitlements produced an area of overlap.[15] But it was a shame that he confined his submissions to this analysis, because Dr Hart had already explained that the mere existence of such an overlap was not evidence of a "dispute".[16] The mere expression of a maximum entitlement is not a claim, especially where, as in the case of the Maldivian legislation, the government is specifically mandated to agree on a different maritime boundary line in the case of overlap.[17] A dispute requires disagreement on where the actual maritime boundary should lie; otherwise, any State with an adjacent coast, or an opposite coast less than 400 nautical miles from another State's coast, could be hauled before ITLOS.

Professor Klein's analysis of the diplomatic exchanges between the Parties was also unconvincing. You will recall that, in relation to the meeting on 21 October 2010,[18] the Parties referred to an area of "potential overlap". His only response was to point out that, elsewhere in the same document, there is a reference to an area of "overlap" without the word "potential".[19]

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[9] *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands), Judgment, I.C.J. Reports 1969*, p. 3 at pp. 46–47, para. 85 (Judges' Folder, Tab 6).

[10] Ibid., para. 85 (Judges' Folder, Tab 6). See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246 at p. 292, para. 87 (Judges' Folder, Tab 9); *Case concerning claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece* v. *Federal Republic of Germany)*, 26 January 1972, RIAA XIX, p. 27 at p. 57 (Supplementary Judges' Folder, Tab 4).

[11] ITLOS/PV.20/C28/2, p. 25, lines 13-25 (Ms Hart).

[12] Ibid., p. 23, lines 5-11 (Ms Hart).

[13] Written Observations of Mauritius, para. 3.39.

[14] ITLOS/PV.20/C28/4, p. 25, lines 18–24 (Mr Klein).

[15] Ibid., p. 23, line 29 – p. 30, line 9 (Mr Klein).

[16] Ibid., p. 24, lines 13–15 (Ms Hart).

[17] ITLOS/PV.20/C28/2, p. 27, lines 4-39 (Ms Hart).

[18] Minutes of First Meeting on Maritime Delimitation and Submission Regarding the Extended Continental Shelf between the Republic of Maldives and the Republic of Mauritius, 21 October 2010, signed by Ahmed Shaheed, Minister of Foreign Affairs, Republic of Maldives and S.C. Seeballuck, Secretary to Cabinet & Head of Civil Service, Republic of Mauritius (Written preliminary objections of the Maldives, Annex 26; Judges' Folder, Tab 30).

[19] ITLOS/PV.20/C28/4, p. 26, lines 24–40 (Mr Klein).

But whether the Parties actually repeated the word "potential" or not, in substance the overlap was only a potential, unspecified one.

His reference to the Joint Communiqué of 12 March 2011[20] is also difficult to understand, given how unfavourable it is to his case. It states that the Parties "agreed to make bilateral arrangements on the overlapping area of extended continental shelf" between them. This is obviously an intention to cooperate before a dispute is crystallized. Where is a specific, particularized, affirmative claim by one Party on the maritime boundary? Where is the rejection by the other Party? The answer is: nowhere.

The same is true of Mauritius' note to the UN Secretary-General of 24 March 2011.[21] Professor Klein told you that "[t]he fact that the precise zone of overlap in the claim is not specified in the note is of no importance".[22] We disagree. The lack of any particulars is of crucial importance because there must be a dispute of "sufficient clarity" as has been spelled out in the jurisprudence.[23] Professor Klein's only comeback was that the Maldives had already made a "claim" in its CLCS submission.[24] But that is irrelevant: there is simply no specific claim, let alone one that is rejected by the other side.

Professor Klein went so far as to state that "the willingness expressed at the time by the two States to engage in a process of negotiation is in itself indicative of the existence of a dispute."[25] But a willingness to negotiate is not a dispute. In any event, as with the third preliminary objection, the problem remains for Mauritius that it must establish the crystallization of a dispute in the four-month period between when it says its sovereignty dispute with the UK was resolved in February 2019 and when it filed its claim against the Maldives, four months later. Professor Klein, of course, pointed to no relevant evidence from this short time period, because there is none.

As to the Maldives' fifth preliminary objection, Professor Klein is right to state that there is a high threshold for establishing an abuse of process.[26] I had already made that clear on Tuesday.[27]

Professor Klein denied that Mauritius is using these proceedings to settle its territorial dispute with the UK.[28] But that flies in the face of Mauritius' admission that, in order to exercise jurisdiction, you must necessarily find that it is the coastal State to the exclusion of the UK. I note further that Mauritius, while insisting on a high threshold in relation to abuse of process on its own part, is quite happy to suggest that the Maldives has been guilty of an abuse of process merely by filing these preliminary objections. We trust that the Special Chamber will see through this double standard.

I now turn to the three questions received from the Special Chamber on Thursday evening for which we are grateful. We were asked to answer these questions orally in our second round speeches and/or in writing by no later than the end of Mauritius' second round speeches on Monday. I will address them now, although the Maldives reserves the right to respond further in writing.

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[20] Joint Communiqué (12 March 2011) (Written Observations of Mauritius, Annex 14), cited at Mr Klein, p. 25.
[21] Written Observations of Mauritius, para. 3.47, citing Diplomatic Note No. 11031/11 from the Permanent Mission of the Republic of Mauritius to the Secretary-General of the United Nations, 24 March 2011 (Written preliminary objections of the Maldives, Annex 27; Judges' Folder, Tab 31), cited at ITLOS/PV.20/C28/4, p. 25, line 32 – p. 36, line 2 (Mr Klein).
[22] ITLOS/PV.20/C28/4, p. 26, lines 37–38 (Mr Klein).
[23] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 382 (Judges' Folder, Tab 12).
[24] ITLOS/PV.20/C28/4, p. 26, line 45 – p. 27, line 9 (Mr Klein).
[25] Ibid., p. 29, lines 26-27 (Mr Klein).
[26] Ibid., p. 32, lines 26-27 (Mr Klein).
[27] ITLOS/PV.20/C28/2, p. 36, lines 28–35 (Mr Akhavan).
[28] ITLOS/PV.20/C28/4, p. 33, lines 5-9 (Mr Klein).

The Chamber's first question asks what the legal considerations were in carrying out certain bilateral exchanges. These exchanges consist of the parties' first meeting on maritime delimitation and submissions regarding the extended continental shelf, which took place on 21 October 2010, and its Joint Communiqué of 12 March 2011.

The Maldives' answer is as follows. These bilateral exchanges took place in furtherance of friendly bilateral relations. In particular, Mauritius had erroneously accused the Maldives of secret maritime delimitation talks with the UK. The Maldives reassured Mauritius that it had not and would not conduct such negotiations. What is reflected in both the minutes of the meeting and the Joint Communiqué are discussions of a strictly diplomatic nature with a view to exploring possible solutions to a potential overlap of the Parties' extended continental shelf. A search of the Maldives' archives has not yielded any documents suggesting that the exchanges were motivated by any legal considerations or obligations, or that the Parties discussed any legal matters or commitments.

The Chamber's second question concerns the reference in the Chagos Advisory Opinion to an obligation on UN Member States "to cooperate with the United Nations in order to complete the decolonization of Mauritius", as set out in paragraph 180 of the Opinion. The Chamber asked whether this obligation is relevant to the present case and, if so, how.

The Maldives' position is that this obligation is not relevant because it does not concern the interpretation or application of UNCLOS and is therefore outside the jurisdiction of the Special Chamber.

The Maldives understands Mauritius' position to be that, in respect of the fifth preliminary objection on abuse of process, the obligation is relevant in the sense that, by raising preliminary objections in these proceedings, the Maldives has acted inconsistently with this obligation.[29] The Maldives disagrees with this position for the following reasons:

First, the ICJ did not set out what action Member States would be required to take pursuant to this obligation, leaving it for the General Assembly "to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius".[30]

Second, in paragraph 5 of resolution 73/295, all that the General Assembly said is that States must

> refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution.[31]

Third, nothing in that resolution suggested that States are under an obligation to delimit a maritime boundary with Mauritius. To the contrary, as I have already explained, the Court did not accept Mauritius' submissions that it should be entitled to delimit a maritime boundary with the Maldives. Accordingly, the Court did not consider this to form part of the obligation to cooperate. Nothing in the General Assembly resolution suggests otherwise.

Fourth, it is not the case that simply because a case implicates obligations *erga omnes*, including the right to self-determination, that an international court or tribunal can exceed its proper jurisdiction. Professor Thouvenin has already taken you to the passages of the *East Timor* case establishing that the *erga omnes* character of an obligation and the rule of consent

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[29] Written Observations of Mauritius, paras 3.78–3.80.

[30] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 139, para. 180 (Judges' Folder, Tab 19).

[31] UNGA resolution 73/295, "Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", 24 May 2019, A/RES/73/295, para. 5 (Judges' Folder, Tab 37).

to jurisdiction are "two different things".[32] He took you to other authorities that make exactly the same point, and I will not repeat them here.

Accordingly, the raising of preliminary objections by the Maldives is not in any way inconsistent with its obligation to cooperate in the decolonization of Mauritius.

Mr President, there is a final point in respect of the second question that I wish to raise. It might be argued that delimiting a maritime boundary with the UK in respect of the Chagos Archipelago would constitute "action that will impede or delay the completion of the process of decolonization of Mauritius". The Maldives merely notes in this regard that, whether or not that is correct, its policy, as I explained on Tuesday, is that it will not delimit a maritime boundary with the UK.[33]

I now turn to the Chamber's third question, which is as follows: if delimitation were deferred for reasons indicated in the Maldives' preliminary objections, what would be the obligations under paragraph 3 of articles 74 and 83 of the Convention? The Chamber asks further whether it could exercise jurisdiction with respect to those obligations.

I turn first to a brief discussion of the content of the obligations in paragraph 3 generally. The first obligation is to "make every effort to enter into provisional arrangements of a practical nature". The second is "during this transitional period, not to jeopardize or hamper the reaching of the final agreement."

In *Guyana* v. *Suriname*, the Annex VII tribunal found that the first obligation in paragraph 3 was "designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending delimitation."[34] It emphasized, however, that the duty to "make every effort" simply requires States to "negotiate in good faith" and to "adopt a conciliatory approach to negotiations".[35] The Special Chamber in *Ghana/Côte d'Ivoire* expressed the same view[36] and confirmed that the party seeking to establish a breach of this obligation must first request that the other party enter into provisional arrangements — in other words, that it must "trigger the requisite negotiations."[37]

As to the second obligation, the Tribunal in *Guyana* v. *Suriname* found that unilateral activity in the disputed area is not prohibited per se, especially if it "do[es] not cause a physical change to the marine environment".[38] Activities will violate the obligation in paragraph 3 if they have the "potential to cause irreparable prejudice" or may "affect the other party's rights in a permanent manner."[39] In *Ghana/Côte d'Ivoire*, the Chamber made clear that the second obligation applies only to "the transitional period", which "means the period after the maritime delimitation dispute has been established until a final delimitation … has been achieved."[40]

It is the Maldives' position that, if delimitation were deferred on the grounds of its preliminary objections, no obligations would arise for itself or Mauritius under paragraph 3 of articles 74 and 83. This is for two reasons.

First, paragraph 3 refers to "the States concerned". Given that the preceding text is "[p]ending agreement as provided for in paragraph 1", it is clear that "the States concerned"

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[32] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 102, para. 29 (Judges' Folder, Tab 10).
[33] ITLOS/PV.20/C28/1, p. 7 (lines 37–39) (Mr Riffath).
[34] *Guyana* v. *Suriname*, Award, 17 September 2008, p. 153, para 460 (Supplementary Judges' Folder, Tab 9).
[35] Ibid., p. 153, para. 461.
[36] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4 at pp. 166–7, para. 627 (Supplementary Judges' Folder, Tab 15).
[37] Ibid., pp. 167, para. 628.
[38] *Guyana* v. *Suriname*, Award, 17 September 2008, pp. 154–5, paras 465–467 (Supplementary Judges' Folder, Tab 9).
[39] Ibid., p. 156, paras 469–470.
[40] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4 at pp. 167, para. 629.

are those "with opposite or adjacent coasts". If this Chamber accepts the Maldives' preliminary objections, then it will have accepted that Mauritius has not been conclusively established as the coastal State of the Chagos Archipelago. In that case, just as the Parties could not seek to delimit their boundary in accordance with paragraph 1, they would not accrue obligations under paragraph 3 either. For the same reason, any allegation that either Party had not complied with the obligations in paragraph 3 would be a matter outside of the Special Chamber's jurisdiction.

Secondly, *Ghana/Côte d'Ivoire* held that paragraph 3 applies only "after the maritime delimitation dispute has been established."[41] The Maldives' position is that such a dispute has not been established to date, and that it cannot crystallize so long as the sovereignty dispute between Mauritius and the UK remains unresolved. If the Chamber accepts that argument, then it would follow that the "transitional period" referred to in paragraph 3 had not yet commenced and no obligations in that provision had been triggered. Again, that would prevent any exercise of jurisdiction by the Special Chamber.

There is a third and fundamental reason why any claim would be outside the jurisdiction of the Special Chamber, which is simply that Mauritius has not asserted any claim that relates to either of these obligations. There is therefore no "dispute" regarding paragraph 3. Mauritius has never produced any evidence and never even suggested that it has either invited the Maldives to enter into negotiations concerning any provisional arrangements of a practical nature or that the Maldives is carrying out any unilateral activities causing irreparable prejudice to Mauritius that would require such negotiations. In *Ghana/Côte d'Ivoire*, the Chamber held that

> [n]ot having requested Ghana to enter into negotiations on provisional arrangements of a practical nature bars Côte d'Ivoire from claiming that Ghana has violated its obligations to negotiate on such arrangements.[42]

The same applies to Mauritius in the present case.

In the time left to me, I have been instructed to make two concluding observations. The first concerns a highly regrettable statement made by Mr Reichler during his submissions on Thursday, which has already been brought to your attention, Mr President, in written correspondence. I truly regret having to raise this matter. Mr Reichler, for whom I have the highest regard, made the following statement:

> I would add to this one more point that further underscores the weakness ... of the Maldives' case. Mauritius, as you know, commenced these proceedings as an Annex VII arbitration, because that was the only vehicle available for compulsory dispute resolution. But shortly after doing so, Mauritius offered the Maldives the opportunity to transfer the case to either the ICJ or ITLOS, in lieu of arbitration. The Maldives' response was, in effect, "anywhere but the ICJ". Of course that would be their response! The Maldives had no desire to put before the ICJ the question of whether its determinations in the Chagos case were authoritative and legally binding. It knew very well what the Court's answer would be. The answer given by this Special Chamber can be no different.[43]

That was the statement made before you. The Maldives considered it simply astonishing that he would make this statement, for two reasons.

The first is that it pertains to communications between the Parties' Counsel that were made in confidence and without prejudice. It is entirely improper to make any reference to such

[41] Ibid.
[42] Ibid., para. 628.
[43] ITLOS/PV.20/C28/4, p. 17, lines 2–11 (Mr Reichler).

exchanges before the Chamber or in any other public context. This is a basic obligation in professional codes of conduct, if not simple courtesy to colleagues at the international bar — in this instance, Professor Boyle, who, for reasons that may be known to some Members of the Chamber, has not been able to join us in this proceeding.

The second point is of more direct relevance to these proceedings. It relates to the prejudicial effect of Mr Reichler's account of confidential communications among the Parties' Counsel, which is patently false. The email exchanges with Professor Boyle that we, with great reluctance, sought leave to submit yesterday show unambiguously that the Maldives' preference was for the case to be heard by the ICJ. This was exactly because Mauritius' case on jurisdiction rested entirely on the ICJ's Chagos Advisory Opinion. It was Mauritius that prevented submission to the ICJ by insisting that it would not accept bifurcation of jurisdiction from the merits, despite the multiple and obvious bars to jurisdiction that we have set out in these proceedings. If there was a Party that opposed the ICJ ruling on its own Advisory Opinion, it was clearly Mauritius. The Agent of the Maldives will have something to say on this in his final remarks.

The second and final concluding observation I will make concerns Professor Sands' evocative imagery of ITLOS being cast into the wilderness if it accepts the Maldives' preliminary objections.[44] Again, I have the highest regard for Professor Sands, but it is not the first time that he has employed this rhetorical device: just look at the similarity to his eloquent submissions in the *Gambia* v. *Myanmar* ICJ hearing a few months ago. He referred to the *South West Africa* case, as he did before you, and argued similarly that if the ICJ failed to exercise jurisdiction, it would be "cast into an incomparably … bleak wilderness".[45] The difference is that the ICJ case relates to breaches of the Genocide Convention whereas the present case relates to maritime delimitation under UNCLOS.

We have every faith that the Chamber will not be swayed by this apocalyptic narrative, because in fact the exact opposite is true: ITLOS will be cast into a bleak wilderness only if it exercises jurisdiction in this case. Mauritius asks you to unsettle settled jurisprudence, to ignore *East Timor*, to ignore *Coastal State Rights*, and so on; to resolve a territorial dispute with a third State. It asks you to do violence to the intention of the drafters of UNCLOS as it attempted to do in the 2015 Chagos arbitration. It asks you to open a Pandora's box that will not be easily closed; if you were to exercise jurisdiction under these circumstances, it is not difficult to see the long succession of UNCLOS States Parties that would make optional exceptions under article 298 because they do not want their territorial disputes decided by ITLOS. It would be the beginning of the end for the Part XV compulsory procedures.

Mr President, distinguished Members of the Special Chamber, this concludes my speech. I take this opportunity to thank you for your kind attention and patience throughout this hearing and to express my sincere gratitude to the Registry, ITLOS staff and interpreters for their courtesy and diligence. I also take this opportunity to express my great respect to the Co-Agent of Mauritius, Ambassador Koonjul, and to our dear friends and esteemed colleagues on the Mauritius Counsel team. Finally, I note with appreciation the hard work of the assistants on the Maldives Counsel team: Dr Justine Bendel, Ms Melina Antoniadis, and Mr Mitchell Lennan. Mr President, I would ask that you now give the floor to Ms Khadeeja Shabeen, Deputy Attorney General of the Maldives, who will give the closing statement on behalf of the Maldives, after which the Agent will deliver a brief conclusion and read the final submissions.

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[44] ITLOS/PV.20/C28/3, p. 12, lines 17–23 (Mr Sands).

[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Oral Proceedings, 12 December 2019, CR 2019/20 pp. 29–30 (para. 3) (Supplementary Judges' Folder, Tab 10).

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akhavan.
I now give the floor to Ms Khadeeja Shabeen to make her statement.

STATEMENT OF MS SHABEEN
REPRESENTATIVE OF THE MALDIVES
[ITLOS/PV.20/C28/5/Rev.1, p. 30–31]

Mr President, honourable Members of the Special Chamber, honourable Agent and members of the delegation of the Republic of Mauritius, it is an honour to address you to present the Maldives' closing statement in this hearing on preliminary objections.

You have heard during the Agent's opening statement that the Maldives has a steadfast commitment to upholding international law. The rules contained in the United Nations Convention on the Law of the Sea, including the rules on the peaceful settlement of disputes, are of particular importance to us as a small island State. We have the highest regard for the International Tribunal for the Law of the Sea and for this Special Chamber. Our long journey from the Maldives to participate in these proceedings, in the midst of the pandemic, is an expression of that respect. We are pleased to have had the opportunity to observe the workings of this Tribunal in this impressive courtroom.

The Maldives also has the highest regard for the International Court of Justice. We are fully committed to the principle of self-determination as repeatedly expressed in our statements before the United Nations General Assembly. For that reason, we have read and considered carefully the implications of the Court's Chagos Archipelago Advisory Opinion.

As you have heard from the Agent and from Counsel for Mauritius, we do not agree with Mauritius that the Special Chamber can exercise jurisdiction on the basis of that Advisory Opinion or the resolution of the General Assembly which followed it. We do not agree that Mauritius' sovereignty dispute with the United Kingdom over the Chagos Archipelago has been definitively resolved.

We look forward to the day when Mauritius and the United Kingdom will finally resolve this dispute and bring to an end this chapter in their bilateral relations. That day would allow the Maldives to conclude an agreement on maritime delimitation without any impediments. But the time is not now, and the forum is not this Special Chamber.

Mr President, the Maldives has no dispute with Mauritius. It is deeply unfair that we have been accused of aiding and abetting colonialism. It is deeply offensive for Mauritius' Counsel to refer to the Maldives as parroting the words of others. We trust that the Co-Agent of Mauritius will distance himself from such insulting remarks in the spirit of the dignified and friendly relations that our two nations have long enjoyed.

The Maldives is a small but proud island nation of some 500,000 people in the midst of the Indian Ocean. Our ancient and resilient people have survived and prospered over 2,500 years of history. Today, we face existential challenges — in particular, rising sea levels that fundamentally threaten our security and development. It is our wish to maintain friendly relations with both Mauritius and the United Kingdom; we do not wish to be forced into the middle of a dispute between them. That is entirely reasonable both as a matter of foreign policy as well as international law. There was no need for Mauritius to rush into these adversarial proceedings. The Maldives cannot resolve the sovereignty dispute over the Chagos Archipelago.

Mr President, all that we ask is that the Special Chamber respect the limits of its jurisdiction in accordance with settled jurisprudence. All we ask is that the Chamber respect the intention and expectations of UNCLOS States Parties. The exploitation of the UNCLOS compulsory procedures for harassment and intimidation does not achieve the high purposes for which such procedures were created. It sets a deeply unfortunate precedent in the eyes of the international community.

The Maldives continues to have the highest respect for ITLOS and the Special Chambers constituted under its auspices. On that note, I would like to take this opportunity to thank you,

Mr President, Members of the Special Chamber, the Registry, the Tribunal staff, the translators and the court reporters, for your consideration and assistance in these proceedings, especially in the challenging circumstances of the COVID-19 pandemic.

Mr President, honourable Members of the Special Chamber, this concludes the Maldives' closing statement. I now ask that you give the floor to the Agent of the Maldives to make some final remarks and to present the Maldives' final submissions.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Shabeen.

I understand that the Agent of the Maldives will now make closing remarks and present the final submissions of the Maldives. I wish to recall that article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Agent of the Maldives, Mr Riffath, to take the floor to present the final submissions of the Maldives.

STATEMENT OF MR RIFFATH
AGENT OF THE MALDIVES
[ITLOS/PV.20/C28/5/Rev.1, p. 31–32]

Mr President, honourable Members of the Special Chamber, this brings to an end the Maldives' oral pleadings in this hearing on preliminary objections. As expressed by the Deputy Attorney General Ms Shabeen, the Maldives has no dispute with Mauritius. All that divides us is a difference of views on whether the ICJ Advisory Opinion definitively resolved the sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago. We have explained why that question falls outside the jurisdiction of this Special Chamber. We trust that you will uphold the boundaries of jurisdiction conferred under UNCLOS consistent with international law.

Before we close this hearing, I must emphasize our sincere wish to maintain friendly and constructive relations with our brothers and sisters in Mauritius. In that spirit, we hereby invite Mauritius, if it so wishes, to enter into discussions with the Maldives, to explore whether our differing views on the ICJ Advisory Opinion could be submitted for the ICJ itself to decide. We also remain open to considering any other means of cooperation that Mauritius may wish to propose.

Mr President, honourable Members of the Special Chamber, I take this last opportunity to thank you and the Registry for the courtesy and diligence with which these proceedings have been conducted.

I shall now read the final submissions of the Republic of Maldives:

In accordance with article 75, paragraph 2, of the Rules of the Tribunal, and for the reasons set out during the written and oral phases of the pleadings, the Republic of Maldives requests the Special Chamber to adjudge and declare that it is without jurisdiction in respect of the claims submitted to the Special Chamber by the Republic of Mauritius. Additionally or alternatively, for the reasons set out during the written and oral phases of the pleadings, the Republic of Maldives requests the Special Chamber to adjudge and declare that the claims submitted to the Special Chamber by the Republic of Mauritius are inadmissible.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Riffath.

This completes the second round of the oral arguments of the Maldives. The hearing will resume on Monday at 2 p.m. to hear Mauritius' second round of pleading. The sitting is now closed.

(*The sitting closed at 4.32 p.m.*)

PUBLIC SITTING HELD ON 19 OCTOBER 2020, 2 P.M.

Special Chamber

Present: *President* PAIK; *Judges* JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR, CHADHA; *Judges* ad hoc OXMAN, SCHRIJVER; *Registrar* HINRICHS OYARCE.

For Mauritius: [See sitting of 13 October 2020, 2 p.m.]

For the Maldives: [See sitting of 13 October 2020, 2 p.m.]

AUDIENCE PUBLIQUE TENUE LE 19 OCTOBRE 2020, 14 HEURES

Chambre spéciale

Présents : M. PAIK, *Président* ; MM. JESUS, PAWLAK, YANAI, BOUGUETAIA, HEIDAR *juges* ; Mme CHADHA, *juge* ; MM. OXMAN, SCHRIJVER, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour Maurice : [Voir l'audience du 13 octobre 2020, 14 h 00]

Pour les Maldives : [Voir l'audience du 13 octobre 2020, 14 h 00]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber meets this afternoon to hear the second round of oral argument of Mauritius on the preliminary objections of the Maldives.

I shall now give the floor to Mr Pierre Klein, who is connected via video link, to make his statement.

You have the floor, sir.

Second tour : Maurice

EXPOSÉ DE M. KLEIN
CONSEIL DE MAURICE
[TIDM/PV.20/A28/6/Rev.1, p. 1–6 ; ITLOS/PV.20/C28/6/Rev.1, p. 1–5]

Merci, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les membres de la Chambre spéciale, à ce stade de l'instance, il est manifeste que deux questions essentielles continuent à diviser les parties. La première est celle du contenu exact de l'avis consultatif de février 2019 sur les *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*. C'est sur cette question que portera la plaidoirie de M. Reichler, qui mettra en évidence les nombreuses omissions qui caractérisent la lecture de l'avis que les Maldives vous ont proposée avant-hier. M. Reichler vous montrera à quel point la position des Maldives, selon laquelle l'avis ne règle en rien la question de la souveraineté sur l'archipel des Chagos, est indéfendable. La seconde question cruciale est celle des effets juridiques de l'avis de 2019. M. Sands reviendra en détail sur cette question pour vous montrer que l'analyse particulièrement formaliste qui en a été faite par nos contradicteurs samedi laisse complètement dans l'ombre le fait que la Cour a clairement identifié les obligations internationales qui pesaient sur le Royaume-Uni dans ce contexte. M. Sands reviendra également sur les conséquences des prononcés de la Cour pour la présente affaire. Enfin, le co-agent de la République de Maurice, Son Excellence l'ambassadeur Koonjul, vous présentera quelques remarques conclusives, ainsi que les conclusions de la République de Maurice. Il est entendu que seules les principales questions qui opposent encore les parties à ce stade seront abordées aujourd'hui. Le fait que certains points plus précis évoqués par nos contradicteurs avant-hier ne seront pas traités dans les exposés qui vont suivre ne constitue cependant en rien une admission de leur bien-fondé.

Mais dans un premier temps, permettez-moi de revenir sur les troisième, quatrième et cinquième exceptions préliminaires des Maldives. Je le ferai assez brièvement, parce que la façon sommaire dont elles ont été traitées par nos contradicteurs, lors de leur second tour de plaidoiries, montre bien qu'ils n'y attachent plus qu'une importance très relative et qu'elles ne sont pas le centre de gravité de nos débats. J'évoquerai donc successivement la question de l'existence d'un différend entre les parties, celle de savoir si ce différend était susceptible d'être résolu par la voie des négociations, et celle de l'existence éventuelle d'un abus de procédure dans la présente espèce. Dans un dernier temps, je vous ferai part de la réponse de la République de Maurice à la première des questions qui ont été adressées aux parties par la Chambre spéciale.

Tout d'abord, donc, existe-t-il un différend entre les parties quant à l'étendue et la délimitation de leurs espaces maritimes ? M. Akhavan a tenté de vous convaincre, avant-hier, que tel n'était pas le cas. Peu importe, vous a-t-il dit, que le terme « potentiel » soit, ou ne soit pas, accolé à celui de « chevauchement » dans les échanges diplomatiques intervenus entre les parties en 2010-2011, car le chevauchement serait indéterminé[1]. Ce n'était pourtant, de toute évidence, pas la position des Maldives lors du premier tour de plaidoiries, où la plus grande importance était accordée à ce qualificatif[2] qui semble soudain, maintenant, sans pertinence. Et l'on comprend le poids que nos contradicteurs lui attribuaient initialement, puisque, selon leur lecture des échanges de l'époque entre les parties, la présence de ce terme leur permettait d'affirmer que les deux États n'avaient alors pas reconnu l'existence de zones de réel chevauchement entre les espaces maritimes que l'un et l'autre revendiquaient. Mais les mots,

[1] TIDM/PV.20/A28/5, p. 25, lignes 30-31 (M. Akhavan).
[2] TIDM/PV.20/A28/1, p. 14, ligne 25 (M. Akhavan) ; TIDM/PV.20/A28/2, p. 36, lignes 17-24, p. 30, lignes 20-22 (Mme Hart) et p. 36, ligne 46 (M. Akhavan).

n'en déplaise à M. Akhavan, ont leur importance, et le fait que les parties aient, à plusieurs reprises, fait référence à ce chevauchement – réel et non potentiel – montre bien qu'elles étaient clairement conscientes du fait que leurs prétentions étaient incompatibles.

M. Akhavan a présenté une lecture tout aussi problématique de la note diplomatique adressée en mars 2011 par la République de Maurice au Secrétaire général des Nations Unies. Elle serait sans pertinence, selon lui, car elle ne préciserait pas la zone concernée par le différend et empêcherait, de ce fait, que celui-ci soit identifié avec suffisamment de clarté[3]. Pourtant, à supposer même qu'il s'agisse là d'une condition de l'existence d'un différend, ce qui est hautement contestable, cette condition est remplie en l'espèce. Pour rappel, cette note fait suite à la demande relative à un plateau continental étendu introduite par les Maldives auprès de la Commission des limites du plateau continental. La République de Maurice s'en est émue, en faisant valoir auprès des Maldives que cette demande ne prenait pas en compte les coordonnées de la zone économique exclusive de Maurice. Les Maldives se sont engagées à en tenir compte et à rectifier leur demande, ce qu'elles n'ont, en fin de compte, jamais fait. C'est en réaction à cette abstention que Maurice a formulé sa protestation auprès des Nations Unies, en indiquant que

> [l]e plateau continental étendu revendiqué par [la République des Maldives] empiète sur la zone économique exclusive de la République de Maurice, *dont les coordonnées ont été communiquées au Secrétaire général dans une note datée du 20 juin 2008*.[4]

À supposer même que l'étendue de la zone de chevauchement résultant des prétentions opposées des parties doive être précisée pour que l'on puisse parler de l'existence d'un différend – ce que la République de Maurice ne pense pas –, tous les ingrédients étaient donc présents, dès ce moment, pour déterminer exactement les contours de la zone de chevauchement.

En tout état de cause, l'essentiel est que cette note constitue une protestation en bonne et due forme en réponse à une prétention exprimée par l'autre partie. M. Akhavan a prétendu le contraire[5]. De toute évidence, pour lui, une demande présentée par un État à la Commission des limites du plateau continental n'a rien à voir avec l'expression des prétentions de cet État sur les espaces maritimes concernés. Et une protestation émise par un autre État à l'encontre de cette revendication ne constitue pas un rejet de cette revendication. Décidément, George Orwell est bien l'auteur de référence de nos débats, puisque la vision de M. Akhavan fait furieusement penser aux slogans en vogue dans la société que décrit le roman « 1984 » : « la guerre, c'est la paix » ou encore « la liberté, c'est l'esclavage ». Mais, fort heureusement, nous ne sommes pas dans *1984* et en 2020, comme en 2011, le mot « protester » veut toujours bien dire protester, c'est-à-dire « exprimer s[on] opposition par des paroles ou des écrits »[6].

J'ajouterai encore sur ce point que l'argument de M. Akhavan selon lequel il ne pourrait exister un différend entre les parties que si celui-ci était né après que la CIJ a reconnu que le Royaume-Uni ne possédait aucun titre sur l'archipel des Chagos[7] est entièrement dépourvu de fondement. La Cour a clairement établi que le détachement des Chagos n'était pas conforme au droit international lorsqu'il est survenu, en 1965, et que ces îles ont, en tout temps, continué à faire partie du territoire de la République de Maurice. Tel était évidemment aussi le cas en 2010-2011, quand les échanges auxquels je viens de faire référence sont intervenus. Les deux

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[3] TIDM/PV.20/A28/5, p. 25, lignes 33-34 (M. Akhavan).

[4] Note diplomatique n° 11031/11 adressée au Secrétaire Général de l'Organisation des Nations Unies par la Mission permanente de Maurice auprès de l'Organisation des Nations Unies, 24 mars 2011 (exceptions préliminaires, annexe n° 27).

[5] TIDM/PV.20/A28/5, p. 26, lignes 2-3 (M. Akhavan).

[6] Dictionnaire Larousse (en ligne : https://www.larousse.fr/dictionnaires/francais/protester/64554).

[7] TIDM/PV.20/A28/5, p. 30, lignes 1-3 (M. Akhavan).

États étaient d'ailleurs pleinement conscients, à l'époque, de l'existence de revendications contradictoires sur les espaces maritimes en cause, et ils estimaient qu'ils étaient seuls compétents pour y apporter une solution. Je reviendrai d'ailleurs tout à l'heure sur ce point. Les pièces du dossier montrent donc bien que, dans notre affaire, les éléments de base d'un différend sont manifestement présents, et l'exception préliminaire formulée par les Maldives sur ce point ne peut donc qu'être rejetée.

Dans sa plaidoirie de samedi, M. Akhavan a réitéré l'argumentation des Maldives quant à l'absence alléguée de négociations préalables entre les parties qui ferait obstacle au recours au mode de règlement des différends envisagé dans la partie XV de la Convention sur le droit de la mer. Selon ses arguments, rien qui ressemble à des négociations n'aurait eu lieu en 2010 et aucune négociation digne de ce nom n'aurait pu intervenir en 2019, eu égard au délai de quatre mois seulement qui a séparé l'avis consultatif de l'introduction de la présente instance par la République de Maurice[8]. Je reviendrai tout à l'heure sur le premier de ces arguments dans ma réponse à la première des questions adressées aux parties par la Chambre spéciale. Pour l'instant, je relèverai surtout que ce qui a fait furieusement défaut dans la réplique de M. Akhavan, ce sont les refus et les silences opposés par les Maldives aux efforts de la République de Maurice de relancer, à partir de 2011, les négociations qui avaient été amorcées en 2010.

Contrairement à ce qu'a affirmé M. Akhavan, Maurice ne s'est aucunement « précipitée » pour mettre en œuvre le règlement juridictionnel du différend qui l'opposait aux Maldives[9]. Je rappellerai à cet égard qu'une demande de reprise des négociations a été adressée par Maurice aux Maldives en mars 2019. Elle est restée sans suite. Étonnamment, M. Akhavan n'a pas eu un mot à vous dire à ce sujet. Tout comme il n'a pas eu un mot à dire sur la jurisprudence à laquelle j'ai fait référence la semaine passée, selon laquelle le refus d'une partie de s'engager dans des négociations permettait de conclure que l'obligation de négocier était épuisée. Votre Tribunal n'est, bien sûr, pas le seul à le dire. Tout récemment encore, la Cour internationale de Justice a rappelé qu'elle avait

> jugé qu'une condition préalable de négociation était remplie lorsque "les positions [des parties] n'[avaie]nt, pour l'essentiel, pas évolué" à la suite de plusieurs échanges de correspondance diplomatique ou de réunions [10].

Manifestement, telle est bien la situation qui se présente dans notre affaire également : la position des Maldives n'a pas évolué, pas plus avant qu'après les premiers mois de 2019, et le présent différend n'en est clairement pas un qui peut être résolu par la voie de la négociation. Rien dans ce que vous ont exposé les Maldives ce samedi ne permet d'arriver à une autre conclusion, et ceci justifie pleinement le rejet de l'exception préliminaire formulée par la partie adverse sur ce point.

Je reviendrai maintenant très brièvement sur la dernière des exceptions préliminaires formulées par les Maldives, celle relative à l'abus de procédure. M. Akhavan s'est limité à vous dire à ce sujet que si la Chambre spéciale exerçait sa compétence dans notre affaire, cela l'obligerait à conclure que Maurice, et non le Royaume-Uni, est l'État côtier concerné[11]. Il est bien difficile, à vrai dire, de voir en quoi cela constituerait la « circonstance exceptionnelle »

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[8] TIDM/PV.20/A28/5, p. 26, lignes 13-18 (M. Akhavan).

[9] TIDM/PV.20/A28/5, p. 33, ligne 27 (M. Akhavan).

[10] *Appel concernant la compétence du Conseil de l'OACI en vertu de l'article 84 de la convention relative à l'aviation civile internationale (Arabie saoudite, Bahreïn, Egypte et Emirats arabes unis c. Qatar)*, arrêt, par. 93, citant *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 446, par. 59, et *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018 (I)*, p. 317, par. 76.

[11] TIDM/PV.20/A28/5, p. 26, lignes 26-28 (M. Akhavan).

requise pour que l'on puisse parler d'un abus de procédure et je ne m'attarderai donc pas davantage à cette question. Cette dernière exception des Maldives, à peine évoquée lors de leur second tour de plaidoiries, ne saurait, à l'évidence, non plus être retenue.

Permettez-moi donc de vous présenter maintenant la réponse de la République de Maurice à la première question adressée aux parties par la Chambre spéciale. Cette question se lit comme suit :

> À quelles considérations juridiques des parties répondaient la tenue de la première réunion du 21 octobre 2010 sur la délimitation maritime et la demande relative au plateau continental étendu, et le fait qu'elles consentent à « conclure des arrangements bilatéraux concernant la zone de chevauchement des plateaux continentaux respectifs des deux États autour de l'archipel des Chagos » dans le communiqué conjoint daté du 12 mars 2011 ?

Cette question fait référence à deux étapes distinctes des échanges qui sont intervenus entre la République des Maldives et la République de Maurice au sujet de la délimitation de leurs frontières maritimes. Ces deux documents, espacés de près de cinq mois, reflètent bien la dynamique qui animait à ce moment-là les deux États en vue de parvenir à un accord sur la délimitation de leur frontière maritime.

Selon la République de Maurice, les considérations juridiques des parties auxquelles répondaient ces initiatives étaient de trois ordres. La première considération juridique en cause est le fait que les deux États estimaient bien que c'était à eux – et à eux seuls – de s'engager dans ce processus, en vue d'arriver à un accord sur la délimitation de leurs espaces maritimes. C'est dans cette perspective que les Maldives se sont adressées à Maurice au début de l'année 2010 pour proposer l'ouverture de discussions sur la délimitation des zones économiques exclusives des deux États[12]. Il était donc clair, dès ce moment-là, que les Maldives identifiaient bien Maurice comme l'État côtier concerné, avec lequel entamer des discussions en vue de la délimitation de leurs espaces maritimes. Dans le même ordre d'idée, dans le compte rendu de la réunion d'octobre 2010 il est exposé que le chef de la délégation mauricienne avait indiqué qu'il était « approprié que Maurice et les Maldives discutent de la délimitation de la frontière »[13]. Cette affirmation n'avait alors aucunement été remise en cause par les Maldives. Tout au contraire, le Ministre des affaires étrangères des Maldives a confirmé son accord pour que les deux parties travaillent ensemble sur la zone de chevauchement. De la même manière encore, le communiqué conjoint de mars 2011 montre très clairement qu'aux yeux des deux parties il s'agissait bien là d'une question qu'elles avaient pleine compétence pour régler de façon définitive – et exclusive. Les deux États s'identifiaient ainsi mutuellement comme étant les interlocuteurs compétents pour régler cette question, en leur qualité d'États côtiers concernés.

Deuxièmement, ces échanges reflètent le constat opéré par les parties de l'existence de revendications opposées au sujet des espaces maritimes concernés – et donc d'un différend sur ce point. C'est évidemment ce constat qui conduit les parties à amorcer un processus de négociation à ce sujet et à organiser une première rencontre en octobre 2010 à cette fin. Ainsi que je viens de le rappeler, le Ministre des affaires étrangères des Maldives exprime alors son accord sur le fait que les parties travaillent ensemble sur ce qu'il identifie lui-même comme une zone de chevauchement[14]. La terminologie est identique dans le communiqué conjoint de

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[12] Lettre adressée par l'Honorable Arvin Boolell (Ministre des affaires étrangères, de l'intégration régionale et du commerce international de la République de Maurice) à S.E. M. A. Shaheed (Ministre des affaires étrangères de la République des Maldives) (2 mars 2010) (observations écrites de la République de Maurice, annexe 11).

[13] « [T]out à fait approprié que Maurice et les Maldives discutent de la délimitation de la frontière. »

[14] « Il était également d'accord pour que les deux parties travaillent ensemble sur la zone de chevauchement. ».

mars 2011[15]. Pris ensemble, ces deux documents témoignent donc à la fois de l'existence d'un désaccord entre les parties quant à l'étendue de leurs espaces maritimes respectifs et du fait que les deux États étaient pleinement conscients de l'existence de ce chevauchement résultant de leurs revendications respectives.

La troisième considération juridique qui ressort de ces développements est une manifestation du fait que les parties se trouvaient confrontées là à une question qu'elles estimaient pouvoir régler par la voie de la négociation. Dans le compte rendu de la rencontre d'octobre 2010, il est ainsi fait mention de l'intervention du Ministre des affaires étrangères des Maldives relevant que la loi des Maldives relative aux espaces maritimes prévoyait la nécessité de trouver une solution par la voie des négociations, sur la base du droit international, aux situations dans lesquelles il existe un chevauchement[16]. Dans cette perspective, les deux parties se sont accordées en octobre 2010 sur l'échange des coordonnées de leurs points de base respectifs dès que possible en vue de faciliter leurs discussions futures sur la frontière maritime[17]. Le communiqué conjoint de mars 2011 met, quant à lui, en évidence le but ultime que les parties entendaient atteindre à l'issue de ce processus de négociations, en l'occurrence la conclusion d'un ou de plusieurs accords[18].

En espérant que cette réponse sera de nature à éclairer la Chambre spéciale, je voudrais vous remercier, Monsieur le Président, Madame et Messieurs de la Chambre spéciale, pour votre bienveillante attention. Je vous demanderais maintenant, Monsieur le Président, de bien vouloir passer la parole à mon estimé collègue, M. Paul Reichler.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Klein.

I now give the floor to Mr Paul Reichler, who is connected by video link, to make his statement.

Mr Reichler, you have the floor.

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[15] « [L]a zone de chevauchement des plateaux continentaux respectifs des deux États autour de l'archipel des Chagos. »

[16] Première réunion sur la délimitation et demande relative au plateau continental étendu entre la République des Maldives et la République de Maurice (21 octobre 2010) (observations écrites de Maurice, annexe 13) (« [...] la Loi sur les zones maritimes des Maldives prévoyait que la ZEE était en principe de 200 milles dans les zones où il n'y avait pas de chevauchement et que, dans les zones où il y avait un chevauchement avec un autre État, ce problème pouvait être résolu au moyen de négociations sur la base du droit international. »).

[17] « Les deux parties sont également convenues d'échanger les coordonnées de leurs points de base respectifs afin de faciliter les discussions qui se tiendront à plus ou moins brève échéance sur la frontière maritime. »

[18] « Les deux dirigeants ont convenu de conclure des arrangements bilatéraux concernant la zone de chevauchement des plateaux continentaux respectifs des deux États autour de l'archipel des Chagos. »

STATEMENT OF MR REICHLER
COUNSEL OF MAURITIUS
[ITLOS/PV.20/C28/6/Rev.1, p. 6–14]

Mr President, Members of the Special Chamber, good afternoon.

As I did last Thursday, I will address the Maldives' argument that the ICJ left the question of sovereignty over the Chagos Archipelago unresolved and that, as a consequence of this allegedly unresolved sovereignty dispute, the United Kingdom is an indispensable party whose absence from these proceedings deprives you of jurisdiction. To avoid repetition, I will respond today only to what the Maldives said in their second round on Saturday, and I will focus especially on whether sovereignty over Chagos has been settled by the ICJ as a matter of international law. This is the core issue on which the Maldives' first two preliminary objections depend.

Before addressing this issue, as a preliminary matter, I would like to very briefly call your attention to the letter you received from the Co-Agent of Mauritius this morning. It responds to the regrettable and wholly unjustified personal attack that was made by the Agent of the Maldives in his letter to the Tribunal of 16 October, and then picked up by Professor Akhavan in his closing argument on Saturday.[1] As our response makes clear, together with the accompanying emails, Mauritius has firmly rejected the allegation that any breach of confidential communication occurred or that any false or incorrect statement was made by its Counsel. It is the fact that the Maldives refused to take this case to the ICJ, and we are entitled to express our view, which is obvious in any event, as to why they are afraid to bring their preliminary objections in that Court.

Mr President, apart from its indecency, the Maldives' personal attack is an unfortunate reflection of Counsel's approach to the core issues in this case. They take the same approach to the ICJ's Advisory Opinion as they do to the email exchanges between the Parties: they are selective, placing reliance on one or another phrase or paragraph, pulling it out of context, and ignoring that which follows or is contradictory. The Maldives' partial presentation of emails, like its partial discussion of the Advisory Opinion, are like directing a performance of Macbeth, and then ending it immediately after he becomes king in Act 2. But just as Macbeth suffers a horrible fate at the end, so do all of their arguments in these proceedings.

In respect of the Advisory Opinion, Professors Akhavan and Thouvenin have now, by their silence, confirmed all of the key points Mauritius made on Thursday. They continue to refuse to engage with the text of the Opinion. We challenged them on this on Thursday. They had a chance to respond, and to provide us finally with their own textual analysis of the ICJ's Opinion on Saturday. But they did not. Again, they ran away from the actual text of the Opinion as fast and as far as they could. There is still no textual analysis from the Maldives, let alone one that even remotely supports their thesis that the ICJ, somehow, decided to leave the matter of sovereignty over Chagos unresolved.

Professor Akhavan read again from the only two paragraphs of the Opinion that he cited in the first round, paragraphs 86 and 136.[2] Finding nothing else in the Opinion to his liking, he quoted not another word from it. Eager for something to say, he read from the concurring opinions of two of the judges. They do not help the Maldives at all. I will come back to them in a moment.

Professor Thouvenin said even less about the actual text of the Court's Opinion. In fact, he said absolutely nothing, again. He had two turns at bat, and he struck out looking both times. No mention of even a single sentence of the Court's Opinion. Counsel's silence on the language

[1] ITLOS/PV.20C28/5, p. 28, lines 16-32 (Mr Akhavan).
[2] ITLOS/PV.20C28/5, p. 2, lines 10-17 (Mr Akhavan).

of the Opinion speaks loudly. The language does not support their interpretation of it, otherwise you would have heard it.

Let me recall for you, briefly, the critical language with which they chose not to engage. Let's go right to the heart of things. Let us look at exactly the language they have no answer for regarding whose territory the Chagos Archipelago actually is at paragraph 173:

> The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago.[3]

As a consequence, at paragraph 177:

> it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State

which is

> an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.[4]

And finally, at paragraph 178:

> Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.[5]

What did the Maldives have to say to you about these three paragraphs? Not a single word. It completely ignored these fundamental elements of the Court's Opinion, the text where the Court determines, as a matter of international law, that the Chagos Archipelago belongs to Mauritius and not the UK. There is not a single word, in either of their two rounds of argument, about any of this. Could there possibly be a more powerful admission by omission, on the part of the Maldives, that these legal determinations by the Court completely destroy their argument that the Court left sovereignty over Chagos unresolved?

How do they explain or interpret the language in paragraph 173, that the UK is required to respect the territorial integrity of Mauritius, "including the Chagos Archipelago", other than as an affirmation by the Court, as a matter of law, that the Chagos Archipelago is an integral part of Mauritius, over which Mauritius alone can be sovereign? They do not. That is because there is no explanation or interpretation except for the one we have put to you.

How do they explain or interpret the language in paragraph 177 that the UK's administration of Chagos is a "wrongful act" entailing the UK's international responsibility, and an "unlawful act of a continuing character" arising from the unlawful detachment of Chagos from Mauritius, except as a determination, under international law, that the UK has neither sovereignty nor even any lesser rights of administration in respect of the Archipelago? They do not, because they cannot. There is no other explanation or interpretation.

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[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019,* para. 173.
[4] Ibid., para. 177.
[5] Ibid., para. 178.

And finally, how do they explain or interpret the language in paragraph 178 that the UK is obligated to terminate its unlawful administration as rapidly as possible so that Mauritius can complete the decolonization of "its territory"? Again, silence. Again, no other explanation or interpretation is possible. If Chagos is Mauritius' territory, as this paragraph plainly states, then it is not the UK's territory and only Mauritius, and not the UK, can be sovereign under international law. This is an indisputable proposition, and the Maldives makes no effort to dispute it.

To the contrary, they dispute none of these legal determinations by the Court. In fact, they have admitted, explicitly, that the Court's Opinion is both correct and authoritative.[6] What the Court said, according to them, is a matter of interpretation, but their interpretation, which ignores the text, makes no sense. It cannot be reconciled with the Court's actual legal findings. In any event, there is not much room for interpretation here. There is only one way to interpret the words "its territory", in paragraph 178: "its" unmistakably refers to Mauritius and "territory" indisputably refers to Chagos. They have no answer for this.

In the second round, Counsel for the Maldives completely abandoned their earlier attempt to reconcile their argument with the text. You will recall that, in the first round, Professor Akhavan insisted that the Court decided that Chagos was an integral part of Mauritius only in 1965, but not thereafter.[7] On Thursday, we pointed to at least three places in the Opinion where the Court referred to Chagos as an integral part of Mauritius after 1965 as "its territory", right up to the present time.[8]

Professor Akhavan had no response on Saturday. He did not deign to make his discredited argument again. What this means is that they now concede – as they are bound to – that the Court determined, as a matter of international law, that the Chagos Archipelago has always been, and remains, an integral part of Mauritius, not just in 1965, but today. This means, also as a matter of international law, that only Mauritius can be sovereign over territory that is, and always has been, its own. Does the Maldives really hope to convince you that there is an unresolved dispute over whether Mauritius is sovereign over what the Court has determined, as a matter of law, to be its own territory?

Instead of grappling with the Court's determination of the law, they fall back in the second round on the same wrong argument that they made in the first. In both rounds, they retreated to paragraph 86 of the Court's Opinion, and tried to read into it more than it says. The flaw lies in their attempt to conflate, and treat as one, two very different aspects of the Opinion. These are: first, the Court's consideration of whether it was asked questions relating to a pending bilateral dispute that has not been consented to by the States involved, such that it should exercise its discretion not to answer them, which is what paragraphs 83 through 91 are about; and second, the answers the Court gave to those questions, including, especially, the legal consequences arising from the UK's unlawful detachment of the Chagos Archipelago, which are at paragraphs 139 to 182, and which the Maldives completely ignores.

As we explained on Thursday, what paragraph 86 and the following paragraphs in that section make clear, is that the Court carefully distinguished between, on the one hand, a purely bilateral territorial dispute, one that is unrelated to decolonization, which it would not attempt to resolve absent the consent of both parties; and on the other hand a dispute about the lawfulness of decolonization, which would be an appropriate subject of an Advisory Opinion, even if it required the Court to address other related legal issues that inevitably arise within the broader framework of decolonization.[9] In paragraph 86, the Court found that the questions submitted by the General Assembly did not concern a purely bilateral territorial dispute, but

[6] Written Observations of the Republic of Maldives (15 April 2020), para. 4.
[7] ITLOS/PV.20C28/2, p. 15, lines 36-38 (Mr Akhavan).
[8] ITLOS/PV.20C28/4, pp. 8-9 (Mr Reichler).
[9] ITLOS/PV.20C28/4, pp. 3-4 (Mr Reichler).

one related to decolonization, and that it therefore could and should answer the UNGA's questions, notwithstanding that its answers would inevitably require it to pronounce upon, what it called in subsequent paragraphs, other legal issues in dispute between Mauritius and the UK which were inseparable from decolonization.

This was plainly not a determination by the Court to avoid issuing an Opinion having legal implications for sovereignty over Chagos. To the contrary, as the Court made clear in paragraphs 88 and 89:

> The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable.[10]

And:

> the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to this request, the Court is dealing with a bilateral dispute.[11]

Thus, in this section of the Opinion, the Court made clear that it understood and intended that, by answering those questions, it would necessarily be addressing other legal issues related to the status of Chagos, and that this would indeed be an appropriate exercise of its advisory jurisdiction. Then, in subsequent sections of the Opinion, at paragraphs 139 to 182, it went ahead and answered those questions.

Paragraph 136, which was the only other part of the text mentioned by Professor Akhavan on Saturday, is of no greater help to him than paragraph 86. It reiterates the Court's conclusion, previously expressed in paragraphs 86 to 89, that it should answer the questions because they "fall within the framework ... of decolonization of Mauritius" and therefore for this reason the UNGA "did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius." In fact, paragraph 136 is quite unhelpful to the Maldives. Professor Akhavan stopped reading it before its conclusion:

> the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States.[12]

As we know, the Court then concluded at paragraphs 173-178 that these legal consequences included binding obligations under international law for the UK and for other States.

The Separate Opinions of Judges Iwasawa and Gevorgian, which Professor Akhavan mentioned on Saturday, do not say anything different. They do not carry the meaning that the Maldives would attribute to them. Rather, they elaborate on, and clarify, the Court's decision to answer the General Assembly's questions. Their Opinions underscore the difference between the Chagos case, which they both recognized was about decolonization, and, on the other hand, a purely bilateral territorial dispute unrelated to decolonization. Because this case

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[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019,* para. 88.

[11] Ibid., para. 89.

[12] ITLOS/PV.20C28/5, p. 2, lines 10-17 (Mr Akhavan).

was about decolonization, and it was not, in their view, a bilateral territorial dispute, they agreed that the questions should be answered.

Professor Akhavan might have provided greater clarity on the Court's Opinion, had he referred to the Separate Opinion of Vice-President Xue. On this very issue, she wrote:

> 4. It is not uncommon that the questions submitted to the Court in advisory proceedings involve a bilateral dispute. As the Court pointed out in the *Namibia* Advisory Opinion, "[d]ifferences of views among States on legal issues have existed in practically every advisory proceeding" … . According to the consistent jurisprudence of the Court, the fact of a pending bilateral dispute, by itself, is not considered a compelling reason for the Court to decline to give an advisory opinion. What is decisive is the object and nature of the request. That is to say, the Court must examine whether the questions put to the Court by the General Assembly concern issues located in a broader frame of reference than the settlement of the dispute …
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> …
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> 5. In the present proceedings, the Court determines that the questions submitted by the General Assembly relate to the decolonization of Mauritius, a subject matter which is of particular concern to the United Nations … The Court considers that the fact that the Court may have to pronounce on legal issues disputed between Mauritius and the United Kingdom does not mean that, by replying to the Request, it is dealing with a bilateral dispute. It therefore does not consider that to give the requested opinion would have the effect of circumventing the principle of consent.[13]

Vice-President Xue then states that she concurs with all of these conclusions, and the full Opinion of the Court.[14]

Mr President, in determining the lawfulness of the decolonization of Mauritius, it was unavoidable that one of the legal issues on which the Court would have to pronounce was the sovereignty over the Chagos Archipelago. The end result of decolonization is the divesting of sovereignty from the colonial power and its assumption by the newly independent State. This is black-letter law. In the first round we quoted the representative of Zambia, and the Max Planck Encyclopaedia of International Law to this effect.[15] With this understanding of the relationship between decolonization and sovereignty in mind, it cannot be disputed that the ICJ pronounced on and settled the sovereignty issue in respect of Chagos when it settled the decolonization issue by concluding, as a matter of law, that Chagos is an integral part of Mauritius, such that its detachment by the UK was unlawful, and that, as a consequence, lawful decolonization had not been completed.

The Maldives attempts to derive some solace from the fact that the Court did not explicitly state that decolonization subsumes the issue of sovereignty. They season this assertion with the factually false contention that Mauritius invited the Court to make this express statement, and the Court rejected Mauritius' invitation.[16] But what we argued was that the Court's decision on decolonization would necessarily determine the sovereignty issue, as did the UK and many other participants in the proceedings, including, as you have seen, India and Zambia. But we never asked the Court to make a specific finding to the effect that "decolonization subsumes sovereignty". What we asked was that the Court find that, because the Chagos Archipelago is an integral part of Mauritius and was unlawfully detached from it, the decolonization of Mauritius was not lawfully completed, and, in regard to legal

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[13] Declaration of Vice-President Xue, para. 5 in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports* 2019.

[14] Ibid., para. 6.

[15] ITLOS/PV.20C28/4, pp. 5-6 (Mr Reichler).

[16] ITLOS/PV.20C28/5, p. 4, lines 29-34 (Mr Akhavan).

consequences, we asked the Court to declare the UK's ongoing administration unlawful and to find that the UK is obligated by international law to terminate it immediately. And that is exactly what the Court determined, except, instead of immediately, it found that the UK was obligated to terminate its unlawful administration "as rapidly as possible". There was no rejection of any of Mauritius' contentions.

The Maldives suggests that there was a rejection of our request that, during whatever amount of time is given to the UK to terminate its unlawful administration, it should be obligated by the Court not to interfere with Mauritius' exercise of sovereignty over Chagos, including by negotiating a maritime boundary agreement with the Maldives.[17]

Here again, the Maldives is wrong. The Court did not reject our request; it mooted it, by finding that the termination should take place as rapidly as possible and delegating to the General Assembly the task of determining the modalities for the termination. The General Assembly then determined that it should take place within a maximum of six months – by November 2019 – and further resolved that no State should delay or impede the completion of the decolonization process. The resolution thus prohibits the UK from impeding Mauritius' effort to negotiate a maritime boundary with the Maldives, and it prohibits the Maldives from invoking the UK's sovereignty claim to delay such negotiation.

The Maldives continue to invoke the Court's *Western Sahara* Opinion as precedent for the Court's alleged separation of matters of decolonization from matters of sovereignty, and its alleged refusal to address sovereignty issues in its Opinions on decolonization. We pointed out the Maldives' error in this reading of *Western Sahara* on Thursday.[18] On Saturday, Professor Akhavan read certain passages in that Opinion where the Court indicated it would not consider the question of Spain's sovereignty over the disputed territory, and he called me out for my alleged failure to address these passages.[19] But this argument is a red herring and another example of their highly selective reading of all texts. What Counsel for the Maldives fails to mention is that Spain, which was the administering power, was no longer making any claim of sovereignty over Western Sahara. In contrast, Morocco was.

The real failure here is Professor Akhavan's refusal to address what the Court said about Morocco's claim of sovereignty, which is all the more glaring because the language comes directly out of the Maldives' own written pleadings:

> the ICJ's opinion on historical sovereignty was explicit: the evidence did not establish "any legal tie of sovereignty between Western Sahara and the Moroccan State."[20]

Thus, the Court did address, and resolve in the negative, Morocco's claim of sovereignty over Western Sahara. So much for their argument that the ICJ does not settle issues of sovereignty within its Advisory Opinions on decolonization.

I mentioned earlier Professor Thouvenin's failure to quote or cite even a single phrase from the ICJ's Opinion in support of any of his arguments. This is a particularly revealing omission, especially because he was tasked by the Maldives to make the argument that there is nothing legally binding in the Opinion. Avoiding engagement with the text of the Opinion serves him well because, if he had engaged with it, he might have had to explain the Court's explicit legal findings on the "obligations" borne by the UK and other States, including the Maldives.

As you have already seen in paragraph 173, the Court finds that the

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[17] ITLOS/PV.20C28/5, p. 5, lines 9-21 (Mr Akhavan).
[18] ITLOS/PV.20C28/4, p. 16, line 35 - p. 17, line 10 (Mr Reichler).
[19] ITLOS/PV.20C28/5, p. 4, lines 5-18 (Mr Akhavan).
[20] Written Observations of the Republic of Maldives (15 April 2020), para. 59.

> obligations arising under international law ... require the United Kingdom, as the administering Power, to respect the territorial integrity of [Mauritius], including the Chagos Archipelago.

In paragraph 178:

> the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible ... .

In paragraph 180:

> Since respect for the right of self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right [and] while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.

Mr President, Members of the Special Chamber, since when are "obligations arising under international law" not binding on the States concerned? Professor Thouvenin avoids answering this question by refusing to engage with this critical language or any other language in the Opinion.

His only response is to accuse Mauritius of "inanity".[21] Now, I have been pleading before international courts for nearly 40 years, and insult is rarely an effective form of argument. Neither is condescension. We say, for Professor Thouvenin to refuse to engage, not with us, but with the Court's own language is about as clear an admission as there could be that they simply have no answer to this, no way to reconcile their arguments with what the Court actually said and decided.

Whatever epithets he may send our way, we are in very good company: that of Professors Rosenne, Pellet, Watts, Dugard and Kolb, and Judge Nagendra Singh. I quoted all of them on Thursday.[22] They are unanimous in explaining that the determinations of law in the Court's advisory opinions are as authoritative as they are in its judgments, and that the legal obligations defined in those opinions are binding, even if the advisory opinion per se is not. I will recall today only what Professor Dugard said in respect of the *Wall* case: "While not bound by the Opinion itself, Israel and States are nonetheless bound by the obligations upon which it relies."[23]

After hearing from Counsel for the Maldives, it might surprise you to learn that the Maldives itself has recognized the binding nature of the legal obligations set out in the Court's Advisory Opinions. In 2004, the Maldives voted in favour of the General Assembly's resolution adopting and implementing the Advisory Opinion in the *Wall* case, which expressly: "Demands that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion" and "[c]alls upon all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion".[24]

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[21] ITLOS/PV.20C28/5, p. 13, line 20 (Mr Thouvenin).

[22] ITLOS/PV.20C28/4, pp. 14-16, 19 (Mr Reichler).

[23] J. Dugard, *Advisory Opinions and the Secretary General with Special Reference to the 2004 Advisory Opinion on the Wall* in International Law and the Quest for Implementation/Le Droit International Et La Quête De Sa Mise En Oeuvre (L. Boisson de Chazournes & M. Kohen eds., 2010), p. 403, at 410.

[24] United Nations General Assembly Resolution, Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including in and around East Jerusalem, A/RES/ES-10/15 (2 August 2004), paras. 2-3.

Mr President, from my remarks today, three conclusions inexorably follow: (1) the ICJ's Chagos Opinion is both correct and authoritative on all of the legal issues it addresses; (2) when the Court makes an authoritative determination of a State's obligations under international law, that State is bound, under international law, to comply with those obligations; and (3) in determining, as a matter of international law, that Chagos is an integral part of Mauritius, that the UK's ongoing administration violates international law, and that the UK is obligated under international law to terminate it as rapidly as possible, so that Mauritius could complete the decolonization of its territory, the Court left no doubt that Mauritius is sovereign over the territory.

Accordingly, Mr President, there is absolutely no merit to the Maldives' objections based on the alleged existence of an unresolved sovereignty dispute, or the absence of a party to that non-existent dispute.

Mr President, Members of the Special Chamber, this concludes my presentation this afternoon. I thank you once again for your kind courtesy and patient attention, and I ask that you now call to the podium my dear colleague, Professor Sands.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Reichler.

I now give the floor to Mr Philippe Sands to make his statement.

You have the floor, sir.

STATEMENT OF MR SANDS
COUNSEL OF MAURITIUS
[ITLOS/PV.20/C28/6/Rev.1, p. 14–23]

Mr President, Judges of the Tribunal, the key issue at this stage of the proceedings is the approach that this Tribunal takes to the effects of the ICJ Advisory Opinion. Counsel for the Maldives has conceded that if you give the effect to the Advisory Opinion, as we say you must, the preliminary objections fall away and the Tribunal is free to exercise the jurisdiction that has been accorded to it by both States to delimit their maritime boundary.[1]

I will therefore address the effects of the ICJ Advisory Opinion. I will do so in five points.

Point 1: the Court determined that the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius. In the first round, we told you that the Maldives had failed to explain why it disagreed with this proposition. "Perhaps they will tell us on Saturday", I said to you.[2] Saturday came and went. We listened attentively. As Mr Reichler has explained, they said nothing. The words "territorial integrity", and the ICJ's pronouncement on this, barely featured in two rounds of written pleadings, and five and a half hours of oral submissions.

We invited the Maldives to address the ICJ Judges' operative legal determination that the Chagos Archipelago is today a part of the territory of Mauritius: "its territory" are the two words the Court uses at paragraph 178. The Maldives simply ignored our invitation. In so doing, as Mr Reichler has explained, the Maldives has conceded our argument: the Court has indeed made a binding legal determination that, as a matter of international law, the Chagos Archipelago is undisputedly a part of the territory of Mauritius.

With that clear determination by the principal judicial organ of the United Nations, can the matter be said to be in dispute? It cannot. The Maldives may assert, as much as it wishes, in exercise of its right of freedom of expression, that there exists a supposed "unresolved sovereignty dispute" in relation to the Chagos Archipelago, but it cannot escape reality: the Court has found otherwise. It has so found not because any such dispute was referred to it for resolution, but because the matter was embedded in the request made to it in relation to the prior and dominant issue of decolonization. With the conclusive resolution of the decolonization legal issue, the consequential issue of a supposed "sovereignty dispute" simply melts away. As a matter of international law, the International Court of Justice has determined that Mauritius has sovereignty over the Chagos Archipelago. As a corollary, it follows that no other State has sovereignty or can, under international law, claim sovereignty over that territory.

I turn to point 2: the Maldives accepts that the ICJ Advisory Opinion is correct and authoritative. In the first round we brought to your attention what the Maldives told this Tribunal in its written pleadings: the Maldives "does not suggest that the advice rendered by the ICJ in the Chagos Advisory Opinion was wrong or lacking in authority."[3] So, on Saturday, the Maldives had its opportunity to tell this Tribunal that we had misunderstood what it said. Did it do so? No, it did not. The Tribunal is now free to proceed on the basis that it is not in dispute between the Parties that the ICJ got it right, that it acted correctly, and that it acted with authority.

The issue that remains, and the one that divides the Parties, is the effect for this Tribunal of the International Court of Justice's correct and authoritative legal determination that the Chagos Archipelago is an integral part of the territory of Mauritius. In particular, does the

[1] ITLOS/PV.20/C28/5, p. 1 (Mr Akhavan).
[2] See for example ITLOS/PV.20C28/3, p. 22 (Mr Sands).
[3] For example ITLOS/PV.20C28/3, p. 7 (Mr Sands) referring to Written Observations of the Republic of Maldives in reply to the Written Observations of the Republic of Mauritius (15 April 2020), para. 4 (emphasis in the original).

Advisory Opinion have implications for the exercise of jurisdiction bestowed on this Tribunal under Part XV of the Convention? The Maldives says that, notwithstanding the Advisory Opinion, this Tribunal cannot exercise its jurisdiction to delimit the maritime boundary between Mauritius and the Maldives.

This brings me to point 3: the International Court of Justice's Advisory Opinion has determined the "law recognized by the United Nations" and international law.

The Maldives' argument is, in effect, that this Tribunal should ignore what the ICJ has determined. That is what they are telling you to do. It should do so, Counsel for the Maldives argued on Saturday, for three reasons: (i) "advisory opinions are not binding, even on the organs which request them, let alone on States in a bilateral dispute";[4] (ii) "the correct interpretation of the Advisory Opinion" is "plainly outside the scope of [the Tribunal's] jurisdiction";[5] and (iii) "the United Kingdom substantively disagrees with the Advisory Opinion."[6]

With respect, each of those three arguments is not only wrong, it is hopelessly wrong. It is not supported by any legal authority or commentary whatsoever.

On the first point, Professor Akhavan was contradicted by Professor Thouvenin, who conceded, as he was bound to do, that, actually, contrary to what his colleague said, advisory opinions do have legal consequences and effects. They, in his words, "can of course assist a tribunal to adjudge a dispute", he told you, and they "can be an auxiliary means to determine the rule of law".[7] His point was that they can only do so once the Tribunal's jurisdiction has been established. This was a proposition he put to you without reference to any authority whatsoever – and that is because there is no authority for his proposition, as he well knows. Professor Rosenne recognized that the characteristics of a "statement of law", as he put it, contained in an advisory opinion is not, in his words, "any different from those of the statement of law contained in a judgment."[8] Professor Rosenne, who was a very careful man, did not limit his view to the merits phase of the case, nor could he. An advisory opinion's "statement of law" may be dispositive at any stage of a judicial proceeding – jurisdiction phase, merits phase, preliminary objections phase – any phase. Judge Pawlak knows this far better than I do, for in its 2015 award, in the jurisdiction and admissibility phase of the *South China Sea* case, the Annex VII arbitral tribunal relied on the International Court of Justice's 1988 Advisory Opinion. It referred to that Advisory Opinion as "jurisprudence" under international law, on a par with a judgment in a contentious case;[9] and the Annex VII tribunal found that "two principles follow from this jurisprudence"; and the Annex VII tribunal proceeded to apply the principles to contribute to its findings that it had jurisdiction in relation to that dispute – clear authority.[10] Professor Thouvenin's novel proposition – that an advisory opinion can offer no authoritative "statement of law" to be relied on in addressing preliminary objections in relation to jurisdiction – is totally unsupportable and totally unsupported.[11]

So what is the effect of the ICJ Advisory Opinion in these proceedings? Counsel for the Maldives would have you rush to the conclusion: none whatsoever! They just want to downplay the effects of an advisory opinion – and not just the Court's but advisory opinions of this

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[4] ITLOS/PV.20/C28/5, p.7 (Mr Akhavan).
[5] Ibid.
[6] Ibid.
[7] Ibid., p.14 (Mr Thouvenin).
[8] S. Rosenne, The International Court of Justice: An Essay in Political and Legal Theory (1961), p. 113.
[9] *The South China Sea Arbitration* (*The Republic of the Philippines v. The People's Republic of China*), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 October 2015), paras. 162-3 (invoking Advisory Opinion of the I.C.J. on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947).*
[10] Ibid., para. 163.
[11] ITLOS/PV.20/C28/5, p.10 (Mr Thouvenin).

Tribunal too. It is not so much, Mr President, Sartre's "*L'être et le néant*", as Thouvenin's "*L'avis consultatif et le néant*". With respect, the Maldives has fallen into error.

Let us go back to basics, because my propositions are long established in international law. Let us go back to that series of proceedings that the Maldives really does not like. Let us go back to 1956. Let us hear from the British Judge on that Advisory Opinion, one of the great international lawyers of the twentieth century, for whom I have a particular affection: Sir Hersch Lauterpacht. Sir Hersch Lauterpacht was confronted with a situation that was not entirely different from the one that you face: the refusal of South Africa to accept the Court's earlier Advisory Opinion of 1950. In his 1956 Separate Opinion (and he was part of the majority in that case), he identified what he called "principle[s] of law of general import" in relation to "the nature of the régime of the territory of South West Africa".[12] He enunciated the view that the "[1950] Opinion laid down ... a régime in the nature of an objective law which is legally operative irrespective of the conduct of South Africa – that status must be given effect except in so far as its application is rendered impossible" because of South Africa's attitude. He goes on: "It is a sound principle of law" that the law should be "applied in a way approximating most closely to its primary object", that it "must be and remain effective"[13] – an effectiveness principle argument for an ICJ Advisory Opinion. He was writing in relation to the regime of South West Africa, but of course his words apply equally to the broader frame of reference of the regime of decolonization. In other words, like South Africa, the continuing refusal of the United Kingdom to accept the 2019 Advisory Opinion cannot be allowed to frustrate its effectiveness.

Let us look in more detail at what Sir Hersch Lauterpacht then went on to say – and these words are rather prescient:

> The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law – a question upon which the Court need not express a view – it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.[14]

Those words – and I would pause to say they were taken up and cited with approval, with a very profound dissent by Judge Tanaka in the 1966 catastrophic case -[15] apply equally in the present matter. The Opinion of 2019 has been accepted and approved by the General Assembly. It is the law recognized by the United Nations. It continues to be so although the Government of the country that is unlawfully administering the Chagos Archipelago has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.

Sir Hersch had a little more to say. In his view the principles of law of general import "are that the Opinion of 1950 must be read as a whole", words that Mr Reichler directed to our friends,

> that it cannot be deprived of its effect by the action of the State which has repudiated it; and that the ensuring of the continued operation of the international regime in question is a legitimate object of the interpretative task of the Court.[16]

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[12] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of 1 June 1956, Separate Opinion of Sir Hersch Lauterpacht, I.C.J. Reports 1956*, p. 46.
[13] Ibid.
[14] Ibid., pp. 46-7.
[15] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 260.
[16] Ibid., p. 49.

In our case at this stage the applicable regime includes one that respects the principle of territorial integrity, and its continued operation is, we say, a legitimate object of this Tribunal's "interpretative task".

This brings me to point 4: the Tribunal must apply and give effect to the law recognized by the United Nations and international law.

Mr President, following General Assembly resolution 73/295, the Advisory Opinion has been given immediate effect by the Secretary-General of the United Nations. You saw that, for example, in the new United Nations map, issued in February this year. It showed Chagos as being, without ambiguity, a part of the territory of Mauritius.[17] That reflected the law of the United Nations.

It is not just political organs that take account of Advisory Opinions, however: other international courts do so also. We have directed you to two recent decisions of the Court of Justice of the European Union. In 2016, that Court gave full effect to the International Court's *Western Sahara* Advisory Opinion, as Mr Reichler told you; and last year the same Court gave full effect to the Court's Advisory Opinion on the Wall, in relation to Israel and Palestine, to determine that in the EU products originating from the occupied Palestinian territories could not be identified as coming from Israel.[18] That is reliance on the Court's Advisory Opinion.

On the basis of these two judgments – which both concerned issues of territory and sovereignty – it is entirely reasonable to conclude that if the Court of Justice of the European Union was to receive a question on the status of the Chagos Archipelago, it would follow the same approach, and it would necessarily conclude that it is a part of Mauritius: it is "its territory", as the International Court of Justice determined in paragraph 178. The Maldives did not seek to challenge those two CJEU judgments on the substance. What Professor Thouvenin told you was that it is not an international court. Well, the last time I looked the Court of Justice of the European Union was created by an international treaty to which 27 States are party. It is not an internal court; it is an international court.

As I have already noted, an Annex VII arbitral Tribunal – in *South China Sea* – has placed reliance on an ICJ advisory opinion in the jurisdictional phase of a case. Numerous ITLOS Judges have referred to advisory opinions in ITLOS proceedings.[19] ITLOS judges have, in their academic writings, recognized that Advisory Opinions "offer authoritative guidance".[20]

Successive Presidents of this distinguished Tribunal have emphasized the need for coherence, for respect, for comity amongst international courts and tribunals. Back in 2007, for example, President Wolfrum identified the frequent references by ITLOS to "precedents set by [the] Court"; he emphasized this Tribunal's role in creating "mutual respect" and "consistency", and what he called "coherence between general international law and the law of the sea", to "avoid[] fragmentation" and "overcom[e] conflicts of jurisdiction."[21]

For his part, shortly afterwards, President Jesus explained how recourse to "other rules of international law" within the meaning of article 293 had been achieved, as he put it,

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[17] ITLOS/PV.20C28/3, p. 23 (Sands); United Nations, *The World* (February 2020), available at: https://www.un.org/Depts/Cartographic/map/profile/world.pdf (last accessed 20 September 2020).

[18] *Organisation juive européenne & Vignoble Psagot Ltd v. Ministre de l'Economie et des Finances,* CJEU Case C-363/18, Judgment (12 November 2019), paras. 35, 48, 56-58.

[19] See for example*The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Separate Opinion of Judge Ndiaye (28 May 2013), paras. 56, 155; *The M/V "Virginia G" Case (Panama/Guinea-Bissau),* Dissenting Opinion of Judge Ndiaye (14 April 2014), para. 87.

[20] Judge Jin-Hyun Paik, 'Some thoughts on dispute settlement under a new legal instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2019), para. 33.

[21] Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007), p. 7.

> especially by resorting to relevant pronouncements in the case-law of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in order to identify relevant rules of customary law and general principles of law to support its findings and positions.[22]

And you too, Mr President, just last year, speaking in your capacity as President, spoke of the need for "the cohesiveness of the system as [a] whole", of reaching out to the jurisprudence of the International Court to maintain consistency, to reinforce what President Wolfrum had identified as "the necessary coherence between general international law and the law of the sea."[23]

Yet despite all of these authorities, the Maldives says this Tribunal, maybe alone amongst all international tribunals, cannot have regard to the Court's 2019 Advisory Opinion. On their approach, you are not to refer to the law of the United Nations, a part of international law, or give effect to it. Despite the fact that ITLOS was created by the United Nations Convention on the Law of the Sea; despite the fact that the General Assembly has granted to ITLOS observer status;[24] despite the fact that ITLOS and the United Nations have been bound by an Agreement on Cooperation since 1997; despite the fact that staff employment disputes and pension matters of this Tribunal are addressed by the reference to United Nations rules – despite all of this, they say: 'no', you cannot have regard to United Nations law, as Judge Lauterpacht indicated you can and must.

As though the Maldives has not gone far enough, it goes even further in putting the boot in. This Tribunal cannot address the issue at all, the Agent of the Maldives told you – "but", he said

> we are willing to enter into discussions ... to explore whether our differing views on the International Court of Justice Advisory Opinion could be submitted for the International Court of Justice itself to decide.[25]

What a curious offer! So, ITLOS cannot decide that it has jurisdiction to delimit the two countries' maritime boundaries, but the International Court of Justice can decide it for you. The Hague can interpret the words "its territory" in paragraph 178, but Hamburg cannot. A third country is an indispensable third party in Hamburg, but it is not in The Hague. With respect, this is perhaps not the most attractive offer I have ever received, and it would be understandable if the Tribunal felt the same way about it.

That brings me to point 5: in applying the law recognized by the United Nations and exercising its jurisdiction in this case, the Tribunal will not contradict any existing jurisprudence or open any floodgates. Why not? Because quite simply this case is unique. In your judgment on jurisdiction you can make it crystal clear that you are not revisiting the arbitral tribunal's award in the MPA case, or violating any supposed principle of *res judicata* – although we do not think that is applicable here because, contrary to the view expressed by

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[22] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 25 October 2010), pp. 7-8.

[23] Statement by the President of the International Tribunal for the Law of the Sea, H.E. Judge Jin-Hyun Paik, at the 30th Annual Informal Meeting of Legal Advisers in New York (29 October 2019), pp. 3-4, citing Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007).

[24] United Nations General Assembly, resolution 51/204, *Observer Status for the International Tribunal for the Law of the Sea in the General Assembly* (17 December 1996).

[25] ITLOS/PV.20/C28/5, pp. 31-32 (Mr Riffath).

Counsel for the Maldives, paragraphs 417 to 419 of that award confirm that the ruling did not involve rendering any decision on whether the UK was the coastal State as matters then stood, since that would lie beyond the Annex VII tribunal's jurisdiction. You will also be able to make it crystal clear that your judgment is entirely consistent with the award in *Ukraine* v. *Russia*, and in no way undermines it or dislodges it.

Why? Because this case is ring-fenced. It is, literally, one of a kind. It does not concern a pure territorial dispute, it is situated in the law of decolonization, and most significantly of all it benefits from a prior determination by the International Court of Justice on that issue which is bang on point. All this Tribunal needs to do is to give effect to the Court's Advisory Opinion, and the implications for other cases melt away. This is not East Timor, which had no such prior determination by the ICJ. There are no "similarities", as Professor Thouvenin put it – not striking similarities and not any other sorts of similarities.[26]

Mr President, before I conclude, may I say a few words in response to the Special Chamber's second question, on the obligation of all Member States to cooperate with the UN to complete the decolonization of Mauritius. Our response to that question is: yes, the obligation to cooperate with the UN is relevant to this case, for three reasons.

First, paragraph 180 of the Advisory Opinion recorded that "respect for the right to self-determination is an obligation *erga omnes*; all States have a legal interest in protecting that right."[27] "[A]ll States" includes the Maldives. And an obligation *erga omnes* of course extends not only to States but also to other international actors, including international courts and tribunals. This Tribunal has a legal interest in protecting the right to self-determination and territorial integrity. For the Tribunal to accede to the application of the Maldives would amount to a failure to protect your own right.

Second, Member States must cooperate in relation to the modalities required to ensure the completion of the decolonization of Mauritius, the practical steps to give effect to the Advisory Opinion. The "modalities" include those referred to in General Assembly resolution 2625[28] and paragraph 5 of resolution 73/295. You can see it on the screen. In paragraph 5 the General Assembly:

> Calls upon all Member States … to refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution.[29]

Counsel for the Maldives told you that nothing in resolution 73/295 "suggested that States are under an obligation to delimit a maritime boundary with Mauritius."[30] We disagree. By raising a preliminary objection which is based on the argument that a country in unlawful administration and occupation of a part of the territory of Mauritius, unlawfully occupied, is an indispensable third party to the delimitation of the maritime boundary of an unlawfully

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[26] Ibid., p. 14 (Mr Thouvenin).

[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 180 (emphasis added).

[28] Resolution 2625 (XXV) states, in relevant part: "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, [...] and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned [...]"

[29] United Nations General Assembly, Resolution 73/295, *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (24 May 2019).

[30] ITLOS/PV.20/C28/5, p. 26 (Mr Akhavan).

occupied territory, the Maldives is, we say, taking "action" in violation of the Advisory Opinion of the Court and resolution 73/295. You could put it in these terms: paragraph 5 precludes this application from going any further. The resolution is very broadly worded – it speaks of "any action" – and it encompasses, in our submission, a refusal to negotiate a maritime boundary in the circumstances that we now find ourselves.

Third, the obligation to cooperate relates to rendering assistance to the United Nations. We say that extends the obligation to cooperate to an international tribunal that is established under a United Nations Convention and which has the relationships with the United Nations to which I have earlier made reference.

In relation to the Special Chamber's third question, Mr President, our position is that there is no bar to the exercise by this Special Chamber of jurisdiction in relation to the Parties' obligations under paragraph 3 of articles 74 and 83. If, however, the Tribunal accedes to the application of the Maldives and finds that it cannot exercise jurisdiction to delimit the Parties' maritime boundaries, then we have difficulty in seeing how it could exercise jurisdiction in relation to those obligations.

Mr President, Members of the Special Chamber, Mauritius trusts that that this Tribunal will proceed to exercise its jurisdiction to delimit the Parties' maritime boundary. The Court's Advisory Opinion opens the door to that, and it does so in dealing with the matter of the greatest significance: completing the decolonization of Mauritius, and bringing to a final end the United Kingdom's last remaining colony in Africa. The draft resolution that sent that request to the Court was met with the argument that the General Assembly was entering a forbidden domain, by referring to the Court an "unresolved sovereignty dispute" between two Members. The Members of the United Nations saw right through that argument; they did not blink. They sent the request on decolonization.

When the Court then addressed the request – and I was present for the oral arguments – it was met with the same arguments; that it could not accede to the request because in so doing the Court would be entering the forbidden domain and, incidentally, resolving an "unresolved dispute" between two States without consent having been granted. Like the General Assembly, the International Court of Justice saw right through that argument. Its judges did not blink. It was about decolonization.

Now, this matter is before you and, once again, you are being given exactly the argument: that you cannot exercise jurisdiction over the matter because it would require the Tribunal to enter the forbidden domain and, incidentally, resolve an "unresolved sovereignty dispute" between two States without their consent having been granted. It is exactly the same argument being made for the third time, having totally failed on two previous occasions.

Yet Counsel for the Maldives somehow told you that it is we, on this side of the room, who are the repeat offenders – we keep bringing these cases, with the same old arguments, and we keep losing. Well, Mr President, you can judge for yourselves whether Mauritius has been successful or not. The purported MPA has been ruled illegal. The International Court of Justice has plainly determined that the Chagos Archipelago is a part of the territory of Mauritius and no other State.

There has been important progress. We do trust that, like the Members of the General Assembly and the Judges of the International Court, you will not blink, that you will not stop "at the threshold", as Judge Jessup put it in the 1966 *South West Africa* dissent that he wrote,[31] and that you will not wish upon yourself an entry into a space of wilderness. And, yes, it is true, Mr President, that on one occasion previously I have drawn to the attention of an international court that analogy with *South West Africa*.[32] It was not very long ago; it was in

[31] *South West Africa, Second Phase*, Dissenting Opinion of Judge Jessup, available at: https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-07-EN.pdf (last accessed 19 October 2020), p. 1.
[32] ITLOS/PV.20/C28/5, p. 29 (Mr Akhavan).

December, in The Hague. It concerned a matter of genocide, perhaps one of the few subjects that might be said to be on a par of gravity and seriousness with decolonization, self-determination and territorial integrity, also an *erga omnes* obligation. My submission back in December was in response to a specific argument made by Myanmar, which said that the Court should not exercise its jurisdiction because The Gambia, for whom I happened to act, had no legal interest in the treatment of the Rohingya residents of Myanmar, and, said Myanmar, the Court should decline to exercise its jurisdiction. What Counsel for the Maldives declined to share with you on Saturday was how the Judges of the International Court of Justice reacted to that argument by me, and by the submissions that were made – how it was received by all 17 Judges of the International Court of Justice. All of them, every single one of them, even the Judge *ad hoc* appointed by Myanmar – bless him – rejected that jurisdictional objection raised by Myanmar[33] – that dead-end, up-the-garden-path jurisdictional objection. The judgment was unanimous, it was decisive, and was widely acclaimed; and we hope the same thing for the judgment that this Tribunal will give in this equally significant and important case.

Mr President, Members of the Special Chamber, that concludes my submissions. I thank you for your kind attention. The plan was to invite the Ambassador for Mauritius, the Co-Agent, to speak the final words. They are not very lengthy – maybe about ten minutes. We are in your hands as to whether we do it now or whether you would like to have a break.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Sands.

I understand that the Co-Agent of Mauritius will make concluding remarks and present the final submissions of Mauritius, so I will allow the Co-Agent of Mauritius to continue and present the final submissions of Mauritius.

I wish to recall that article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions.

A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Special Chamber and transmitted to the other Party.

I now invite the Co-Agent of Mauritius, Mr Jagdish Dharamchand Koonjul, to take the floor.

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Order of 23 January 2020.

STATEMENT OF MR KOONJUL
CO-AGENT OF MAURITIUS
[ITLOS/PV.20/C28/6/Rev.1, p. 23–26]

Mr President, honourable Members of the Special Chamber of the International Tribunal for the Law of the Sea, honourable Agent and members of the delegation of the Republic of Maldives, good afternoon.

It falls to me, in my capacity as Co-Agent of the Republic of Mauritius, to bring to a close these oral pleadings and to recite the final submissions of the Republic of Mauritius. Before I do so, let me express my gratitude to the Tribunal for the opportunity to make a few concluding remarks.

As you heard last week, Mauritius and the Maldives share warm and long-standing relations. Among the many expressions of friendship between our two nations, Mauritius was among the first to support the Maldives when it sought to rejoin the Commonwealth. As small island States, Mauritius and the Maldives stand together in the face of the existential threats to which the honourable Deputy Attorney General of the Maldives referred last week.[1]

Mr President, it is precisely because of our deeply intertwined history – as former colonies – and our common future that we are so disappointed not to benefit from the cooperation and support of the Maldives in the completion of the decolonization of Mauritius. Such a conclusion is a matter of objective fact: The Maldives voted against resolution 71/292, by which the matter of our decolonization was transmitted to the International Court of Justice. It voted against resolution 73/295, affirming and adopting the findings of the Advisory Opinion. It has declined to negotiate a maritime boundary with us, and now it seeks to frustrate our ability to proceed upon the basis of the Court's clear Advisory Opinion. We never heard from our friends why they were opposed to all of this; on so much they have remained silent.

Mr President, Members of the Special Chamber, we listened very carefully to the submissions made by our friends last week. It is a matter of regret that so much of what we heard were attacks, not only against Mauritius, but also attacks of a more personal nature against Counsel and their integrity. We were disappointed, during the first round, to hear Professor Akhavan suggest that Counsel for Mauritius were in some way acting improperly, by allegedly treating this Special Chamber as though it were a "casino".[2] Even more unhappily, Professor Akhavan, on Saturday, made a deeply regrettable and completely unfounded attack on senior Counsel, Mr Reichler, accusing him of allegedly breaching rules of professional conduct.[3] Mr President, as I said in my opening statement, when they go low, we go high.[4] We have addressed these matters in a letter to the Tribunal. Therefore, I will say no more on this matter.

Mr President, the Republic of Mauritius has come to the International Tribunal for the Law of the Sea to assert its legal rights under the Convention: it wishes to complete the delimitation of its maritime boundaries, a matter that falls squarely within your jurisdiction. Earlier proceedings sought to protect our rights under UNCLOS in relation to the creation by a third State of a purported "Marine Protected Area" over a part of our territory, and that effort was, in large part, effective. Last year, following a request made by the African Member States of the United Nations, the International Court of Justice delivered its Advisory Opinion, which was unanimous on the substance. It found clearly and unambiguously that the Chagos Archipelago is, and has always been, an integral part of the territory of the Republic of Mauritius. There is a political commitment in Mauritius, and broad political support around the

[1] ITLOS/PV.20C28/5, p. 30 (Ms Shabeen).
[2] ITLOS/PV.20C28/2, p. 35 (Mr Akhavan).
[3] ITLOS/PV.20C28/5, p. 28 (Mr Akhavan).
[4] ITLOS/PV.20C28/3, p.2 (H.E. Jagdish Koonjul G.O.S.K.).

world, for the completion of the decolonization of Mauritius and the respect of its territorial integrity. Unfortunately, there appears to be no such support from the other side in this room. We express the hope that in time the Maldives will return to the fold and rejoin the overwhelming number of States around the world which believe that colonialism is a wrong and that decolonization is a legitimate aspiration of all peoples. In the meantime, as a diligent and responsible State, and a country that respects the rule of law, Mauritius will continue to protect its rights under international law, including in respect of self-determination.

Mr President, Mauritius cannot be criticized for taking the steps that it has, acting under international law to exercise its sovereign rights. Any reasonable State would do the same, acting with care and diligence, resorting to the peaceful settlement of disputes under the Convention. Following the ICJ's Advisory Opinion, the logical next step was rather obvious: delimitation of our maritime boundaries. The exercise by this Special Chamber of the jurisdiction it has, and the judgment which we hope will follow, will take us one step closer in our 70-year struggle to complete our decolonization.

Mr President, through a long-standing practice of judicial dialogue with its international judicial counterparts, this Tribunal, which itself emerged in the long shadow of colonialism, not least in the context of South West Africa, has helped to strengthen and develop the corpus of international law. It has proceeded on the basis that the law of the sea is not entirely autonomous, that it is part of a greater legal order. With admiration we have observed how, by way of such judicial dialogue, ITLOS has maintained consistency in international law, reinforced its excellent relations with other international courts and tribunals, including the International Court of Justice, by respecting and giving effect to its well-founded jurisprudence, and confirmed and developed "the necessary coherence between general international law and the law of the sea."[5] This general international law obviously includes the right of self-determination and the obligations in respect of the completion of decolonization, which are part of the law of the United Nations. We have full confidence that this Special Chamber of ITLOS will fulfil the mandate with which it has been entrusted under the Special Agreement.

To be clear, we do not seek from this Special Chamber a determination on the legal status of the Chagos Archipelago. That has already been determined by the ICJ, acting as it was entitled to, with authority and correctly, as a matter of international law. Besides, the Maldives has not challenged the Advisory Opinion on those grounds. Instead, we simply ask the Special Chamber to apply that law, as it is required by article 293 of the Convention, and to apply the rules and obligations as set out in the Advisory Opinion.

Mr President, allow me to conclude, on behalf of the Agent of Mauritius, my legal team, the Government and the people of Mauritius, by expressing sincere thanks and appreciation to you, Mr President, and the distinguished Members of this Special Chamber for your kind attention, astute engagement, and the manner in which you have conducted this hearing during these exceptionally difficult circumstances.

We also express our deepest gratitude and appreciation to the Registrar, her outstanding staff, the interpreters, the stenographers, and the entire team responsible for arranging this hearing.

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[5] Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007) 6-7, available at:
https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf (last accessed 19 October 2020). See also Statement by the President of the International Tribunal for the Law of the Sea, H.E. Judge Jin-Hyun Paik, at the 30th Annual Informal Meeting of Legal Advisers (United Nations, New York, 29 October 2019), available at:
https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/paik/20191029_Paik_UN_Judicial_dialogue_en.pdf (last accessed 19 October 2020).

Mr President, distinguished Members of the Special Chamber, that leaves me with the task, on behalf of the Agent of Mauritius, of reading out the final submissions of Mauritius.

For the reasons set out in our written pleadings and during this oral hearing, Mauritius respectfully requests the Special Chamber of ITLOS to rule that:

1. The Preliminary Objections raised by Maldives are rejected;
2. It has jurisdiction to entertain the Application filed by Mauritius;
3. There is no bar to its exercise of that jurisdiction; and
4. It shall proceed to delimit the maritime boundary between Mauritius and the Maldives.

Mr President, thank you very much for your attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Koonjul.

Closure of the Oral Proceedings
[ITLOS/PV.20/C28/6/Rev.1, p. 26–27]

THE PRESIDENT OF THE SPECIAL CHAMBER: This brings us to the end of this hearing. On behalf of the Special Chamber, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both the Maldives and Mauritius. I would also like to take this opportunity to thank both the Agent of the Maldives and the Agent and Co-Agent of Mauritius for their cooperation. In particular, I would like to thank the Parties for their cooperation in the organization of the hybrid hearing and their willingness to make use of video conference technology. The Registrar will now address matters relating to documentation.

THE REGISTRAR: Thank you, Mr President.

Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of the Special Chamber, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. These corrections relate to the transcripts in the official language used by the Party in question. The Parties are requested to use for this purpose the verified versions of the transcripts and not those marked as "unchecked". The corrections should be submitted to the Registry as soon as possible and by Friday, 23 October 2020 at 4.00 p.m. Hamburg time, at the latest.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam Registrar.

The Special Chamber will now withdraw to deliberate. The judgment will be read on a date to be notified to the Agents. The Special Chamber currently plans to deliver the judgment in early 2021. The Agents of the Parties will be informed reasonably in advance of the precise date of the reading of the judgment.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Special Chamber in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the judgment.

The hearing is now closed.

(The sitting closed at 3.55 p.m.)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques du *Différend relatif à la délimitation de la frontière maritime entre Maurice et les Maldives dans l'océan Indien (Maurice/Maldives), exceptions préliminaires.*

Le 2 mars 2021
2 March 2021

Le Président de la Chambre spéciale
Jin-Hyun Paik
President of the Special Chamber

La Greffière
Ximena Hinrichs Oyarce
Registrar