

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**DISPUTE CONCERNING DELIMITATION OF THE MARITIME  
BOUNDARY BETWEEN MAURITIUS AND MALDIVES IN THE  
INDIAN OCEAN**

**THE REPUBLIC OF MAURITIUS / THE REPUBLIC OF MALDIVES**

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 THE  
SEA

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**PART I**

**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 THE SEA**

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## CHAPTER 1 INTRODUCTION

1. By its Notification and Statement of the Claim and the Grounds on which it is Based dated 18 June 2019 ('the Notification'), the Republic of Mauritius ('Mauritius') gave written notification to the Republic of Maldives ('the Maldives') that "it has elected to submit the dispute concerning the delimitation of its maritime boundary with Maldives to the arbitral procedure provided for in Annex VII to [the United Nations Convention on the Law of the Sea ('UNCLOS')]"<sup>1</sup>. By Special Agreement and Notification dated 24 September 2019, Mauritius and the Maldives agreed that the alleged dispute submitted by Mauritius be transferred to a special chamber of the International Tribunal of the Law of the Sea ('ITLOS').
2. By Order dated 27 September 2019, a Special Chamber of nine judges was formed and that Chamber was declared to have been duly constituted ('the Tribunal').<sup>2</sup> On 8 October 2019, a telephone consultation was held by the President of the Tribunal with representatives of the Parties with regard to questions of procedure, pursuant to which the time-limits for the filing of the Memorial and Counter-Memorial were fixed,<sup>3</sup> without prejudice to the Maldives' right to submit preliminary objections.
3. In accordance with Article 97 of the ITLOS Rules governing these proceedings,<sup>4</sup> the Maldives submits these Preliminary Objections in which it requests the Tribunal to dismiss Mauritius' claims for lack of jurisdiction and inadmissibility.
4. This Chapter sets out the factual and legal background to Mauritius' claims. Chapter 2 sets out the Maldives' Preliminary Objections (summarised at paragraphs 37–44 of that Chapter).
5. As elaborated in Chapter 2, at the core of the Maldives' Preliminary Objections is the long-standing, unresolved sovereignty dispute between Mauritius and the United Kingdom (which is not a party to the present proceedings) with respect to the Chagos Archipelago.<sup>5</sup> A prerequisite for the determination of Mauritius' claims would be a

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<sup>1</sup> Notification and Statement of the Claim and the Grounds on which it is Based of the Republic of Mauritius, 18 June 2019 (**Annex 1**), para. 1.

<sup>2</sup> Order 2019/4 dated 27 September 2019, p. 6, paras. 2 and 3 (and summarised in Order 2019/5 dated 10 October 2019, para. 1).

<sup>3</sup> Order 2019/5 dated 10 October 2019, p. 2 (providing for time limits of 9 April 2020 and 9 October 2020, respectively).

<sup>4</sup> These proceedings are governed by the Statute and the Rules of the International Tribunal of the Law of the Sea: see Order 2019/4 dated 27 September 2019 para. 4 and see also the Minutes of Consultations dated 17 September 2019 (at para. 3) attached to the Special Agreement and Notification dated 24 September 2019.

<sup>5</sup> The Chagos Archipelago is referred to by the United Kingdom as the British Indian Ocean Territory ('BIOT'). For convenience, the present Preliminary Objections will refer to the islands by their geographical name. Mauritius notes at para. 17 of the Notification (**Annex 1**) that the "Maldives is a group of islands located less than 400 nautical miles to the north of the Chagos Archipelago". A graphic showing the relative positions of the Maldives, the Chagos Archipelago and Mauritius is reproduced at **Annex 2**.

decision by this Tribunal on that sovereignty dispute, but this Tribunal does not have jurisdiction to make such a determination. In those circumstances it must dismiss Mauritius' claims.

6. The Maldives notes that the United Kingdom takes the same view; in a written statement to Parliament on 5 November 2019, the Minister of State for Foreign and Commonwealth Affairs set out the United Kingdom's position as follows:

“The UK is not a party to these proceedings, which can have no effect for the UK or for maritime delimitation between the UK (in respect of the British Indian Ocean Territory) and the Republic of the Maldives.

The UK has no doubt of our sovereignty over the British Indian Ocean Territory. ...

A fundamental principle of international law and the international legal order is the principle of consent. It follows that the Special Chamber is not in a position to pronounce itself on the sovereignty dispute between the UK and Mauritius without the consent of the UK to resolve the sovereignty dispute before the Special Chamber”.<sup>6</sup>

### I. Factual and legal background

7. This section addresses: **(A)** the long-standing sovereignty dispute between Mauritius and the United Kingdom with respect to the Chagos Archipelago; **(B)** the fact that this bilateral sovereignty dispute is unresolved; **(C)** Mauritius' claims, noting that a prerequisite for their determination is a decision on which State (Mauritius or the United Kingdom) is sovereign over the Chagos Archipelago; **(D)** concluding remarks on the consistent position of the Maldives with respect to the sovereignty dispute between Mauritius and the United Kingdom.

- A. The long-standing sovereignty dispute between Mauritius and the United Kingdom with respect to the Chagos Archipelago

8. Since 1814,<sup>7</sup> and following the establishment of the British Indian Ocean Territory ('BIOT') in 1965,<sup>8</sup> the United Kingdom has consistently claimed sovereignty over the

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<sup>6</sup> 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 (**Annex 3**).

<sup>7</sup> See e.g. UNGA, 54th session, 19th plenary meeting, 30 September 1999, A/54/PV.19 (**Annex 4**), p. 39. Mauritius was ceded to the United Kingdom by the Treaty of Paris in 1814.

<sup>8</sup> The British Indian Ocean Territory Order No. 1 of 1965, SI 1965 No. 1920, 8 November 1965 (**Annex 5**) provides at section 3 that “the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius” shall with certain islands previously part of the colony of Seychelles “together form a separate colony which shall be known as the British Indian Ocean Territory” .



Chagos Archipelago. As set out above and in further detail in subsection B below, the United Kingdom’s position remains that it has sovereignty over the Archipelago.

9. On the other hand, since at least 1980, Mauritius has claimed that it is sovereign over the Chagos Archipelago;<sup>9</sup> on 9 October 1980 the Mauritian Prime Minister, at the thirty-fifth session of the United Nations General Assembly (‘UNGA’), stated that the BIOT should be “disband[ed]” and the territory restored to Mauritius as part of its “natural heritage”.<sup>10</sup> Subsequently, Mauritius has asserted its sovereignty over the Chagos Archipelago in a variety of fora, including in bilateral communications with the United Kingdom and in statements to the United Nations.<sup>11</sup>
10. Before the UNGA, Mauritius has repeatedly acknowledged its “sovereignty dispute” with the United Kingdom,<sup>12</sup> and its “lasting claim on the sovereignty” of the Chagos Archipelago.<sup>13</sup> A statement made in 2016 noted that:

“Mauritius has consistently protested against the illegal excision of the Chagos Archipelago and has unequivocally maintained that the Chagos Archipelago, including the island of Diego Garcia, forms an integral part of its territory, under both Mauritian law and international law ... [whilst] the United Kingdom maintains that its continued presence in the Chagos Archipelago is lawful”.<sup>14</sup>
11. Mauritius has also expressly stated that it “will never abandon its intention to reunite its territory and to assert its sovereignty over the Chagos archipelago”,<sup>15</sup> noting in 2015 that:

“The Government of Mauritius is resolutely committed to making every effort that accords with international law to enable it to effectively exercise its sovereignty over the Chagos Archipelago, including the possibility of having further recourse to judicial or arbitral bodies”.<sup>16</sup>

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<sup>9</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 209.

<sup>10</sup> UNGA, 35th session, 30th plenary meeting, 9 October 1980, A/35/PV.30 (**Annex 6**), para. 40.

<sup>11</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 209.

<sup>12</sup> UNGA, 51st session, 29th plenary meeting, 10 October 1996, A/51/PV.29 (**Annex 7**), p. 14.

<sup>13</sup> UNGA, 53rd session, 11th plenary meeting, 23 September 1998, A/53/PV.11 (**Annex 8**), p. 10.

<sup>14</sup> UNGA, 71st session, 17th plenary meeting, 23 September 2016, A/71/PV.17 (**Annex 9**), p. 38.

<sup>15</sup> UNGA, 55th session, 28th plenary meeting, 22 September 2000, A/55/PV.28 (**Annex 10**), p. 16. See also UNGA, 56th session, 46th plenary meeting, 11 November 2001, A/56/PV.46 (**Annex 11**), p. 15; UNGA, 57th session, 4th plenary meeting, 13 September 2002, A/57/PV.4 (**Annex 12**), p. 21; UNGA, 70th session, 25th plenary meeting, 2 October 2015, A/70/PV.25 (**Annex 13**), p. 15.

<sup>16</sup> UNGA, 70th session, 25th plenary meeting, 2 October 2015, A/70/PV.25 (**Annex 13**), p. 16. See also Communiqué of the Mauritius Prime Minister’s Office, 30 April 2019 <<http://pmo.govmu.org/English/Documents/Communiqué%20and%20Reports/Communiqué%20on%20ICJ%20Advisory%20Opinion.pdf>> accessed 16 November 2019 (**Annex 14**) (noting that “[t]he Government of Mauritius will spare no efforts to complete the decolonisation process of Mauritius”), and the reported comments (dated September 2019) of a source in Prime Minister Pravind Jugnauth’s office to Reuters that the Pope’s position on Chagos “represents an important step forward in our fight

## B. The bilateral sovereignty dispute is unresolved

12. The dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago has not been resolved bilaterally. Nor, despite Mauritius' efforts to advance its sovereignty claim in a range of forums, has the sovereignty dispute been resolved by a binding third party determination. Consistent with its stated policy of "recourse to judicial or arbitral bodies",<sup>17</sup> Mauritius has advanced its sovereignty claim over the Chagos Archipelago before *inter alia*<sup>18</sup> the Annex VII Tribunal in the matter of the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*,<sup>19</sup> before the International Court of Justice ('ICJ')<sup>20</sup> and before the UNGA.<sup>21</sup>

### 1. *The Annex VII Award (UNCLOS)*

13. As set out in further detail in section II of Chapter 2, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* confirmed that it did not have jurisdiction to determine the disputed issue of territorial sovereignty over the Chagos Archipelago.<sup>22</sup>

### 2. *The Advisory Opinion (ICJ)*

14. The Advisory Opinion issued by the ICJ on 25 February 2019<sup>23</sup> is expressly referred to in Mauritius' Notification.<sup>24</sup> Of course, that Opinion did not, and could not, resolve the bilateral sovereignty dispute between Mauritius and the United Kingdom; it did

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to recognize the sovereignty of the Republic of Mauritius over the Chagos archipelago": "Mauritius says Pope visit supports claim to Chagos Islands", *Reuters*, 9 September 2019 (**Annex 15**).

<sup>17</sup> See para. 11 above.

<sup>18</sup> Mauritius has also raised the sovereignty dispute with the United Kingdom before the Commonwealth Heads of State and Government meeting, the Indian Ocean Tuna Commission, the International Mobile Satellite Organization, the African Union and the Non-Aligned Movement: see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, 27 February 2018, para. 5.15.

<sup>19</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Memorial of Mauritius, 1 August 2012, para. 1.3(i); *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 212 noting that "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".

<sup>20</sup> See paras. 14–20 below. See further Judge Donoghue's Dissenting Opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ, 25 February 2019, para. 11: "To be sure, there is no reference to 'sovereignty' in the request. However, Mauritius' own statements make clear that the dispute over sovereignty is at the heart of the request. In its May 2017 aide-memoire regarding the draft request, Mauritius stated that the proposal to request an advisory opinion related to 'the completion of the process of decolonization of Mauritius, thereby enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago' (Written Statement of the United Kingdom, Ann. 3: Republic of Mauritius, Aide Memoire, May 2017)".

<sup>21</sup> See paras. 21–29 below.

<sup>22</sup> See para. 60(a) below.

<sup>23</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ, 25 February 2019.

<sup>24</sup> Notification (**Annex 1**), para. 15.

not make a determination that Mauritius or the United Kingdom currently has sovereignty over the Chagos Archipelago. As the Court clearly noted:

“In Question (a), 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.*”<sup>25</sup>

15. The Court’s opinion (by thirteen votes to one) was (*inter alia*) as follows:
  - (a) That, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago;
  - (b) That the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;
  - (c) That all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.
16. The question of when and how the United Kingdom “brings an end its administration of the Chagos Archipelago” has not yet been agreed by the United Kingdom and Mauritius or otherwise resolved.
17. Mauritius’ position following the Advisory Opinion is that it is “undeniable that the Republic of Mauritius is the sole State lawfully entitled to exercise sovereignty and sovereign rights in relation to the Chagos Archipelago and its maritime zones. The UK cannot and does not have sovereignty over the Chagos Archipelago”.<sup>26</sup> This was a view repeated in a diplomatic note sent to the Maldives dated 7 March 2019 in which Mauritius asserted:

“In view of the above ruling by the ICJ, the Government of Mauritius is of the view that there should now be no doubt as to the sovereignty of Mauritius over the Chagos Archipelago”.<sup>27</sup>
18. The United Kingdom, however, disagrees: in a written statement issued following the Advisory Opinion, the United Kingdom stated:

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<sup>25</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ, 25 February 2019, para. 136 (emphasis added). See also para. 86 where the Court notes that the General Assembly “has not sought the Court’s opinion to resolve a territorial dispute between two States.”

<sup>26</sup> Communiqué of the Mauritius Prime Minister’s Office, 30 April 2019 <<http://pmo.govmu.org/English/Documents/Communiqué%20and%20Reports/Communiqué%20on%20ICJ%20Advisory%20Opinion.pdf>> accessed 16 November 2019 (**Annex 14**).

<sup>27</sup> 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 (**Annex 16**).

“We [the United Kingdom] have no doubt about our sovereignty over the Chagos Archipelago. ... Mauritius has never held sovereignty over the Archipelago and we do not recognise its claim”.<sup>28</sup>

19. As noted earlier, in his statement before Parliament dated 5 November 2019, the Minister of State for Foreign and Commonwealth Affairs reiterated that stance, and further confirmed the United Kingdom’s position that:

“the opinion is advisory and not legally binding. Moreover, the Court itself recognised that its opinion is without prejudice to the sovereignty dispute over the BIOT between the UK and Mauritius.”<sup>29</sup>

20. The matter plainly remains in dispute as between Mauritius and the United Kingdom. No court has either settled that dispute or held that Mauritius currently has sovereignty over the Chagos Archipelago.

### 3. *The UNGA resolution (22 May 2019)*

21. In its Notification,<sup>30</sup> Mauritius also refers to the subsequent resolution of the UNGA dated 22 May 2019.

22. Mauritius had earlier submitted, on 8 May 2019, a draft of that resolution to the UNGA. During the UNGA’s deliberations on the draft, the Maldives’ representative noted that:

“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”.<sup>31</sup>

The representative confirmed that “the Maldives has always believed that the issue of the Chagos archipelago would best be addressed through dialogue between the States concerned”, noting 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”. The Maldives accordingly voted against the resolution, but reiterated that its vote “should not be construed as a

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<sup>28</sup> Foreign and Commonwealth Office of the United Kingdom, “British Indian Ocean Territory: Written statement”, Doc HCWS10, 26 June 2017 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-06-26/HCWS10/>> accessed 16 November 2019 (**Annex 17**).

<sup>29</sup> 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 (**Annex 3**).

<sup>30</sup> Notification (**Annex 1**), para. 16.

<sup>31</sup> United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83 (Maldives’ explanation of vote) (**Annex 18**), p. 24.

vote or a position taken against the sponsors of the draft resolution, with which we have excellent relations”.<sup>32</sup>

23. The final text of the resolution affirmed “in accordance with the advisory opinion” that *inter alia* the Chagos Archipelago forms an integral part of the territory of Mauritius.<sup>33</sup> It also demanded that the United Kingdom “withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months” from the date of the resolution.<sup>34</sup>
24. However in claiming that the Chagos Archipelago “forms an integral part of the territory of Mauritius” the UNGA resolution goes further than the ICJ Advisory Opinion. The Court found only that “at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory”.<sup>35</sup> It did not state that the archipelago forms an integral part of the territory of Mauritius *today*; that issue is at the heart of the current dispute over sovereignty between the United Kingdom and Mauritius.
25. Commenting on the UNGA resolution, the representative of the United Kingdom reiterated that:<sup>36</sup>

“The United Kingdom is not in doubt about our sovereignty over the British Indian Ocean Territory. It has been under continuous British sovereignty since 1814”.

She confirmed the United Kingdom’s “commitment to cede [the Chagos Archipelago] when no longer needed for defence purposes” and continued:

“[T]he issue between Mauritius and the United Kingdom surrounding the Chagos archipelago is a bilateral sovereignty dispute. ...

[T]here is a binding treaty obligation between the United Kingdom and the United States to maintain British sovereignty of the British Indian Ocean Territory until at least 2036”.

26. Subsequently, on 30 April 2019, the United Kingdom Minister of State for Europe and the Americas in a statement before the House of Commons confirmed that:

“we have no doubt about our sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the Archipelago and we do not recognise its claim. We

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<sup>32</sup> *Ibid.*

<sup>33</sup> 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 (**Annex 19**), para. 2(b).

<sup>34</sup> *Ibid.*, para 3.

<sup>35</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ, 25 February 2019, para. 170.

<sup>36</sup> UNGA, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83 (**Annex 20**) at pp. 10–11.

have, however, made a long-standing commitment since 1965 to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes. We stand by that commitment.”<sup>37</sup>

27. In his statement of 5 November 2019 the Minister of State for Foreign and Commonwealth Affairs commented that:

“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”.<sup>38</sup>

28. On 21 November 2019, the Prime Minister of Mauritius made a statement to the Parliament of Mauritius referring to the fact that the United Kingdom had “made clear that it does not intend to withdraw its unlawful administration from the Chagos Archipelago by the deadline set by the General Assembly”, reiterating its view that the ICJ Advisory Opinion “made clear that the Chagos Archipelago is, and has always been, a part of Mauritius”.<sup>39</sup>
29. Plainly, the matter of sovereignty over the Chagos Archipelago remains in dispute as between Mauritius and the United Kingdom.

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<sup>37</sup> 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/written-statement/Commons/2019-04-30/HCWS1528/>> accessed 16 November 2019 (**Annex 21**). In a letter from the United Kingdom’s Minister of State for the Commonwealth and the United Nations (Lord Ahmad) to the Chair of the House of Commons Foreign Affairs Committee dated 19 June 2019, the United Kingdom restated this position: “The UK has no doubt about our sovereignty over BIOT. The ICJ Advisory Opinion made no determination on sovereignty”: 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>> accessed 16 November 2019 (**Annex 22**).

<sup>38</sup> 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 (**Annex 3**).

<sup>39</sup> Seventh National Assembly of the Republic of Mauritius, Parliamentary Debates (Hansard) (Unrevised), First Session, 21 November 2019, pp. 26–27 (**Annex 23**).

C. Mauritius' claims: a prerequisite for determination is a decision on which State (Mauritius or the United Kingdom) is sovereign over the Chagos Archipelago

30. In its Notification, Mauritius claims that the alleged dispute concerns “the delimitation of the Exclusive Economic Zone (‘EEZ’) and continental shelf of Mauritius with Maldives in the Indian Ocean”.<sup>40</sup> Mauritius requests the Tribunal:

“to delimit, in accordance with the principles and rules set forth in UNCLOS, the maritime boundary between Mauritius and Maldives in the Indian Ocean, in the EEZ and the continental shelf, including the portion of the continental shelf pertaining to Mauritius that lies more than 200 nautical miles from the baselines from which its territorial sea is measured”.<sup>41</sup>

31. The UNCLOS provisions on delimitation of the EEZ and continental shelf relied upon by Mauritius in its Notification<sup>42</sup> are Articles 74 and 83 respectively. The texts of these provisions are identical, save that Article 74 refers to the EEZ and Article 83 to the continental shelf. Subparagraph (1) of those Articles provides as follows (emphasis added):

“The delimitation of the exclusive economic zone [or continental shelf] *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”.

32. Mauritius' claim to be a State with an “opposite or adjacent coast” to the Maldives is expressly predicated on its claim to sovereignty over the land territory of the Chagos Archipelago. Mauritius asserts:

“the territory of Mauritius includes, in addition to the main island, *inter alia*, the Chagos Archipelago”.<sup>43</sup>

33. Only an “opposite” or “adjacent” state may bring proceedings pursuant to Articles 74 and 83 of UNCLOS. Determining whether Mauritius is currently the State with the “opposite or adjacent coast” to the Maldives would inevitably require this Tribunal to determine (either expressly or implicitly) the dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago.

D. Concluding remarks on the consistent position of the Maldives with respect to the sovereignty dispute between Mauritius and the United Kingdom

34. As made clear by the Maldives before the UNGA,<sup>44</sup> the Maldives has always supported – and continues to support – the process of decolonisation within the framework of the United Nations Charter.

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<sup>40</sup> Notification (**Annex 1**), para. 3.

<sup>41</sup> *Ibid.*, para. 27.

<sup>42</sup> *Ibid.*, para. 25. Mauritius also cites Article 76 UNCLOS which sets out the definition of the continental shelf.

<sup>43</sup> Notification (**Annex 1**), para. 11.

35. However, it should not – and will not – be forced by Mauritius’ commencement of these proceedings to take a position on a bilateral sovereignty dispute between Mauritius and the United Kingdom, both of which are States with which it has maintained and wishes to maintain friendly relations.
36. The Maldives maintains its long-standing<sup>45</sup> position that delimitation of the maritime boundary between the Maldives and the Chagos Archipelago can only be addressed once the status of Chagos Archipelago is settled and the decolonisation process is resolved, through bilateral consultations of the parties involved, and in accordance with international law.

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<sup>44</sup> See para. 22 above.

<sup>45</sup> See e.g. Mauritius’ acknowledgement of the Maldives’ position in its Notification (**Annex 1**) at para. 24, 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 (**Annex 16**).



**CHAPTER 2**  
**THE MALDIVES' PRELIMINARY OBJECTIONS**

37. The Maldives' Preliminary Objections are organised in Chapter 2 as follows.
38. **Section I** explains that the United Kingdom is an indispensable third party to the present proceedings, and that, as it is *not* a party to these proceedings, the Tribunal does not have jurisdiction over the alleged dispute.
39. **Section II** establishes that, in any event, this Tribunal has no jurisdiction to determine the disputed issue of sovereignty over the Chagos Archipelago, which it would necessarily have to do if it were to determine Mauritius' claims in these proceedings. This Tribunal's jurisdiction is established by, and limited to, disputes "concerning the interpretation or application of this Convention" pursuant to Article 288(1) UNCLOS. A dispute over territorial sovereignty is clearly not such a dispute.
40. **Section III** explains why, in circumstances where the sovereignty dispute between Mauritius and the United Kingdom remains unresolved, Mauritius and the Maldives have not engaged – and cannot meaningfully engage – in the negotiations mandated by Articles 74 and 83 UNCLOS.
41. **Section IV** sets out why, in circumstances where the sovereignty dispute between Mauritius and the United Kingdom remains unresolved, there is not – and cannot be – a "dispute" between Mauritius and the Maldives concerning its maritime boundary. Without such a dispute the Tribunal has no jurisdiction pursuant to Article 288.
42. **Section V** argues that the present proceedings constitute an abuse of process. Mauritius has invoked UNCLOS dispute settlement mechanisms against the Maldives in a case that primarily concerns the long-standing and unresolved bilateral dispute between Mauritius and the United Kingdom about territorial sovereignty over the Chagos Archipelago, consistent with Mauritius' stated objective of advancing that claim before judicial or arbitral bodies.
43. **Section VI** notes that the Preliminary Objections all have an exclusively preliminary character.
44. The Preliminary Objections conclude with the Maldives' formal Submissions.<sup>46</sup>

**I. The absence of the United Kingdom, as an indispensable party, deprives the Tribunal of jurisdiction**

45. The first preliminary objection raised by the Maldives is that the Tribunal lacks jurisdiction because an indispensable party, namely the United Kingdom, is absent in these proceedings and did not consent to be a party to them. According to ITLOS, in a

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<sup>46</sup> Rule 97(2) provides that the preliminary objections shall set out the submissions.

situation where a “third party is indispensable to the ... proceedings” and is absent, the Tribunal has no jurisdiction *ratione personae*.<sup>47</sup>

46. The Maldives will first recall the doctrine of the “indispensable” or “necessary” party, also known as the “Monetary Gold Principle” (see **subsection A** below). It will then demonstrate that this principle plainly applies here and should lead the Tribunal to refuse to entertain Mauritius’ claim because it lacks jurisdiction (see **subsection B** below).

#### A. The “Monetary Gold Principle”

47. The rule under which in the absence of an “indispensable Party” an international court or tribunal must decline to exercise jurisdiction in a case is:

“a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ”.<sup>48</sup>

48. This rule has indeed been enunciated by the ICJ in its judgment of 15 June 1954 in the *Case of the Monetary Gold Removed from Rome in 1943*.<sup>49</sup> In this case, the ICJ was requested to decide a dispute between Italy and France, the United Kingdom, and the United States of America. The Court noted that although Albania was not a Party to that case, and had not “given her consent in this case either expressly or by implication”,<sup>50</sup> “Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision”.<sup>51</sup> Therefore, the Court declined jurisdiction, finding that it could not “without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.”<sup>52</sup>
49. The ICJ recalled the relevance of this principle, which came to be known as the “Monetary Gold Principle”, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>53</sup> in the

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<sup>47</sup> In the *M/V “Norstar” Case*, ITLOS held: “The Tribunal will now consider whether it has jurisdiction *ratione personae* to entertain the present dispute. The questions the Tribunal has to examine in this regard are twofold, namely whether Italy is the proper respondent in these proceedings and whether any third party is indispensable to the present proceedings”: *M/V “Norstar” Case (Panama v. Italy)*, Judgment on Preliminary Objections, 4 November 2016, para. 160.

<sup>48</sup> *Ibid.*, para. 172.

<sup>49</sup> *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v. France)*, Judgment of June 15th, 1954, ICJ Reports 1954, p. 19.

<sup>50</sup> *Ibid.*, p. 32.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, p. 33.

<sup>53</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392. The Court held that: “There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings ‘would not only be affected by a decision, but would form the very subject-matter of the decision’ (*I.C.J. Reports 1954*, p. 32)”: p. 431, para. 88.

*Certain Phosphate Lands in Nauru (Nauru v. Australia)* case,<sup>54</sup> and in many other cases.<sup>55</sup>

50. In the *East Timor* case, the Court found that, in deciding the claims brought by Portugal against Australia, it would have to decide, as a prerequisite:

“whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia”.<sup>56</sup>

But the Court could not decide on this question absent Indonesia’s consent to its jurisdiction. The Court recalled:

“that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgement given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions”.<sup>57</sup>

51. Since it is based on the fundamental principle that there can be no jurisdiction without a State’s consent, the application of the “Monetary Gold Principle” is unsurprisingly not limited to the ICJ.<sup>58</sup> In so far as ITLOS is concerned, the position is clearly stated in *M/V “Norstar”*:

“The Tribunal acknowledges that the notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ. Pursuant to this notion, where ‘the vital issue to be settled concerns the international responsibility of a third State’ or where the legal interests of a third State would form ‘the very subject-matter’ of the dispute, a court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute (*Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Judgment, *I.C.J. Reports 1954*, p. 19, at pp. 32-33; *East Timor (Portugal/Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 92,

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<sup>54</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240. The Court recalled that it can exercise jurisdiction only when “the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for”: p. 261, para. 54.

<sup>55</sup> *Continental Shelf (Libya/Malta)*, Merits, ICJ Reports 1985, p. 13 at p. 25, para. 40; *Frontier Dispute (Burkina Faso/Mali)*, Judgment, ICJ Reports 1986, p. 554 at p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*, Application to Intervene, Judgment, ICJ Reports 1990, p. 92 at p. 122, para. 73; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgment, ICJ Reports 2002, p. 303 at p. 421, para. 239.

<sup>56</sup> *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90 at p. 105, para. 35.

<sup>57</sup> *Ibid.*, p. 101, para. 26; see also p. 105, para. 34.

<sup>58</sup> It has also been applied in mixed arbitration, such as in *Larsen v. Hawaiian Kingdom* where the tribunal emphasised that the rule “applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings”: *Larsen v. Hawaiian Kingdom*, Award, 5 February 2001, para. 11.17.

para. 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 392, at p. 431, para. 88; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 240, at pp. 259-262, paras. 50-55; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, *I.C.J. Reports 2005*, p. 168, at pp. 237-238, paras. 203-204).<sup>59</sup>

52. It follows from this consistent case law that under the “necessary” or “indispensable” party rule, or “Monetary Gold Principle”: (i) a State not party to proceedings is an “indispensable party” “when the decision as between the parties cannot be reached without the Court [or tribunal] examining the legality of the conduct of [this] State ... or [its] legal position”,<sup>60</sup> and (ii) an international court or tribunal cannot exercise its jurisdiction in the absence of such an indispensable party.

B. The Monetary Gold Principle precludes the exercise of the Tribunal’s jurisdiction in the present case

53. In these proceedings, Mauritius requests the Tribunal to carry out a delimitation of the maritime zones lying between the Chagos Archipelago and the Maldives and complains that the Maldives did not comply with certain obligations under UNCLOS Articles 74 and 83.

54. However, Mauritius is fully aware that the United Kingdom claims sovereignty over the Chagos Archipelago, and that, as set out above, there is a long-standing and unresolved dispute between Mauritius and the United Kingdom on this matter (see Chapter 1, section I, subsections A and B above). Likewise, it is plain that before even considering whether to entertain Mauritius’ maritime claims, the Tribunal would be constrained, as a prerequisite, to decide that Mauritius, not the United Kingdom, has sovereignty over the Chagos Archipelago (see Chapter 1, section I, subsection C above).

55. The legal situation in the present case is strikingly similar to the *East Timor* case. In that case, Portugal claimed that Australia had violated its rights as administering power of East Timor by concluding a treaty with Indonesia regarding the exploitation of the continental shelf lying between Australia and East Timor. At the time, Indonesia was claiming and exercising sovereignty over East Timor.<sup>61</sup> The ICJ observed that Portugal’s claim was “based on the assertion that Portugal alone, in its capacity as administering power, had the power to enter into a treaty on behalf of East Timor”.<sup>62</sup> It noted that the very subject-matter of its decision would necessarily be a determination of whether Indonesia “could or could not have acquired the power to

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<sup>59</sup> *M/V “Norstar” Case (Panama v. Italy)*, Judgment on Preliminary Objections, 4 November 2016, para. 172.

<sup>60</sup> Malcolm N. Shaw (ed), *Rosenne’s Law and Practice of the International Court: 1920–2015*, Vol. II (5th ed., Brill Nijhoff, 2016) (**Legal Annex 1**), p. 568.

<sup>61</sup> *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90 at p. 98, para. 19.

<sup>62</sup> *Ibid.*, p. 101, para. 27.

enter into treaties on behalf of East Timor relating to the resources of its continental shelf.”<sup>63</sup> The Court concluded that it “could not make such a determination in the absence of the consent of Indonesia.”<sup>64</sup>

56. In the same manner, Mauritius’ claims before the Tribunal are predicated on the assertion that the United Kingdom is not sovereign over the Chagos Archipelago and that it is Mauritius which has the exclusive power to negotiate or litigate a maritime boundary for the Chagos Archipelago. Thus, the subject-matter of the Tribunal’s decision would necessarily entail a determination of whether the United Kingdom is or is not sovereign over the Chagos Archipelago. The Tribunal cannot make such a determination without the consent of the United Kingdom.
57. The Maldives notes the position of the United Kingdom as recently articulated by the Minister of State for Foreign and Commonwealth Affairs before Parliament:

“A fundamental principle of international law and the international legal order is the principle of consent. It follows that the Special Chamber is not in a position to pronounce itself on the sovereignty dispute between the UK and Mauritius without the consent of the UK to resolve the sovereignty dispute before the Special Chamber”.<sup>65</sup>

### C. Concluding remarks

58. In sum, the Maldives submits that this case is one in which the “Monetary Gold Principle” plainly applies. In order to entertain Mauritius’ delimitation claims, the Tribunal would necessarily be required to rule on the United Kingdom’s legal interests, which would not only be affected, but would form the very subject-matter of this decision. Since the United Kingdom has not consented to these proceedings, the Maldives submits that the Tribunal should decline jurisdiction.

## II. The Tribunal has no jurisdiction to determine the sovereignty dispute over the Chagos Archipelago

### A. Introduction

59. As set out in Chapter 1, a determination of Mauritius’ claims would require this Tribunal to first determine whether it is Mauritius or the United Kingdom that has sovereignty over the Chagos Archipelago.<sup>66</sup> This Tribunal, however, has no jurisdiction to determine such a disputed issue of sovereignty. The jurisdiction of this Tribunal is established by, and limited to, disputes “concerning the interpretation or

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<sup>63</sup> *Ibid.*, p. 102, para. 28.

<sup>64</sup> *Ibid.*

<sup>65</sup> 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 (**Annex 3**).

<sup>66</sup> See Chapter 1, section I, subsection C above.

application of this Convention” pursuant to Article 288(1) (which is the sole jurisdictional basis on which Mauritius relies<sup>67</sup>). As set out in further detail in **subsection B** below, a dispute over territorial sovereignty is clearly not a dispute “concerning the interpretation or application of this Convention”.

B. A dispute over territorial sovereignty is not a dispute “concerning the interpretation or application of this Convention”

60. The jurisprudence provides clear and consistent confirmation that disputes concerning sovereignty over land territory do not come within the jurisdiction of an UNCLOS tribunal pursuant to Article 288 UNCLOS:

(a) In *Mauritius v. United Kingdom*, the tribunal<sup>68</sup> stated:

“Given the inherent sensitivity of States to questions of territorial sovereignty, the question must be asked: if the drafters of the Convention were sufficiently concerned with the sensitivities involved in delimiting maritime boundaries that they included the option to exclude such disputes from compulsory settlement, is it reasonable to expect that the same States accepted that more fundamental issues of territorial sovereignty could be raised as separate claims under Article 288(1)?

In the Tribunal’s view, had the drafters intended that such claims could be presented as disputes ‘concerning the interpretation or application of the Convention’, the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes.

...

In the Tribunal’s view, to read Article 298(1)(a)(i) 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 to craft a balanced text and to respect the manifest sensitivity of States to the compulsory settlement of disputes relating to sovereign rights and maritime territory.”<sup>69</sup>

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<sup>67</sup> Notification (**Annex 1**), para. 9.

<sup>68</sup> The tribunal comprised: President, Professor Ivan Shearer AM; Judge Sir Christopher Greenwood CMG, QC; Judge Albert Hoffmann; Judge James Kateka; Judge Rüdiger Wolfrum.

<sup>69</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, paras. 216–219.

(b) In *Philippines v. China*, the tribunal<sup>70</sup> stated:

“The Convention, however, does not address the sovereignty of States over land territory. Accordingly, this Tribunal has not been asked to, and does not purport to, make any ruling as to which State enjoys sovereignty over any land territory in the South China Sea, in particular with respect to the disputes concerning sovereignty over the Spratly Islands or Scarborough Shoal. None of the Tribunal’s decisions in this Award are dependent on a finding of sovereignty, nor should anything in this Award be understood to imply a view with respect to questions of land sovereignty.”<sup>71</sup>

61. Furthermore, in characterising the dispute before it,<sup>72</sup> the *Philippines v. China* tribunal stated:

“The Tribunal might consider that the Philippines’ Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines’ claims was to advance its position in the Parties’ dispute over sovereignty.”<sup>73</sup>

62. As already noted in Chapter 1, the resolution of Mauritius’ claims would require the Tribunal first to render a decision on sovereignty (either expressly or implicitly).<sup>74</sup> That dispute over territorial sovereignty is manifestly beyond the jurisdiction of the Tribunal.

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<sup>70</sup> The tribunal comprised: Judge Thomas A. Mensah; Judge Jean-Pierre Cot; Judge Stanislaw Pawlak; Professor Alfred H.A. Soons; Judge Rüdiger Wolfrum.

<sup>71</sup> See *South China Sea Arbitration (Philippines v. China)*, Award, 12 July 2016, para. 5. See also *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 8 (“Conscious that the Convention is not concerned with territorial disputes, the Philippines has stated at all stages of this arbitration that it is not asking this Tribunal to rule on the territorial sovereignty aspect of its disputes with China”) and para. 153.

<sup>72</sup> The Tribunal has to determine whether it has jurisdiction to decide a claim, and in making that determination it is for the Tribunal to characterise the dispute. See *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432 at p. 448, paras. 30–31 (cited with approval in *South China Sea Arbitration (Republic of Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 150 and *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 208). See also *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457 at p. 466, para. 30 noting that the Court is required “to isolate the real issue in the case and to identify the object of the claim”.

<sup>73</sup> *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 153. Similarly see *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 211.

<sup>74</sup> See Chapter 1, section I, subsection C above.

### III. The procedural precondition mandated in Articles 74 and 83 UNCLOS has not been fulfilled

63. This section sets out the content of the relevant procedural obligation in Articles 74 and 83 UNCLOS respectively (**subsection A** below) and then explains that this procedural obligation has not, and cannot, be fulfilled in the present case (**subsection B** below).

A. The relevant procedural obligation in Articles 74 and 83 UNCLOS

64. Articles 74 and 83 provide in relevant part as follows (emphasis added):<sup>75</sup>

“(1) The delimitation of the exclusive economic zone [or continental shelf] 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.

(2) 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.”

65. Accordingly, pursuant to the plain terms of Articles 74 and 83, *before* resorting to the procedures provided for in Part XV, States with opposite or adjacent coasts are under a mandatory obligation to negotiate with a view to effecting “by agreement” the relevant delimitation. It is only once such negotiations have been engaged in, and the attempt to reach an agreement has failed, that either State can resort to the procedures provided for in Part XV UNCLOS.

66. As noted by the Special Chamber in *Ghana/Côte d’Ivoire*:

“the obligation under article 83, paragraph 1, of the Convention to reach an agreement on delimitation necessarily entails negotiations to this effect. The Special Chamber emphasizes that the obligation to negotiate in good faith occupies a prominent place in the Convention, as well as in general international law, and that this obligation is particularly relevant where neighbouring States conduct maritime activities in close proximity.”<sup>76</sup>

67. It is, of course, recognised that Articles 74 and 83 “do not require that delimitation negotiations should be successful”, but “like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith”.<sup>77</sup>

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<sup>75</sup> The text of subparagraph (1) is already set out in Chapter 1 (para. 31) above; for ease it is reproduced here. As noted at para. 31, the texts of Articles 74(1) & (2) and 83(1) & (2) are identical, save that Article 74 refers to the EEZ and Article 83 to the continental shelf.

<sup>76</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, 23 September 2017, para. 604.

<sup>77</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303 at p. 424, para. 244. See more recently



68. The requirement of good faith is a significant one. As explained by the ICJ, the obligation to negotiate necessitates that the parties conduct themselves such “that the negotiations are meaningful”.<sup>78</sup> This requires *inter alia* conducting themselves with a view to actually reaching an agreement; in the *Gulf of Maine* case the ICJ referred 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”.<sup>79</sup>
- B. Why the procedural obligation has not – and cannot – be fulfilled in the present case
69. In the present case, as a matter of fact, bilateral negotiations between Mauritius and the Maldives addressing delimitation of the EEZ and continental shelf have not taken place. Further, in the present circumstances, they cannot take place in any meaningful way. The mandatory procedural obligation set out in Articles 74 and 83 respectively has therefore not been fulfilled.
70. The reason why negotiations have not taken place is simple. As set out above, Mauritius’ maritime boundary claim with respect to the Maldives is predicated on its claim to sovereignty over the Chagos Archipelago,<sup>80</sup> yet the United Kingdom continues to claim sovereignty over the Chagos Archipelago, which it still controls.<sup>81</sup> Until that sovereignty dispute is settled, the Maldives is unable to negotiate a maritime boundary agreement with Mauritius. For the same reasons, it is neither possible nor appropriate for the parties to seek to negotiate the provisional arrangements envisaged by Articles 74(3) and 83(3).
71. It is acknowledged that Mauritius has in the past requested that the Maldives meet to discuss a maritime boundary delimitation.<sup>82</sup> But, in the present circumstances, such negotiations between Mauritius and the Maldives would not be meaningful.

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*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, ICJ, 1 October 2018, para. 86 (“While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith”); *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, ICJ Reports 2017, p. 3 at p. 37, para. 90 (“The Court notes that Article 83, paragraph 1, of UNCLOS, in providing that delimitation shall be effected by way of agreement, requires that there be negotiations conducted in good faith”).

<sup>78</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, p. 3 at pp. 46–47 paras. 85–86, cited in Myron H. Nordquist and others (eds), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II (Martinus Nijhoff, 1985) (**Legal Annex 2**), commentary to Article 74 (at pp. 813–814, para. 74.11(a)) and Article 83 (at p. 982, para. 83.19(a)).

<sup>79</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, ICJ Reports 1984, p. 246 at p. 292, para. 87. 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 (Greece v. Federal Republic of Germany)*, 26 January 1972, RIAA XIX, p. 27 at p. 57.

<sup>80</sup> Chapter 1, section I, subsection C.

<sup>81</sup> Chapter 1, section I, subsections A and B.

<sup>82</sup> By Note Verbale dated 19 June 2001, Mauritius requested that the Maldives “agree to preliminary negotiations” on the issue of delimitation: 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

72. This has been the consistent and clear position of the Maldives.<sup>83</sup> It is a position adopted in good faith, with a view to ultimately achieving a peaceful, practical and equitable outcome in accordance with international law.

#### **IV. There is no “dispute” on maritime delimitation between the parties**

73. UNCLOS Part XV and the jurisprudence of international courts and tribunals require the existence of a “dispute” as a precondition to the exercise of jurisdiction. In particular, the party alleging the existence of a dispute – in this case Mauritius – must demonstrate that, at the time it initiated proceedings by filing its Notification on 18 June 2019, the parties held clearly opposite views in respect of the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean in the EEZ and the continental shelf, and that such views had been expressed with sufficient clarity.
74. As set out in Chapter 1 of these Preliminary Objections,<sup>84</sup> the precondition to a maritime boundary dispute is resolution of the dispute over territorial sovereignty between Mauritius and the United Kingdom in respect of the Chagos Archipelago. There can be no dispute between the Maldives and Mauritius over maritime delimitation until such time as Mauritius becomes the undisputed opposite coastal State within the meaning of UNCLOS Articles 74(1) and 83(1).
75. Furthermore, even if the dispute over territorial sovereignty between Mauritius and the United Kingdom was not at issue, there is still no dispute between the parties regarding maritime delimitation. Mauritius’ Notification does not point to any positively opposed claims regarding the delimitation of the EEZ or continental shelf. Further, the Special Agreement dated 24 September 2019 by which the parties submitted Mauritius’ claim to a special chamber does not establish the existence of a dispute. First, it was made after the critical date (18 June 2019, when Mauritius filed its case) and second, it was made without prejudice to the Maldives’ right to make objections to jurisdiction, including as regards whether a dispute existed at all.

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Foreign Affairs, Republic of Maldives, 19 June 2001 (**Annex 24**). By Note Verbale dated 7 March 2019 (just two months prior to instituting the present proceedings), Mauritius referred to a meeting on maritime delimitation held between Mauritius and the Maldives in Male in October 2010 and, in light of the ICJ Advisory Opinion, invited “the Maldives authorities to a second round of discussions in the second week of April in Mauritius”: 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 (**Annex 16**).

<sup>83</sup> See the Note Verbale dated 18 July 2001 responding to the Note Verbale dated 19 June 2001 cited above (**Annex 24**) in which the Maldives explained: “As the 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”: 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 (**Annex 25**).

<sup>84</sup> Chapter 1, section I, subsection C.

Accordingly, no dispute had crystallised at the critical date, and the Tribunal lacks jurisdiction over Mauritius' claims.

76. This section:

- (a) Demonstrates that the precondition to the existence of any maritime boundary dispute between Mauritius and the Maldives is the resolution of the dispute between Mauritius and the United Kingdom over sovereignty in respect of the Chagos Archipelago, which has not occurred (see **subsection A** below);
- (b) Demonstrates further, in light of the applicable international law, that irrespective of the sovereignty dispute over the Chagos Archipelago there is no maritime boundary dispute because Mauritius' Notification does not establish the existence of positively opposed claims regarding either the EEZ or continental shelf (see **subsection B** below); and
- (c) Sets out the inescapable conclusion that the Tribunal does not have jurisdiction over the present case (see **subsection C** below).

A. There can be no dispute over maritime delimitation until the dispute between Mauritius and the United Kingdom over sovereignty has been resolved

77. The Maldives' primary position is that there cannot exist any valid dispute as regards maritime delimitation between Mauritius and the Maldives until the dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago is resolved.

78. UNCLOS Article 288(1) makes explicit that only disputes concerning the interpretation or application of UNCLOS fall within the Tribunal's jurisdiction. A claim will concern "the interpretation or application" of Articles 74(1) and 83(1) only if it addresses the "delimitation of the exclusive economic zone [or continental shelf] between States with opposite or adjacent coasts".

79. Mauritius' claim to be a State with a relevant "opposite or adjacent coast" to the Maldives is predicated on its assertion that it has sovereignty over the Chagos Archipelago, which (as Chapter 1 of these Preliminary Objections<sup>85</sup> makes clear) is disputed by the United Kingdom. Only if that dispute is resolved in Mauritius' favour can Mauritius be a party to a maritime delimitation dispute as the relevant coastal State.

B. Mauritius has not established the existence of "positively opposed" claims regarding the EEZ or continental shelf

80. Additionally and alternatively, even if the sovereignty dispute did not bar the existence of a valid dispute over maritime delimitation as claimed by Mauritius, based on the applicable principles of international law, it is manifest that there was no

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<sup>85</sup> Chapter 1, section I, subsections A and B.

maritime boundary dispute between Mauritius and the Maldives at the time that proceedings under Part XV of UNCLOS were initiated.

81. The requirement of a prior “dispute” as a precondition to the exercise of jurisdiction is established in the jurisprudence of both ITLOS and Annex VII tribunals. Part XV of UNCLOS – which is the sole basis for the Tribunal’s jurisdiction – is a regime for the settlement of “disputes”. Article 288(1) of UNCLOS stipulates that:

“A court or tribunal referred to in article 287 shall have jurisdiction over any *dispute* concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part” (emphasis added).

82. In *Philippines v. China*, the tribunal<sup>86</sup> held that:

“The concept of a dispute is well-established in international law and the inclusion of the term within Article 288 constitutes a threshold requirement for the exercise of the Tribunal’s jurisdiction. Simply put, the Tribunal is not empowered to act except in respect of one or more actual disputes between the Parties.”<sup>87</sup>

83. It further confirmed, drawing on ICJ jurisprudence, that a dispute must be concrete and specific:

“The existence of a dispute in international law generally requires that there be ‘positive opposition’ between the parties, in that the claims of one party are affirmatively opposed and rejected by the other. In the ordinary course of events, such positive opposition will normally be apparent from the diplomatic correspondence of the Parties, as views are exchanged and claims are made and rejected.”<sup>88</sup>

84. The tribunal in *Mauritius v. United Kingdom*<sup>89</sup> similarly stated that, in order for it to exercise jurisdiction, it must be satisfied that “a dispute ha[d] arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed” by the time proceedings were instituted.<sup>90</sup>

85. Similarly, in *Saint Vincent and the Grenadines v. Spain*, ITLOS concluded that the absence of a dispute between the parties concerning the interpretation or application

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<sup>86</sup> Regarding the constitution of the Tribunal, see note 70 above.

<sup>87</sup> See *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 148.

<sup>88</sup> *Ibid.*, para. 159 (internal citation omitted).

<sup>89</sup> Regarding the constitution of the Tribunal, see note 68 above.

<sup>90</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 382.

of UNCLOS when the application was filed meant that it had “no jurisdiction *ratione materiae* to entertain the present case”.<sup>91</sup>

86. The UNCLOS jurisprudence is consistent with the established ICJ jurisprudence requiring the existence of a dispute as a fundamental pre-condition to the exercise of jurisdiction. The ICJ held in the *Nuclear Tests* case that:

“The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute.”<sup>92</sup>

87. It has further clarified that whether a dispute exists “is a matter for objective determination”.<sup>93</sup> A dispute does not exist simply because “the interests of two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.”<sup>94</sup> Furthermore, there must have been an existing dispute at the time proceedings were instituted.<sup>95</sup>

88. In the recent *Marshall Islands* case,<sup>96</sup> the ICJ confirmed that in order for a dispute to exist:

“The evidence must show that the parties ‘*hold clearly opposite views*’ with respect to the issue brought before the Court. ... As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is 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.”<sup>97</sup>

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<sup>91</sup> See *M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, 28 May 2013, para. 151.

<sup>92</sup> *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253 at pp. 270–271, para. 55. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, p. 803 at p. 810, para. 16 (“the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it”); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74 (a mere assertion by one party that a dispute exists is “not sufficient to prove the existence of a dispute”).

<sup>93</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 at p. 74.

<sup>94</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319 at p. 328.

<sup>95</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at pp. 84–85, para. 30.

<sup>96</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833.

<sup>97</sup> *Ibid.*, p. 850, para. 41 (emphasis added).

89. The Court held further that “declining to co-operate with certain diplomatic initiatives” was not evidence of a dispute.<sup>98</sup>
90. It also confirmed the obvious point that, given that the relevant dispute must exist at the critical date of the filing of an application, the mere act of filing an application could not in itself be taken as evidence of a dispute, or as having crystallised an incipient dispute, existing at the time of the application.<sup>99</sup>
91. In the present case, the Notification of Mauritius has not pointed to any dispute or “positive opposition” between the Parties regarding their respective maritime boundary claims. Furthermore, none of the exchanges between the Maldives and Mauritius referred to in the Notification establish that a dispute exists.<sup>100</sup>
92. Mauritius’ Notification itself cannot be taken as evidence of, or as having crystallised, a dispute. Similarly, Mauritius could not create a dispute by (in due course) filing its Memorial in this proceeding in anticipation that the Maldives will oppose its maritime boundary claims. The dispute must have clearly existed prior to the filing of the Notification. In the present case, there is no indication of a “positive opposition” of maritime boundary claims between the Parties.

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<sup>98</sup> *Ibid.*, p. 856, para. 57.

<sup>99</sup> *Ibid.*, pp. 847, 851, 855, paras. 29, 43, 54.

<sup>100</sup> In its letter dated 19 June 2001, Mauritius stated that it was “embarking on the exercise to delimit the Continental Shelf around the Chagos Archipelago”, that the Maldives and Mauritius “may have overlapping claims”, and that the two States “may also have to look at the issue of delimitation of the Exclusive Economic Zones, if necessary”: 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 (**Annex 24**). This language shows an attempt to pre-empt a dispute, rather than the existence of a dispute. In the meeting between Mauritius and the Maldives of 21 October 2010, 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” and proposed that the two States could “make a joint submission with regard to that area”. Both sides agreed that they would “exchange coordinates of their respective base points ... in order to facilitate the eventual discussions on the maritime boundary”: 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 (**Annex 26**). Mauritius’ agreement to amend its submission to the Commission on the Limited of the Continental Shelf (‘CLCS’) was not evidence of opposition of opposing claims: all that the Maldives’ representative stated was that the Maldives’ CLCS submission would in due course be amended “in consultation with the Government of the Republic of Mauritius”: *ibid.* Mauritius’ objection dated 24 March 2011 to the Maldives’ submission to the CLCS made only vague statements about Maldives’ submission not taking into account the EEZ around the Chagos Archipelago without any clarification as to an area of overlapping claims: 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 (**Annex 27**). The note verbale from Mauritius to Maldives dated 7 March 2019 indicates that previous discussions over maritime delimitation were “inconclusive” but does not assert a positive claim to which Maldives could be opposed: 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 (**Annex 16**).

### C. Concluding remarks

93. Mauritius has submitted no evidence in its Notification as to the existence of a dispute between the Parties on the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean in the EEZ and the continental shelf. The only dispute is between Mauritius and the United Kingdom in respect of sovereignty over the Chagos Archipelago. The Maldives is not a party to that dispute.
94. Consistent with UNCLOS Part XV and the established principles of international law, there is no maritime boundary dispute between the Parties, and the Tribunal manifestly lacks jurisdiction over this case.

### V. Mauritius' claims constitute an abuse of process and should be rejected as inadmissible

95. Apart from and without prejudice to the Maldives' objections to the Tribunal's jurisdiction, the Maldives submits that Mauritius' claims are inadmissible because they constitute an abuse of process.
96. Mauritius has invoked UNCLOS dispute settlement procedures against the Maldives in a case that *primarily* concerns a long-standing and unresolved bilateral dispute between Mauritius and the United Kingdom about territorial sovereignty over the Chagos Archipelago (see Chapter 1 above).
97. The Maldives will recall below that, in a case of abuse of process, an international court or tribunal is entitled to reject a claim as inadmissible (see **subsection A** below). It will then demonstrate that Mauritius' claims amount to an abuse of process (see **subsection B** below).

#### A. The inadmissibility of claims constituting an abuse of process

98. The Maldives finds the current objection on the well-established procedural rule according to which a claim will be inadmissible and an international court or tribunal must refrain from exercising jurisdiction if the claimant's application constitutes an abuse of process.<sup>101</sup>

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<sup>101</sup> Maldives does not argue that UNCLOS Article 300 on "Good Faith and abuse of rights" constitutes the legal grounds of this admissibility objection. The *South China Sea Arbitration* Award authoritatively made the point that: "the mere act of unilaterally initiating an arbitration under Part XV in itself cannot constitute an abuse of rights. In this regard it recalls the following statement in *Barbados v. Trinidad and Tobago*: '[T]he unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged ...': *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 126, referring to *Barbados v. Trinidad and Tobago*, Award, 11 April 2006, para. 208.

99. The ICJ has consistently acknowledged this procedural rule. The case law of the ICJ is replete with instances where the principle of abuse of process has been invoked, with the Court acknowledging its applicability in international proceedings.<sup>102</sup> In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the Court stated:

“An abuse of process goes to the procedure before a court or tribunal *and can be considered at the preliminary phase* of these proceedings.”<sup>103</sup>

100. This rule operates as a general procedural rule and is therefore applicable before any UNCLOS court or tribunal.

101. The Arbitral Tribunal in the *South China Sea Arbitration (Philippines v. China)* found that abuse of process “is appropriate in only the most blatant cases of abuse or harassment.”<sup>104</sup> This position is echoed in the case law of the ICJ, according to which:

“It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process.”<sup>105</sup>

102. One of the most obvious examples of a “blatant case of abuse of process” creating “the exceptional circumstances” mentioned above is when a claimant purports “to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted”.<sup>106</sup>

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<sup>102</sup> *Ambatielos case (Greece v. United Kingdom)*, Merits: Obligation to Arbitrate, ICJ Reports 1953, p. 10 at p. 23; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 69 pp. 91–92, paras. 51–54, pp. 105–106, para. 94; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, ICJ Reports 1991, p. 53 at p. 63, paras. 26–27; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240 at p. 255, paras. 37–38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 325 at p. 336, para. 19; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, ICJ Reports 1996, p. 595 at p. 622, para. 46; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgment, ICJ Reports 2000, p. 12 at p. 30, para. 40; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, p. 12 at pp. 37–38, para. 44.

<sup>103</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ, 6 June 2018, para. 150 (emphasis added). See also *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ, 13 February 2019, paras. 107–115; *Jadhav (India v. Pakistan)*, Judgment, ICJ, 17 July 2019, para. 49.

<sup>104</sup> *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 128.

<sup>105</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ, 6 June 2018, para. 150. See also *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ, 13 February 2019, paras. 107–115; *Jadhav (India v. Pakistan)*, Judgment, ICJ, 17 July 2019, para. 49.

<sup>106</sup> Robert Kolb, “General Principles of Procedural Law” in Andreas Zimmerman and Christian J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, Oxford University Press, 2019) (Legal Annex 3), p. 999, para. 49.



## B. Mauritius' claims constitutes an abuse of process

103. Against the backdrop of the relevant case law, the Maldives submits that Mauritius' claims constitutes a clear abuse of process and should therefore be rejected as inadmissible at the preliminary objections phase.
104. The present case falls within the exceptional circumstances articulated above. Having failed in the *Chagos Protected Marine Area Arbitration* to obtain a judicial decision against the United Kingdom stating that Mauritius has sovereignty over the Chagos Archipelago, Mauritius now tries to secure the same outcome by initiating UNCLOS proceedings against the Maldives, a third party to the bilateral sovereignty dispute.
105. Mauritius is fully aware that the United Kingdom claims, and at present exercises, sovereignty over the Chagos Archipelago (see Chapter 1, section I, subsections A and B above). It cannot ignore the fact that an UNCLOS tribunal cannot entertain proceedings the resolution of which requires a ruling that Mauritius has sovereignty over the Chagos Archipelago, as stated clearly by the Annex VII tribunal in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*.<sup>107</sup>
106. The use of maritime boundary proceedings in order to promote its claim to sovereignty over the Chagos Archipelago is a clear attempt by Mauritius to "use proceedings for aims alien to the ones for which the procedural rights at stake have been granted".<sup>108</sup> As such it constitutes one of "the most blatant cases of abuse" envisaged by the *South China Sea Arbitration*. For this reason Mauritius' claims should be rejected as inadmissible.

## VI. The Maldives' Preliminary Objections have an exclusively preliminary character

107. The Maldives' objections to jurisdiction and admissibility set out in this Chapter all have an exclusively preliminary character. The Tribunal is not required to make a decision on any aspect of the merits of the case before deciding whether it has jurisdiction to hear any part of the case or whether the case is otherwise admissible.
108. The basic principle is straightforward: a State "should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established."<sup>109</sup> The ICJ has applied this rule on many occasions.<sup>110</sup> A party raising preliminary objections will "have these objections

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<sup>107</sup> Para. 60(a) above.

<sup>108</sup> Robert Kolb, "General Principles of Procedural Law" in Andreas Zimmerman and Christian J. Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, Oxford University Press, 2019) (**Legal Annex 3**), p. 999, para. 49.

<sup>109</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, p. 46 at p. 56.

<sup>110</sup> See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at pp. 425–426, para. 76; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at*

answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits.”<sup>111</sup> The same rule is reflected in Article 97 of the ITLOS Rules applicable to this case.<sup>112</sup>

109. In the present case none of the Preliminary Objections require the Tribunal to decide any factual issues that can only be determined by hearing the merits of the case. Similarly, none of the Preliminary Objections require it to address any legal question that could only be determined by hearing the merits of the case.

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*Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 9 at pp. 28–29, para. 50; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275 at pp. 324–325, paras. 116–117; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832 at p. 850, para. 46. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, ICJ Reports 2015, p. 592 at p. 610, para. 53 (in which the Court found that it was not precluded from ruling on Chile’s objection at a preliminary stage because “the Court considers that it has all the facts necessary to rule on Chile’s objection”).

<sup>111</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832 at p. 852, para. 51.

<sup>112</sup> On the applicability of the ITLOS Rules, see note 4 above.

## SUBMISSIONS

For the reasons set out in these Preliminary Objections, the Republic of Maldives requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the claims submitted to the Tribunal by the Republic of Mauritius. Additionally or alternatively, for the reasons set out in these Preliminary Objections, the Republic of Maldives requests the Tribunal to adjudge and declare that the claims submitted to the Tribunal by the Republic of Mauritius are inadmissible.

In accordance with Rule 97(3) of the Rules of this Tribunal, and unless the preceding request is accepted by the Republic of Mauritius, the Republic of Maldives hereby requests that the proceedings on the merits be suspended and the Tribunal fix a time-limit within which the Republic of Mauritius may present its written observations and submissions.



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Annex 8	United Nations General Assembly, 53rd session, 11th plenary meeting, 23 September 1998, A/53/PV.11 (extracts)
Annex 9	United Nations General Assembly, 71st session, 17th plenary meeting, 23 September 2016, A/71/PV.17 (extracts)
Annex 10	United Nations General Assembly, 55th session, 28th plenary meeting, 22 September 2000, A/55/PV.28 (extracts)
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Legal Annex 2	Myron H. Nordquist and others (eds), <i>United Nations Convention on the Law of the Sea, 1982: A Commentary</i> , Vol. II (Martinus Nijhoff, 1985), pp. 796–817, 948–983
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11. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392
12. *Continental Shelf (Libya/Malta)*, Merits, ICJ Reports 1985, p. 13
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15. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*, Application to Intervene, Judgment, ICJ Reports 1990, p. 92
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23. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275
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26. *Larsen v. Hawaiian Kingdom*, Award, 5 February 2001
27. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgment, ICJ Reports 2002, p. 303
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30. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832
31. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70
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42. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, ICJ, 1 October 2018
43. *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ, 13 February 2019
44. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ, 25 February 2019
45. *Jadhav (India v. Pakistan)*, Judgement, ICJ, 17 July 2019

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46. *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Memorial of Mauritius, 1 August 2012
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