

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2020

Public sitting

held on Tuesday, 13 October 2020, at 2 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President of the Special Chamber, Judge Jin-Hyun Paik, presiding

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

Preliminary Objections

(Mauritius/Maldives)

Verbatim Record

Special Chamber
of the International Tribunal for the Law of the Sea

<i>Present:</i>	President	Jin-Hyun Paik
	Judges	José Luís Jesus
		Stanislaw Pawlak
		Shunji Yanai
		Boualem Bouguetaia
		Tomas Heidar
		Neeru Chadha
	Judges <i>ad hoc</i>	Bernard H. Oxman
		Nicolaas Schrijver
	Registrar	Ximena 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.

1 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Good afternoon and welcome.
2 The Special Chamber of the Tribunal formed pursuant to article 15, paragraph 2, of
3 the Statute of the Tribunal meets this afternoon to examine the preliminary
4 objections raised by the Maldives in the *Dispute concerning delimitation of the*
5 *maritime boundary between Mauritius and Maldives in the Indian Ocean.*
6

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

11
12 In light of travel, social distancing and other restrictions put in place by governments
13 worldwide in response to the pandemic, the Tribunal has had to adapt its working
14 methods so as to ensure the continued fulfilment of its mandate.

15
16 The Tribunal has recently amended its Rules to allow for new ways of working. On
17 25 September 2020, the Tribunal amended article 74 of its Rules to add a new
18 paragraph which provides that, as an exceptional measure, for public health, security
19 or other compelling reasons the Tribunal may decide to hold a hearing entirely or in
20 part by video link. The Tribunal also amended article 112 of its Rules to add a new
21 paragraph to provide that the reading of the Tribunal's Judgment in a case may take
22 place by video link when necessary for public health, security or other compelling
23 reasons.

24
25 In view of the COVID-19 pandemic, the Special Chamber has decided that the
26 hearing on the preliminary objections raised by the Maldives will take place in a
27 hybrid format, with a mix of virtual and in-person participation.

28
29 The following judges are present with me in the courtroom of the Tribunal: Judge
30 Jesus, Judge Yanai, Judge Bouguetaia, Judge Heidar and Judge *ad hoc* Schrijver.
31 On the other hand, Judge Pawlak, Judge Chadha and Judge *ad hoc* Oxman are
32 participating in the hearing by video link.

33
34 Today's hearing is the first in the history of the Tribunal to take place with the
35 participation of some Judges, Agents and Counsel by video link. The sitting of the
36 Special Chamber will be accessible to the public by webstream and any interested
37 person can follow our proceedings today either in the original language from the floor
38 or through the interpretation to the other official language of the Tribunal.

39
40 While every effort has been made to ensure the smooth conduct of this hearing, it
41 remains possible that a technical issue with the video link and simultaneous
42 interpretation technology might arise. In the event that we experience a loss of video
43 or audio input from the remote participants, I might have to interrupt the hearing
44 briefly to allow the technical team to re-establish the connection. I appreciate your
45 patience in this regard.

46
47 Turning to the case at hand, it should be recalled that, by Special Agreement
48 concluded on 24 September 2019, and notified to the Tribunal on the same day, the
49 representatives of the Republic of Mauritius and the Republic of Maldives agreed to
50 submit their dispute concerning delimitation of the maritime boundary in the Indian

1 Ocean to a special chamber of the Tribunal to be formed pursuant to article 15,
2 paragraph 2, of the Statute of the Tribunal.

3
4 The Special Chamber was constituted by an Order of the Tribunal of 27 September
5 2019. The case was named “Dispute concerning delimitation of the maritime
6 boundary between Mauritius and Maldives in the Indian Ocean” and was entered as
7 No. 28 in the List of Cases.

8
9 On 18 December 2019, within the time-limit set by article 97, paragraph 1, of the
10 Rules of the Tribunal, the Maldives raised preliminary objections to the jurisdiction of
11 the Special Chamber and to the admissibility of Mauritius’ claims.

12
13 With respect to the composition of the Special Chamber, I wish to note that Judge
14 Cot resigned from the Special Chamber with effect as of 26 August 2020. On
15 15 September 2020, the Tribunal adopted an order determining, with the approval of
16 the Parties, that Judge Pawlak should fill the vacancy created by the resignation of
17 Judge Cot.

18
19 I now call on the Registrar to summarize the procedure and to read out the
20 submissions of the Parties.

21
22 **THE REGISTRAR:** Thank you, Mr President.

23
24 By Order of 19 December 2019, the President of the Special Chamber fixed
25 17 February 2020 as the time-limit for Mauritius to submit its written observations
26 and submissions on the preliminary objections filed by the Maldives, and 17 April
27 2020 as the time-limit for the Maldives to file its written observations and
28 submissions in reply. The two Parties lodged their statements within the prescribed
29 time-limits. By the same Order, the Tribunal suspended the proceedings on the
30 merits pursuant to article 97, paragraph 3, of the Rules of the Tribunal.

31
32 I will now read out the submissions of the Parties in the phase of the case relating to
33 the preliminary objections.

34
35 The Republic of Maldives requests the Special Chamber to adjudge and declare that
36 it is without jurisdiction in respect of the claims submitted to the Special Chamber by
37 the Republic of Mauritius.

38
39 Additionally or alternatively, the Republic of Maldives requests the Special Chamber
40 to adjudge and declare that the claims submitted to the Special Chamber by the
41 Republic of Mauritius are inadmissible.

42
43 Mauritius requests the Special Chamber to rule that:

- 44
45 a. The preliminary objections raised by the Maldives are rejected;
46 b. It has jurisdiction to entertain the Application filed by Mauritius;
47 c. There is no bar to its exercise of that jurisdiction; and
48 d. It shall proceed to delimit the maritime boundary between Mauritius
49 and the Maldives.
50

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

2
3 In accordance with the arrangements on the organization of the procedure decided
4 by the Special Chamber, the hearings will comprise a first and second round of oral
5 argument.

6
7 The first round of oral argument will begin today with the statement of the Maldives,
8 and will close on Thursday, 15 October 2020, following Mauritius' first round of
9 pleading. Each Party has been allocated a period of four hours for the first round.

10
11 The second round of oral argument will begin in the afternoon of Saturday,
12 17 October 2020 and conclude in the afternoon of Monday, 19 October 2020. Each
13 Party will have one hour and a half to present its reply, with an additional hour
14 available to each party if needed.

15
16 Now I note the presence at the hearing of Agents, representatives, Counsel and
17 Advocates of Mauritius and the Maldives. I also note the remote attendance at the
18 hearing of the Agent of Mauritius, and of Counsel and Advocates of both Parties.

19
20 I now call on the Agent of the Maldives, His Excellency Mr Ibrahim Riffath, Attorney
21 General of the Republic of Maldives, to introduce the delegation of the Maldives. You
22 have the floor, sir.

23
24 **MR RIFFATH:** Mr President, honourable Members of the Tribunal, my name is
25 Ibrahim Riffath. I am the Attorney General of the Republic of Maldives and the
26 Maldives' Agent in these proceedings.

27
28 It is my pleasure to introduce the members of the Maldives' team. I am joined by
29 Ms Khadeeja Shabeen, Deputy Attorney General of the Republic of Maldives, and
30 Ms Salwa Habeeb, Senior State Counsel in the Office of the Attorney General.

31
32 Also in the delegation as Counsel and Advocates are: Professor Payam Akhavan of
33 the University of Toronto, and a Member of the Permanent Court of Arbitration;
34 Emeritus Professor Alan Boyle of the University of Edinburgh and Essex Court
35 Chambers in London (who is participating in this hearing remotely); Professor Jean-
36 Marc Thouvenin of the University Paris-Nanterre; and Dr Naomi Hart of Essex Court
37 Chambers in London, who is also participating remotely.

38
39 Dr Justine Bendel and Ms Melina Antoniadis are assisting the delegation, as is
40 Mr Mitchell Lennan, who is participating remotely.

41
42 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Riffath.

43
44 I now call on the Co-Agent of Mauritius, Mr Jagdish Dharamchand Koonjul,
45 Ambassador and Permanent Representative of Mauritius to the United Nations, to
46 introduce the delegation of Mauritius. You have the floor, sir.

47
48 **MR KOONJUL:** Mr President, distinguished Members of the Special Chamber,
49 Madam Registrar, on behalf of the Government of Mauritius, I would like to express

1 our sincere thanks and gratitude to you for organizing this hearing in these
2 exceptional circumstances linked to the COVID-19 pandemic.

3
4 It is my distinct honour at this point to introduce the members of the Mauritius
5 delegation. My name is Jagdish Koonjul. I am the Permanent Representative of
6 Mauritius at the United Nations in New York and the Co-Agent for Mauritius.

7
8 The Agent for Mauritius is Mr Dheerendra Kumar Dabee, Solicitor General of
9 Mauritius, who could not join us on this occasion because of the pandemic but, as
10 you can see from the screen, is following the proceedings from Port Louis.

11
12 The members of the team are as follows: as Counsel and Advocates, Mr Philippe
13 Sands QC, Professor of International Law at University College London, Barrister at
14 Matrix Chambers, London, and he is present here in person.

15
16 Mr Paul Reichler, Attorney-at-Law from Foley Hoag LLP, member of the Bar of the
17 District of Columbia, will participate via video conference from Washington DC.

18
19 Mr Pierre Klein, Professor of International Law at the University of Brussels, will also
20 participate via video conference from Montreal, Canada.

21
22 As Counsel, we have Mr Remi Reichhold, Barrister at 5 Essex Court, London, and
23 he is present here today in the Chamber.

24
25 We also have Mr Andrew Loewenstein, Attorney-at-Law, Foley Hoag LLP, member
26 of the Bar of Massachusetts, who is following via video conference. Ms Diem Huang
27 Ho, Attorney-at-Law from Foley Hoag LLP, is also following via video conference
28 from Paris.

29
30 Mr Yuri Parkhomenko, Attorney-at-Law, Foley Hoag LLP, is also following via video
31 conference from Washington DC; and Ms Angolie Singh, member of the Indian Bar,
32 is following the proceedings from New Delhi.

33
34 As Adviser, we have Ms Shiu Ching Young Kim Fat, Minister Counsellor at the Prime
35 Minister's Office in Mauritius, also following the hearing from Port Louis.

36
37 As Technical Advisers, we have Mr Scott Edmonds, from International Mapping,
38 Ellicott City, Maryland, USA, following via video conference; and Mr Thomas Frogh,
39 International Mapping, Ellicott City, Maryland, also following from Washington DC.

40
41 Finally, as Assistant, we have Ms Lea Main-Klingst, who is present here in person.

42
43 Mr President, I wish to conclude the introduction of my delegation by assuring you
44 and the Maldives team of our full collaboration to ensure that the hearing proceeds
45 as smoothly as possible.

46
47 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Koonjul.

48
49 I now request the Agent of the Maldives, Mr Riffath, to begin his statement.
50

1 **MR RIFFATH:** Mr President, honourable Members of the Tribunal, honourable Agent
2 and members of the delegation of the Republic of Mauritius.

3
4 It is a great privilege for me to appear before you today as Agent of my country, the
5 Republic of Maldives, in this hearing on preliminary objections. I take this opportunity
6 to express our sincere gratitude to the Special Chamber and Registry of the
7 International Tribunal for the Law of the Sea for the efficient and well-organized
8 arrangements of this hearing in such challenging circumstances. We are grateful for
9 your courtesy and diligence.

10
11 Mr President, the Maldives is a small but ancient island nation, with 2,500 years of
12 history. Our people were born with the sea and our fate is inextricably intertwined
13 with the waters that surround us. Our territory consists of an archipelago of 1,190
14 small islands scattered over 90,000 square kilometres of the Indian Ocean. This
15 special relationship with the ocean has profoundly shaped our identity. For centuries,
16 ships sailed to distant lands in Asia and Africa, enriching our nation through
17 commercial and cultural ties with diverse civilizations. Today, the livelihood of our
18 people continues to depend on the sustainability and security of the oceans. Eco-
19 tourism and fishing industries are the mainstays of the economy. This natural
20 endowment is our greatest asset, and we are committed to its preservation for future
21 generations. Safeguarding these resources has always been of the utmost
22 importance to the Maldivian Government.

23
24 The Maldives signed the United Nations Convention on the Law of the Sea
25 (UNCLOS) on 10 December 1982, and ratified it on 7 September 2000. It has
26 adopted legislation to give effect to the provisions of the Convention. Regulating
27 ocean affairs in accordance with international law is a central pillar of our foreign
28 policy. The Maldives takes great pride in its strong international alliances, especially
29 with regard to the interconnected regime of small island nations and climate change.
30 It would be no exaggeration to say that, for us, addressing rising sea-levels is a
31 matter of survival.

32
33 Mr President, the Maldives has a long history of support for multilateralism and
34 respect for international law. We hold in the highest regard the far-reaching
35 contributions of the International Court of Justice and UNCLOS tribunals in
36 promoting the rule of law and the peaceful settlement of disputes. We regret that in
37 this case we have been left with no choice but to make these preliminary objections
38 to the jurisdiction of the Special Chamber. The Maldives has no dispute with
39 Mauritius, a State with which we enjoy friendly relations. The only dispute is between
40 Mauritius and the United Kingdom; and that dispute is about sovereignty over the
41 Chagos Archipelago, not maritime boundary delimitation. The Maldives cannot be
42 expected to take sides in that dispute, especially in proceedings before this Tribunal.
43 The Special Chamber cannot rule on disputes over land territory, let alone where
44 one of the Parties to the dispute is not even present to argue its case. If there was no
45 dispute as to who is the coastal State of the Chagos Archipelago, there would be no
46 issue with delimitation. The Maldives would eagerly negotiate an agreement on the
47 maritime boundary.

48
49 It is unfortunate that Mauritius has decided to use these proceedings to settle its
50 territorial dispute with the United Kingdom at the expense of the Maldives. We have

1 been pushed into the middle of a conflict which is not of our making. It is especially
2 regrettable that Mauritius attempts to portray us as opposing decolonization. Such
3 accusations are offensive and unfair. Nothing could be further from the truth. The
4 Maldives has been a strong advocate of upholding international principles and
5 adhering to international obligations. We have always supported decolonization and
6 self-determination of countries in accordance with international law. We recognize
7 the right to self-determination as an integral and fundamental element of
8 international law. But this case is not about whether the Maldives supports
9 decolonization or not. This case is about whether an ITLOS Chamber can hear a
10 maritime delimitation claim that requires it to resolve a sovereignty dispute between
11 Mauritius and the United Kingdom – a dispute in which the Maldives has repeatedly
12 stated it does not wish to interfere.

13
14 Mr President, the Maldives' preliminary objections are simple and straightforward.
15 They are consistent with the decisions of international courts and tribunals. Indeed,
16 the question before you was already decided in 2015 by the Annex VII tribunal in the
17 Chagos Marine Protected Area Arbitration between Mauritius and the United
18 Kingdom. The tribunal in that case declined jurisdiction on the ground that a dispute
19 over land territory was clearly a matter falling outside of UNCLOS. The Maldives
20 respectfully submits that the exact same jurisdictional problem arises for Mauritius'
21 claim in these proceedings, except that, unlike that previous arbitration, the United
22 Kingdom is not even a party to this case.

23
24 Mauritius claims that the 2015 Award is irrelevant because the sovereignty dispute
25 over the Chagos Archipelago has now been resolved. It invokes as its central
26 argument – indeed its only argument – that the non-binding Advisory Opinion
27 rendered by the International Court of Justice on 25 February 2019, in *Legal*
28 *Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,
29 immediately extinguished British sovereignty over this territory. However, the Court
30 clearly stated in that Opinion that the questions put to it by the United Nations
31 General Assembly did not involve the bilateral territorial dispute. Instead, the
32 Advisory Opinion related to matters of self-determination and decolonization. The
33 Court said nothing about sovereignty.

34
35 On 22 May 2020, the United Nations General Assembly passed resolution 73/295.
36 The Maldives did not believe that this resolution accurately reflected the Court's
37 Advisory Opinion. Thus, it felt obliged to vote against the resolution, but it made the
38 following statement to explain its position:

39
40 The Maldives has always supported all processes concerning the
41 decolonization of territories within the United Nations. We will not deny any
42 peoples their right to self-determination. As a responsible Member of the
43 United Nations, we abide firmly by the principles of the Charter of the United
44 Nations, and express our support for a rules-based international order.¹

45
46 The Maldives further stated that it "has always believed that the issue of the Chagos
47 archipelago would best be addressed through dialogue between the States

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).

1 concerned.”² The Maldives also made clear that it would welcome a resolution of the
2 sovereignty dispute by the States involved. It emphasized that “[f]or the Maldives,
3 any uncertainty concerning the issue of the Chagos archipelago will have serious
4 implications for the sovereignty, territorial integrity and wider security of the Indian
5 Ocean region.”³ These are, for a small island nation at the centre of a vital strategic
6 region, entirely reasonable and legitimate concerns. The Maldives confirmed its
7 “excellent relations” with Mauritius, despite its vote on the resolution.⁴

8
9 On 18 June 2019, less than a month after that General Assembly resolution,
10 Mauritius initiated UNCLOS proceedings against the Maldives. It did so on the
11 questionable premise that the Advisory Opinion had immediately transformed
12 Mauritius into the undisputed coastal State of the Chagos Archipelago. The Maldives
13 can only observe that the long-standing sovereignty dispute has not suddenly
14 disappeared. Without either an agreement or a binding decision on the competing
15 sovereignty claims of Mauritius and the United Kingdom, it is not even possible for
16 the Maldives to negotiate an agreement on delimitation, or to establish a specific
17 maritime boundary dispute with Mauritius.

18
19 The Maldives can only conclude that Mauritius has rushed to bring these
20 proceedings as a pretext for resolving its sovereignty dispute with the United
21 Kingdom. This is not a maritime boundary dispute at all, and it is certainly not a
22 dispute with the Maldives. It was not the intention of UNCLOS States Parties to use
23 the dispute settlement procedures for such purposes.

24
25 The Maldives has, regrettably, found itself in the middle of this same bilateral
26 sovereignty dispute before. On 26 July 2010, the Maldives made a submission to the
27 Commission on the Limits of the Continental Shelf (CLCS). In a note verbale dated
28 9 August 2010, the United Kingdom stated that the Maldives’ submission did not take
29 full account of the Fisheries and Environment Zones of the British Indian Ocean
30 Territory and the exclusive economic zone of the Chagos Archipelago. The United
31 Kingdom, however, did not object to the Maldives’ submission. It stated instead that
32 it was committed to negotiating a maritime boundary. By contrast, on 24 March 2011,
33 Mauritius submitted a formal objection to the Maldives’ CLCS submission because it
34 did not take into account Mauritius’ sovereignty claim over the Chagos Archipelago.
35 Since then, the Maldives has adopted a policy of refraining from bilateral talks with
36 either party to the exclusion of the other. Mauritius is opposed to that policy. It is
37 using the Special Chamber to force the Maldives to take sides.

38
39 The Maldives has always stressed its willingness to co-operate in resolving bilateral
40 issues with other States in a spirit of good faith. But it is understandably reluctant to
41 become entangled in a controversial dispute with two States with which it enjoys
42 important and friendly relations. Beyond such diplomatic and policy considerations,
43 the Maldives’ position is also entirely consistent with international law. All that we ask
44 is for the Special Chamber to uphold fundamental principles of jurisdiction. UNCLOS
45 States Parties did not envisage that ITLOS and Annex VII tribunals would be
46 exploited to settle territorial disputes, let alone without the consent of indispensable
47 third parties. We look forward to the day when Mauritius and the United Kingdom

² Ibid.

³ Ibid.

⁴ Ibid.

1 resolve their dispute over the Chagos Archipelago. This would allow the Maldives to
2 negotiate a maritime boundary with complete clarity as to which is the coastal State
3 for the purposes of UNCLOS.
4

5 I note, Mr President, that if the Maldives did not make these preliminary objections,
6 the Special Chamber would be placed in the unfortunate position of having to decline
7 to exercise jurisdiction on its own initiative. It is not for Parties to these proceedings
8 to expand your jurisdiction even by agreement among themselves. Beyond its own
9 rights, therefore, the Maldives also seeks to uphold the integrity and legitimacy of
10 UNCLOS tribunals. We sincerely hope that our preliminary objections will be
11 considered in this light, rather than any reluctance whatsoever to submit valid
12 disputes to these highly important compulsory procedures.
13

14 Mr President, with your permission, I shall now briefly introduce the first round of oral
15 pleadings by Counsel and representatives of the Maldives. First, Professor Payam
16 Akhavan will introduce the five preliminary objections and explain why the Advisory
17 Opinion on the Chagos Archipelago did not resolve the bilateral sovereignty dispute
18 between Mauritius and the United Kingdom.
19

20 He will be followed by Professor Alan Boyle, appearing remotely, who will explain
21 why the Namibia and Western Sahara Advisory Opinions do not support Mauritius'
22 contention that the bilateral sovereignty dispute has been resolved.
23

24 Next will be Professor Jean-Marc Thouvenin. He will address the Maldives' first
25 preliminary objection, which is that the United Kingdom is an indispensable third
26 party to this dispute. He will also address the Maldives' second preliminary objection,
27 which is that disputes over land territory fall outside the scope of UNCLOS.
28

29 He will be followed by Ms Salwa Habeeb who will address the third preliminary
30 objection on the failure of Mauritius to satisfy the precondition of negotiations under
31 articles 74 and 83 of UNCLOS.
32

33 Dr Naomi Hart (appearing remotely) will then address the fourth preliminary
34 objection. This is that a dispute regarding maritime boundary delimitation had not
35 crystallized between the parties at the time Mauritius commenced these
36 proceedings. Finally, Professor Akhavan will once again take the floor and address
37 the fifth preliminary objection on abuse of process, and conclude the Maldives' first
38 round oral pleadings.
39

40 Mr President, honourable Members of the Special Chamber, that concludes the
41 Agent's speech. I now ask that you give the floor to Professor Akhavan.
42

43 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Riffath. I now give
44 the floor to Mr Payam Akhavan to make his statement. Mr Akhavan.
45

46 **MR AKHAVAN:** Mr President, distinguished Members of the Special Chamber, I am
47 honoured to appear before you on behalf of the Maldives. It is a privilege to be
48 pleading once more in this courtroom, in this hearing on preliminary objections. As I
49 will explain, this is a case with far-reaching significance for the stability and
50 predictability of ITLOS decisions. It is an important opportunity to confirm the settled

1 jurisprudence on elementary principles of jurisdiction, upon which the legitimacy of
2 UNCLOS compulsory procedures rests.

3
4 The case before you, Mr President, involves a territorial dispute between Mauritius
5 and the United Kingdom. It is neither a dispute between Mauritius and the Maldives,
6 nor a dispute regarding the interpretation or application of UNCLOS. This is an
7 unprecedented case, with both an indispensable third party, and a territorial dispute,
8 both of which fall outside the Chamber's jurisdiction. The fundamental principle is
9 that "the land dominates the sea".¹ So long as there is a sovereignty dispute over the
10 Chagos Archipelago, it is not even possible for Mauritius and the Maldives to
11 meaningfully negotiate, let alone crystallize a dispute, in respect of a maritime
12 boundary. These further preconditions to jurisdiction have not been, and cannot be,
13 satisfied. In simple terms, Mauritius is using this Chamber to settle its territorial
14 dispute with the UK, at the expense of the Maldives. This is the very definition of an
15 abuse of process.

16
17 Mr President, it is my task to introduce the Maldives' preliminary objections. My
18 presentation will be in three parts.

19
20 First, I will make some general observations regarding Mauritius' basic assertion that
21 it is the "coastal State" in respect of Chagos and, in that context, I will summarize
22 each of the five preliminary objections raised by the Maldives.

23
24 Second, I will explain the historical background to the bilateral sovereignty dispute
25 between Mauritius and the UK, which emerged in the 1980s, and address the
26 fundamental premise on which Mauritius' case on jurisdiction relies: namely, that its
27 40-year-old bilateral dispute was definitively resolved last year by the Advisory
28 Opinion of the International Court of Justice in *Legal Consequences of the*
29 *Separation of the Chagos Archipelago from Mauritius in 1965* and the subsequent
30 UN General Assembly resolution 73/295. I will set out the Maldives' view that
31 Mauritius has fundamentally misrepresented both the scope and effect of that
32 Opinion, which is the only basis for its case on jurisdiction.

33
34 Third, I will explain the status of the sovereignty dispute today: namely, that, despite
35 the Advisory Opinion and the General Assembly resolution, the UK maintains its
36 claim over Chagos, which it continues to administer as the British Indian Ocean
37 Territory. It is not the Maldives' role, or this Chamber's role, to say whether Mauritius
38 has the better claim. As my colleagues will explain, the very existence of the
39 territorial dispute, which involves a State that is not a party to these proceedings, is
40 sufficient to deprive the Chamber of jurisdiction.

41
42 I turn first to an overview of each Party's case on jurisdiction.

43
44 Mauritius' case rests entirely on the premise that its sovereignty dispute with the UK
45 has already been definitively resolved. If that premise is false, its case on jurisdiction
46 necessarily fails. Mauritius accepts, as it must, that in 2015, the Annex VII tribunal in
47 the *Chagos Marine Protected Area Arbitration* found that there was a bilateral

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).*

1 territorial dispute with the United Kingdom. It found on that basis that it could not
2 exercise jurisdiction over Mauritius' claim that it was the "coastal State".² The tribunal
3 did not mince words. It held that Mauritius' interpretation of Part XV compulsory
4 procedures

5
6 as a warrant to assume jurisdiction over matters of land sovereignty on the
7 pretext that the Convention makes use of the term "coastal State" would do
8 violence to the intent of the drafters of the Convention.³
9

10 That argument, categorically rejected by the Annex VII tribunal in 2015, is exactly the
11 same argument that Mauritius has recycled in these proceedings. It does so on the
12 pretext that the ICJ's Advisory Opinion of 25 February 2019 overrides the Arbitral
13 Award delivered four years earlier, because it supposedly confirmed Mauritius'
14 sovereignty over Chagos; but, as I will explain, the ICJ said no such thing. To the
15 contrary, it emphasized that the General Assembly "did not submit to the Court a
16 bilateral dispute over sovereignty which might exist between the United Kingdom and
17 Mauritius."⁴ It further clarified that it was not overriding the *res judicata* effect of the
18 earlier Chagos Award. It emphasized that the questions before the Annex VII tribunal
19 were "not the same as those that are before the Court".⁵
20

21 As I will elaborate shortly, it is plain and clear that the ICJ did not express an opinion
22 on Mauritius' sovereignty; but the more obvious point is that even if it had, the
23 Parties are in agreement that advisory proceedings do not have binding effect. It is
24 elementary that a bilateral dispute cannot be resolved without the consent of relevant
25 parties.
26

27 However, Mauritius proceeds to claim, on the basis of the Advisory Opinion alone,
28 that you should simply ignore the British claim because, as of last year, it is no
29 longer "plausible" or "arguable".⁶ Aside from its misreading of a non-binding Opinion,
30 Mauritius is trying to have this Chamber apply the wrong test. The plausibility or
31 implausibility of a party's claim in a territorial dispute is irrelevant to whether this
32 Chamber can exercise jurisdiction. The settled jurisprudence was affirmed as
33 recently as 21 February of this year in the *Dispute Concerning Coastal State Rights*
34 *in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*. In
35 its Award on Russia's preliminary objections, a distinguished Annex VII tribunal
36 confirmed unanimously that the existence of opposing territorial claims is all that is
37 required to deprive it of jurisdiction. It expressly rejected any "plausibility or other test
38 in order to verify the existence of a dispute."⁷ This is yet another fatal flaw in
39 Mauritius' case before you. It is made worse because the State whose claim
40 Mauritius says is implausible, the United Kingdom, is not even here to argue its case.
41

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. 188 (Judges' Folder, Tab 21).

1 Mr President, the Maldives obviously cannot be expected to argue whether the
2 British claim is right or wrong. Whether Mauritius has the better argument is
3 irrelevant. Mauritius simply cannot litigate its territorial dispute before this Chamber.
4

5 That is the context in which the Maldives has raised its five preliminary objections,
6 which I will now summarize in turn.
7

8 The Maldives' first preliminary objection is that the United Kingdom is an
9 indispensable third party to these proceedings. The Special Chamber cannot resolve
10 Mauritius' maritime delimitation claim without, as an inevitable predicate,
11 categorically rejecting the territorial claims of the UK over Chagos.
12

13 Mauritius has not challenged the so-called *Monetary Gold* principle, which confirms
14 that it is beyond the jurisdiction of international courts and tribunals to resolve a
15 dispute without the consent of an indispensable third State. Mauritius argues that
16 *Monetary Gold* does not apply because the ICJ resolved the bilateral dispute in
17 2019. The Maldives' answer is that the dispute was not and could not have been
18 resolved by the Advisory Opinion. I will shortly elaborate on both Mauritius'
19 mischaracterization of what the ICJ did and did not say, and its questionable theory
20 of the implicit binding effect of that non-binding Opinion.
21

22 But irrespective of what the Court opined, whether the British sovereignty claim is
23 plausible or not is irrelevant, even if it implicates obligations in respect of
24 decolonization. In *East Timor (Portugal v. Australia)* the ICJ made clear that the
25 *Monetary Gold* principle applies even in the extreme circumstance of a third party's
26 manifestly unlawful invasion and annexation of a non-self-governing territory; it
27 applies even if both the General Assembly and Security Council have declared such
28 conduct unlawful. In that case, the indispensable third party was Indonesia, which
29 was not even the administering power of the territory. The Court made clear that the
30 *erga omnes* character of the principle of self-determination did not circumvent the
31 fundamental rule of consent to jurisdiction. It held:
32

33 Whatever the nature of the obligations invoked, the Court could not rule on the
34 lawfulness of the conduct of a State when its judgment would imply an
35 evaluation of the lawfulness of the conduct of another State which is not a
36 party to the case.⁸
37

38 In summary, the Chagos Advisory Opinion did not resolve the bilateral dispute. The
39 *Monetary Gold* principle applies, and the Chamber has no jurisdiction. That is the
40 Maldives' first preliminary objection.
41

42 The Maldives' second preliminary objection is that the question of whether Mauritius
43 is the "coastal State" in respect of the Chagos Archipelago is clearly not a dispute
44 concerning the interpretation or application of UNCLOS. Thus, aside from the United
45 Kingdom being an absent indispensable third party, Mauritius' claim requires the
46 Chamber to determine a matter that is manifestly outside of its jurisdiction under
47 article 288 of UNCLOS. That is exactly why the tribunal in the Chagos Award

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

1 rejected Mauritius' contention that it was the "coastal State", even though, unlike in
2 this case, the UK was a party to those proceedings.

3
4 Mauritius tries to get around the 2015 Chagos Award by arguing once again that its
5 bilateral dispute with the UK has been resolved by the Advisory Opinion. That
6 argument requires the Chamber to find that the Chagos Opinion somehow overruled
7 the earlier Chagos Award; something that the ICJ expressly disavowed.

8
9 Mauritius maintains further that the British claim is implausible. But the Coastal State
10 Rights Award provides a complete answer to this argument. That case involved
11 compelling facts. Upon its independence from the Soviet Union in 1991, Ukraine was
12 the undisputed coastal State of Crimea. Ukraine argued that Russia's claim to
13 territorial sovereignty beginning in 2014 was implausible because it was the result of
14 armed aggression and annexation; it argued that it was manifestly unlawful, as
15 confirmed by various resolutions of the General Assembly.

16
17 Even in those extreme circumstances, the Annex VII tribunal confirmed that it was
18 solely concerned with whether a sovereignty dispute existed as a matter of fact,
19 which, it noted, was a "rather low" threshold.⁹ It specifically rejected Ukraine's
20 argument that "the validity or strength of the assertion should be put to a plausibility
21 or other test in order to verify the existence of a dispute."¹⁰ It further clarified that so
22 long as a dispute had not been "fabricated solely to defeat [the tribunal's]
23 jurisdiction", its mere existence was sufficient to uphold a preliminary objection.¹¹
24 Mauritius does not and cannot suggest that its notorious 40-year-old territorial
25 dispute with the UK has been somehow "fabricated" by the Maldives to defeat the
26 Chamber's jurisdiction.

27
28 The Tribunal in Coastal State Rights went even further. It held that it could not even
29 accept "Ukraine's interpretation of [General Assembly resolutions] as correct", for to
30 do so "would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of
31 Ukraine's territory", which it had "no jurisdiction to do".¹² This applies equally to
32 Mauritius' questionable interpretation of the Advisory Opinion and General Assembly
33 resolution.

34
35 This brings me to the Maldives' third preliminary objection, which is that Mauritius
36 has not satisfied a precondition to jurisdiction under articles 74 and 83 of UNCLOS,
37 namely, the requirement of negotiations between the parties before a dispute is
38 submitted for adjudication. Mauritius has not explained how there can be meaningful
39 negotiations on maritime boundary delimitation where there is an unresolved
40 territorial dispute with a third party over the relevant coast.

41
42 The Maldives' fourth preliminary objection follows – namely, that Mauritius has also
43 failed to establish that there is an actual rather than speculative maritime boundary
44 "dispute" between itself and the Maldives. A "dispute" is essential to the exercise of

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.

1 jurisdiction under article 288 of UNCLOS. Mauritius accepts that the parties must
2 have had, at the time proceedings were instituted, “positively opposed”¹³ claims in
3 order for the Chamber to have jurisdiction. The jurisprudence is clear: “the claims of
4 one party [must be] affirmatively opposed and rejected by the other.”¹⁴ But the
5 evidence establishes that, beyond potential overlap of their maximum entitlements,
6 neither Party made a claim that was affirmatively opposed and rejected by the other.
7 There was no dispute before Mauritius commenced these proceedings.

8
9 The Maldives’ fifth and final preliminary objection concerns Mauritius’ abuse of the
10 Part XV compulsory procedures for a purpose that is manifestly extraneous to
11 UNCLOS. The Maldives’ first four objections that I have summarized are blindingly
12 obvious. The Special Chamber does not have jurisdiction to decide the territorial
13 dispute between Mauritius and the UK, with or without an Advisory Opinion. Yet that
14 is exactly what Mauritius seeks to achieve in these proceedings: a judgment that it is
15 the “coastal State” to the exclusion of the UK, in proceedings against the Maldives.
16 The fact that Mauritius is re-litigating the same arguments that failed before the
17 Annex VII tribunal and the ICJ only aggravates this abuse of process.

18
19 I would add, Mr President, that Mauritius’ accusation that the Maldives is “aid[ing]
20 and abet[ting]”¹⁵ colonialism merely by raising preliminary objections is particularly
21 unfortunate; it is unbecoming of the dignity of these proceedings.

22
23 The second part of my speech concerns the historical background to the sovereignty
24 dispute over the Chagos Archipelago since the 1980s, and whether that dispute was
25 definitively resolved in 2019 as Mauritius maintains. As I have explained, the effects
26 of the Advisory Opinion and subsequent General Assembly resolution are at the core
27 of Mauritius’ implausibility claim. It characterizes them as two “critical developments”
28 which overruled the 2015 Chagos Award and conclusively established Mauritius’
29 sovereignty as the coastal State.¹⁶

30
31 The basic facts are not in dispute. France ceded the Chagos Archipelago under the
32 1814 Treaty of Paris¹⁷ and, since then, the United Kingdom has claimed continuous
33 sovereignty over the territory.¹⁸

34
35 In 1965, that territory was separated from the British colony of Mauritius, prior to its
36 independence three years later in 1968. On 9 October 1980, the Prime Minister of
37 Mauritius stated before the UN General Assembly that the islands should be restored

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).

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.

1 to Mauritius as part of its “natural heritage”.¹⁹ Subsequently, the 1992 Constitution
2 defined Mauritius to include the Chagos Archipelago.²⁰

3
4 Over the past forty years, Mauritius and the UK have never resolved this dispute,
5 and never agreed to its adjudication. That is exactly why the Chagos Award of
6 18 March 2015 found that the tribunal could not exercise jurisdiction to determine
7 that Mauritius was the “coastal State”.²¹

8
9 It was against this backdrop that two years later, on 1 June 2017, the Permanent
10 Representative of Mauritius to the UN wrote to the President of the General
11 Assembly, proposing an advisory opinion from the ICJ.²² Mauritius made clear that
12 the request “contains two legal questions which are linked to the issue of
13 decolonization – a matter of direct interest to the General Assembly.”²³ Questions
14 about decolonization: that was what the General Assembly submitted to the Court on
15 23 June 2017, not questions about a bilateral sovereignty dispute.²⁴ The Court
16 rendered its Advisory Opinion on 25 February 2019, following extensive written and
17 oral pleadings.

18
19 Mauritius’ pleading on jurisdiction in this case repeats obsessively – in at least 22
20 paragraphs – that the Advisory Opinion conclusively resolved the bilateral dispute
21 with the UK.²⁵ It goes so far as to state that

22
23 Mauritius is recognized under international law, by the ICJ and the UN, as the
24 coastal State that is opposite or adjacent to the Maldives for purposes of this
25 maritime boundary delimitation.²⁶

26
27 Mauritius’ case on jurisdiction rests entirely on this mantra of definitive and exclusive
28 sovereignty.

29
30 But this is, to say the least, a curious misreading of the Advisory Opinion. The
31 questions posed to the Court made no mention of sovereignty whatsoever. The
32 Court made that much clear itself. The Opinion emphasized that “[t]he General
33 Assembly ha[d] not sought the Court’s opinion to resolve a territorial dispute between
34 two States.”²⁷ The Court made the same point in different words when it said that the
35 General Assembly “did not submit to the Court a bilateral dispute over sovereignty
36 which might exist between the United Kingdom and Mauritius.”²⁸ Mauritius’ claim that

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.

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.

1 the ICJ decided the bilateral dispute could only be correct if the Court went beyond
2 the legal questions put to it and exceeded its jurisdiction. That, Mr President, cannot
3 be right.

4
5 The second question put to the Court is particularly instructive. It concerned the
6 consequences, under international law, arising from the continuing British
7 administration of the territory. The Court's answer was a short one. It said that:

8
9 the United Kingdom has an obligation to bring to an end its administration of
10 the Chagos Archipelago as rapidly as possible, and ... all Member States must
11 co-operate with the United Nations to complete the decolonization of
12 Mauritius.²⁹

13
14 Those were the only legal consequences which the Court identified. At no point did
15 the Court state that the UK suddenly lost sovereignty, let alone that Mauritius
16 immediately became the exclusive sovereign and coastal State. The General
17 Assembly had not asked for an opinion about sovereignty – only one about
18 decolonization.

19
20 One needs to go no further than the Court's refusal to accept Mauritius' own
21 pleadings to confirm that the Opinion did not resolve the sovereignty dispute. Despite
22 the limited scope of the questions posed by the General Assembly, Mauritius had
23 seized the opportunity to pursue a more far-reaching objective. It invited the Court to
24 issue a sweeping opinion on territorial sovereignty and maritime boundary
25 delimitation with the Maldives. There can be no question that the Court did not
26 accept Mauritius' invitation. Yet Mauritius asks the Special Chamber to interpret the
27 Advisory Opinion as if the ICJ had accepted those same arguments.

28
29 First, Mauritius had invited the Court to find that

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

34
35 That is identical to Mauritius's assertion in these proceedings that "the matter of
36 sovereignty was subsumed within and incidental" to the question of decolonization,
37 and that "once the lawfulness of decolonization is determined, the question of
38 territorial sovereignty no longer arises".³¹ The ICJ evidently disagreed with this view;
39 it declined to opine at all on the issue of sovereignty as Mauritius had requested. To
40 the contrary, as I have already pointed out, it made clear that the General Assembly
41 had not asked it to resolve the bilateral dispute with the UK.³²

42

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).

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).

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

18
19 It is difficult to understand how it is possible to arrive at such an interpretation of the
20 Opinion. But Mauritius doesn’t stop there. It goes even further, insisting that, unless
21 its highly questionable interpretation is upheld, the Special Chamber would be in
22 “direct conflict” with the ICJ; that it would “effectively overrule” the Advisory
23 Opinion.³⁴ This is, of course, a thinly disguised scare tactic. Mauritius would have
24 you believe that unless their misconceived arguments are upheld, there will be a
25 fatal crash between ITLOS and the ICJ; a head-on collision on the autobahn
26 between Hamburg and The Hague. Mauritius twists and distorts the Advisory
27 Opinion beyond recognition. It is the Maldives that would have the Special Chamber
28 give proper effect to what the Court said.

29
30 Perhaps there is no clearer indication of Mauritius’ mischaracterization of the Opinion
31 than its repeated assertion that the Court concluded that Chagos “is, and always has
32 been, a part of the territory of Mauritius.”³⁵ The Court simply did not say this. All it
33 said was that “at the time of its detachment from Mauritius in 1965, the Chagos
34 Archipelago was clearly an integral part of” the British colony of Mauritius.³⁶ It did not
35 say that there is no sovereignty dispute with the UK today. Surely, if that is what the
36 Court meant to say, it would have found the right words.

37
38 In summary, the Court rejected both Mauritius’ assertion that it has sovereignty over
39 Chagos, as well as its assertion that it could effect a maritime delimitation with the
40 Maldives. Those matters were not upheld by way of necessary implication either.³⁷
41 Professor Boyle will shortly address the Namibia and Western Sahara Advisory
42 Opinions, neither of which support Mauritius’ interpretation of the Chagos Opinion.

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.

1 To the contrary, Western Sahara confirms that the obligation to complete
2 decolonization is not one and the same as territorial sovereignty; the Court can issue
3 an opinion on the former without any necessary or implied consequences for the
4 latter.

5
6 But there is yet another even more obvious answer to Mauritius' claim that the
7 Advisory Opinion conclusively resolved the bilateral sovereignty dispute. Mauritius
8 concedes, as it must, that advisory opinions are not binding.³⁸ The Court itself made
9 clear that it was not circumventing the consent of the UK to its jurisdiction.³⁹ Yet,
10 Mauritius invites the Special Chamber to transform the advisory proceedings into a
11 contentious proceeding through the backdoor. This halfway house of non-binding
12 binding effect is difficult to comprehend. It is simply not a serious argument.

13
14 Mauritius' invocation of General Assembly resolution 73/295 of 24 May 2019 is even
15 less convincing. Even Mauritius, with its imaginative theories on the Opinion, stops
16 short of asserting that General Assembly resolutions are somehow binding. It is
17 entirely unclear, then, how it can rely on this document as being legally dispositive of
18 the United Kingdom's sovereignty claim.

19
20 Resolution 73/295 expressed the view that Chagos "forms an integral part of the
21 territory of Mauritius".⁴⁰ By contrast, the Court limited itself to the status of the
22 territory in 1965. There is not much more that can be said about the resolution,
23 except that the word "sovereignty" appears nowhere in the text. It did not purport to
24 resolve, and was not capable of resolving, the sovereignty dispute.

25
26 Mr President, Mauritius' only argument as to why the Special Chamber can exercise
27 jurisdiction – in disregard of the *Monetary Gold* principle, in disregard of the 2015
28 Chagos Award – is that the Advisory Opinion definitively settled its sovereignty
29 dispute with the UK with binding effect. That contention is manifestly false. It is
30 wholly without merit.

31
32 Mr President, I now wish to address the Chamber on the third and final part of my
33 speech. This concerns the unambiguous evidence that, subsequent to the Advisory
34 Opinion in February of last year and until the present day, the United Kingdom
35 continues to claim the Chagos Archipelago as part of its sovereign territory. This
36 much is common ground between the parties. Mauritius does not and cannot
37 question the obvious fact that the bilateral dispute still exists.

38
39 On 30 April 2019, shortly after the Advisory Opinion, a British government minister
40 issued a statement to the House of Commons claiming that Chagos "has been under
41 continuous British sovereignty since 1814." He stated that "Mauritius has never held
42 sovereignty" over the Archipelago and that the UK "does not recognize its claim."⁴¹

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->

1
2 General Assembly resolution 73/295 of 22 May 2019 did not alter the British position
3 either. In response, the UK representative to the UN stated bluntly that it was “not in
4 doubt about our sovereignty over the British Indian Ocean Territory”.⁴² She
5 reaffirmed the commitment to cede the territory to Mauritius when it was no longer
6 required for defence purposes. She remarked that she “use[d] the word ‘cede’ here
7 deliberately, not ‘give back’”.⁴³ This makes clear the British position that it continues
8 to exercise sovereignty over Chagos. Other statements express the same view. On
9 19 June 2019, the day after Mauritius filed its UNCLOS Notification against the
10 Maldives, the Minister of State for the Commonwealth and the United Nations
11 reiterated that: “The UK has no doubt about our sovereignty over BIOT. The ICJ
12 Advisory Opinion made no determination on sovereignty.”⁴⁴

13
14 In a statement dated 5 November 2019, the UK Minister of State for Foreign and
15 Commonwealth Affairs specifically rejected Mauritius’ arguments on the scope and
16 effect of the Advisory Opinion. He stated:

17
18 [W]hat is undisputed is that the opinion is advisory and not legally binding.
19 Moreover, the Court itself recognized that its opinion is without prejudice to the
20 sovereignty dispute over the BIOT between the UK and Mauritius.

21
22 ... General Assembly resolution 73/295, adopted following the ICJ’s advisory
23 opinion, cannot and does not create any legal obligations for the Member
24 States. Nor can or does General Assembly resolution 73/295 create legal
25 obligations for other international actors such as a Special Chamber of the
26 International Tribunal for the Law of the Sea. Neither the non-binding Advisory
27 Opinion nor the non-binding General Assembly resolution alter the legal
28 situation, that of a sovereignty dispute over the BIOT between the UK and
29 Mauritius.⁴⁵

30
31 The UK position is thus abundantly clear. It continues to claim sovereignty over
32 Chagos. It considers that the Advisory Opinion had no legal effect on its claim. It
33 considers that General Assembly resolution 73/295 changed nothing.

34
35 Mauritius takes a different view to the UK. But that is beside the point. The Special
36 Chamber does not have jurisdiction to determine whether a third State that is not a
37 party to these proceedings has a plausible or implausible argument in respect of a
38 territorial dispute.

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.

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).

1
2 Mr President, you have heard the Agent's speech. The Maldives has made clear its
3 support for decolonization of the Chagos Archipelago. But it cannot be forced to take
4 sides in a sovereignty dispute between Mauritius and the UK – two States with which
5 it enjoys friendly and important relations. Even if the Maldives did take sides, and
6 accepted Mauritius' sovereignty claim, this Chamber would still have to decline
7 jurisdiction *proprio motu*. The Maldives and Mauritius cannot override the UK's lack
8 of consent by agreement among themselves. It would be no different if the Maldives
9 and the UK were parties to a maritime delimitation before you. There can be no
10 doubt that the Chamber does not have jurisdiction in the present case.

11
12 Mr President, distinguished Members of the Special Chamber, Mauritius would have
13 you throw settled jurisprudence to the wind; it would have you discard elementary
14 principles of jurisdiction in favour of a reckless judicial adventure. In upholding the
15 Maldives' preliminary objections, the Special Chamber would not only affirm the
16 stability and predictability of ITLOS decisions, but also render a decision consistent
17 with both the award of the Chagos Annex VII tribunal and the Chagos Advisory
18 Opinion of the ICJ.

19
20 Mr President, that concludes the introduction to the Maldives' preliminary objections.
21 I would now ask that you give the podium to Professor Alan Boyle, who will address
22 the Namibia and the Western Sahara Advisory Opinions.

23
24 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akhavan. I now
25 give the floor to Mr Alan Boyle, who is connected via video link, to make his
26 statement.

27
28 **MR BOYLE** (remote): Mr President, distinguished Members of the Special Chamber.
29 I am especially honoured to appear before you today as Counsel to the Republic of
30 Maldives. It goes without saying that this is an important case because it raises
31 difficult questions concerning the relationship between compulsory jurisdiction under
32 Part XV of UNCLOS and disputes over territorial sovereignty. As Professor Akhavan
33 has explained, it is the Maldives' contention that this case necessarily involves a
34 sovereignty dispute between the United Kingdom and Mauritius.

35
36 Mr President, I have a little bit of a problem because in addition to hearing myself
37 giving my own speech I am also hearing somebody else repeating what I have said
38 in the background and it is making things rather difficult.

39
40 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Mr Boyle, I think it may be best to
41 take a break at this point. It is 3.20 p.m. This may be a convenient time for you and
42 our technical team to sort out whatever problem you may have, so we will take a
43 break for half an hour and we will resume at 3.50. You may restart your oral pleading
44 when we resume.

45
46 (Break)