# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2020

Public sitting

held on Saturday, 17 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

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| *Present:* | President | Jin-Hyun Paik |
| | Judges | José Luís Jesus |
| | | Stanislaw Pawlak |
| | | Shunji Yanai |
| | | Boualem Bouguetaia |
| | | Tomas Heidar |
| | | Neeru Chadha |
| | Judges *ad hoc* | Bernard H. Oxman |
| | | Nicolaas Schrijver |
| | Registrar | Ximena Hinrichs Oyarce |

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*and*

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**THE PRESIDENT OF THE SPECIAL CHAMBER:** Good afternoon. The Special Chamber meets this afternoon to hear the second round of oral argument of the Maldives on its preliminary objections. I would like to recall that, in view of the hybrid nature of the hearing in this case, the following Judges are present with me in the courtroom of the Tribunal: Judge Jesus, Judge Yanai, Judge Bouguetaia, Judge Heidar and Judge *ad hoc* Schrijver; while Judge Pawlak, Judge Chadha and Judge *ad hoc* Oxman are present via video link.

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

**MR AKHAVAN:** Mr President, distinguished Members of the Special Chamber. On the first day of the oral proceedings, we voiced the Maldives' view that this case is about a territorial dispute between Mauritius and the United Kingdom. You have now heard the oral pleadings of Mauritius. Over four hours, their Counsel delivered an eloquent lecture on the law of decolonization; on the League of Nations, the Atlantic Charter, the UN Charter, the struggle for self-determination, the ICJ *South West Africa* cases, the UN Council for Namibia; in short, everything except UNCLOS. This was followed by the history of British colonialism, the detachment of the Chagos Archipelago in 1965, the territorial integrity of Mauritius; in short, a re-litigation of Mauritius' case against the UK. Unfortunately, our learned friends were wasting their precious breath. They were litigating against the wrong respondent in the wrong courtroom. In case there was any doubt, Mauritius has now confirmed that its case is about everything except a maritime boundary dispute with the Maldives.

Mr President, the Maldives' second round of oral submissions will proceed as follows. In this introductory speech, I will address Mauritius' position, on which all its submissions rest — namely that in its Chagos Advisory Opinion the ICJ purported to conclusively resolve a bilateral sovereignty dispute. I will also explain why Mauritius' claim that the earlier 2015 Chagos Marine Protected Area Arbitration is no longer relevant is wrong. Next, Professor Thouvenin will address the Maldives' first and second preliminary objections, and Mauritius' total failure to unsettle the settled jurisprudence on jurisdiction. He will also address Mauritius' spurious argument that the Advisory Opinion is a "judicial determination" with binding effect on the UK. After the break, I will then take the floor again to address the Maldives' third, fourth and fifth preliminary objections, and to answer the three questions helpfully put to the Parties by the Special Chamber. Ms Khadeeja Shabeen, Deputy Attorney General of the Maldives, will deliver the Maldives' closing statement. Finally, the Agent of the Maldives will make brief concluding remarks and read the Maldives' final submissions.

Mr President, Professor Sands claimed, rightly, that the Maldives' preliminary objections are based on the "core premise … that there is an unresolved sovereignty dispute between Mauritius and the United Kingdom … with respect to the Chagos Archipelago".[1] Equally, Mauritius' entire position on jurisdiction is based on the "core premise" that, as of last year, that same sovereignty dispute has been definitively resolved by the Chagos Advisory Opinion. It has never suggested that this Chamber

[1] ITLOS/PV.20/C28/3, p. 6, lines 1-3 (Mr Sands).

can exercise jurisdiction if that premise fails. The Parties are in agreement on this fundamental point.

Mauritius' position is that the Maldives has misunderstood the Advisory Opinion. The Maldives stands accused of not undertaking a "textual analysis" of what the Court said.[2] And yet, oddly enough, despite pleading for almost three hours between them, ostensibly taking you through the Opinion in detail, there was one paragraph that Professor Sands and Mr Reichler studiously avoided — text that, to use their words, they "surgically"[3] removed from their so-called "textual" analysis. That neglected and unwanted text is found in paragraph 136, in which the Court categorically rejected that it had been asked to resolve a sovereignty dispute. The Court stated:

> the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius.[4]

There was no ambiguity in the Opinion of the Court. But, if there had been, it would have been wholly dispelled by multiple declarations in which individual Judges confirmed that the Maldives' reading of the Opinion in this proceeding is entirely correct.

Take for example the declaration of Judge Iwasawa, which states:

> The Court gives an opinion on the questions requested by the General Assembly to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization. Giving the opinion in this way does not amount to adjudication of a territorial dispute between the United Kingdom and Mauritius.[5]

Another example is the declaration of Judge Gevorgian, which states at paragraph 3:

> One cannot deny that the Request concerns a situation in which two States claim sovereignty over a territory; indeed, Mauritius has repeatedly attempted to bring the matter of Chagos to the attention of this Court, but the United Kingdom has not consented to the Court's jurisdiction — a decision that it is free to make in accordance with Article 36 of the Statute.[6]

He states further at paragraph 4:

> In such circumstances, the Court's task in the present Opinion is limited to considering the lawfulness of Mauritius' decolonization process (and to stating

[2] ITLOS/PV.20/C28/4, p. 2, lines 42–43 (Mr Reichler).
[3] Ibid., lines 21–22 (Mr Reichler).
[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 129, para. 136 (Judges' Folder, Tab 19).
[5] Ibid., p. 342, para. 10 (Declaration of Judge Iwasawa) (Supplementary Judges' Folder, Tab 17).
[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 95 at pp. 335–336, para. 3 (Declaration of Judge Gevorgian) (Supplementary Judges' Folder, Tab 17).

> any legal consequences arising therefrom) without dealing with the bilateral aspects of the pending dispute.[7]

As Mauritius has repeatedly pointed out, the Judges were not in dissent. They agreed with the Court's Opinion and confirmed that it was not adjudicating the territorial dispute.

Given that Mauritius accused the Maldives of taking quotations from the majority Opinion out of context, its own treatment of the relevant text of paragraph 86 is also striking. In reading, and even putting on the screen, the first three sentences of that paragraph,[8] Mr Reichler "surgically" removed the rest of the paragraph with his sharp scalpel. As we have already pointed out, the Court stated that "[t]he General Assembly has not sought the Court's opinion to resolve a territorial between two States."[9]

That text is clear and unambiguous in its own right. But, as if to put beyond doubt its meaning, the Court went on to state:

> The Court has emphasized that it may be in the interest of the General Assembly to seek an advisory opinion which it deems of assistance in carrying out its functions in regard to decolonization

before quoting an important passage from the *Western Sahara* Advisory Opinion, as follows:

> The object of the General Assembly has not been to bring before the Court, by way of a request for [an] advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.[10]

Apparently, Mauritius tried to turn your attention away from that passage because it knows precisely how unhelpful it is for its position. Indeed, before the ICJ, Mauritius had strained to distinguish the Chagos Advisory Proceedings from the *Western Sahara* Opinion. It had stated:

> Here, in contrast to *Western Sahara*, sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonization issue. There is no basis for a separate consideration or determination of any question of territorial sovereignty.[11]

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[7] Ibid., para. 4.
[8] ITLOS/PV.20/C28/4, p. 3, lines 21–32 (Mr Reichler).
[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at pp. 117–118, para. 86 (Judges' Folder, Tab 19).
[10] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 at pp. 26–27, para. 39 (Judges' Folder, Tab 8).
[11] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.47 (Supplementary Judges' Folder, Tab 19).

But the Court rejected that argument. It found that, just like in *Western Sahara*, the General Assembly's questions did not intend or require it to opine on, let alone resolve, a sovereignty dispute.

On Tuesday, my colleague Professor Boyle addressed *Western Sahara* at length. The ICJ could not have been more clear; that it could address the question of decolonization without resolving, either expressly or as a matter of implication, a sovereignty dispute:

> The settlement of this issue [i.e. questions of decolonization] will not affect the rights of Spain today as the administering Power.[12] … [T]he request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory.[13]

Nothing in the proceedings "conveys any implication that the present case relates to a claim of a territorial nature."[14]

Mr Reichler's complete failure to deal with these passages speaks volumes.

This is certainly not the only time that Mauritius has pleaded something before the ICJ that it now seeks to hide from the Special Chamber. On Thursday, Mr Reichler stated:

> Contrary to the insistence of Professors Akhavan and Boyle, Mauritius did not "invite" the Court to find that the sovereignty issue was subsumed within the question of decolonization, such that deciding the one would also decide the other.[15]

Those are his words. It is a curious litigation strategy to make statements that are demonstrably false. When we described Mauritius' submissions to the ICJ, we were literally quoting them word by word. Let's be clear. Mauritius explicitly invited the ICJ to find that "sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by the question of whether decolonization has or has not been lawfully completed."[16]

That is a verbatim quote that I already showed you on Tuesday. There are yet others, which you can see on the screen and which are contained in tab 19 of the supplementary Judges' folders[17] but, in the interests of time, I will not read them for you.

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[12] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12 at p. 27, para. 42 (Judges' Folder, Tab 8).
[13] Ibid., pp. 27–28, para. 43 (Judges' Folder, Tab 8).
[14] Ibid.
[15] ITLOS/PV.20/C28/4, p. 5, lines 20-23 (Mr Reichler).
[16] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.16 (Judges' Folder, Tab 25).
[17] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Comments of the Republic of Mauritius, 15 May 2018, para. 2.17 ("*the territorial dimension here is completely and fully resolved exclusively by reference to the rules of international law on decolonization and self-determination. … Rather, in this decolonization matter, in particular, the lawful completion of the decolonization process, in and of itself, brings to an end the issues*

The ICJ had the opportunity to agree with Mauritius' submission that, if decolonization was not lawfully completed, then the sovereignty dispute was also resolved. But it did not do so.

Of course, the Court also had the opportunity to accede to Mauritius' express submissions about its status as the coastal State of Chagos — a matter of direct relevance to these proceedings.

As I already highlighted for you on Tuesday, Mauritius invited the Court to find that, among the legal consequences of continued British administration of the Chagos Archipelago was the obligation of the United Kingdom to "consult and cooperate with Mauritius inter alia to … allow Mauritius to proceed to a delimitation of its maritime boundaries with the Maldives."[18]

Separately, it also stated:

> [T]he maritime boundary between Mauritius and the Republic of the Maldives remains to be delimited. The administering power is required to allow Mauritius to take all reasonable steps to proceed to the delimitation of those boundaries by agreement with the Maldives in accordance with Articles 74(1) and 83(1) of UNCLOS, and to refrain from seeking to negotiate such an agreement itself.[19]

We referred to these passages numerous times on Tuesday. And what was Mr Reichler's response to them? Here it is. Precisely nothing. The silence was deafening.

It adds nothing to Mauritius' case to point to submissions made by the UK itself before the ICJ. It's true that, in objecting to the exercise of the Court's advisory jurisdiction, the UK had expressed concern that the Opinion would make a de facto ruling on sovereignty.[20] But the Court addressed that concern by making clear that in opining on decolonization it would not be making such a ruling. It was the same reason the Court had rejected Spain's objection to its jurisdiction in the *Western Sahara* Advisory Proceedings some four decades earlier.

Mauritius has sought to persuade the Chamber that the Maldives' interpretation of the Opinion is shared only by the UK. But even if we disregard the text of the Opinion and the Judges' Declarations, this reading is clearly supported by numerous States from across the world. Let us consider, for example, the explanations of vote on UN General Assembly resolution 73/295.

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*relating to territorial sovereignty*"), para. 4.73 ("*in these proceedings … the answer to the questions posed by the General Assembly is dispositive of all other matters. The Court's answer to the first question, and its determination of whether decolonization has been lawfully completed, in and of itself determines whether the administering power or Mauritius is lawfully entitled to act as the sovereign over the Chagos Archipelago, and to exercise sovereignty*") (Supplementary Judges' Folder, Tab 19).

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

[19] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, Written Statement of Mauritius, 1 March 2018, para. 7.61 (Judges' Folder, Tab 24).

[20] ITLOS/PV.20/C28/3, p. 21, line 40 – p. 22, line 1 (Mr Sands).

Let's start with the United States, whose representative said:

> The Court did not say that today Mauritius is sovereign over the British Indian Ocean Territory, or suggest that States or international organizations must recognize it as such.[21]

Australia, too, made clear its "long-standing position that the Court's advisory jurisdiction should not be used to adjudicate bilateral disputes" and that "binding judicial settlement of this matter did not have the consent of both Parties."[22]

We can already hear our friends on the opposite side complaining that these States don't count because they are part of the same "axis of evil" as the United Kingdom; so let's venture to States considerably further afield, many of whom expressed identical views despite voting in favour of the General Assembly resolution.

For example, Sweden's representative said:

> We note that the Court has underlined that the General Assembly did not submit a bilateral dispute over sovereignty that may exist between the United Kingdom and Mauritius, and that the Court has restricted itself to responding to the questions as formulated in the request for an advisory opinion.[23]

Another example is the Turkish representative who said that

> bilateral disputes over sovereignty cannot and should not be referred to the International Court of Justice for an advisory opinion without the clear consent of both parties concerned.[24]

China observed that the Court "acknowledge[d] the need to abide by the principle of consent of the countries concerned in its advisory proceedings."[25]

Chile's representative said:

> [W]e should recall that advisory opinions of the International Court of Justice are not binding on States and that it does not therefore follow that the General Assembly can use a resolution to order the implementation of the Court's conclusions. Considering the advisory nature of the opinion, matters and issues of a purely bilateral nature between the States concerned should be addressed through the appropriate bilateral channels, in accordance with international law. The Court recognized in the advisory opinion that the parties directly involved in the non-completion of the decolonization process should

[21] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.83, p. 17 (Supplementary Judges' Folder, Tab 21).
[22] United Nations General Assembly, 73rd session, 84th plenary meeting, 22 May 2019, A/73/PV.84, p. 2 (Supplementary Judges' Folder, Tab 22).
[23] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.84, p. 1 (Supplementary Judges' Folder, Tab 22).
[24] Ibid., p. 7.
[25] Ibid., p. 3.

> engage by diplomatic means and in accordance with international law in order to complete that process.[26]

Mauritius has repeated *ad nauseam* that the Maldives was one of only six States to vote against resolution 73/295; but what it fails to tell you is that many States that voted in favour shared the Maldives' view that the Advisory Opinion did not resolve the sovereignty dispute. Furthermore, a considerable number of States — 56 in total — abstained. This included developing countries ranging from El Salvador to Fiji to Timor-Leste to Sri Lanka, to name but a few. Fifteen others, from Liberia to Haiti, chose not even to attend the vote.

It goes without saying that the Maldives considers its interpretation of the Advisory Opinion to be correct. But here's the truly fatal blow for Mauritius: it doesn't matter — it doesn't matter — whether the Maldives has interpreted the Advisory Opinion correctly or not. This is for three reasons.

First, the correct interpretation of the Advisory Opinion is not a matter concerning the interpretation or application of UNCLOS. It is plainly outside the scope of this Chamber's jurisdiction. Professor Thouvenin will expand on this point in relation to the first and second preliminary objections.

Secondly, advisory opinions are not binding, even on the organs which request them, let alone on States in a bilateral dispute. Mauritius has done its best to blur the distinction between the ICJ's advisory and contentious jurisdictions. This is a point on which Professor Thouvenin will elaborate. At this point, it suffices to say that, whatever authority advisory opinions may have in jurisprudence as abstract statements of international law, they are not a means of binding States in specific disputes through the backdoor.

Thirdly, whatever the position of Mauritius or even that of the Maldives, the fact remains that the United Kingdom substantively disagrees with the Advisory Opinion. In recent statements, the United Kingdom has once again confirmed that

> we do not share the Court's approach and have made known our views on the content of the opinion, including the insufficient regard for significant material facts and legal issues[27]

and has stated clearly that the Opinion "is not a legally binding judgment."[28]

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[26] United Nations General Assembly, 73rd session, 83rd plenary meeting, 22 May 2019, A/73/PV.84, p. 4 (Supplementary Judges' Folder, Tab 22).
[27] United Nations General Assembly, 74th session, Item 86, Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Report of the Secretary-General, 18 May 2020, UN Doc A/74/834, p. 14 (Supplementary Judges' Folder, Tab 23).
[28] United Nations General Assembly, Letter dated 28 September 2020 from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, 28 September 2020, A/75/359, p. 1 (Supplementary Judges Folder, Tab 24).

Mauritius complains that the UK is a "recalcitrant"[29] State in respect of its obligations; but that is not the Maldives' problem, and it is most certainly not a matter within this Chamber's jurisdiction. Mr Reichler denigrated the Maldives as parroting the UK's assertions of sovereignty.[30] "[N]othing is gained when a parrot is taught a new word", he said, quoting George Orwell; a rather insulting thing to say to a nation in inter-State proceedings; but he chooses to ignore that the Maldives takes a different position to the UK in respect of the Advisory Opinion, in that it accepts the Court's pronouncements insofar as they relate to decolonization. If a quote from George Orwell is appropriate, it is that, in concealing inconvenient truths, "one turns, as it were, instinctively to long words and exhausted idioms, like a cuttlefish squirting out ink." Indeed, in Mr Reichler's speech, there was plenty of ink, spilled across the numerous pages of an exhausting and repetitive speech that seriously infringed on the coffee break, and said everything — everything — except how it is possible for a non-binding advisory opinion to definitively adjudicate a bilateral sovereignty dispute.

On the theme of creative licence, it is also instructive to briefly address Professor Sands' rendition of the Chagos Marine Protected Area Award. He stated that the Annex VII tribunal "ma[de] no findings on the question of who was the coastal State", except that Judges Kateka and Wolfrum suggested, in dissent, that Mauritius was the coastal State. Of course, he did not take you to the text of that award, because that would demonstrate that neither of his statements are true.

As to the majority Opinion, as the Maldives has pleaded before,[31] although the tribunal declined jurisdiction over Mauritius' first submission in that case (namely, that the United Kingdom was not entitled to act as coastal State at all), it found that it could exercise jurisdiction over Mauritius' fourth submission — namely, that, in exercising some of the powers of the coastal State, the United Kingdom had failed to comply with its obligations under UNCLOS. In that context, the majority of the Tribunal found that the United Kingdom was entitled to exercise the rights of the coastal State. It found, for instance, that "Mauritius enjoyed rights to fish in the waters of the Chagos Archipelago … subject to licences issued freely by the BIOT administration to Mauritian-flagged vessels".[32] As well, although the Tribunal found that the UK had breached certain obligations incumbent on coastal States in declaring the Marine Protected Area, its findings were premised on the fact that the UK was entitled to exercise the powers of the coastal State, provided that it complied with UNCLOS in doing so.[33] Unlike the Advisory Opinion, these findings have *res judicata* effect as between Mauritius and the UK. As we have already said,[34] and as Mauritius itself accepted,[35] the ICJ acknowledged that it was not overriding the *res judicata* effect of that earlier award and that the questions before the Annex VII tribunal were "not the same as those that are before the Court".[36]

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[29] Maldives' Written Observations, para. 22.
[30] ITLOS/PV.20/C28/4, p. 18, lines 24-26 (Mr Reichler).
[31] Maldives' Written Observations, para. 22.
[32] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 455 (Supplementary Judges' Folder, Tab 13).
[33] Ibid., paras 503, 516, 518, 535.
[34] ITLOS/PV.20/C28/1, p. 10, lines 17-18 (Mr Akhavan); ITLOS/PV.20/C28/2, p. 35, lines 7–9 (Mr Akhavan).
[35] ITLOS/PV.20/C28/3, p. 19, lines 26–28 (Mr Sands).
[36] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 116, para. 81 (Supplementary Judges' Folder, Tab 17).

In other words, an Opinion in respect of decolonization did not resolve the extant bilateral sovereignty dispute and did not overrule the Annex VII tribunal's findings on the power of the United Kingdom to act as a coastal State.

And what about the distinguished ITLOS Judges Kateka and Wolfrum? Professor Sands would have you believe that their Dissenting Opinion provided the "roots"[37] of the Chagos Advisory Opinion. What he told you was that, in their view, the view of those two judges,

> the majority had fallen into error, that the tribunal could and should have concluded that under the applicable law of self-determination and decolonization, Mauritius was "the coastal State" within the meaning of the Convention.[38]

Mr President, that is simply not true. Like the majority, the dissenters found only that "the manner in which the United Kingdom proclaimed the MPA did not take into account the rights and interests of Mauritius".[39] They proceeded to find that the rights of the coastal State are subject to

> obligations arising from commitments by the coastal State bilaterally or even unilaterally, as well as commitments based upon customary international law or the binding decisions of an international organization.[40]

They went on to find that,

> the undertakings of the United Kingdom [i.e., the State exercising the power of the coastal State] in the Lancaster House Understanding have to be read directly into Article 2(3) of the Convention

and therefore affect the United Kingdom's exercise of its powers as the coastal State.[41]

In other words, the Annex VII tribunal found unanimously in 2015 that the UK was entitled to exercise the powers of a coastal State in respect of the Chagos Archipelago in accordance with UNCLOS. The Advisory Opinion of 2019 did not change that fact, irrespective of obligations in respect of decolonization. There continues to be, beyond any doubt, a sovereignty dispute between Mauritius and the UK. The plausibility of the UK's claim, with or without an Advisory Opinion, is irrelevant. The Special Chamber cannot exercise jurisdiction over a territorial dispute with a third State.

Mr President, distinguished Members of the Special Chamber, that concludes my speech. I now ask that you give the podium to Professor Thouvenin, who will address the Maldives' first and second preliminary objections.

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[37] ITLOS/PV.20/C28/3, p. 20, lines 27–28 (Mr Sands).
[38] ITLOS/PV.20/C28/3, p. 20, lines 6–8 (Mr Sands).
[39] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, para. 89.
[40] Ibid., para. 94.
[41] Ibid.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akhavan. I now give the floor to Mr Jean-Marc Thouvenin to make his statement. You have the floor.

**MR THOUVENIN** *(Interpretation from French)***:** Thank you, Mr President. Before I begin, I would like to pay tribute to Mr Boyle, my friend, who was keen to share his insights with me in preparing this statement.

Mr President, Members of the Tribunal, Members of the Special Chamber, at this stage of the adversarial debate, the last round of oral pleadings from the Maldives, when the arguments have been exchanged, it would worthwhile for me to try to take stock of what still separates the Parties; but, to be honest, I am struggling to find anything, as regards the jurisdiction of the Special Chamber — the only question which brings us together this week — which they can actually agree on.

We certainly agree on many other points that have nothing to do with the United Nations Convention on the Law of the Sea, still less to do with the question of the jurisdiction of the Special Chamber. In this respect, I can only congratulate Mr Sands for his wonderful lesson on "the law of self-determination and decolonization" and for describing to us in detail how Mauritius gained independence. On a personal note, I can only regret that he did not keep this historical fresco for the podium of the finest hall in a law faculty or academy because here, as we are discussing the jurisdiction of the Special Chamber, it is irrelevant.

Mr President, Members of the Special Chamber, on Thursday they would have had you believe that the question being discussed this week is more complex than it really is. They wished to, alternatively, entice you a little, having you believe that if you accept jurisdiction, you will be taking your place in the great historical fresco of decolonization and, above all, to scare you by saying that if you decline jurisdiction you will be nothing less than accomplices to the maintenance of British colonial domination,[1] you will prevent Mauritius from restoring its territorial integrity,[2] and maybe you will even be ostracized for the next 20 years at least.

None of this is true, of course. I will come back to this. For now, what I would like to do is recall the question that is raised here and now, which is the question of your jurisdiction or lack of jurisdiction to entertain the territorial dispute with the United Kingdom which Mauritius has elected to bring before you, using the Maldives as a pretext.

I know there is nothing poetic about the rule of consent to jurisdiction. It is a very "technical" law, based largely on jurisprudence, and is sometimes frustrating, because declining jurisdiction means not entertaining a case. However, that cannot, of course, determine the application or non-application of a rule of law, particularly since the respect of that rule is essential to the system of judicial dispute settlement which has been arduously consolidated since the first stirrings, which are generally understood to date back to the *Alabama* case. There is a good reason that the rule on consent to jurisdiction is a well-established principle of the international

[1] ITLOS/PV.20/C28/3, p. 24, line 8 (Mr Sands) ("perpetuating an administration that should have ended last November").
[2] Ibid., p. 24, line 9 (Mr Sands) ("failure to allow Mauritius to enjoy its territorial integrity").

procedural law in contentious cases, as the International Court of Justice has underlined.[3] It is because it is the guarantor of States' trust in the mechanisms of judicial dispute settlement, and that trust can only exist if the limits of their consent to jurisdiction are scrupulously respected.

In this respect the Tribunal for the Law of the Sea is no less scrupulous than other judicial bodies. Only four years ago it expressly set out, formally, for the attention of all, an *obiter dictum*, in the form of a general observation underlining the limits of the jurisdiction of courts and tribunals responsible for the law of the sea. The Tribunal stated — I will cite this very well-known *obiter dictum*:

> a distinction must be made between the question of its jurisdiction, on the one hand, and the applicable law, on the other. The Tribunal notes, in this regard, that article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal.[4]

This answers the rather curious reference made on Thursday by Mr Sands[5] to article 293 of the Convention, echoing the fundamentally misguided interpretation of it in the *Guyana/Suriname* case.[6] The position is clear: article 293 has no bearing on these incidental proceedings, which relate only to jurisdiction.

But it is evident that consent to jurisdiction is not our opponents' cup of tea — forgive me for using this expression, which is too imperial for this case, but it is now common all over the world!

Allow me to illustrate the core argument of Mauritius, Mr President, by recalling the timeline.

In 2015 there was an unresolved territorial dispute between Mauritius and the United Kingdom. This is indisputable, it is not disputed and it is expressly established and adjudged in the arbitral award of 2015, which Mauritius does not call into question.[7] You will read in paragraph 209 of that award, which is reproduced for your convenience, that *(Continues in English)* "[i]n the Tribunal's view, the record … clearly indicates that a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago."[8]

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[3] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 71 (Supplementary Judges' Folder, Tab 1); *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar)*, *Judgment of 14 July 2020*, para. 55 (Supplementary Judges' Folder, Tab 18).

[4] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, para. 136 (Supplementary Judges' Folder, Tab 14). See also *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, Award on the Merits, 14 August 2015, in particular paras 188–192 and 197-198 (Supplementary Judges' Folder, Tab 12); *MOX Plant (Ireland* v. *United Kingdom)*, Procedural Order No. 3 of 24 June 2003, para. 19 (Supplementary Judges' Folder, Tab 7).

[5] ITLOS/PV.20/C28/3, p. 24, line 4 (Mr Sands).

[6] *Guyana* v. *Suriname,* Award, 17 September 2007, paras 405–406 (Supplementary Judges' Folder, Tab 9).

[7] Ibid., p. 18, lines 5-13 (Mr Sands).

[8] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, p. 90, para. 209 (Judges' Folder, Tab 12).

In paragraph 212:

> the Tribunal concludes that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago.[9]

In paragraph 219: "The Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention."[10]

*(Interpretation from French)* That was the legally established situation in 2015. Five years later, in 2020, Mauritius claims that there is no longer a "sovereignty dispute" and that, for this reason, unlike the arbitral tribunal in 2015, the Special Chamber should declare that it has jurisdiction.

It is perfectly true that the dispute could have been resolved since 2015 by one of the methods mentioned in article 33 of the Charter of the United Nations, but the Maldives can only observe that this has not happened. The Advisory Opinion of the International Court of Justice is not a means of dispute settlement to which the parties to the territorial dispute, Mauritius and the United Kingdom, have consented. Nor is the subsequent resolution by the General Assembly of the United Nations, or the cumulation of the two, even if you add the map of the world displayed by Mr Sands on Thursday. Recently, the International Court of Justice unreservedly rejected "the assumption that an obligation may arise through the cumulative effect of a series of acts" which, taken in isolation, do not create any obligation.[11]

However, without the slightest hesitation, Mauritius is asking you to rule that an Advisory Opinion or a resolution of the General Assembly, or their cumulation, is an authentic means for the final and compulsory judicial settlement of disputes between States, with exactly the same legal effect as a judgment having the force of *res judicata*. Mr Reichler's argument is straightforward and quite audacious. I quote the key extract from Mr Reichler's oral pleadings *(Continues in English)*:

> the issue has been already resolved by the ICJ's determination that Chagos is an integral part of the territory of Mauritius ... There is thus no "unresolved sovereignty dispute" … To hold otherwise …would mean that no dispute could ever be considered finally resolved, as long as a recalcitrant State, dissatisfied with an international tribunal's reasoned and authoritative resolution of it, refused to accept the result … It would mean, for example, that China could continue to argue that a legal dispute still exists over the lawfulness of its so-called nine-dash line … On the same basis, Colombia, which defiantly rejected the ICJ's unanimous 17-0 Judgment delimiting its maritime boundary with Nicaragua, could claim that a legitimate dispute still exists simply by insisting, without any basis in law, that the continental shelf and exclusive economic zone that the Court awarded to Nicaragua are Colombian.[12]

[9] Ibid., para. 212.
[10] Ibid., para. 219.
[11] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 507 at p. 563, para. 174 (Supplementary Judges' Folder, Tab 16).
[12] ITLOS/PV.20/C28/4, pp. 19, lines 11–27 (Mr Reichler).

*(Interpretation from French)* I don't read as well as Mr Reichler, but I will ask my assistant kindly to leave this slide on the screen so that you can allow this reasoning to permeate.

One need only recall that the two *res judicata* effects attached to judgments are to prevent the same dispute from being relentlessly reopened and to preserve the litigious situation in the terms laid down by the court — *res judicata pro veritate habetur* — in order to realize that it is precisely these two effects which my eminent opponent is asking you to attach to an advisory opinion. Let me remind you, and I quote from the judgment of the International Court of Justice, that "[t]he operative part of a judgment of the Court possesses the force of *res judicata*."[13]

It is so that you might change this fundamental rule of international dispute settlement that Mauritius has brought the case before you. So that you might adjudge, in a judgment signed with your names, that, contrary to established principle in all legal systems, and in particular in international systems, an advisory opinion is, like a judgment, *res judicata* in respect of parties to a dispute which have not consented to it.

Mr President, as we say in my country, "you have to pinch yourself to believe" that you have really heard such "inanities" — and I am borrowing this word from my friend Mr Klein — here in this hall of justice: that the dispute on the delimitation of the continental shelf between Nicaragua and Colombia could have been decided by an advisory opinion, just as the territorial dispute between Mauritius and the United Kingdom was decided by an advisory opinion? That the dispute between the Philippines and China in the *South China Sea* case could have been decided by an advisory opinion, just as the dispute between Mauritius and the United Kingdom has been decided by an advisory opinion?

You can take down the slide.

It is clear: this is what our opponents are arguing. They have no other arguments since they abandoned the argument relating to the implausibility of the British claim in the light of the Advisory Opinion,[14] that argument having become untenable in the context of a discussion on jurisdiction — and I stress — after the arbitral award in *Ukraine* v. *Russia*. Mr Reichler said, with his customary authority, that Mauritius "never made" the argument of plausibility[15] but I think it would be more accurate to say it "is no longer" making this argument, which we find spelled out in bold in paragraph 3.6 of the Mauritius' written pleadings.[16]

Mr President, even though the Special Chamber clearly does not need it in order to deliberate this argument and reject it, nevertheless allow me to make a brief point of law.

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[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43 at p. 94, para. 123 (Supplementary Judges' Folder, Tab 10).
[14] ITLOS/PV.20/C28/4, p. 19, lines 1-6 (Mr Reichler).
[15] Ibid.
[16] Written Observations of Mauritius, para. 3.6.

Advisory opinions requested by organs of the United Nations in order to assist them in performing their functions are not opinions indicating "assent" but "advisory" opinions. They are not binding on the requesting organ. According to the most eminent legal literature, "the requesting organ remains free to examine the consequences to be drawn from an opinion."[17]

Evidently, if the organ requesting the opinion is not bound by it, the States to which it is not addressed are even less so, particularly as regards their disputes. As the Court ruled:

> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.[18]

No one on this side would ever say that advisory opinions have no legal value. But Mauritius can refer to all the writers on the planet, from Alain Pellet to John Dugard via Shabtai Rosenne. None of them has ever had the absurd idea to argue that an advisory opinion can resolve, as would a judgment, a dispute extant between States that have not consented to the opinion having such effect. An advisory opinion can, of course, assist a tribunal in adjudging a dispute for which it has jurisdiction, as an auxiliary means to determine the rule of law, but an advisory opinion cannot rule on a dispute in such a way that an international tribunal, whose jurisdiction is founded on consent, then deems it to be decided in respect of a State which has not consented to its jurisdiction. Let me note, in passing, that the reference made by Mr Reichler to the Court of Justice of the European Union merely confirms that, if the mysteries of the US legal system are completely impenetrable for European jurists — I would not venture there — the reverse is equally true. Quite obviously, in the cited cases, the Court of Justice of the European Union was adjudicating on the internal law of the European Union and was not acting as an international court or tribunal. Let me refer on this point to paragraphs 65-72 of the Written Observations of the Maldives on Mauritius' Reply.

As for the UN General Assembly itself, it is of course a political organ; it is not a judicial organ. In the words of the International Court of Justice, "[t]he Charter does not confer judicial functions on the General Assembly".[19]

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[17] K. Oellers-Frahm, Article 96, in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams, Maral Kashgar (Assistant Editor), David Diehl (Assistant Editor), *The Statute of the International Court of Justice: A Commentary* (2nd edition), 2012, p. 1987.

[18] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65 at p. 71 (Supplementary Judges' Folder, Tab 1).

[19] *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of 13 July I954, I.C.J. Reports 1954*, p. 47 at p. 61 (Supplementary Judges' Folder, Tab 2).

Moreover, even where it has been set up by the UN General Assembly itself, an international tribunal cannot be regarded — I will quote the Court — as a "subsidiary, subordinate or secondary organ".[20] Fundamentally, no court or tribunal may, whilst exercising its contentious function in a case concerning two parties that have consented to its jurisdiction, *rule* as being established statements made by a General Assembly resolution regarding the rights and obligations of a third State which has not consented to its jurisdiction.

Now that is out of the way, allow me to return to the two preliminary objections to jurisdiction raised by the Maldives, and more specifically to two key jurisprudential precedents, i.e. the *East Timor* judgment and the award handed down very recently in *Ukraine* v. *Russia*.

Let me start with *East Timor*. I devoted part of my oral statement on Tuesday to this because it presents striking similarities with the present case. Indeed, Mr Reichler had trouble distinguishing between the two cases, his key argument being that here the territorial dispute has already been resolved by an advisory opinion, whereas in the *East Timor* case, and I quote him *(Continues in English)*:

> the Court could not treat the resolutions of political organs, without more, as having resolved a dispute about the lawfulness of Indonesia's conduct and, on that basis alone, proceed to adjudicate Indonesia's rights in its absence.[21]

*(Interpretation from French)* This explanation in no way corresponds to reality. In the *East Timor* case the Court verified the terms and the scope of the resolutions which had been relied upon by Portugal to justify the absence of Indonesia's title to sovereignty. It found that the terms of those texts did not clearly settle the territorial dispute, which was sufficient for the Court to reject Portugal's argument. But, had the terms of the resolution been clear, the Court would have had to ascertain whether the resolutions were binding. And if that had been the case, the Court would also have been compelled to ponder what treatment it should accord to these texts as a court of justice ruling on a dispute whose power is derived from consent.

Let me just digress here, Mr President, to address a question raised by Mr Sands on Thursday, which relates to some degree to this part of my oral presentation *(Continues in English)*:

> We say … that the situation of the United Kingdom in relation to the Chagos Archipelago is akin to that of South Africa in relation to South West Africa after the 1971 Advisory Opinion. Back then, would South Africa have had a right under international law to be engaged in the delimitation of Namibia's maritime boundary with Angola?[22]

*(Interpretation from French)* Concluding agreements with South Africa concerning Namibia was prohibited at the time, not by the Advisory Opinion but by resolution 276 of the UN Security Council. Consequently, there is no doubt that, had Angola concluded an agreement with South Africa regarding the boundary with

[20] Ibid.
[21] ITLOS/PV.20/C28/4, p. 22, lines 33-34 (Mr Reichler).
[22] ITLOS/PV.20/C28/3, pp. 11, line 36 to 12, line 4 (Mr Sands).

Namibia, it would have violated the Security Council resolution and proceedings could have been brought on that ground before an international court having jurisdiction, even in the absence of South Africa, as the source of the breached obligation would not have been the wrongful conduct of South Africa but the Security Council resolution. Equally, it is clear that South Africa could also have been brought before a competent tribunal for violating that Security Council resolution.

In the instant case, besides the fact that there is no Security Council resolution capable of being violated, the Maldives has no intention — let me be very clear about this — of negotiating an agreement with the United Kingdom. Thus, dramatic though it may be, Mauritius' comparison misses the mark, unless it be an amalgam of propositions whereby the territorial claims of the United Kingdom have been rejected bindingly and definitively by an advisory opinion, or they are without merit and thus without legal plausibility, two lines of argument that I have rebutted or will rebut today.

To return to jurisprudence, here in the *East Timor* case, my opponent also suggested that the case before us this week is more comparable to the *Nauru* case, where the *Monetary Gold* principle was set aside.[23] That is not so.

In the *Nauru* case, the question at issue was whether the Court could find Australia responsible when such a determination could have had "implications for the legal situation" of New Zealand and the United Kingdom, neither of which were parties to the case.[24] The Court observed that it did not have to take a position on the responsibility of New Zealand and of the United Kingdom *before* being able to determine the responsibility of Australia and thus set aside the *Monetary Gold* rule.

This is totally different from the present case, where it is only if the United Kingdom's claim to sovereignty over the Chagos Archipelago is held to be without merit — *held* to be without *merit* — by the Special Chamber that the Chamber could engage in the maritime delimitation sought by Mauritius. The Special Chamber cannot do this in the absence of the United Kingdom, whose rights would be the very subject matter of the decision.

One final crucial aspect of the *East Timor* jurisprudence must still be mentioned.

Portugal argued, in order to evade the *Monetary Gold* rule, that what was at issue was the right of the people of East Timor to self-determination, which is applicable *erga omnes*. Here Mauritius is invoking the same right, to the same ends. Portugal inferred from this that Australia was obliged to respect that right and refrain from dealing with a State which manifestly had no title to exercise its sovereignty over East Timor, without the Court needing to rule on Indonesian claims to sovereignty over East Timor. Mauritius develops the same line of argument.[25] The Court found that, although it was beyond doubt, first, that the right of peoples to self-determination is one of the essential principles of contemporary international law,

[23] ITLOS/PV.20/C28/4, p. 21, lines 27-36 (Mr Reichler).
[24] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 at p. 261–262, para. 55 (Supplementary Judges' Folder, Tab 5).
[25] ITLOS /PV.20/C28/4, p. 22, lines 23-29, p. 21, lines 42–46, p. 22, lines 31–41 (Mr Reichler).

second, that this had been recognized for the people of East Timor and, third, that it was *erga omnes*:

> The *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[26]

The International Court of Justice reaffirmed this jurisprudence in 2006 in *Armed Activities on the Territory of the Congo*;[27] and it did so even more forcefully, by deeming it applicable not only to *era omnes* norms but also to *jus cogens* norms. According to the Court:

> The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statue that jurisdiction is always based on the consent of the parties.[28]

The Court insisted on this jurisprudence again in 2012 in *Jurisdictional Immunities of the State*.[29]

What one must conclude in the present case is that, whatever the obligations arising from the Advisory Opinion for the United Kingdom with respect to the Chagos Archipelago, whatever their nature, *erga omnes* or *jus cogens*, the Special Chamber has no jurisdiction to settle the dispute between the United Kingdom and Mauritius over the Chagos Archipelago absent the former's consent.

Mr President, I shall now turn to the award in the *Ukraine* v. *Russia* case.

Its lessons are clear and to the point, their firmness underscored by the fact that they were adopted unanimously by the five arbitrators, all law of the sea specialists, four of them sitting or having sat at the Tribunal for the Law of the Sea, two of them as Presidents.

I will summarize those lessons.

First, if, in a case presented as concerning the interpretation or application of the Convention, a tribunal holds that a territorial sovereignty dispute over which it has no jurisdiction must necessarily be settled before it can entertain the case referred to it,

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[26] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 102, para. 29 (Judges' Folder, Tab 11).
[27] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at p. 32, para. 64, and p. 52, para. 125 (Supplementary Judges' Folder, Tab 8).
[28] Ibid., p. 32, para. 64.
[29] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 at p. 141, para. 95 (Supplementary Judges' Folder, Tab 11).

it must decline jurisdiction. If I am not mistaken, Mauritius does not dispute this rule, this principle, this conclusion, but perhaps we will learn more on Monday.

The second lesson is that in order to satisfy itself that a dispute over territorial sovereignty exists, the tribunal must only verify if, in fact, competing claims are expressed. On this point, I quote the tribunal *(Continues in English)*: "the threshold for establishing the existence of a dispute is rather low."[30]

*(Interpretation from French)* Of course, the tribunal must establish the existence of opposing claims. "Mere assertions" are not enough.[31] The tribunal in the *Ukraine* v. *Russia* case did not invent this formula. It reflects the jurisprudence of the International Court of Justice in the *South West Africa* case, according to which:

> A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence … . It must be shown that the claim of one party is positively opposed by the other.[32]

Mr Reichler argues that the UK's sovereignty claim is a mere "assertion" because, according to him, the Advisory Opinion deprives it of a legal basis.[33] In doing so, he claims he is not asking you to put the British claim to a plausibility test.[34] But it is far more than that; it is a test of validity to which he is asking you to submit it. What you heard on Thursday resembles a "plausibility plus" test, which is, in truth, a validity test.

However, and this is the third rule, the third lesson from the arbitral award in *Ukraine* v. *Russia*, the existence of a dispute is in no way linked to the validity or plausibility of the opposing claims.

The tribunal was very clear on this point *(Continues in English)*: "it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute."[35]

*(Interpretation from French)* The legal plausibility or implausibility, or validity of the claims which constitute the dispute are therefore of no relevance in determining its existence. The tribunal cannot take this into account since making a determination on this point would necessarily resolve a question over which it has no jurisdiction.

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[30] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 188 (Judges' Folder, Tab 21).
[31] Ibid.
[32] *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Report; 1962*, p. 319 at p. 328 (Supplementary Judges' Folder, Tab 3).
[33] ITLOS/PV.20/C28/4, p. 19, line 5 (Mr Reichler).
[34] Ibid., p. 19, lines 2-9 (Mr Reichler).
[35] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 188 (Judges' Folder, Tab 21).

In *Ukraine* v. *Russia*, the tribunal quite logically simply found that *(Continues in English)* "since March 2014, both Parties have held opposite views on the status of Crimea and this situation persists today."[36]

*(Interpretation from French)* In the present case, the dispute between Mauritius and the United Kingdom is longstanding, and it is a fact that persists to this day, both parties fiercely disputing sovereignty over the Chagos Archipelago.

The fourth lesson learnt from the *Ukraine* v. *Russia* award is that if a resolution of the UN General Assembly or any other text has taken a position on the territorial dispute, the tribunal cannot interpret it as resolving that territorial dispute because, in doing so, it would be exercising its contentious jurisdiction in respect of a dispute over which it has no jurisdiction.

Here again, the tribunal was clear *(Continues in English)*:

> Ukraine's argument that the Arbitral Tribunal must defer to the UNGA resolutions and need only treat Ukraine's sovereignty over Crimea as an internationally recognized background fact is equivalent to asking the Arbitral Tribunal to accept the UNGA resolutions as interpreted by Ukraine. Apart from the question of the legal effect of the UNGA resolutions, if the Arbitral Tribunal were to accept Ukraine's interpretation of those UNGA resolutions as correct, it would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory. However, it has no jurisdiction to do so.[37]

*(Interpretation from French)* The Special Chamber might be interested to know that Judge Shahabuddeen had already established this reasoning, which is, in fact, irrefutable, in his Separate Opinion in the *East Timor* case. I will quote from this very inspired Separate Opinion by Judge Shahabuddeen:

> what Portugal is asking the Court to accept as *données* is not the mere text of the resolutions, but the text of the resolutions as interpreted by Portugal … [Even] if Portugal's interpretation of the resolutions is correct, … [i]f the Court were to accept Portugal's interpretation of the resolutions as correct, what it would be deciding, without hearing Indonesia on a substantial question of interpretation, is that it was Portugal and not Indonesia that possessed the treaty-making power; … In effect, the question is not merely whether Portugal's interpretation is correct, but whether, in reaching the conclusion that it is correct, the Court would be passing on Indonesia's legal interests.
>
> There is a further point. As the Court would be barred by the *Monetary Gold* principle from acting *even if* Portugal's interpretation of the resolutions were correct, it is possible to dispose of Portugal's Application without the necessity for the Court to determine whether or not the resolutions do indeed bear the interpretation proposed by it; the Court could arrive at its judgment assuming, but without deciding, that Portugal's interpretation is correct.[38]

[36] Ibid., para. 189.
[37] Ibid., para. 176.
[38] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, Separate Opinion of Judge Shahabuddeen, p. 90 at p. 123–124 (Supplementary Judges' Folder, Tab 6).

The Special Chamber is in the same situation here: if it accepted the interpretation of the Advisory Opinion given by Mauritius, whatever the legal value of that Advisory Opinion, this would imply *ipso facto* that the Special Chamber resolves the territorial dispute over which it has no jurisdiction.

CI am coming now to my conclusion. Mr President, Members of the Special Chamber, the ink is barely dry on this award whose enlightening lessons I have just set out, even though they are rather frustrating, but *dura lex sed lex*. It reflects the most unquestionable state of the law that it falls to you to apply in determining your jurisdiction. Mr Sands urged this Tribunal to maintain legal harmony.[39] I agree: it would seriously undermine the credibility of the coherent dispute settlement system established by the Convention on the Law of the Sea for your formation of the Tribunal to change already the jurisprudence, as if Ukraine's cause was somehow worth less than that of Mauritius.

And yet this is what Mr Sands suggested. In *Ukraine* v. *Russia*, he stressed, it was not a question of colonization or decolonization. Well, the questions there concern armed aggression, displaced population, violation of human rights, a situation that goes on and on. It is a question of the violation of the same principle of territorial integrity that lies at the heart of Mauritius' case and which is mentioned no fewer than 20 times in Mr Sands' statement on Thursday.

I will end where I began, returning to the threat made countless times by our friends on the other side on Thursday, which Professor Klein summarized in his conclusion as follows: If you, the Special Chamber, decline jurisdiction, you will

> perpetuate a situation of continuing breach of one of the most fundamental principles of the international legal order, namely the right of peoples to self-determination.[40]

If "inanities" were voiced before this Chamber, this one is undoubtedly the most patent. According to our opponents, when the International Court of Justice declined jurisdiction to rule on the violation of the rights of the people of East Timor to self-determination, it sided with Indonesia and perpetuated a situation of breach of the right to self-determination. When Judge Shahabuddeen outlined the reasoning that I recalled just a moment ago, he also perpetuated the breach of the right to self-determination of the people of Timor. When the International Court of Justice declined jurisdiction in *Georgia* v. *Russia*, it was complicit in the perpetuation of human rights violations in Georgia, and when the tribunal in the *Ukraine* v. *Russia* case, whose composition I recalled a moment ago, declined jurisdiction, its arbitrators unanimously sided with Russia in perpetuating a situation of armed aggression and continued violation of the territorial integrity of a sovereign State: Ukraine,

There is hardly any need to refute this line of argument that collapses on itself as soon as it is formulated. Let us just recall that in *Ukraine* v. *Russia* the tribunal held that *(Continues in English)*:

[39] ITLOS/PV.20/C28/3, p. 24, line 11 (Mr Sands).
[40] ITLOS/PV.20/C28/4, p. 34, lines 15-18 (Mr Klein); ITLOS/PV.20/C28/3, p. 24, lines 7-8 (Mr Sands).

> the Arbitral Tribunal's recognition of the existence of a dispute over the territorial status of Crimea in no way amounts to recognizing any alteration of the status of Crimea from the territory of one Party to the other, or to "any action or dealing that might be interpreted as recognizing any such altered status." Neither would it imply that the Russian Federation's actions toward and in Crimea were lawful ... The Arbitral Tribunal recognizes this reality without engaging in any analysis of whether the Russian Federation's claim of sovereignty is right or wrong. In this regard, the Arbitral Tribunal recalls the statement of the ICJ in *East Timor* that Portugal, similarly to the Russian Federation in this case, "has, *rightly or wrongly* formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute."[41]

*(Interpretation from French)* The Maldives says precisely that. It is no more taking a position in the bilateral dispute that exists between Mauritius and the United Kingdom over the Chagos Archipelago than the Special Chamber would do by simply applying the rule of law, leading it to decline jurisdiction.

Mr President, Members of the Special Chamber, I will end by stating that the Maldives maintains its first two preliminary objections to jurisdiction.

Thank you for your attention. If you agree, this would seem to be an appropriate time for a well-deserved break.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Thouvenin. At this stage, the Special Chamber will withdraw for a break of 30 minutes. We will continue the hearing at 3.45 p.m.

(*Break*)

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Please be seated. I now give the floor to Mr Akhavan to make his statement. You have the floor, Mr Akhavan.

**MR AKHAVAN:** Thank you. Mr President, distinguished Members of the Chamber. In this final speech, I will address you on Mauritius' responses to the third, fourth and fifth preliminary objections, before responding to the three questions posed to the Parties by the Chamber. I will then make some concluding observations before the Maldives' closing statement and final submissions.

I turn first to the Maldives' third preliminary objection, concerning the jurisdictional precondition of negotiations.

Mauritius' first response is that there is no requirement of negotiations. My learned friend Professor Klein told you that any jurisdictional requirements are to be found "exclusively" [1] in Part XV of UNCLOS. Ms Habeeb explained on Tuesday that there is no rule of treaty interpretation stipulating that all jurisdictional preconditions must

[41] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 178 (Judges' Folder, Tab 21).

[1] ITLOS/PV.20/C28/4, p. 27, line 41 (Mr Klein).

be located in the same part of a treaty.[2] There is no reason why Parts V and VI of UNCLOS might not contain additional jurisdictional preconditions in respect of maritime delimitation in the EEZ and continental shelf. Articles 74 and 83 make clear that States may resort to dispute resolution under Part XV only "[i]f no agreement can be reached". The text is plain and clear, and Ms Habeeb referred to jurisprudence supporting this interpretation.[3] Professor Klein failed to respond to that case law.

Mauritius' second contention is that, if there is a precondition of negotiations, it has been satisfied. Professor Klein stated, quite correctly, that the Maldives' position since as long ago as 2001 is that negotiations are not possible so long as the UK continues to administer the Chagos Archipelago.[4] As Ms Habeeb explained, the Maldives stated that since Mauritius did not exercise jurisdiction over the islands,

> it would be inappropriate to initiate any discussions between the Government of Maldives and the Government of Mauritius regarding the delimitation of the boundary between the Maldives and the Chagos Archipelago.[5]

Professor Klein did not suggest that, as a matter of fact, any negotiations occurred at that time.

Professor Klein proceeded to refer to certain exchanges in 2010 when the Parties held initial meetings in which they envisaged that negotiations may occur in the future.[6] But he stops short of saying that negotiations actually occurred. He describes the exchanges as being "the start of a negotiation process"[7] and an expression of "good intentions".[8]

In any event, the truly problematic point for Mauritius is its central argument that its sovereignty dispute with the UK was resolved by the Advisory Opinion in 2019. On that basis, any "meaningful"[9] negotiations that could lead to the Parties "arriving at an agreement"[10] must have taken place after that time last year. But they did not, because Mauritius rushed to file its claim against Mauritius just four months later, and in any event, there could be no meaningful agreement, because the UK continues to assert sovereignty and to administer Chagos as a matter of fact.

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[2] ITLOS/PV.20/C28/2, p. 18 (line 29) (Ms Habeeb).
[3] ITLOS/PV.20/C28/2, p. 19, line 22 – p. 20, line 13 (Ms Habeeb).
[4] ITLOS/PV.20/C28/4, p. 27, lines 15–25 (Mr Klein).
[5] Diplomatic Note Ref. (F1) AF-26-A/2001/03 from the Ministry of Foreign Affairs of the Republic of Maldives to the Ministry of Foreign Affairs of the Republic of Mauritius, 18 July 2001 (Written preliminary objections of the Maldives, Annex 25; Judge's Folder, Tab 28).
[6] ITLOS/PV.20/C28/4, p. 27, lines 26–45 (Mr Klein).
[7] Ibid., p. 29, line 14 (Mr Klein).
[8] Ibid., p. 30, line 30 (Mr Klein).
[9] *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands), Judgment, I.C.J. Reports 1969*, p. 3 at pp. 46–47, para. 85 (Judges' Folder, Tab 6).
[10] Ibid., para. 85 (Judges' Folder, Tab 6). See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246 at p. 292, para. 87 (Judges' Folder, Tab 9); *Case concerning claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece* v. *Federal Republic of Germany)*, 26 January 1972, RIAA XIX, p. 27 at p. 57 (Supplementary Judges' Folder, Tab 4).

As to the Maldives' fourth preliminary objection, the Parties disagree on two matters. First, there is disagreement on whether Mauritius' territorial dispute with the UK remains unresolved to this day. Without an undisputed coastal State, there can be no dispute on maritime delimitation between Mauritius and the Maldives. The Maldives' position on this point was fully set out by Dr Hart in her speech on Tuesday[11] and I will not repeat those points.

Secondly, the Parties disagree on whether, irrespective of the UK's sovereignty claim, there existed a dispute, consisting of a specific, particularized maritime boundary claim by one Party which had been affirmatively opposed and rejected by the other,[12] before Mauritius initiated these proceedings. On this point, we received one helpful clarification from Professor Klein, which is that, contrary to the suggestion in its written pleadings,[13] Mauritius does not contend that any of the illustrative maps produced by its consultants are evidence of a dispute.[14]

Instead, Professor Klein turned to the Parties' legislation as the starting point for establishing a dispute. He spoke about the fact that each State had claimed a maximum entitlement to an EEZ of 200 nautical miles from its baselines, and that these maximum entitlements produced an area of overlap.[15] But it was a shame that he confined his submissions to this analysis, because Dr Hart had already explained that the mere existence of such an overlap was not evidence of a "dispute".[16] The mere expression of a maximum entitlement is not a claim, especially where, as in the case of the Maldivian legislation, the government is specifically mandated to agree on a different maritime boundary line in the case of overlap.[17] A dispute requires disagreement on where the actual maritime boundary should lie; otherwise, any State with an adjacent coast, or an opposite coast less than 400 nautical miles from another State's coast, could be hauled before ITLOS.

Professor Klein's analysis of the diplomatic exchanges between the Parties was also unconvincing. You will recall that, in relation to the meeting on 21 October 2010,[18] the Parties referred to an area of "potential overlap". His only response was to point out that, elsewhere in the same document, there is a reference to an area of "overlap" without the word "potential".[19] But whether the Parties actually repeated the word "potential" or not, in substance the overlap was only a potential, unspecified one.

[11] ITLOS/PV.20/C28/2, p. 25, lines 13-25 (Ms Hart).
[12] Ibid., p. 23, lines 5-11 (Ms Hart).
[13] Written Observations of Mauritius, para. 3.39.
[14] ITLOS/PV.20/C28/4, p. 25, lines 18–24 (Mr Klein).
[15] Ibid., p. 23, line 29 – p. 30, line 9 (Mr Klein).
[16] Ibid., p. 24, lines 13–15 (Ms Hart).
[17] ITLOS/PV.20/C28/2, p. 27, lines 4-39 (Ms Hart).
[18] Minutes of First Meeting on Maritime Delimitation and Submission Regarding the Extended Continental Shelf between the Republic of Maldives and the Republic of Mauritius, 21 October 2010, signed by Ahmed Shaheed, Minister of Foreign Affairs, Republic of Maldives and S.C. Seeballuck, Secretary to Cabinet & Head of Civil Service, Republic of Mauritius (Written preliminary objections of the Maldives, Annex 26; Judges' Folder, Tab 30).
[19] ITLOS/PV.20/C28/4, p. 26, lines 24–40 (Mr Klein).

His reference to the Joint Communiqué of 12 March 2011[20] is also difficult to understand, given how unfavourable it is to his case. It states that the Parties "agreed to make bilateral arrangements on the overlapping area of extended continental shelf" between them. This is obviously an intention to cooperate before a dispute is crystallized. Where is a specific, particularized, affirmative claim by one Party on the maritime boundary? Where is the rejection by the other Party? The answer is: nowhere.

The same is true of Mauritius' note to the UN Secretary-General of 24 March 2011.[21] Professor Klein told you that "[t]he fact that the precise zone of overlap in the claim is not specified in the note is of no importance".[22] We disagree. The lack of any particulars is of crucial importance because there must be a dispute of "sufficient clarity" as has been spelled out in the jurisprudence.[23] Professor Klein's only comeback was that the Maldives had already made a "claim" in its CLCS submission.[24] But that is irrelevant: there is simply no specific claim, let alone one that is rejected by the other side.

Professor Klein went so far as to state that "the willingness expressed at the time by the two States to engage in a process of negotiation is in itself indicative of the existence of a dispute."[25] But a willingness to negotiate is not a dispute. In any event, as with the third preliminary objection, the problem remains for Mauritius that it must establish the crystallization of a dispute in the four-month period between when it says its sovereignty dispute with the UK was resolved in February 2019 and when it filed its claim against the Maldives, four months later. Professor Klein, of course, pointed to no relevant evidence from this short time period, because there is none.

As to the Maldives' fifth preliminary objection, Professor Klein is right to state that there is a high threshold for establishing an abuse of process.[26] I had already made that clear on Tuesday.[27]

Professor Klein denied that Mauritius is using these proceedings to settle its territorial dispute with the UK.[28] But that flies in the face of Mauritius' admission that, in order to exercise jurisdiction, you must necessarily find that it is the coastal State to the exclusion of the UK. I note further that Mauritius, while insisting on a high threshold in relation to abuse of process on its own part, is quite happy to suggest that the Maldives has been guilty of an abuse of process merely by filing these

[20] Joint Communiqué (12 March 2011) (Written Observations of Mauritius, Annex 14), cited at Mr Klein, p. 25.
[21] Written Observations of Mauritius, para. 3.47, citing Diplomatic Note No. 11031/11 from the Permanent Mission of the Republic of Mauritius to the Secretary-General of the United Nations, 24 March 2011 (Written preliminary objections of the Maldives, Annex 27; Judges' Folder, Tab 31), cited at ITLOS/PV.20/C28/4, p. 25, line 32 – p. 36, line 2 (Mr Klein).
[22] ITLOS/PV.20/C28/4, p. 26, lines 37–38 (Mr Klein).
[23] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award, 18 March 2015, para. 382 (Judges' Folder, Tab 12).
[24] ITLOS/PV.20/C28/4, p. 26, line 45 – p. 27, line 9 (Mr Klein).
[25] Ibid., p. 29, lines 26-27 (Mr Klein).
[26] Ibid., p. 32, lines 26-27 (Mr Klein).
[27] ITLOS/PV.20/C28/2, p. 36, lines 28–35 (Mr Akhavan).
[28] ITLOS/PV.20/C28/4, p. 33, lines 5-9 (Mr Klein).

preliminary objections. We trust that the Special Chamber will see through this double standard.

I now turn to the three questions received from the Special Chamber on Thursday evening for which we are grateful. We were asked to answer these questions orally in our second round speeches and/or in writing by no later than the end of Mauritius' second round speeches on Monday. I will address them now, although the Maldives reserves the right to respond further in writing.

The Chamber's first question asks what the legal considerations were in carrying out certain bilateral exchanges. These exchanges consist of the parties' first meeting on maritime delimitation and submissions regarding the extended continental shelf, which took place on 21 October 2010, and its Joint Communiqué of 12 March 2011.

The Maldives' answer is as follows. These bilateral exchanges took place in furtherance of friendly bilateral relations. In particular, Mauritius had erroneously accused the Maldives of secret maritime delimitation talks with the UK. The Maldives reassured Mauritius that it had not and would not conduct such negotiations. What is reflected in both the minutes of the meeting and the Joint Communiqué are discussions of a strictly diplomatic nature with a view to exploring possible solutions to a potential overlap of the Parties' extended continental shelf. A search of the Maldives' archives has not yielded any documents suggesting that the exchanges were motivated by any legal considerations or obligations, or that the Parties discussed any legal matters or commitments.

The Chamber's second question concerns the reference in the Chagos Advisory Opinion to an obligation on UN Member States "to cooperate with the United Nations in order to complete the decolonization of Mauritius", as set out in paragraph 180 of the Opinion. The Chamber asked whether this obligation is relevant to the present case and, if so, how.

The Maldives' position is that this obligation is not relevant because it does not concern the interpretation or application of UNCLOS and is therefore outside the jurisdiction of the Special Chamber.

The Maldives understands Mauritius' position to be that, in respect of the fifth preliminary objection on abuse of process, the obligation is relevant in the sense that, by raising preliminary objections in these proceedings, the Maldives has acted inconsistently with this obligation.[29] The Maldives disagrees with this position for the following reasons:

First, the ICJ did not set out what action Member States would be required to take pursuant to this obligation, leaving it for the General Assembly "to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius".[30]

Second, in paragraph 5 of resolution 73/295, all that the General Assembly said is that States must

[29] Written Observations of Mauritius, paras 3.78–3.80.
[30] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion, I.C.J. Reports 2019*, p. 95 at p. 139, para. 180 (Judges' Folder, Tab 19).

> refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution.[31]

Third, nothing in that resolution suggested that States are under an obligation to delimit a maritime boundary with Mauritius. To the contrary, as I have already explained, the Court did not accept Mauritius' submissions that it should be entitled to delimit a maritime boundary with the Maldives. Accordingly, the Court did not consider this to form part of the obligation to cooperate. Nothing in the General Assembly resolution suggests otherwise.

Fourth, it is not the case that simply because a case implicates obligations *erga omnes*, including the right to self-determination, that an international court or tribunal can exceed its proper jurisdiction. Professor Thouvenin has already taken you to the passages of the *East Timor* case establishing that the *erga omnes* character of an obligation and the rule of consent to jurisdiction are "two different things".[32] He took you to other authorities that make exactly the same point, and I will not repeat them here.

Accordingly, the raising of preliminary objections by the Maldives is not in any way inconsistent with its obligation to cooperate in the decolonization of Mauritius.

Mr President, there is a final point in respect of the second question that I wish to raise. It might be argued that delimiting a maritime boundary with the UK in respect of the Chagos Archipelago would constitute "action that will impede or delay the completion of the process of decolonization of Mauritius". The Maldives merely notes in this regard that, whether or not that is correct, its policy, as I explained on Tuesday, is that it will not delimit a maritime boundary with the UK.[33]

I now turn to the Chamber's third question, which is as follows: if delimitation were deferred for reasons indicated in the Maldives' preliminary objections, what would be the obligations under paragraph 3 of articles 74 and 83 of the Convention? The Chamber asks further whether it could exercise jurisdiction with respect to those obligations.

I turn first to a brief discussion of the content of the obligations in paragraph 3 generally. The first obligation is to "make every effort to enter into provisional arrangements of a practical nature". The second is "during this transitional period, not to jeopardize or hamper the reaching of the final agreement."

In *Guyana* v*. Suriname*, the Annex VII tribunal found that the first obligation in paragraph 3 was "designed to promote interim regimes and practical measures that could pave the way for provisional utilization of disputed areas pending

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[31] UNGA resolution 73/295, "Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965", 24 May 2019, A/RES/73/295, para. 5 (Judges' Folder, Tab 37).
[32] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 102, para. 29 (Judges' Folder, Tab 10).
[33] ITLOS/PV.20/C28/1, p. 7 (lines 37–39) (Mr Riffath).

delimitation."[34] It emphasized, however, that the duty to "make every effort" simply requires States to "negotiate in good faith" and to "adopt a conciliatory approach to negotiations".[35] The Special Chamber in *Ghana/Côte d'Ivoire* expressed the same view[36] and confirmed that the party seeking to establish a breach of this obligation must first request that the other party enter into provisional arrangements — in other words, that it must "trigger the requisite negotiations."[37]

As to the second obligation, the Tribunal in *Guyana* v. *Suriname* found that unilateral activity in the disputed area is not prohibited per se, especially if it "do[es] not cause a physical change to the marine environment".[38] Activities will violate the obligation in paragraph 3 if they have the "potential to cause irreparable prejudice" or may "affect the other party's rights in a permanent manner."[39] In *Ghana/Côte d'Ivoire*, the Chamber made clear that the second obligation applies only to "the transitional period", which "means the period after the maritime delimitation dispute has been established until a final delimitation … has been achieved."[40]

It is the Maldives' position that, if delimitation were deferred on the grounds of its preliminary objections, no obligations would arise for itself or Mauritius under paragraph 3 of articles 74 and 83. This is for two reasons.

First, paragraph 3 refers to "the States concerned". Given that the preceding text is "[p]ending agreement as provided for in paragraph 1", it is clear that "the States concerned" are those "with opposite or adjacent coasts". If this Chamber accepts the Maldives' preliminary objections, then it will have accepted that Mauritius has not been conclusively established as the coastal State of the Chagos Archipelago. In that case, just as the Parties could not seek to delimit their boundary in accordance with paragraph 1, they would not accrue obligations under paragraph 3 either. For the same reason, any allegation that either Party had not complied with the obligations in paragraph 3 would be a matter outside of the Special Chamber's jurisdiction.

Secondly, *Ghana/Côte d'Ivoire* held that paragraph 3 applies only "after the maritime delimitation dispute has been established."[41] The Maldives' position is that such a dispute has not been established to date, and that it cannot crystallize so long as the sovereignty dispute between Mauritius and the UK remains unresolved. If the Chamber accepts that argument, then it would follow that the "transitional period" referred to in paragraph 3 had not yet commenced and no obligations in that provision had been triggered. Again, that would prevent any exercise of jurisdiction by the Special Chamber.

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[34] *Guyana* v. *Suriname*, Award, 17 September 2008, p. 153, para 460 (Supplementary Judges' Folder, Tab 9).
[35] Ibid., p. 153, para. 461.
[36] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4 at pp. 166–7, para. 627 (Supplementary Judges' Folder, Tab 15).
[37] Ibid., pp. 167, para. 628.
[38] *Guyana* v. *Suriname*, Award, 17 September 2008, pp. 154–5, paras 465–467 (Supplementary Judges' Folder, Tab 9).
[39] Ibid., p. 156, paras 469–470.
[40] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4 at pp. 167, para. 629.
[41] Ibid.

There is a third and fundamental reason why any claim would be outside the jurisdiction of the Special Chamber, which is simply that Mauritius has not asserted any claim that relates to either of these obligations. There is therefore no "dispute" regarding paragraph 3. Mauritius has never produced any evidence and never even suggested that it has either invited the Maldives to enter into negotiations concerning any provisional arrangements of a practical nature or that the Maldives is carrying out any unilateral activities causing irreparable prejudice to Mauritius that would require such negotiations. In *Ghana/Côte d'Ivoire*, the Chamber held that

> [n]ot having requested Ghana to enter into negotiations on provisional arrangements of a practical nature bars Côte d'Ivoire from claiming that Ghana has violated its obligations to negotiate on such arrangements.[42]

The same applies to Mauritius in the present case.

In the time left to me, I have been instructed to make two concluding observations. The first concerns a highly regrettable statement made by Mr Reichler during his submissions on Thursday, which has already been brought to your attention, Mr President, in written correspondence. I truly regret having to raise this matter. Mr Reichler, for whom I have the highest regard, made the following statement:

> I would add to this one more point that further underscores the weakness … of the Maldives' case. Mauritius, as you know, commenced these proceedings as an Annex VII arbitration, because that was the only vehicle available for compulsory dispute resolution. But shortly after doing so, Mauritius offered the Maldives the opportunity to transfer the case to either the ICJ or ITLOS, in lieu of arbitration. The Maldives' response was, in effect, "anywhere but the ICJ". Of course that would be their response! The Maldives had no desire to put before the ICJ the question of whether its determinations in the Chagos case were authoritative and legally binding. It knew very well what the Court's answer would be. The answer given by this Special Chamber can be no different.[43]

That was the statement made before you. The Maldives considered it simply astonishing that he would make this statement, for two reasons.

The first is that it pertains to communications between the Parties' Counsel that were made in confidence and without prejudice. It is entirely improper to make any reference to such exchanges before the Chamber or in any other public context. This is a basic obligation in professional codes of conduct, if not simple courtesy to colleagues at the international bar — in this instance, Professor Boyle, who, for reasons that may be known to some Members of the Chamber, has not been able to join us in this proceeding.

The second point is of more direct relevance to these proceedings. It relates to the prejudicial effect of Mr Reichler's account of confidential communications among the Parties' Counsel, which is patently false. The email exchanges with Professor Boyle that we, with great reluctance, sought leave to submit yesterday show

[42] Ibid., para. 628.
[43] ITLOS/PV.20/C28/4, p. 17, lines 2–11 (Mr Reichler).

unambiguously that the Maldives' preference was for the case to be heard by the ICJ. This was exactly because Mauritius' case on jurisdiction rested entirely on the ICJ's Chagos Advisory Opinion. It was Mauritius that prevented submission to the ICJ by insisting that it would not accept bifurcation of jurisdiction from the merits, despite the multiple and obvious bars to jurisdiction that we have set out in these proceedings. If there was a Party that opposed the ICJ ruling on its own Advisory Opinion, it was clearly Mauritius. The Agent of the Maldives will have something to say on this in his final remarks.

The second and final concluding observation I will make concerns Professor Sands' evocative imagery of ITLOS being cast into the wilderness if it accepts the Maldives' preliminary objections.[44] Again, I have the highest regard for Professor Sands, but it is not the first time that he has employed this rhetorical device: just look at the similarity to his eloquent submissions in the *Gambia* v. *Myanmar* ICJ hearing a few months ago. He referred to the *South West Africa* case, as he did before you, and argued similarly that if the ICJ failed to exercise jurisdiction, it would be "cast into an incomparably … bleak wilderness".[45] The difference is that the ICJ case relates to breaches of the Genocide Convention whereas the present case relates to maritime delimitation under UNCLOS.

We have every faith that the Chamber will not be swayed by this apocalyptic narrative, because in fact the exact opposite is true: ITLOS will be cast into a bleak wilderness only if it exercises jurisdiction in this case. Mauritius asks you to unsettle settled jurisprudence, to ignore *East Timor*, to ignore *Coastal State Rights*, and so on; to resolve a territorial dispute with a third State. It asks you to do violence to the intention of the drafters of UNCLOS as it attempted to do in the 2015 Chagos arbitration. It asks you to open a Pandora's box that will not be easily closed; if you were to exercise jurisdiction under these circumstances, it is not difficult to see the long succession of UNCLOS States Parties that would make optional exceptions under article 298 because they do not want their territorial disputes decided by ITLOS. It would be the beginning of the end for the Part XV compulsory procedures.

Mr President, distinguished Members of the Special Chamber, this concludes my speech. I take this opportunity to thank you for your kind attention and patience throughout this hearing and to express my sincere gratitude to the Registry, ITLOS staff and interpreters for their courtesy and diligence. I also take this opportunity to express my great respect to the Co-Agent of Mauritius, Ambassador Koonjul, and to our dear friends and esteemed colleagues on the Mauritius Counsel team. Finally, I note with appreciation the hard work of the assistants on the Maldives Counsel team: Dr Justine Bendel, Ms Melina Antoniadis, and Mr Mitchell Lennan.

Mr President, I would ask that you now give the floor to Ms Khadeeja Shabeen, Deputy Attorney General of the Maldives, who will give the closing statement on behalf of the Maldives, after which the Agent will deliver a brief conclusion and read the final submissions.

[44] ITLOS/PV.20/C28/3, p. 12, lines 17–23 (Mr Sands).
[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Oral Proceedings, 12 December 2019, CR 2019/20 pp. 29–30 (para. 3) (Supplementary Judges' Folder, Tab 10).

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akhavan. I now give the floor to Ms Khadeeja Shabeen to make her statement.

**MS SHABEEN:** Mr President, honourable Members of the Special Chamber, honourable Agent and members of the delegation of the Republic of Mauritius, it is an honour to address you to present the Maldives' closing statement in this hearing on preliminary objections.

You have heard during the Agent's opening statement that the Maldives has a steadfast commitment to upholding international law. The rules contained in the United Nations Convention on the Law of the Sea, including the rules on the peaceful settlement of disputes, are of particular importance to us as a small island State. We have the highest regard for the International Tribunal for the Law of the Sea and for this Special Chamber. Our long journey from the Maldives to participate in these proceedings, in the midst of the pandemic, is an expression of that respect. We are pleased to have had the opportunity to observe the workings of this Tribunal in this impressive courtroom.

The Maldives also has the highest regard for the International Court of Justice. We are fully committed to the principle of self-determination as repeatedly expressed in our statements before the United Nations General Assembly. For that reason, we have read and considered carefully the implications of the Court's Chagos Archipelago Advisory Opinion.

As you have heard from the Agent and from Counsel for Mauritius, we do not agree with Mauritius that the Special Chamber can exercise jurisdiction on the basis of that Advisory Opinion or the resolution of the General Assembly which followed it. We do not agree that Mauritius' sovereignty dispute with the United Kingdom over the Chagos Archipelago has been definitively resolved.

We look forward to the day when Mauritius and the United Kingdom will finally resolve this dispute and bring to an end this chapter in their bilateral relations. That day would allow the Maldives to conclude an agreement on maritime delimitation without any impediments. But the time is not now, and the forum is not this Special Chamber.

Mr President, the Maldives has no dispute with Mauritius. It is deeply unfair that we have been accused of aiding and abetting colonialism. It is deeply offensive for Mauritius' Counsel to refer to the Maldives as parroting the words of others. We trust that the Co-Agent of Mauritius will distance himself from such insulting remarks in the spirit of the dignified and friendly relations that our two nations have long enjoyed.

The Maldives is a small but proud island nation of some 500,000 people in the midst of the Indian Ocean. Our ancient and resilient people have survived and prospered over 2,500 years of history. Today, we face existential challenges — in particular, rising sea levels that fundamentally threaten our security and development. It is our wish to maintain friendly relations with both Mauritius and the United Kingdom; we do not wish to be forced into the middle of a dispute between them. That is entirely reasonable both as a matter of foreign policy as well as international law. There was

no need for Mauritius to rush into these adversarial proceedings. The Maldives cannot resolve the sovereignty dispute over the Chagos Archipelago.

Mr President, all that we ask is that the Special Chamber respect the limits of its jurisdiction in accordance with settled jurisprudence. All we ask is that the Chamber respect the intention and expectations of UNCLOS States Parties. The exploitation of the UNCLOS compulsory procedures for harassment and intimidation does not achieve the high purposes for which such procedures were created. It sets a deeply unfortunate precedent in the eyes of the international community.

The Maldives continues to have the highest respect for ITLOS and the Special Chambers constituted under its auspices. On that note, I would like to take this opportunity to thank you, Mr President, Members of the Special Chamber, the Registry, the Tribunal staff, the translators and the court reporters, for your consideration and assistance in these proceedings, especially in the challenging circumstances of the COVID-19 pandemic.

Mr President, honourable Members of the Special Chamber, this concludes the Maldives' closing statement. I now ask that you give the floor to the Agent of the Maldives to make some final remarks and to present the Maldives' final submissions.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Ms Shabeen. I understand that the Agent of the Maldives will now make closing remarks and present the final submissions of the Maldives. I wish to recall that article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Agent of the Maldives, Mr Riffath, to take the floor to present the final submissions of the Maldives.

**MR RIFFATH:** Mr President, honourable Members of the Special Chamber, this brings to an end the Maldives' oral pleadings in this hearing on preliminary objections. As expressed by the Deputy Attorney General Ms Shabeen, the Maldives has no dispute with Mauritius. All that divides us is a difference of views on whether the ICJ Advisory Opinion definitively resolved the sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago. We have explained why that question falls outside the jurisdiction of this Special Chamber. We trust that you will uphold the boundaries of jurisdiction conferred under UNCLOS consistent with international law.

Before we close this hearing, I must emphasize our sincere wish to maintain friendly and constructive relations with our brothers and sisters in Mauritius. In that spirit, we hereby invite Mauritius, if it so wishes, to enter into discussions with the Maldives, to explore whether our differing views on the ICJ Advisory Opinion could be submitted for the ICJ itself to decide. We also remain open to considering any other means of cooperation that Mauritius may wish to propose.

Mr President, honourable Members of the Special Chamber, I take this last opportunity to thank you and the Registry for the courtesy and diligence with which these proceedings have been conducted.

I shall now read the final submissions of the Republic of Maldives:

In accordance with article 75, paragraph 2, of the Rules of the Tribunal, and for the reasons set out during the written and oral phases of the pleadings, the Republic of Maldives requests the Special Chamber to adjudge and declare that it is without jurisdiction in respect of the claims submitted to the Special Chamber by the Republic of Mauritius. Additionally or alternatively, for the reasons set out during the written and oral phases of the pleadings, the Republic of Maldives requests the Special Chamber to adjudge and declare that the claims submitted to the Special Chamber by the Republic of Mauritius are inadmissible.

**THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Riffath. This completes the second round of the oral arguments of the Maldives. The hearing will resume on Monday at 2 p.m. to hear Mauritius' second round of pleading. The sitting is now closed.

(*The sitting closed at 4.32 p.m.*)