INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2020

Public sitting

held on Monday, 19 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

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

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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as Agent;

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

as Co-Agent;

and

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

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and

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

as Representatives;

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

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber meets this afternoon to hear the second round of oral argument of Mauritius on the preliminary objections of the Maldives.

I shall now give the floor to Mr Pierre Klein, who is connected via video link, to make his statement. You have the floor, sir.

MR KLEIN *(Interpretation from French)***:** Mr President, Members of the Special Chamber, at this stage in the proceedings it is clear that two key questions still divide the Parties. The first is the question of the precise content of the Advisory Opinion of February 2019 on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Mr Reichler's statement will address this question and he will highlight the numerous omissions in the reading of the Opinion that the Maldives offered you the day before yesterday. Mr Reichler will show to what extent the Maldives' position – that the Opinion does nothing to resolve the question of sovereignty over the Chagos Archipelago – is indefensible. The second key question is the question of the legal effects of the 2019 Opinion. Mr Sands will revisit this question in detail and demonstrate that the particularly formalistic analysis of it given by our opponents on Saturday completely ignores the fact that the Court clearly identified the international obligations incumbent on the United Kingdom in this context. Mr Sands will also revisit the consequences of the Court's rulings in terms of the present case. Finally, the Co-Agent of the Republic of Mauritius, His Excellency Ambassador Koonjul, will make some concluding remarks and present the submissions of the Republic of Mauritius. It is understood that only the main issues which still separate the Parties at this juncture will be dealt with today. The fact that certain more specific points raised by our opponents the day before yesterday will not be addressed in the following presentations in no way constitutes an admission of their merit.

However, to begin, allow me to return to the third, fourth and fifth preliminary objections raised by the Maldives. I will do this fairly succinctly because the summary fashion in which they were dealt with by our opponents during their second round of oral argument clearly shows that they attach only minor importance to them and that they are not the centre of gravity of our proceedings. I will therefore touch *seriatim* on the question of the existence of a dispute between the Parties, the question whether that dispute was capable of being resolved by negotiations and the question of the possible existence of an abuse of process in this case. Lastly, I will present to you the Republic of Mauritius' response to the first of the questions that were addressed to the Parties by the Special Chamber.

First of all, then, is there a dispute between the Parties regarding the extent and the delimitation of their maritime areas? Mr Akhavan attempted to convince you the day before yesterday that this was not the case. It matters little, he said, whether or not the term "potential" was conjoined to the term "overlap" in the diplomatic exchanges between the Parties in 2010-2011, because the overlap was unspecified.[1] That was quite evidently not the Maldives' position during the first round of oral argument,

[1] ITLOS/PV.20/C28/5 (17 October 2020), p. 24, lines 7-8 (Mr Akhavan).

where the utmost importance was given to this qualifier,[2] which now suddenly seems irrelevant. Well, we can understand the significance that our opponents attached to it initially since, according to their reading of the exchanges between the Parties at that time, the presence of this term allowed them to assert that the two States had not recognized the existence of areas of real overlap between the maritime areas which they each claimed. But, with all due respect to Mr Akhavan, words are important and the fact that the Parties referred time and again to this overlap – real and not potential – shows that they were clearly aware of the fact that their claims were incompatible.

Mr Akhavan presented an equally problematical reading of the diplomatic note sent by the Republic of Mauritius to the Secretary-General of the United Nations in March 2011. According to him, it was irrelevant because it did not specify the disputed area and thus allegedly prevented it from being identified with sufficient clarity.[3] However, even supposing that this were a condition for the existence of a dispute, which is highly arguable, that condition is met in this case. To remind you, this note follows the claim for an extended continental shelf submitted by the Maldives to the Commission on the Limits of the Continental Shelf. The Republic of Mauritius was stirred by this, informing the Maldives that this claim did not take into consideration the coordinates of Mauritius' exclusive economic zone. The Maldives undertook to take those coordinates into consideration and to rectify its claim, which, in the end, it never did; and it was in reaction to this failure that Mauritius made its protest to the United Nations, stating that

> the Extended Continental Shelf being claimed by the Republic of Maldives encroaches on the Exclusive Economic Zone of the Republic of Mauritius, the coordinates of which were communicated to the Secretary-General in a Note dated 20 June 2008.[4]

Even if it were assumed that the extent of the area of overlap resulting from the Parties' opposing claims must be specified for a dispute to be deemed to exist, which the Republic of Mauritius does not think to be the case, all the ingredients were thus present, from that moment, in order to determine precisely the contours of the area of overlap.

In any event, the key point is that this note constitutes a protest made in due form in response to a claim expressed by the other Party. Mr Akhavan alleged the contrary.[5] Evidently, for him, a claim submitted by a State to the Commission on the Limits of the Continental Shelf has nothing to do with the expression of that State's claims over the maritime areas concerned and a protest made by another State against that claim does not constitute a rejection of that claim. Undoubtedly, George Orwell is the go-to author in these proceedings, since the vision presented by Mr Akhavan makes one inescapably think of those societal slogans in vogue described in the novel *1984*: "War is peace" or "Freedom is slavery". But, very thankfully, we are not in

[2] ITLOS/PV.20/C28/1 (13 October 2020), p. 12, line 31 (Mr Akhavan); ITLOS/PV.20/C28/2 (13 October 2020), p. 34, lines 14-20, and p. 29, lines 5-6 (Ms Hart); ITLOS/PV.20/C28/2 (13 October 2020), p. 34, line 41 (Mr Akhavan).
[3] ITLOS/PV.20/C28/5 (17 October 2020), p. 24, lines 10-11 (Mr Akhavan).
[4] 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 (Preliminary Objections, Annex 27).
[5] ITLOS/PV.20/C28/5 (17 October 2020), p. 23, lines 12-13 (Mr Akhavan).

1984, and in 2020, as in 2011, the verb "protest" still means "protest", that is to say, "to express one's opposition in words or in writing".[6]

I would further add that Mr Akhavan's argument that there could be a dispute between the Parties if only it arose after the ICJ recognized that the United Kingdom had no title over the Chagos Archipelago[7] is entirely without merit. The Court clearly found that the separation of Chagos was not consistent with international law when it took place in 1965 and that those islands have, at all times, continued to be part of the territory of the Republic of Mauritius. That was clearly also the case in 2010-2011, when the exchanges to which I have just referred took place. Moreover, the two States were fully aware, at that time, of the existence of conflicting claims over the maritime areas at issue, and they considered that they alone were competent to find a solution. I will return to this point in a while. The documents in the case file show full well that in this case the constitutive elements of a dispute are manifestly present and that the preliminary objection raised by the Maldives on this point must therefore be rejected.

In his oral statement on Saturday, Mr Akhavan repeated the Maldives' argument about the purported absence of prior negotiations between the Parties, which prevented recourse to the means of dispute settlement laid down in Part XV of the Convention on the Law of the Sea. According to those arguments, nothing resembling negotiations took place in 2010 and no negotiations worthy of that name were held in 2019, given the period of only four months between the Advisory Opinion and the initiation of these proceedings by the Republic of Mauritius.[8] I will come back shortly to the first of these arguments in my reply to the first of the questions addressed to the Parties by the Special Chamber. For the time being, I would like to point out in particular something that was blatantly absent from Mr Akhavan's reply, namely the refusals and silences from the Maldives in response to the efforts made by the Republic of Mauritius to resume, from 2011, the negotiations which had begun in 2010.

Contrary to the contention made by Mr Akhavan, Mauritius in no way "rushed" to bring about the judicial settlement of its dispute with the Maldives.[9] I would mention in this regard that a request to resume negotiations was sent by Mauritius to the Maldives in March 2019; there was no response. Astonishingly, Mr Akhavan did not say anything about this, just as he said nothing about the jurisprudence to which I have referred in this past week, according to which a party's refusal to engage in negotiations led to the conclusion that the obligation to negotiate was exhausted. Your Tribunal is not the only one to say this. Just recently, the International Court of Justice held that it had

> found that a negotiation precondition was satisfied when the parties' "basic positions ha[d] not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings.[10]

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[6] Larousse dictionary (at line: https://www.larousse.fr/dictionnaires/francais/protester/64554).
[7] ITLOS/PV.20/C28/5 (17 October 2020), p. 27, lines 32-34 (Mr Akhavan).
[8] ITLOS/PV.20/C28/5 (17 October 2020), p. 24, lines 21-26 (Mr Akhavan).
[9] ITLOS/PV.20/C28/5 (17 October 2020), p. 31, lines 1-2 (Mr Akhavan).
[10] *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),*

Quite clearly, that is also the situation in our case. The Maldives' position has not evolved, either before or after the first few months of 2019, and the present dispute is clearly not one which can be resolved by negotiation. There is nothing in the statements made by the Maldives this Saturday that allows a different conclusion to be reached, and this fully justifies the rejection of this preliminary objection raised by the other Party in this regard.

I shall now turn very briefly to the last of the preliminary objections raised by the Maldives, that is, the one relating to abuse of process. On this, Mr Akhavan merely said that, if the Special Chamber were to exercise its jurisdiction in our case, this would mean that it must necessarily find that Mauritius was the coastal State concerned,[11] to the exclusion of the United Kingdom. To be honest, it is difficult to see how this constitutes the "exceptional circumstance" which is required to be able to talk about an abuse of process, so I will not dwell on this question any further. This last objection raised by the Maldives, hardly touched upon during their second round of oral pleadings, clearly cannot be upheld.

Allow me then to give you the Republic of Mauritius' response to the first question addressed to the Parties by the Special Chamber. The question reads as follows:

> What were the legal considerations of the Parties in holding the first meeting on maritime delimitation and submission regarding the extended continental shelf of 21 October 2010 and in agreeing to "make bilateral arrangements on the overlapping area of the extended continental shelf of the two States around the Chagos Archipelago" in the joint communiqué of 12 March 2011?

This question refers to two separate stages in the exchanges that took place between the Republic of Maldives and the Republic of Mauritius on the delimitation of their maritime boundaries. These two documents, nearly five months apart, clearly reflect the momentum behind the two States at that time with a view to arriving at an agreement on the delimitation of their maritime boundary.

In the view of the Republic of Mauritius, the legal considerations of the Parties to which these initiatives responded were threefold. The first legal consideration is the fact that the two States did indeed consider that it was up to them, and them alone, to engage in this process in order to reach agreement on the delimitation of their maritime areas. It is with this in mind that the Maldives approached Mauritius at the start of 2010 to propose opening discussions on the delimitation of the exclusive economic zones of the two States.[12] It was therefore clear as of then that the Maldives identified Mauritius as being the coastal State concerned, with which to commence discussions on the delimitation of their maritime areas. Similarly, the minutes of the meeting in October 2010 state that the head of the Mauritian delegation had said that it was "quite appropriate for the Maldives and Mauritius to

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Judgment, para. 93*,* citing *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II),* p. 446, para. 59 and (II), p. 446, para. 59 and *Immunities and criminal proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 317, para. 76.

[11] ITLOS/PV.20/C28/5 (17 October 2020), p. 24, lines 33-35 (Mr Akhavan).

[12] Letter from the Hon. Dr Arvin Boolell, Minister of Foreign Affairs, Regional Integration and International Trade to H.E. Dr A. Shaheed, Minister of Foreign Affairs, Republic of Maldives, 2 March 2010, Written Observations of the Republic of Mauritius, Annex 11.

discuss boundary delimitation."[13] This assertion was never called into question at the time by the Maldives. To the contrary, the Maldives Minister of Foreign Affairs confirmed his agreement that both sides would work jointly on the area of overlap. Similarly again, the Joint Communiqué of March 2011 clearly shows that, in the eyes of both Parties, this was a matter which they were fully competent to resolve definitively and exclusively. The two States thus identified each other as being the competent parties to resolve this question as the coastal States concerned.

Secondly, these exchanges reflect the recognition by the Parties of the existence of opposing claims in respect of the maritime areas concerned, and therefore of a dispute on this point. It is this recognition that led the Parties to begin a negotiation process on this subject and to organize a first meeting to that end in October 2010. As I have just mentioned, the Maldives Minister of Foreign Affairs agreed then that the Parties should work jointly on what he identified himself as being an area of overlap.[14] The terminology is the same in the Joint Communiqué of March 2011, which mentions the overlapping area of the two States' extended continental shelves around the Chagos Archipelago.[15] Taken together, these two documents are therefore testimony to both the existence of a disagreement between the Parties regarding the extent of their respective maritime areas and the fact that the two States were fully aware of the existence of this overlap arising from their respective claims.

The third legal consideration that is apparent from this process is a demonstration of the fact that the Parties were faced with a question which they felt they could resolve through negotiation. In the minutes of the meeting in October 2010, mention is made of the statement made by the Maldives Minister of Foreign Affairs, pointing out that the Maldives Maritime Zones Act provided for the need to find a solution through negotiations, on the basis of international law, to situations where there was an overlap.[16] With this in mind, both Parties agreed in October 2010 to exchange coordinates of their respective basepoints as soon as possible in order to facilitate the eventual discussions on the maritime boundary.[17] The Joint Communiqué of March 2011 highlights the ultimate aim which the Parties intended to achieve at the end of this negotiation process, namely to conclude one or more agreements.[18]

I hope that this response is enlightening for the Special Chamber, and I would like to thank you, Mr President, Members of the Special Chamber, for your kind attention. I would now ask you, Mr President, to give the floor to my esteemed colleague, Mr Paul Reichler.

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[13] "[Q]uite appropriate for Mauritius and Maldives to discuss boundary delimitation".
[14] "He also agreed that both sides will work jointly on the area of overlap".
[15] "[T]he overlapping area of extended continental shelf of the two States around the Chagos archipelago".
[16] First Meeting on Maritime Delimitation and Submission Regarding the Extended Continental Shelf Between the Republic of Maldives and Republic of Mauritius, 21 October 2010 (Written Observations of Mauritius, Annex 13) ("[…] the Maldives Maritime Zones Act provides for the principle of a 200M EEZ where there is no overlap and in areas where there is an overlap with another State can be resolved through negotiations on the basis of international law").
[17] "Both parties have agreed to exchange coordinates of their respective base points as soon as possible in order to facilitate the eventual discussions on the maritime boundary".
[18] "Both leaders agreed to make bilateral arrangements on the overlapping area of extended continental shelf of the two States around the Chagos archipelago."

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Klein. I now give the floor to Mr Paul Reichler, who is connected by video link, to make his statement. Mr Reichler, you have the floor.

MR REICHLER: Mr President, Members of the Special Chamber, good afternoon.

As I did last Thursday, I will address the Maldives' argument that the ICJ left the question of sovereignty over the Chagos Archipelago unresolved and that, as a consequence of this allegedly unresolved sovereignty dispute, the United Kingdom is an indispensable party whose absence from these proceedings deprives you of jurisdiction. To avoid repetition, I will respond today only to what the Maldives said in their second round on Saturday, and I will focus especially on whether sovereignty over Chagos has been settled by the ICJ as a matter of international law. This is the core issue on which the Maldives' first two preliminary objections depend.

Before addressing this issue, as a preliminary matter, I would like to very briefly call your attention to the letter you received from the Co-Agent of Mauritius this morning. It responds to the regrettable and wholly unjustified personal attack that was made by the Agent of the Maldives in his letter to the Tribunal of 16 October, and then picked up by Professor Akhavan in his closing argument on Saturday.[1] As our response makes clear, together with the accompanying emails, Mauritius has firmly rejected the allegation that any breach of confidential communication occurred or that any false or incorrect statement was made by its Counsel. It is the fact that the Maldives refused to take this case to the ICJ, and we are entitled to express our view, which is obvious in any event, as to why they are afraid to bring their preliminary objections in that Court.

Mr President, apart from its indecency, the Maldives' personal attack is an unfortunate reflection of Counsel's approach to the core issues in this case. They take the same approach to the ICJ's Advisory Opinion as they do to the email exchanges between the Parties: they are selective, placing reliance on one or another phrase or paragraph, pulling it out of context, and ignoring that which follows or is contradictory. The Maldives' partial presentation of emails, like its partial discussion of the Advisory Opinion, are like directing a performance of Macbeth, and then ending it immediately after he becomes king in Act 2. But just as Macbeth suffers a horrible fate at the end, so do all of their arguments in these proceedings.

In respect of the Advisory Opinion, Professors Akhavan and Thouvenin have now, by their silence, confirmed all of the key points Mauritius made on Thursday. They continue to refuse to engage with the text of the Opinion. We challenged them on this on Thursday. They had a chance to respond, and to provide us finally with their own textual analysis of the ICJ's Opinion on Saturday. But they did not. Again, they ran away from the actual text of the Opinion as fast and as far as they could. There is still no textual analysis from the Maldives, let alone one that even remotely supports their thesis that the ICJ, somehow, decided to leave the matter of sovereignty over Chagos unresolved.

[1] ITLOS/PV.20C28/5, p. 28, lines 16-32 (Mr Akhavan).

Professor Akhavan read again from the only two paragraphs of the Opinion that he cited in the first round, paragraphs 86 and 136.[2] Finding nothing else in the Opinion to his liking, he quoted not another word from it. Eager for something to say, he read from the concurring opinions of two of the judges. They do not help the Maldives at all. I will come back to them in a moment.

Professor Thouvenin said even less about the actual text of the Court's Opinion. In fact, he said absolutely nothing, again. He had two turns at bat, and he struck out looking both times. No mention of even a single sentence of the Court's Opinion. Counsel's silence on the language of the Opinion speaks loudly. The language does not support their interpretation of it, otherwise you would have heard it.

Let me recall for you, briefly, the critical language with which they chose not to engage. Let's go right to the heart of things. Let us look at exactly the language they have no answer for regarding whose territory the Chagos Archipelago actually is at paragraph 173:

> The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago.[3]

As a consequence, at paragraph 177:

> it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State

which is

> an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.[4]

And finally, at paragraph 178:

> Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.[5]

What did the Maldives have to say to you about these three paragraphs? Not a single word. It completely ignored these fundamental elements of the Court's Opinion, the text where the Court determines, as a matter of international law, that the Chagos Archipelago belongs to Mauritius and not the UK. There is not a single word, in either of their two rounds of argument, about any of this. Could there

[2] ITLOS/PV.20C28/5, p. 2, lines 10-17 (Mr Akhavan).
[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion of 25 February 2019, I.C.J. Reports 2019,* para. 173.
[4] Ibid., para. 177.
[5] Ibid., para. 178.

possibly be a more powerful admission by omission, on the part of the Maldives, that these legal determinations by the Court completely destroy their argument that the Court left sovereignty over Chagos unresolved?

How do they explain or interpret the language in paragraph 173, that the UK is required to respect the territorial integrity of Mauritius, "including the Chagos Archipelago", other than as an affirmation by the Court, as a matter of law, that the Chagos Archipelago is an integral part of Mauritius, over which Mauritius alone can be sovereign? They do not. That is because there is no explanation or interpretation except for the one we have put to you.

How do they explain or interpret the language in paragraph 177 that the UK's administration of Chagos is a "wrongful act" entailing the UK's international responsibility, and an "unlawful act of a continuing character" arising from the unlawful detachment of Chagos from Mauritius, except as a determination, under international law, that the UK has neither sovereignty nor even any lesser rights of administration in respect of the Archipelago? They do not, because they cannot. There is no other explanation or interpretation.

And finally, how do they explain or interpret the language in paragraph 178 that the UK is obligated to terminate its unlawful administration as rapidly as possible so that Mauritius can complete the decolonization of "its territory"? Again, silence. Again, no other explanation or interpretation is possible. If Chagos is Mauritius' territory, as this paragraph plainly states, then it is not the UK's territory and only Mauritius, and not the UK, can be sovereign under international law. This is an indisputable proposition, and the Maldives makes no effort to dispute it.

To the contrary, they dispute none of these legal determinations by the Court. In fact, they have admitted, explicitly, that the Court's Opinion is both correct and authoritative.[6] What the Court said, according to them, is a matter of interpretation, but their interpretation, which ignores the text, makes no sense. It cannot be reconciled with the Court's actual legal findings. In any event, there is not much room for interpretation here. There is only one way to interpret the words "its territory", in paragraph 178: "its" unmistakably refers to Mauritius and "territory" indisputably refers to Chagos. They have no answer for this.

In the second round, Counsel for the Maldives completely abandoned their earlier attempt to reconcile their argument with the text. You will recall that, in the first round, Professor Akhavan insisted that the Court decided that Chagos was an integral part of Mauritius only in 1965, but not thereafter.[7] On Thursday, we pointed to at least three places in the Opinion where the Court referred to Chagos as an integral part of Mauritius after 1965 as "its territory", right up to the present time.[8]

Professor Akhavan had no response on Saturday. He did not deign to make his discredited argument again. What this means is that they now concede – as they are bound to – that the Court determined, as a matter of international law, that the Chagos Archipelago has always been, and remains, an integral part of Mauritius, not

[6] Written Observations of the Republic of Maldives (15 April 2020), para. 4.
[7] ITLOS/PV.20C28/2, p. 15, lines 36-38 (Mr Akhavan).
[8] ITLOS/PV.20C28/4, pp. 8-9 (Mr Reichler).

just in 1965, but today. This means, also as a matter of international law, that only Mauritius can be sovereign over territory that is, and always has been, its own. Does the Maldives really hope to convince you that there is an unresolved dispute over whether Mauritius is sovereign over what the Court has determined, as a matter of law, to be its own territory?

Instead of grappling with the Court's determination of the law, they fall back in the second round on the same wrong argument that they made in the first. In both rounds, they retreated to paragraph 86 of the Court's Opinion, and tried to read into it more than it says. The flaw lies in their attempt to conflate, and treat as one, two very different aspects of the Opinion. These are: first, the Court's consideration of whether it was asked questions relating to a pending bilateral dispute that has not been consented to by the States involved, such that it should exercise its discretion not to answer them, which is what paragraphs 83 through 91 are about; and second, the answers the Court gave to those questions, including, especially, the legal consequences arising from the UK's unlawful detachment of the Chagos Archipelago, which are at paragraphs 139 to 182, and which the Maldives completely ignores.

As we explained on Thursday, what paragraph 86 and the following paragraphs in that section make clear, is that the Court carefully distinguished between, on the one hand, a purely bilateral territorial dispute, one that is unrelated to decolonization, which it would not attempt to resolve absent the consent of both parties; and on the other hand a dispute about the lawfulness of decolonization, which would be an appropriate subject of an Advisory Opinion, even if it required the Court to address other related legal issues that inevitably arise within the broader framework of decolonization.[9] In paragraph 86, the Court found that the questions submitted by the General Assembly did not concern a purely bilateral territorial dispute, but one related to decolonization, and that it therefore could and should answer the UNGA's questions, notwithstanding that its answers would inevitably require it to pronounce upon, what it called in subsequent paragraphs, other legal issues in dispute between Mauritius and the UK which were inseparable from decolonization.

This was plainly not a determination by the Court to avoid issuing an Opinion having legal implications for sovereignty over Chagos. To the contrary, as the Court made clear in paragraphs 88 and 89:

> The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable.[10]

And:

> the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom

[9] ITLOS/PV.20C28/4, pp. 3-4 (Mr Reichler).
[10] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion of 25 February 2019, I.C.J. Reports 2019,* para. 88.

> does not mean that, by replying to this request, the Court is dealing with a bilateral dispute.[11]

Thus, in this section of the Opinion, the Court made clear that it understood and intended that, by answering those questions, it would necessarily be addressing other legal issues related to the status of Chagos, and that this would indeed be an appropriate exercise of its advisory jurisdiction. Then, in subsequent sections of the Opinion, at paragraphs 139 to 182, it went ahead and answered those questions.

Paragraph 136, which was the only other part of the text mentioned by Professor Akhavan on Saturday, is of no greater help to him than paragraph 86. It reiterates the Court's conclusion, previously expressed in paragraphs 86 to 89, that it should answer the questions because they "fall within the framework … of decolonization of Mauritius" and therefore for this reason the UNGA "did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius." In fact, paragraph 136 is quite unhelpful to the Maldives. Professor Akhavan stopped reading it before its conclusion:

> the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States.[12]

As we know, the Court then concluded at paragraphs 173-178 that these legal consequences included binding obligations under international law for the UK and for other States.

The Separate Opinions of Judges Iwasawa and Gevorgian, which Professor Akhavan mentioned on Saturday, do not say anything different. They do not carry the meaning that the Maldives would attribute to them. Rather, they elaborate on, and clarify, the Court's decision to answer the General Assembly's questions. Their Opinions underscore the difference between the Chagos case, which they both recognized was about decolonization, and, on the other hand, a purely bilateral territorial dispute unrelated to decolonization. Because this case was about decolonization, and it was not, in their view, a bilateral territorial dispute, they agreed that the questions should be answered.

Professor Akhavan might have provided greater clarity on the Court's Opinion, had he referred to the Separate Opinion of Vice-President Xue. On this very issue, she wrote:

> 4. It is not uncommon that the questions submitted to the Court in advisory proceedings involve a bilateral dispute. As the Court pointed out in the *Namibia* Advisory Opinion, "[d]ifferences of views among States on legal issues have existed in practically every advisory proceeding" … . According to the consistent jurisprudence of the Court, the fact of a pending bilateral dispute, by itself, is not considered a compelling reason for the Court to decline to give an advisory opinion. What is decisive is the object and nature of the request. That is to say, the Court must examine whether the questions put to the Court

[11] Ibid., para. 89.
[12] ITLOS/PV.20C28/5, p. 2, lines 10-17 (Mr Akhavan).

> by the General Assembly concern issues located in a broader frame of reference than the settlement of the dispute …
>
> …
>
> 5. In the present proceedings, the Court determines that the questions submitted by the General Assembly relate to the decolonization of Mauritius, a subject matter which is of particular concern to the United Nations … The Court considers that the fact that the Court may have to pronounce on legal issues disputed between Mauritius and the United Kingdom does not mean that, by replying to the Request, it is dealing with a bilateral dispute. It therefore does not consider that to give the requested opinion would have the effect of circumventing the principle of consent.[13]

Vice-President Xue then states that she concurs with all of these conclusions, and the full Opinion of the Court.[14]

Mr President, in determining the lawfulness of the decolonization of Mauritius, it was unavoidable that one of the legal issues on which the Court would have to pronounce was the sovereignty over the Chagos Archipelago. The end result of decolonization is the divesting of sovereignty from the colonial power and its assumption by the newly independent State. This is black-letter law. In the first round we quoted the representative of Zambia, and the Max Planck Encyclopaedia of International Law to this effect.[15] With this understanding of the relationship between decolonization and sovereignty in mind, it cannot be disputed that the ICJ pronounced on and settled the sovereignty issue in respect of Chagos when it settled the decolonization issue by concluding, as a matter of law, that Chagos is an integral part of Mauritius, such that its detachment by the UK was unlawful, and that, as a consequence, lawful decolonization had not been completed.

The Maldives attempts to derive some solace from the fact that the Court did not explicitly state that decolonization subsumes the issue of sovereignty. They season this assertion with the factually false contention that Mauritius invited the Court to make this express statement, and the Court rejected Mauritius' invitation.[16] But what we argued was that the Court's decision on decolonization would necessarily determine the sovereignty issue, as did the UK and many other participants in the proceedings, including, as you have seen, India and Zambia. But we never asked the Court to make a specific finding to the effect that "decolonization subsumes sovereignty". What we asked was that the Court find that, because the Chagos Archipelago is an integral part of Mauritius and was unlawfully detached from it, the decolonization of Mauritius was not lawfully completed, and, in regard to legal consequences, we asked the Court to declare the UK's ongoing administration unlawful and to find that the UK is obligated by international law to terminate it immediately. And that is exactly what the Court determined, except, instead of immediately, it found that the UK was obligated to terminate its unlawful administration "as rapidly as possible". There was no rejection of any of Mauritius' contentions.

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[13] Declaration of Vice-President Xue, para. 5 in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion of 25 February 2019, I.C.J. Reports* 2019.
[14] Ibid*.,* para. 6.
[15] ITLOS/PV.20C28/4, pp. 5-6 (Mr Reichler).
[16] ITLOS/PV.20C28/5, p. 4, lines 29-34 (Mr Akhavan).

The Maldives suggests that there was a rejection of our request that, during whatever amount of time is given to the UK to terminate its unlawful administration, it should be obligated by the Court not to interfere with Mauritius' exercise of sovereignty over Chagos, including by negotiating a maritime boundary agreement with the Maldives.[17]

Here again, the Maldives is wrong. The Court did not reject our request; it mooted it, by finding that the termination should take place as rapidly as possible and delegating to the General Assembly the task of determining the modalities for the termination. The General Assembly then determined that it should take place within a maximum of six months – by November 2019 – and further resolved that no State should delay or impede the completion of the decolonization process. The resolution thus prohibits the UK from impeding Mauritius' effort to negotiate a maritime boundary with the Maldives, and it prohibits the Maldives from invoking the UK's sovereignty claim to delay such negotiation.

The Maldives continue to invoke the Court's *Western Sahara* Opinion as precedent for the Court's alleged separation of matters of decolonization from matters of sovereignty, and its alleged refusal to address sovereignty issues in its Opinions on decolonization. We pointed out the Maldives' error in this reading of *Western Sahara* on Thursday.[18] On Saturday, Professor Akhavan read certain passages in that Opinion where the Court indicated it would not consider the question of Spain's sovereignty over the disputed territory, and he called me out for my alleged failure to address these passages.[19] But this argument is a red herring and another example of their highly selective reading of all texts. What Counsel for the Maldives fails to mention is that Spain, which was the administering power, was no longer making any claim of sovereignty over Western Sahara. In contrast, Morocco was.

The real failure here is Professor Akhavan's refusal to address what the Court said about Morocco's claim of sovereignty, which is all the more glaring because the language comes directly out of the Maldives' own written pleadings:

> the ICJ's opinion on historical sovereignty was explicit: the evidence did not establish "any legal tie of sovereignty between Western Sahara and the Moroccan State."[20]

Thus, the Court did address, and resolve in the negative, Morocco's claim of sovereignty over Western Sahara. So much for their argument that the ICJ does not settle issues of sovereignty within its Advisory Opinions on decolonization.

I mentioned earlier Professor Thouvenin's failure to quote or cite even a single phrase from the ICJ's Opinion in support of any of his arguments. This is a particularly revealing omission, especially because he was tasked by the Maldives to make the argument that there is nothing legally binding in the Opinion. Avoiding engagement with the text of the Opinion serves him well because, if he had engaged

[17] ITLOS/PV.20C28/5, p. 5, lines 9-21 (Mr Akhavan).
[18] ITLOS/PV.20C28/4, p. 16, line 35 - p. 17, line 10 (Mr Reichler).
[19] ITLOS/PV.20C28/5, p. 4, lines 5-18 (Mr Akhavan).
[20] Written Observations of the Republic of Maldives (15 April 2020), para. 59.

with it, he might have had to explain the Court's explicit legal findings on the "obligations" borne by the UK and other States, including the Maldives.

As you have already seen in paragraph 173, the Court finds that the

> obligations arising under international law … require the United Kingdom, as the administering Power, to respect the territorial integrity of [Mauritius], including the Chagos Archipelago.

In paragraph 178:

> the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible … .

In paragraph 180:

> Since respect for the right of self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right [and] while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.

Mr President, Members of the Special Chamber, since when are "obligations arising under international law" not binding on the States concerned? Professor Thouvenin avoids answering this question by refusing to engage with this critical language or any other language in the Opinion.

His only response is to accuse Mauritius of "inanity".[21] Now, I have been pleading before international courts for nearly 40 years, and insult is rarely an effective form of argument. Neither is condescension. We say, for Professor Thouvenin to refuse to engage, not with us, but with the Court's own language is about as clear an admission as there could be that they simply have no answer to this, no way to reconcile their arguments with what the Court actually said and decided.

Whatever epithets he may send our way, we are in very good company: that of Professors Rosenne, Pellet, Watts, Dugard and Kolb, and Judge Nagendra Singh. I quoted all of them on Thursday.[22] They are unanimous in explaining that the determinations of law in the Court's advisory opinions are as authoritative as they are in its judgments, and that the legal obligations defined in those opinions are binding, even if the advisory opinion per se is not. I will recall today only what Professor Dugard said in respect of the *Wall* case: "While not bound by the Opinion itself, Israel and States are nonetheless bound by the obligations upon which it relies."[23]

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[21] ITLOS/PV.20C28/5, p. 13, line 20 (Mr Thouvenin).
[22] ITLOS/PV.20C28/4, pp. 14-16, 19 (Mr Reichler).
[23] J. Dugard, *Advisory Opinions and the Secretary General with Special Reference to the 2004 Advisory Opinion on the Wall* in International Law and the Quest for Implementation/Le Droit International Et La Quête De Sa Mise En Oeuvre (L. Boisson de Chazournes & M. Kohen eds., 2010), p. 403, at 410.

After hearing from Counsel for the Maldives, it might surprise you to learn that the Maldives itself has recognized the binding nature of the legal obligations set out in the Court's Advisory Opinions. In 2004, the Maldives voted in favour of the General Assembly's resolution adopting and implementing the Advisory Opinion in the *Wall* case, which expressly: "Demands that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion" and "[c]alls upon all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion".[24]

Mr President, from my remarks today, three conclusions inexorably follow: (1) the ICJ's Chagos Opinion is both correct and authoritative on all of the legal issues it addresses; (2) when the Court makes an authoritative determination of a State's obligations under international law, that State is bound, under international law, to comply with those obligations; and (3) in determining, as a matter of international law, that Chagos is an integral part of Mauritius, that the UK's ongoing administration violates international law, and that the UK is obligated under international law to terminate it as rapidly as possible, so that Mauritius could complete the decolonization of its territory, the Court left no doubt that Mauritius is sovereign over the territory.

Accordingly, Mr President, there is absolutely no merit to the Maldives' objections based on the alleged existence of an unresolved sovereignty dispute, or the absence of a party to that non-existent dispute.

Mr President, Members of the Special Chamber, this concludes my presentation this afternoon. I thank you once again for your kind courtesy and patient attention, and I ask that you now call to the podium my dear colleague, Professor Sands.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Reichler. I now give the floor to Mr Philippe Sands to make his statement. You have the floor, sir.

MR SANDS: Mr President, Judges of the Tribunal, the key issue at this stage of the proceedings is the approach that this Tribunal takes to the effects of the ICJ Advisory Opinion. Counsel for the Maldives has conceded that if you give the effect to the Advisory Opinion, as we say you must, the preliminary objections fall away and the Tribunal is free to exercise the jurisdiction that has been accorded to it by both States to delimit their maritime boundary.[1]

I will therefore address the effects of the ICJ Advisory Opinion. I will do so in five points.

Point 1: the Court determined that the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius. In the first round, we told you that the Maldives had failed to explain why it disagreed with this proposition. "Perhaps they will tell us on Saturday", I said to you.[2] Saturday came and went. We listened

[24] United Nations General Assembly Resolution, Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including in and around East Jerusalem, A/RES/ES-10/15 (2 August 2004), paras. 2-3.
[1] ITLOS/PV.20/C28/5, p. 1 (Mr Akhavan).
[2] See for example ITLOS/PV.20C28/3, p. 22 (Mr Sands).

attentively. As Mr Reichler has explained, they said nothing. The words "territorial integrity", and the ICJ's pronouncement on this, barely featured in two rounds of written pleadings, and five and a half hours of oral submissions.

We invited the Maldives to address the ICJ Judges' operative legal determination that the Chagos Archipelago is today a part of the territory of Mauritius: "its territory" are the two words the Court uses at paragraph 178. The Maldives simply ignored our invitation. In so doing, as Mr Reichler has explained, the Maldives has conceded our argument: the Court has indeed made a binding legal determination that, as a matter of international law, the Chagos Archipelago is undisputedly a part of the territory of Mauritius.

With that clear determination by the principal judicial organ of the United Nations, can the matter be said to be in dispute? It cannot. The Maldives may assert, as much as it wishes, in exercise of its right of freedom of expression, that there exists a supposed "unresolved sovereignty dispute" in relation to the Chagos Archipelago, but it cannot escape reality: the Court has found otherwise. It has so found not because any such dispute was referred to it for resolution, but because the matter was embedded in the request made to it in relation to the prior and dominant issue of decolonization. With the conclusive resolution of the decolonization legal issue, the consequential issue of a supposed "sovereignty dispute" simply melts away. As a matter of international law, the International Court of Justice has determined that Mauritius has sovereignty over the Chagos Archipelago. As a corollary, it follows that no other State has sovereignty or can, under international law, claim sovereignty over that territory.

I turn to point 2: the Maldives accepts that the ICJ Advisory Opinion is correct and authoritative. In the first round we brought to your attention what the Maldives told this Tribunal in its written pleadings: the Maldives "does not suggest that the advice rendered by the ICJ in the Chagos Advisory Opinion was wrong or lacking in authority."[3] So, on Saturday, the Maldives had its opportunity to tell this Tribunal that we had misunderstood what it said. Did it do so? No, it did not. The Tribunal is now free to proceed on the basis that it is not in dispute between the Parties that the ICJ got it right, that it acted correctly, and that it acted with authority.

The issue that remains, and the one that divides the Parties, is the effect for this Tribunal of the International Court of Justice's correct and authoritative legal determination that the Chagos Archipelago is an integral part of the territory of Mauritius. In particular, does the Advisory Opinion have implications for the exercise of jurisdiction bestowed on this Tribunal under Part XV of the Convention? The Maldives says that, notwithstanding the Advisory Opinion, this Tribunal cannot exercise its jurisdiction to delimit the maritime boundary between Mauritius and the Maldives.

This brings me to point 3: the International Court of Justice's Advisory Opinion has determined the "law recognized by the United Nations" and international law.

[3] For example ITLOS/PV.20C28/3, p. 7 (Mr Sands) referring to Written Observations of the Republic of Maldives in reply to the Written Observations of the Republic of Mauritius (15 April 2020), para. 4 (emphasis in the original).

The Maldives' argument is, in effect, that this Tribunal should ignore what the ICJ has determined. That is what they are telling you to do. It should do so, Counsel for the Maldives argued on Saturday, for three reasons: (i) "advisory opinions are not binding, even on the organs which request them, let alone on States in a bilateral dispute";[4] (ii) "the correct interpretation of the Advisory Opinion" is "plainly outside the scope of [the Tribunal's] jurisdiction";[5] and (iii) "the United Kingdom substantively disagrees with the Advisory Opinion."[6]

With respect, each of those three arguments is not only wrong, it is hopelessly wrong. It is not supported by any legal authority or commentary whatsoever.

On the first point, Professor Akhavan was contradicted by Professor Thouvenin, who conceded, as he was bound to do, that, actually, contrary to what his colleague said, advisory opinions do have legal consequences and effects. They, in his words, "can of course assist a tribunal to adjudge a dispute", he told you, and they "can be an auxiliary means to determine the rule of law".[7] His point was that they can only do so once the Tribunal's jurisdiction has been established. This was a proposition he put to you without reference to any authority whatsoever – and that is because there is no authority for his proposition, as he well knows. Professor Rosenne recognized that the characteristics of a "statement of law", as he put it, contained in an advisory opinion is not, in his words, "any different from those of the statement of law contained in a judgment."[8] Professor Rosenne, who was a very careful man, did not limit his view to the merits phase of the case, nor could he. An advisory opinion's "statement of law" may be dispositive at any stage of a judicial proceeding – jurisdiction phase, merits phase, preliminary objections phase – any phase. Judge Pawlak knows this far better than I do, for in its 2015 award, in the jurisdiction and admissibility phase of the *South China Sea* case, the Annex VII arbitral tribunal relied on the International Court of Justice's 1988 Advisory Opinion. It referred to that Advisory Opinion as "jurisprudence" under international law, on a par with a judgment in a contentious case;[9] and the Annex VII tribunal found that "two principles follow from this jurisprudence"; and the Annex VII tribunal proceeded to apply the principles to contribute to its findings that it had jurisdiction in relation to that dispute – clear authority.[10] Professor Thouvenin's novel proposition – that an advisory opinion can offer no authoritative "statement of law" to be relied on in addressing preliminary objections in relation to jurisdiction – is totally unsupportable and totally unsupported.[11]

So what is the effect of the ICJ Advisory Opinion in these proceedings? Counsel for the Maldives would have you rush to the conclusion: none whatsoever! They just

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[4] ITLOS/PV.20/C28/5, p.7 (Mr Akhavan).
[5] Ibid.
[6] Ibid.
[7] Ibid., p.14 (Mr Thouvenin).
[8] S. Rosenne, The International Court of Justice: An Essay in Political and Legal Theory (1961), p. 113.
[9] *The South China Sea Arbitration* (*The Republic of the Philippines v. The People's Republic of China*), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 October 2015), paras. 162-3 (invoking Advisory Opinion of the I.C.J. on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947)*.
[10] Ibid., para. 163.
[11] ITLOS/PV.20/C28/5, p.10 (Mr Thouvenin).

want to downplay the effects of an advisory opinion – and not just the Court's but advisory opinions of this Tribunal too. It is not so much, Mr President, Sartre's "*L'être et le néant",* as Thouvenin's "*L'avis consultatif et le néant"*. With respect, the Maldives has fallen into error.

Let us go back to basics, because my propositions are long established in international law. Let us go back to that series of proceedings that the Maldives really does not like. Let us go back to 1956. Let us hear from the British Judge on that Advisory Opinion, one of the great international lawyers of the twentieth century, for whom I have a particular affection: Sir Hersch Lauterpacht. Sir Hersch Lauterpacht was confronted with a situation that was not entirely different from the one that you face: the refusal of South Africa to accept the Court's earlier Advisory Opinion of 1950. In his 1956 Separate Opinion (and he was part of the majority in that case), he identified what he called "principle[s] of law of general import" in relation to "the nature of the régime of the territory of South West Africa".[12] He enunciated the view that the "[1950] Opinion laid down … a régime in the nature of an objective law which is legally operative irrespective of the conduct of South Africa – that status must be given effect except in so far as its application is rendered impossible" because of South Africa's attitude. He goes on: "It is a sound principle of law" that the law should be "applied in a way approximating most closely to its primary object", that it "must be and remain effective"[13] – an effectiveness principle argument for an ICJ Advisory Opinion. He was writing in relation to the regime of South West Africa, but of course his words apply equally to the broader frame of reference of the regime of decolonization. In other words, like South Africa, the continuing refusal of the United Kingdom to accept the 2019 Advisory Opinion cannot be allowed to frustrate its effectiveness.

Let us look in more detail at what Sir Hersch Lauterpacht then went on to say – and these words are rather prescient:

> The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law – a question upon which the Court need not express a view – it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.[14]

Those words – and I would pause to say they were taken up and cited with approval, with a very profound dissent by Judge Tanaka in the 1966 catastrophic case -[15] apply equally in the present matter. The Opinion of 2019 has been accepted and approved by the General Assembly. It is the law recognized by the United Nations. It continues to be so although the Government of the country that is unlawfully administering the Chagos Archipelago has declined to accept it as binding upon it

[12] *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *Advisory Opinion of 1 June 1956, Separate Opinion of Sir Hersch Lauterpacht, I.C.J. Reports 1956*, p. 46.
[13] Ibid.
[14] Ibid., pp. 46-7.
[15] *South West Africa, Second Phase*, *Judgment, I.C.J. Reports 1966*, p. 6, at p. 260.

and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.

Sir Hersch had a little more to say. In his view the principles of law of general import "are that the Opinion of 1950 must be read as a whole", words that Mr Reichler directed to our friends,

> that it cannot be deprived of its effect by the action of the State which has repudiated it; and that the ensuring of the continued operation of the international regime in question is a legitimate object of the interpretative task of the Court.[16]

In our case at this stage the applicable regime includes one that respects the principle of territorial integrity, and its continued operation is, we say, a legitimate object of this Tribunal's "interpretative task".

This brings me to point 4: the Tribunal must apply and give effect to the law recognized by the United Nations and international law.

Mr President, following General Assembly resolution 73/295, the Advisory Opinion has been given immediate effect by the Secretary-General of the United Nations. You saw that, for example, in the new United Nations map, issued in February this year. It showed Chagos as being, without ambiguity, a part of the territory of Mauritius.[17] That reflected the law of the United Nations.

It is not just political organs that take account of Advisory Opinions, however: other international courts do so also. We have directed you to two recent decisions of the Court of Justice of the European Union. In 2016, that Court gave full effect to the International Court's *Western Sahara* Advisory Opinion, as Mr Reichler told you; and last year the same Court gave full effect to the Court's Advisory Opinion on the Wall, in relation to Israel and Palestine, to determine that in the EU products originating from the occupied Palestinian territories could not be identified as coming from Israel.[18] That is reliance on the Court's Advisory Opinion.

On the basis of these two judgments – which both concerned issues of territory and sovereignty – it is entirely reasonable to conclude that if the Court of Justice of the European Union was to receive a question on the status of the Chagos Archipelago, it would follow the same approach, and it would necessarily conclude that it is a part of Mauritius: it is "its territory", as the International Court of Justice determined in paragraph 178. The Maldives did not seek to challenge those two CJEU judgments on the substance. What Professor Thouvenin told you was that it is not an international court. Well, the last time I looked the Court of Justice of the European Union was created by an international treaty to which 27 States are party. It is not an internal court; it is an international court.

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[16] Ibid., p. 49.
[17] ITLOS/PV.20C28/3, p. 23 (Sands); United Nations, *The World* (February 2020), available at: https://www.un.org/Depts/Cartographic/map/profile/world.pdf (last accessed 20 September 2020).
[18] *Organisation juive européenne & Vignoble Psagot Ltd v. Ministre de l'Economie et des Finances,* CJEU Case C-363/18, Judgment (12 November 2019), paras. 35, 48, 56-58.

As I have already noted, an Annex VII arbitral Tribunal – in *South China Sea* – has placed reliance on an ICJ advisory opinion in the jurisdictional phase of a case. Numerous ITLOS Judges have referred to advisory opinions in ITLOS proceedings.[19] ITLOS judges have, in their academic writings, recognized that Advisory Opinions "offer authoritative guidance".[20]

Successive Presidents of this distinguished Tribunal have emphasized the need for coherence, for respect, for comity amongst international courts and tribunals. Back in 2007, for example, President Wolfrum identified the frequent references by ITLOS to "precedents set by [the] Court"; he emphasized this Tribunal's role in creating "mutual respect" and "consistency", and what he called "coherence between general international law and the law of the sea", to "avoid[] fragmentation" and "overcom[e] conflicts of jurisdiction."[21]

For his part, shortly afterwards, President Jesus explained how recourse to "other rules of international law" within the meaning of article 293 had been achieved, as he put it,

> especially by resorting to relevant pronouncements in the case-law of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in order to identify relevant rules of customary law and general principles of law to support its findings and positions.[22]

And you too, Mr President, just last year, speaking in your capacity as President, spoke of the need for "the cohesiveness of the system as [a] whole", of reaching out to the jurisprudence of the International Court to maintain consistency, to reinforce what President Wolfrum had identified as "the necessary coherence between general international law and the law of the sea."[23]

Yet despite all of these authorities, the Maldives says this Tribunal, maybe alone amongst all international tribunals, cannot have regard to the Court's 2019 Advisory Opinion. On their approach, you are not to refer to the law of the United Nations, a part of international law, or give effect to it. Despite the fact that ITLOS was created by the United Nations Convention on the Law of the Sea; despite the fact that the

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[19] See for example *The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Separate Opinion of Judge Ndiaye (28 May 2013), paras. 56, 155; *The M/V "Virginia G" Case (Panama/Guinea-Bissau),* Dissenting Opinion of Judge Ndiaye (14 April 2014), para. 87.

[20] Judge Jin-Hyun Paik, 'Some thoughts on dispute settlement under a new legal instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2019), para. 33.

[21] Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007), p. 7.

[22] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 25 October 2010), pp. 7-8.

[23] Statement by the President of the International Tribunal for the Law of the Sea, H.E. Judge Jin-Hyun Paik, at the 30th Annual Informal Meeting of Legal Advisers in New York (29 October 2019), pp. 3-4, citing Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007).

General Assembly has granted to ITLOS observer status;[24] despite the fact that ITLOS and the United Nations have been bound by an Agreement on Cooperation since 1997; despite the fact that staff employment disputes and pension matters of this Tribunal are addressed by the reference to United Nations rules – despite all of this, they say: 'no', you cannot have regard to United Nations law, as Judge Lauterpacht indicated you can and must.

As though the Maldives has not gone far enough, it goes even further in putting the boot in. This Tribunal cannot address the issue at all, the Agent of the Maldives told you – "but", he said

> we are willing to enter into discussions … to explore whether our differing views on the International Court of Justice Advisory Opinion could be submitted for the International Court of Justice itself to decide.[25]

What a curious offer! So, ITLOS cannot decide that it has jurisdiction to delimit the two countries' maritime boundaries, but the International Court of Justice can decide it for you. The Hague can interpret the words "its territory" in paragraph 178, but Hamburg cannot. A third country is an indispensable third party in Hamburg, but it is not in The Hague. With respect, this is perhaps not the most attractive offer I have ever received, and it would be understandable if the Tribunal felt the same way about it.

That brings me to point 5: in applying the law recognized by the United Nations and exercising its jurisdiction in this case, the Tribunal will not contradict any existing jurisprudence or open any floodgates. Why not? Because quite simply this case is unique. In your judgment on jurisdiction you can make it crystal clear that you are not revisiting the arbitral tribunal's award in the MPA case, or violating any supposed principle of *res judicata* – although we do not think that is applicable here because, contrary to the view expressed by Counsel for the Maldives, paragraphs 417 to 419 of that award confirm that the ruling did not involve rendering any decision on whether the UK was the coastal State as matters then stood, since that would lie beyond the Annex VII tribunal's jurisdiction. You will also be able to make it crystal clear that your judgment is entirely consistent with the award in *Ukraine* v. *Russia*, and in no way undermines it or dislodges it.

Why? Because this case is ring-fenced. It is, literally, one of a kind. It does not concern a pure territorial dispute, it is situated in the law of decolonization, and most significantly of all it benefits from a prior determination by the International Court of Justice on that issue which is bang on point. All this Tribunal needs to do is to give effect to the Court's Advisory Opinion, and the implications for other cases melt away. This is not East Timor, which had no such prior determination by the ICJ. There are no "similarities", as Professor Thouvenin put it – not striking similarities and not any other sorts of similarities.[26]

[24] United Nations General Assembly, resolution 51/204, *Observer Status for the International Tribunal for the Law of the Sea in the General Assembly* (17 December 1996).
[25] ITLOS/PV.20/C28/5, pp. 31-32 (Mr Riffath).
[26] Ibid., p. 14 (Mr Thouvenin).

Mr President, before I conclude, may I say a few words in response to the Special Chamber's second question, on the obligation of all Member States to cooperate with the UN to complete the decolonization of Mauritius. Our response to that question is: yes, the obligation to cooperate with the UN is relevant to this case, for three reasons.

First, paragraph 180 of the Advisory Opinion recorded that "respect for the right to self-determination is an obligation *erga omnes*; all States have a legal interest in protecting that right."[27] "[A]ll States" includes the Maldives. And an obligation *erga omnes* of course extends not only to States but also to other international actors, including international courts and tribunals. This Tribunal has a legal interest in protecting the right to self-determination and territorial integrity. For the Tribunal to accede to the application of the Maldives would amount to a failure to protect your own right.

Second, Member States must cooperate in relation to the modalities required to ensure the completion of the decolonization of Mauritius, the practical steps to give effect to the Advisory Opinion. The "modalities" include those referred to in General Assembly resolution 2625[28] and paragraph 5 of resolution 73/295. You can see it on the screen. In paragraph 5 the General Assembly:

> Calls upon all Member States … to refrain from any action that will impede or delay the completion of the process of decolonization of Mauritius in accordance with the advisory opinion of the Court and the present resolution.[29]

Counsel for the Maldives told you that nothing in resolution 73/295 "suggested that States are under an obligation to delimit a maritime boundary with Mauritius."[30] We disagree. By raising a preliminary objection which is based on the argument that a country in unlawful administration and occupation of a part of the territory of Mauritius, unlawfully occupied, is an indispensable third party to the delimitation of the maritime boundary of an unlawfully occupied territory, the Maldives is, we say, taking "action" in violation of the Advisory Opinion of the Court and resolution 73/295. You could put it in these terms: paragraph 5 precludes this application from going any further. The resolution is very broadly worded – it speaks of "any action" – and it encompasses, in our submission, a refusal to negotiate a maritime boundary in the circumstances that we now find ourselves.

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[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, para. 180 (emphasis added).

[28] Resolution 2625 (XXV) states, in relevant part: "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, […] and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned […]"

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

[30] ITLOS/PV.20/C28/5, p. 26 (Mr Akhavan).

Third, the obligation to cooperate relates to rendering assistance to the United Nations. We say that extends the obligation to cooperate to an international tribunal that is established under a United Nations Convention and which has the relationships with the United Nations to which I have earlier made reference.

In relation to the Special Chamber's third question, Mr President, our position is that there is no bar to the exercise by this Special Chamber of jurisdiction in relation to the Parties' obligations under paragraph 3 of articles 74 and 83. If, however, the Tribunal accedes to the application of the Maldives and finds that it cannot exercise jurisdiction to delimit the Parties' maritime boundaries, then we have difficulty in seeing how it could exercise jurisdiction in relation to those obligations.

Mr President, Members of the Special Chamber, Mauritius trusts that that this Tribunal will proceed to exercise its jurisdiction to delimit the Parties' maritime boundary. The Court's Advisory Opinion opens the door to that, and it does so in dealing with the matter of the greatest significance: completing the decolonization of Mauritius, and bringing to a final end the United Kingdom's last remaining colony in Africa. The draft resolution that sent that request to the Court was met with the argument that the General Assembly was entering a forbidden domain, by referring to the Court an "unresolved sovereignty dispute" between two Members. The Members of the United Nations saw right through that argument; they did not blink. They sent the request on decolonization.

When the Court then addressed the request – and I was present for the oral arguments – it was met with the same arguments; that it could not accede to the request because in so doing the Court would be entering the forbidden domain and, incidentally, resolving an "unresolved dispute" between two States without consent having been granted. Like the General Assembly, the International Court of Justice saw right through that argument. Its judges did not blink. It was about decolonization.

Now, this matter is before you and, once again, you are being given exactly the argument: that you cannot exercise jurisdiction over the matter because it would require the Tribunal to enter the forbidden domain and, incidentally, resolve an "unresolved sovereignty dispute" between two States without their consent having been granted. It is exactly the same argument being made for the third time, having totally failed on two previous occasions.

Yet Counsel for the Maldives somehow told you that it is we, on this side of the room, who are the repeat offenders – we keep bringing these cases, with the same old arguments, and we keep losing. Well, Mr President, you can judge for yourselves whether Mauritius has been successful or not. The purported MPA has been ruled illegal. The International Court of Justice has plainly determined that the Chagos Archipelago is a part of the territory of Mauritius and no other State.

There has been important progress. We do trust that, like the Members of the General Assembly and the Judges of the International Court, you will not blink, that you will not stop "at the threshold", as Judge Jessup put it in the 1966 *South West*

Africa dissent that he wrote,[31] and that you will not wish upon yourself an entry into a space of wilderness. And, yes, it is true, Mr President, that on one occasion previously I have drawn to the attention of an international court that analogy with *South West Africa*.[32] It was not very long ago; it was in December, in The Hague. It concerned a matter of genocide, perhaps one of the few subjects that might be said to be on a par of gravity and seriousness with decolonization, self-determination and territorial integrity, also an *erga omnes* obligation. My submission back in December was in response to a specific argument made by Myanmar, which said that the Court should not exercise its jurisdiction because The Gambia, for whom I happened to act, had no legal interest in the treatment of the Rohingya residents of Myanmar, and, said Myanmar, the Court should decline to exercise its jurisdiction. What Counsel for the Maldives declined to share with you on Saturday was how the Judges of the International Court of Justice reacted to that argument by me, and by the submissions that were made – how it was received by all 17 Judges of the International Court of Justice. All of them, every single one of them, even the Judge *ad hoc* appointed by Myanmar – bless him – rejected that jurisdictional objection raised by Myanmar[33] – that dead-end, up-the-garden-path jurisdictional objection. The judgment was unanimous, it was decisive, and was widely acclaimed; and we hope the same thing for the judgment that this Tribunal will give in this equally significant and important case.

Mr President, Members of the Special Chamber, that concludes my submissions. I thank you for your kind attention. The plan was to invite the Ambassador for Mauritius, the Co-Agent, to speak the final words. They are not very lengthy – maybe about ten minutes. We are in your hands as to whether we do it now or whether you would like to have a break.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Sands. I understand that the Co-Agent of Mauritius will make concluding remarks and present the final submissions of Mauritius, so I will allow the Co-Agent of Mauritius to continue and present the final submissions of Mauritius.

I wish to recall that article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Special Chamber and transmitted to the other Party.

I now invite the Co-Agent of Mauritius, Mr Jagdish Dharamchand Koonjul, to take the floor.

MR KOONJUL: Mr President, honourable Members of the Special Chamber of the International Tribunal for the Law of the Sea, honourable Agent and members of the delegation of the Republic of Maldives, good afternoon.

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[31] *South West Africa, Second Phase*, Dissenting Opinion of Judge Jessup, available at: https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-07-EN.pdf (last accessed 19 October 2020), p. 1.

[32] ITLOS/PV.20/C28/5, p. 29 (Mr Akhavan).

[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Order of 23 January 2020.

It falls to me, in my capacity as Co-Agent of the Republic of Mauritius, to bring to a close these oral pleadings and to recite the final submissions of the Republic of Mauritius. Before I do so, let me express my gratitude to the Tribunal for the opportunity to make a few concluding remarks.

As you heard last week, Mauritius and the Maldives share warm and long-standing relations. Among the many expressions of friendship between our two nations, Mauritius was among the first to support the Maldives when it sought to rejoin the Commonwealth. As small island States, Mauritius and the Maldives stand together in the face of the existential threats to which the honourable Deputy Attorney General of the Maldives referred last week.[1]

Mr President, it is precisely because of our deeply intertwined history – as former colonies – and our common future that we are so disappointed not to benefit from the cooperation and support of the Maldives in the completion of the decolonization of Mauritius. Such a conclusion is a matter of objective fact: The Maldives voted against resolution 71/292, by which the matter of our decolonization was transmitted to the International Court of Justice. It voted against resolution 73/295, affirming and adopting the findings of the Advisory Opinion. It has declined to negotiate a maritime boundary with us, and now it seeks to frustrate our ability to proceed upon the basis of the Court's clear Advisory Opinion. We never heard from our friends why they were opposed to all of this; on so much they have remained silent.

Mr President, Members of the Special Chamber, we listened very carefully to the submissions made by our friends last week. It is a matter of regret that so much of what we heard were attacks, not only against Mauritius, but also attacks of a more personal nature against Counsel and their integrity. We were disappointed, during the first round, to hear Professor Akhavan suggest that Counsel for Mauritius were in some way acting improperly, by allegedly treating this Special Chamber as though it were a "casino".[2] Even more unhappily, Professor Akhavan, on Saturday, made a deeply regrettable and completely unfounded attack on senior Counsel, Mr Reichler, accusing him of allegedly breaching rules of professional conduct.[3] Mr President, as I said in my opening statement, when they go low, we go high.[4] We have addressed these matters in a letter to the Tribunal. Therefore, I will say no more on this matter.

Mr President, the Republic of Mauritius has come to the International Tribunal for the Law of the Sea to assert its legal rights under the Convention: it wishes to complete the delimitation of its maritime boundaries, a matter that falls squarely within your jurisdiction. Earlier proceedings sought to protect our rights under UNCLOS in relation to the creation by a third State of a purported "Marine Protected Area" over a part of our territory, and that effort was, in large part, effective. Last year, following a request made by the African Member States of the United Nations, the International Court of Justice delivered its Advisory Opinion, which was unanimous on the substance. It found clearly and unambiguously that the Chagos Archipelago is, and has always been, an integral part of the territory of the Republic of Mauritius. There

[1] ITLOS/PV.20C28/5, p. 30 (Ms Shabeen).
[2] ITLOS/PV.20C28/2, p. 35 (Mr Akhavan).
[3] ITLOS/PV.20C28/5, p. 28 (Mr Akhavan).
[4] ITLOS/PV.20C28/3, p.2 (H.E. Jagdish Koonjul G.O.S.K.).

is a political commitment in Mauritius, and broad political support around the world, for the completion of the decolonization of Mauritius and the respect of its territorial integrity. Unfortunately, there appears to be no such support from the other side in this room. We express the hope that in time the Maldives will return to the fold and rejoin the overwhelming number of States around the world which believe that colonialism is a wrong and that decolonization is a legitimate aspiration of all peoples. In the meantime, as a diligent and responsible State, and a country that respects the rule of law, Mauritius will continue to protect its rights under international law, including in respect of self-determination.

Mr President, Mauritius cannot be criticized for taking the steps that it has, acting under international law to exercise its sovereign rights. Any reasonable State would do the same, acting with care and diligence, resorting to the peaceful settlement of disputes under the Convention. Following the ICJ's Advisory Opinion, the logical next step was rather obvious: delimitation of our maritime boundaries. The exercise by this Special Chamber of the jurisdiction it has, and the judgment which we hope will follow, will take us one step closer in our 70-year struggle to complete our decolonization.

Mr President, through a long-standing practice of judicial dialogue with its international judicial counterparts, this Tribunal, which itself emerged in the long shadow of colonialism, not least in the context of South West Africa, has helped to strengthen and develop the corpus of international law. It has proceeded on the basis that the law of the sea is not entirely autonomous, that it is part of a greater legal order. With admiration we have observed how, by way of such judicial dialogue, ITLOS has maintained consistency in international law, reinforced its excellent relations with other international courts and tribunals, including the International Court of Justice, by respecting and giving effect to its well-founded jurisprudence, and confirmed and developed "the necessary coherence between general international law and the law of the sea."[5] This general international law obviously includes the right of self-determination and the obligations in respect of the completion of decolonization, which are part of the law of the United Nations. We have full confidence that this Special Chamber of ITLOS will fulfil the mandate with which it has been entrusted under the Special Agreement.

To be clear, we do not seek from this Special Chamber a determination on the legal status of the Chagos Archipelago. That has already been determined by the ICJ, acting as it was entitled to, with authority and correctly, as a matter of international law. Besides, the Maldives has not challenged the Advisory Opinion on those grounds. Instead, we simply ask the Special Chamber to apply that law, as it is required by article 293 of the Convention, and to apply the rules and obligations as set out in the Advisory Opinion.

[5] Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs (United Nations, New York, 29 October 2007) 6-7, available at: https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf (last accessed 19 October 2020). See also Statement by the President of the International Tribunal for the Law of the Sea, H.E. Judge Jin-Hyun Paik, at the 30th Annual Informal Meeting of Legal Advisers (United Nations, New York, 29 October 2019), available at: https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/paik/20191029_Paik_UN_Judicial_dialogue_en.pdf (last accessed 19 October 2020).

Mr President, allow me to conclude, on behalf of the Agent of Mauritius, my legal team, the Government and the people of Mauritius, by expressing sincere thanks and appreciation to you, Mr President, and the distinguished Members of this Special Chamber for your kind attention, astute engagement, and the manner in which you have conducted this hearing during these exceptionally difficult circumstances.

We also express our deepest gratitude and appreciation to the Registrar, her outstanding staff, the interpreters, the stenographers, and the entire team responsible for arranging this hearing.

Mr President, distinguished Members of the Special Chamber, that leaves me with the task, on behalf of the Agent of Mauritius, of reading out the final submissions of Mauritius.

For the reasons set out in our written pleadings and during this oral hearing, Mauritius respectfully requests the Special Chamber of ITLOS to rule that:

1. The Preliminary Objections raised by Maldives are rejected;
2. It has jurisdiction to entertain the Application filed by Mauritius;
3. There is no bar to its exercise of that jurisdiction; and
4. It shall proceed to delimit the maritime boundary between Mauritius and the Maldives.

Mr President, thank you very much for your attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Koonjul. This brings us to the end of this hearing. On behalf of the Special Chamber, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both the Maldives and Mauritius. I would also like to take this opportunity to thank both the Agent of the Maldives and the Agent and Co-Agent of Mauritius for their cooperation. In particular, I would like to thank the Parties for their cooperation in the organization of the hybrid hearing and their willingness to make use of video conference technology. The Registrar will now address matters relating to documentation.

THE REGISTRAR: Thank you, Mr President. Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of the Special Chamber, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. These corrections relate to the transcripts in the official language used by the Party in question. The Parties are requested to use for this purpose the verified versions of the transcripts and not those marked as “unchecked”. The corrections should be submitted to the Registry as soon as possible and by Friday, 23 October 2020 at 4.00 p.m. Hamburg time, at the latest.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam Registrar. The Special Chamber will now withdraw to deliberate. The judgment will be read on a date to be notified to the Agents. The Special Chamber currently plans to deliver

the judgment in early 2021. The Agents of the Parties will be informed reasonably in advance of the precise date of the reading of the judgment.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Special Chamber in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the judgment.

The hearing is now closed.

(The sitting closed at 3.55 p.m.)