

CASE NOTE

THE LEGAL EFFECT OF ICJ ADVISORY OPINIONS REDEFINED?

THE MAURITIUS/MALDIVES DELIMITATION CASE — JUDGMENT ON PRELIMINARY OBJECTIONS

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I BACKGROUND

On 28 January 2021, a Special Chamber of the International Tribunal for the Law of the Sea ('ITLOS') handed down a judgment on preliminary objections in the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean*.¹ The Special Chamber asserted its jurisdiction to delimit the overlapping maritime claims of Mauritius and the Maldives around the Chagos Archipelago. By doing so, it sided with Mauritius in what can be considered another success in the State's decades-long endeavour to claim sovereignty over the Chagos Archipelago. The judgment contributed to the development of international law particularly by its progressive interpretation of the ‘legal effect’ of advisory opinions given by the International Court of Justice ('ICJ').

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¹ *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) ('Delimitation in the Indian Ocean').

The case before the Special Chamber can be fully appreciated in light of its context.² The Chagos Archipelago consists of several atolls in the Indian Ocean located approximately 500 kilometres south of the Maldives and almost 2200 kilometres north-east of Mauritius' main island. The islands of the Archipelago were colonised by the French in the 18th century.³ With the *Treaty of Paris* of 1814, France ceded the Chagos Archipelago as a dependency of Mauritius to the United Kingdom.⁴

Subsequently, the Chagos Archipelago was under British colonial rule. In 1965, the United Kingdom entered into an agreement with representatives of the colony of Mauritius detaching the Chagos Archipelago from Mauritius administratively and declaring it part of the British Indian Ocean Territory ('BIOT').⁵ Since 1966, the United Kingdom has leased the Archipelago's largest island, Diego Garcia, to the United States, where the latter built a strategically important military base.⁶ Between 1967 and 1973, all inhabitants of the Chagos Archipelago were either forcibly removed or prevented from returning. Mauritius became independent in 1968.

Since at least the 1980s, Mauritius has claimed sovereignty over the Chagos Archipelago and in recent years increasingly asserted its claim judicially. In 2010, it filed a claim against the United Kingdom under the *United Nations Convention on the Law of the Sea* ('UNCLOS'),⁷ arguing that the establishment of a Marine Protected Area ('MPA') around the Chagos Archipelago contravened UNCLOS. One of Mauritius' arguments was that the United Kingdom could not have lawfully established the MPA because it was not the 'coastal state' in the sense of UNCLOS.⁸ The Tribunal refused to exercise jurisdiction over the coastal state question.⁹ However, it declared that the United Kingdom's establishment of the MPA was in violation of arts 2(3), 56(2) and 194(4) of the UNCLOS.¹⁰

In 2017, the United Nations ('UN') General Assembly referred a request for an advisory opinion on the decolonisation of the Chagos Archipelago to the ICJ, asking (a) whether the process of decolonisation of Mauritius had been lawfully completed and (b) for the legal consequences of the United Kingdom's

² The Chagos Archipelago's complex history has been summarised extensively elsewhere and shall only be briefly recounted here: see, eg, *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award) (UNCLOS Arbitral Tribunal, Case No 2011–03, 18 March 2015) 13–46 ('Chagos MPA Award').

³ *Ibid* 14 [58].

⁴ *Delimitation in the Indian Ocean* (n 1) 20 [57].

⁵ *Ibid* 20 [59].

⁶ Mark E Rosen, 'Is Diego Garcia at Risk of Slipping from Washington's Grasp?', *The National Interest* (online, 19 September 2017) <<https://nationalinterest.org/feature/diego-garcia-risk-slipping-washingtons-grasp-22381>>, archived at <<https://perma.cc/SB72-GR6Q>>.

⁷ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

⁸ 'Memorial of the Republic of Mauritius', *Mauritius v United Kingdom* (UNCLOS Arbitral Tribunal, 1 August 2012) vol 1, ch 6.

⁹ *Chagos MPA Award* (n 2) 90 [219]–[221].

¹⁰ *Ibid* 215 [547(B)].

administration of Chagos.¹¹ In its opinion, the ICJ stated that ‘the United Kingdom’s continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State’ and that ‘the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible’.¹² This position was subsequently endorsed by the UN General Assembly in *Resolution 73/295*, which demanded that the United Kingdom ‘withdraw its colonial administration ... unconditionally within a period of no more than six months’.¹³ The United Kingdom rejected the Advisory Opinion as non-binding and let the period pass without taking action regarding the Chagos Archipelago.¹⁴

Mauritius first reached out to the Maldives in 2001 asking to begin negotiations regarding the delimitation of their continental shelves around the Chagos Archipelago. This was rejected by the Maldives ‘[a]s jurisdiction over the Chagos Archipelago is not exercised by the Government of Mauritius’.¹⁵ In 2010, the Maldives made a submission to the Commission on the Limits of the Continental Shelf ('CLCS') under art 76(8) of the *UNCLOS*. In the aftermath of this submission, the Maldives and Mauritius held their first talks on the delimitation of their maritime boundaries. A representative of the Maldives stated that the Maldives would amend its submission to the CLCS to take the exclusive economic zone ('EEZ') of Mauritius into consideration, which however never happened.¹⁶ In a joint communiqué of 2011, the two States ‘agreed to make bilateral arrangements on the overlapping area of extended continental shelf of the two States around the Chagos Archipelago’.¹⁷ Shortly after, Mauritius submitted a note to the UN Secretary-General, formally protesting against the Maldives’ submission to the CLCS which Mauritius claimed had encroached on its EEZ. Further efforts by Mauritius to enter into negotiations on the delimitation of the maritime zones around the Chagos Archipelago after the 2019 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ('Chagos Advisory Opinion') went unanswered by the Maldives.

¹¹ *Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 71/292, UN GAOR, 71st sess, 88th plen mtg, Agenda Item 87, Supp No 49, UN Doc A/RES/71/292 (22 June 2017).

¹² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 138–9 [177], 139–40 [182] ('Chagos Advisory Opinion').

¹³ *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 73/295, 73rd sess, 83rd plen mtg, Agenda Item 88, Supp No 49, UN Doc A/RES/73/295 (24 May 2019) para 3 ('GA Res 73/295').

¹⁴ Alan Duncan, ‘British Indian Ocean Territory’, *UK Parliament* (Statement, 30 April 2019) <<https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/HCWS1528>>, archived at <<https://perma.cc/5ZFW-LZSX>>.

¹⁵ *Delimitation in the Indian Ocean* (n 1) 21 [62].

¹⁶ Ibid 22–3 [66], 93 [331].

¹⁷ Ibid 23 [67].

On 18 June 2019, Mauritius instituted arbitral proceedings against the Maldives under Annex VII of the *UNCLOS*.¹⁸ After consulting with the President of the ITLOS, a special agreement was concluded between the two states and the case was transferred to a Special Chamber formed under art 15(2) of the *Statute of the International Tribunal for the Law of the Sea*. Mauritius asked the Special Chamber to delimit its EEZ, inner and outer continental shelf from that of the Maldives and to find that the Maldives had violated its obligation under arts 74(3) and 83(3) of the *UNCLOS* to enter into provisional arrangements pending an agreement on delimitation and not to jeopardise the reaching of a final agreement.¹⁹

II THE SPECIAL CHAMBER'S JUDGMENT ON PRELIMINARY OBJECTIONS

The Maldives raised five preliminary objections to the Special Chamber's jurisdiction and the admissibility of the case. The first two of these objections stood at the centre of the judgment by the Special Chamber.

A *Monetary Gold and Mauritius' Sovereignty over the Chagos Archipelago*

The first objection was that the Special Chamber lacked jurisdiction because the United Kingdom was an 'indispensable party' to the proceedings. The Maldives based its argument on the *Monetary Gold* principle, according to which 'a court or tribunal cannot exercise its jurisdiction in the absence of an indispensable party'.²⁰ Under this 'well-established procedural rule in international judicial proceedings',²¹ a judicial body lacks jurisdiction if the 'very subject-matter' of a decision would implicate the rights of a state that is not party to the proceeding.²² This, according to the Maldives, was the case for the United Kingdom because the Special Chamber would be required to rule on the sovereignty over the Chagos Archipelago to delimit the maritime boundary.²³ In Mauritius' view, the *Chagos Advisory Opinion* of the ICJ had already determined in an 'authoritative' fashion that the United Kingdom possessed no sovereign rights regarding the Chagos Archipelago.²⁴ Accordingly, the Special Chamber would not be required to determine the rights and obligations of the United Kingdom.²⁵

¹⁸ 'Written Preliminary Objections of the Republic of Maldives under Article 294 of the United Nations Convention on the Law of the Sea and Article 97 of the Rules of the International Tribunal for the Law of the Sea', *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* (International Tribunal for the Law of the Sea, Case No 28, 18 December 2019) annex 1 ('Preliminary Objections of the Maldives').

¹⁹ *Delimitation in the Indian Ocean* (n 1) 35 [112].

²⁰ *Ibid* 27 [82], citing *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Preliminary Question)* [1954] ICJ Rep 19, 32–3 ('*Monetary Gold*'). In addition, the Maldives referred in particular to *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [28] ('*East Timor*'), cited in *ibid* 28 [84].

²¹ *M/V 'Norstar' (Panama v Italy) (Preliminary Objections)* [2016] ITLOS Reports 44, 84 [172]. See *Delimitation in the Indian Ocean* (n 1) 31 [97].

²² *Monetary Gold* (n 20) 32.

²³ *Delimitation in the Indian Ocean* (n 1) 27–8 [83].

²⁴ *Ibid* 30 [95].

²⁵ *Ibid* 30 [92].

The Special Chamber linked the discussion of the application of the *Monetary Gold* principle to the Maldives' second preliminary objection. Therein, the Maldives argued that the Special Chamber lacked jurisdiction over the dispute because 'a determination of Mauritius' claims would require this Tribunal to first determine whether it is Mauritius or the United Kingdom that has sovereignty over the Chagos Archipelago'.²⁶ Relying on *South China Sea Arbitration, Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait and Chagos Marine Protected Area ('Chagos MPA Award')*, the Maldives emphasised that disputes over territorial sovereignty were not disputes 'concerning the interpretation of application of this Convention' under art 288(1) of the UNCLOS.²⁷

The Special Chamber considered these first two preliminary objections to run parallel to one another. If there were still an ongoing dispute between the United Kingdom and Mauritius about the sovereignty over the Chagos Archipelago, then accepting jurisdiction to delimit between Mauritius and the Maldives could imply exercising jurisdiction over this sovereignty dispute incidentally. Furthermore, only if a sovereignty dispute still existed could the United Kingdom possibly be considered as a third state with a legal interest at stake in the dispute before the Special Chamber and, therefore, as an indispensable party in the sense of the *Monetary Gold* principle.²⁸ Accordingly, for the Special Chamber, its decision on the two first preliminary objections hinged on the 'validity of the premise that Mauritius has sovereignty over the Chagos Archipelago'.²⁹

Mauritius argued that the Special Chamber could not possibly overstep its jurisdiction in this regard because it was beyond doubt that it had sovereignty over the Chagos Archipelago. Any uncertainties had been resolved by the Advisory Opinion and the subsequent UN General Assembly *Resolution 73/295*.³⁰ The Maldives disagreed with Mauritius and maintained that the dispute between the United Kingdom and Mauritius remained extant.³¹ Because the

²⁶ 'Preliminary Objections of the Maldives' (n 18) 19–20 [59].

²⁷ *Delimitation in the Indian Ocean* (n 1) 33 [103]; *Ibid* 20–1 [60]–[62], discussing *South China Sea Arbitration (Philippines v China) (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013–19, 29 October 2015) 2 [8], 59–60 [153] and *Chagos MPA Award* (n 2) 89–90 [216]–[219]; 'Written Observations of the Republic of Maldives in Reply to the Written Observations of the Republic of Mauritius', *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 15 April 2020) 31–2 [118] ('Written Observations of the Maldives'), quoting *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia) (Award concerning the Preliminary Objections of Russia)* (UNCLOS Arbitral Tribunal, Case No 2017–06, 21 February 2020) 54 [176].

²⁸ *Delimitation in the Indian Ocean* (n 1) 31 [98]–[99]:

Thus the Parties' disagreement boils down to the question as to whether a sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago still exists or has been resolved. Accordingly, if a sovereignty dispute over the Chagos Archipelago exists, the United Kingdom may be regarded as an indispensable party and the *Monetary Gold* principle would prevent the Special Chamber from exercising its jurisdiction.

²⁹ *Ibid* 36 [114]–[115].

³⁰ *Ibid* 66 [221].

³¹ *Ibid* 36–7 [117]; see 'Written Observations of the Maldives' (n 27) 3 [2]–[3].

United Kingdom continued to assert its sovereignty, the Maldives argued that the disagreement fell within the *Mavrommatis Palestine Concessions* ('*Mavrommatis*') definition of a dispute as 'disagreement on a point of law or fact, a conflict of legal views or of interests'.³²

The Special Chamber made this disagreement about the conclusive resolution of the sovereignty dispute between the United Kingdom and Mauritius the central issue of its judgment.³³ To determine whether a dispute still existed about the sovereignty over the Chagos Archipelago, the Special Chamber went on to examine the relevance of the *Chagos MPA Award*, the *Chagos Advisory Opinion* and *Resolution 73/295*.

1 *Chagos MPA Award: No Res Judicata*

The Maldives argued that the *Chagos MPA Award* had not resolved the dispute and remained *res judicata* between Mauritius and the United Kingdom as to the latter's treatment as coastal state.³⁴ The Maldives claimed that the Annex VII Arbitral Tribunal ('the Tribunal') had established that a sovereignty dispute existed between Mauritius and the United Kingdom and had declined to resolve this dispute because doing so would have been outside the Tribunal's jurisdiction.³⁵ Further, according to the Maldives, the award had treated the United Kingdom as the relevant coastal state when finding that the United Kingdom had violated arts 2(3), 56(2) and 194(4) of the *UNCLOS*.³⁶

While the Special Chamber agreed that the Tribunal had found that a sovereignty dispute existed between the United Kingdom and Mauritius, it rejected the idea that the award could have *res judicata* effect regarding a matter over which the Tribunal had expressly declined to exercise jurisdiction.³⁷ In the Special Chamber's understanding, the Tribunal had been able to find a violation of the mentioned articles of the *UNCLOS* because of the binding undertakings provided by the United Kingdom in this regard, without considering the United Kingdom as coastal state.³⁸ However, the Special Chamber stated that the findings of the Tribunal 'may play a role' regarding Mauritius' status as a state with an opposite or adjacent coast to the Maldives.³⁹ In sum, no conclusion regarding the existence of a dispute between the United Kingdom and Mauritius about the Chagos Archipelago could be drawn from the *Chagos MPA Award*.

³² *Delimitation in the Indian Ocean* (n 1) 69 [233]. See *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 11.

³³ According to *Delimitation in the Indian Ocean* (n 1) 32 [100], it was the 'core premise' of the Maldives' argument that the sovereignty dispute remained unresolved.

³⁴ *Delimitation in the Indian Ocean* (n 1) 37–8 [120]–[123].

³⁵ *Ibid* 37 [121].

³⁶ *Ibid* 38 [122]. See Written Observations of the Maldives (n 27) 8 [22]–[23], citing *Chagos MPA Award* (n 2) 215 [547(B)].

³⁷ *Delimitation in the Indian Ocean* (n 1) 42–3 [138]. This had also been Mauritius' argument: at 38 [125].

³⁸ *Ibid* 42–3 [138].

³⁹ *Ibid* 43 [139]. This rather vague holding by the Special Chamber was later supplemented with the claim that the award had demonstrated that the Chagos Archipelago had 'been subject to a special regime, according to which Mauritius is entitled to certain maritime rights': at 72 [246].

2 Mauritius' Sovereignty and the Legal Effect of the Chagos Advisory Opinion

The Maldives also attacked Mauritius' premise that its sovereignty over the Chagos Archipelago had been established by arguing that the *Chagos Advisory Opinion* had not resolved the dispute between the United Kingdom and Mauritius.⁴⁰ In the final analysis for the Special Chamber, 'whether the legal status of the Chagos Archipelago ha[d] been clarified by the advisory opinion of the ICJ' turned out to be the 'key question in the present proceedings'.⁴¹ The Special Chamber structured its analysis along the arguments made by the Maldives, of which three are particularly noteworthy.

First, the Maldives pushed back against Mauritius' interpretation of the *Chagos Advisory Opinion*. The Maldives argued that the ICJ did not provide any advice on the sovereignty dispute but rather only on the lawfulness of the decolonisation.⁴² The ICJ had specifically emphasised that no question on the bilateral sovereignty dispute between the United Kingdom and Mauritius had been submitted to it.⁴³ For Mauritius, the Advisory Opinion had definitely resolved the matter of whether the Chagos Archipelago was 'an integral part of the territory of Mauritius'.⁴⁴ Mauritius interpreted the Advisory Opinion to have concluded that Chagos 'is, and always has been, a part of the territory of Mauritius'⁴⁵ and claimed that 'decolonization always implicate[d] sovereignty'.⁴⁶ Following this tenet, the *Chagos Advisory Opinion* was 'determining which State was the lawful sovereign over Chagos'⁴⁷ by advising on whether decolonisation had been lawfully completed. This was also reflected, according to Mauritius, by the ICJ's statement that the United Kingdom was obliged to enable Mauritius to 'complete the decolonization of *its territory*' by withdrawing from Chagos and to respect its '*territorial integrity* ... including the Chagos Archipelago'.⁴⁸

The Special Chamber accepted most of Mauritius' interpretation of the *Chagos Advisory Opinion*. It disagreed with the Maldives that the *Chagos Advisory Opinion* had no relevance to the issue of sovereignty.⁴⁹ The Special Chamber went on to determine, crucially, that the United Kingdom's claim to sovereignty over Chagos was 'contrary' to the ICJ's holding that the United Kingdom's continued administration of Chagos was an unlawful act of continuing character.⁵⁰ In the Special Chamber's view, the ICJ's finding that the United Kingdom is required to 'respect the territorial integrity' of Mauritius, 'including the Chagos Archipelago', could be 'interpreted as suggesting

⁴⁰ Ibid 43 [141].

⁴¹ Ibid 71 [243].

⁴² Ibid 43 [141], 44 [144], 45 [147].

⁴³ Ibid 44–5 [145]–[146], citing *Chagos Advisory Opinion* (n 12) 129 [136].

⁴⁴ *Delimitation in the Indian Ocean* (n 1) 46 [152].

⁴⁵ Ibid 46 [150].

⁴⁶ Ibid 48 [157].

⁴⁷ Ibid.

⁴⁸ Ibid 49 [161] (emphasis in original), quoting *Chagos Advisory Opinion* (n 12) 137 [173], 139 [178].

⁴⁹ *Delimitation in the Indian Ocean* (n 1) 50–1 [166].

⁵⁰ Ibid 53 [173].

Mauritius' sovereignty over the Chagos Archipelago'.⁵¹ Later in the judgment, the Special Chamber summarised more clearly that 'Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations'.⁵²

The Maldives' second argument also concerned the interpretation of the *Chagos Advisory Opinion*. It claimed that the resolution of the sovereignty dispute was not an implied or necessary consequence of the ICJ's Advisory Opinion.⁵³ Most importantly, the Maldives contended that the United Kingdom's obligation to complete the process of decolonisation was not the same as being 'immediately stripped of sovereignty over that territory'.⁵⁴ Mauritius countered that to accept even the plausibility of the United Kingdom's claim of sovereignty over the Chagos Archipelago 'would transgress the general principle of international law of *ex injuria non oritur jus*'.⁵⁵ Regarding the question of whether the obligation to complete the process of decolonisation immediately entailed a loss of sovereignty, the Special Chamber stated that this was not so much a question of general principle but more so one to be decided in the specific case.⁵⁶ However, it did not explicitly come back to this question.

Third, the Maldives argued that even if the ICJ had provided advice on the sovereignty dispute, the opinion would not have been binding on states. Advisory opinions, it pointed out, do not have binding effect on any state, as confirmed many times by the ICJ.⁵⁷ Mauritius retorted that 'while an advisory opinion is not binding as such, this does not mean that it is devoid of legal effects'.⁵⁸ Rather, it 'provides an authoritative statement of the law' that states have to comply with.⁵⁹ This, in Mauritius' view, was confirmed by cases of the Court of Justice of the European Union ('CJEU'), which had accepted the ICJ's determinations in matters of international law as conclusive.⁶⁰

The Special Chamber's finding on the legal effects of the *Chagos Advisory Opinion* is the most intriguing part of the judgment. While acknowledging that advisory opinions of the ICJ 'cannot be considered legally binding',⁶¹ the Special Chamber introduced a distinction between the 'binding character and the authoritative nature of an advisory opinion of the ICJ'.⁶² In a key passage, the Special Chamber claimed that 'judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of

⁵¹ Ibid 53–4 [174] (emphasis omitted).

⁵² Ibid 72–3 [246].

⁵³ Ibid 54–6 [176]–[182].

⁵⁴ Ibid 55 [179].

⁵⁵ Ibid 57 [185].

⁵⁶ Ibid 59 [191].

⁵⁷ Ibid 59 [194]. See, eg, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (First Phase)* [1950] ICJ Rep 65, 71 ('Peace Treaties').

⁵⁸ *Delimitation in the Indian Ocean* (n 1) 60 [197].

⁵⁹ Ibid 60 [197]–[198].

⁶⁰ Ibid 60–1 [199], where Mauritius cited *Council of the European Union v Front Polisario* (Court of Justice of the European Union, C-104/16P, ECLI:EU:C:2016:973, 21 December 2016) ('Front Polisario') and *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Economie et des Finances* (Court of Justice of the European Union, C-363/18, ECLI:EU:C:2019:954, 12 November 2019) ('Organisation juive européenne').

⁶¹ *Delimitation in the Indian Ocean* (n 1) 61 [202].

⁶² Ibid 61–2 [203].

the United Nations'.⁶³ The Special Chamber went on to hold that the determinations by the ICJ in the *Chagos Advisory Opinion* 'have legal effect'.⁶⁴

To substantiate this finding, the Special Chamber also relied on the UN General Assembly *Resolution 73/295*. The Maldives denied any significant role to *Resolution 73/295*. It emphasised that a General Assembly resolution was non-binding on states and could not amplify the authority of the *Chagos Advisory Opinion*.⁶⁵ The Special Chamber, however, found the Resolution 'relevant to assessing the legal status of the Chagos Archipelago',⁶⁶ in light of the special role the General Assembly played regarding decolonisation.⁶⁷ In particular, the Special Chamber claimed that the passing of the six months' time limit set for the United Kingdom 'strengthen[ed]' its finding that the United Kingdom's claim to sovereignty was contrary to the unlawful character of its continued administration of the Chagos Archipelago.⁶⁸

3 Conclusion: Sovereignty Dispute Resolved

After examining these arguments, the Special Chamber concluded that if

the ICJ has determined that the Chagos Archipelago is a part of the territory of Mauritius, as Mauritius argues, the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than 'a mere assertion'. However, such assertion does not prove the existence of a dispute.⁶⁹

In light of the *Chagos Advisory Opinion*, the Special Chamber held that the Maldives' argument that a dispute existed at least as a matter of fact was 'not ... convincing'.⁷⁰ Rather, the *Chagos Advisory Opinion* had resolved the dispute in favour of Mauritius, and 'Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations'.⁷¹

By ascribing legal effect to the *Chagos Advisory Opinion* and considering the dispute between the United Kingdom and Mauritius about the sovereignty over the Chagos Archipelago resolved, the Special Chamber rejected the first two preliminary objections of the Maldives. With regards to the *Monetary Gold* principle, the Special Chamber considered it 'inconceivable that the United Kingdom ... can have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation'.⁷² Because the Special Chamber considered it established that the United Kingdom had no sovereign rights, it possessed no legal interest and was not an indispensable party.

In its second preliminary objection, the Maldives maintained that the Special Chamber lacked jurisdiction because it would need to decide a dispute over land territory. In this regard, the Special Chamber held that its findings

⁶³ Ibid.

⁶⁴ Ibid 62 [205].

⁶⁵ Ibid 65 [219].

⁶⁶ Ibid 67 [227].

⁶⁷ Ibid 67 [226], citing *Chagos Advisory Opinion* (n 12) 135 [163].

⁶⁸ *Delimitation in the Indian Ocean* (n 1) 53 [173], 68 [229], 72–3 [246].

⁶⁹ Ibid 71 [243].

⁷⁰ Ibid 72 [245].

⁷¹ Ibid 72–3 [246].

⁷² Ibid 73 [247].

provide it with sufficient basis to conclude that Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of decolonization of Mauritius is completed.⁷³

B Remaining Objections: Negotiation Requirement, Maritime Boundary Dispute, Bad Faith

The ITLOS Special Chamber dealt with the remaining three preliminary objections more succinctly.

Relying on *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* ('Ghana/Côte d'Ivoire')⁷⁴ and *Maritime Delimitation in the Indian Ocean*,⁷⁵ the Maldives claimed in its third preliminary objection that arts 74 and 83 of the UNCLOS stipulated a negotiation requirement as a procedural precondition to the jurisdiction of UNCLOS dispute settlement bodies.⁷⁶ It went on to argue that this precondition had not been and could not be meaningfully fulfilled in the present case because the sovereignty dispute between the United Kingdom and Mauritius remained unresolved.⁷⁷ The Special Chamber agreed with the Maldives that arts 73 and 83 of the UNCLOS contained 'an obligation to negotiate in good faith with a view to reaching an agreement on delimitation'.⁷⁸ However, it found that the obligation to negotiate had been fulfilled, because Mauritius had made several attempts to engage the Maldives in negotiations which were not taken up by the latter.⁷⁹ In light of that finding, it rejected the Maldives' objection.

In its fourth preliminary objection, the Maldives maintained that the Special Chamber lacked jurisdiction because no maritime boundary dispute existed between the parties.⁸⁰ It based this on the fact that Mauritius was not an 'undisputed opposite coastal state'⁸¹ and that there had been no positively opposed claims as to the maritime zones between the parties when the proceedings had been initiated.⁸² The Special Chamber quickly dispensed with the first point, considering it established that Mauritius was the undisputed coastal state,⁸³ and also rejected the second part of the argument, holding that the different claims of Mauritius and the Maldives regarding their maritime zones demonstrated opposite views.⁸⁴

⁷³ Ibid 74 [250].

⁷⁴ 'Preliminary Objections of the Maldives' (n 18) 22 [66], citing *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire) (Judgment)* [2017] ITLOS Rep 4, 162 [604] ('Ghana/Côte d'Ivoire').

⁷⁵ 'Written Observations of the Maldives' (n 27) 32–3 [123], citing *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)* [2017] ICJ Rep 3, 37 [90].

⁷⁶ *Delimitation in the Indian Ocean* (n 1) 74 [252].

⁷⁷ Ibid 80 [277].

⁷⁸ Ibid 79 [273].

⁷⁹ Ibid 83 [288]–[289].

⁸⁰ Ibid 84 [294].

⁸¹ Ibid 84 [296].

⁸² Ibid 85 [297].

⁸³ Ibid 90–1 [321]. See above n 71.

⁸⁴ Ibid 92–3 [325]–[332].

In its fifth and last preliminary objection, the Maldives claimed that Mauritius' claim amounted to an abuse of process and, therefore, was inadmissible. The Maldives alleged that Mauritius tried to 'use proceedings for aims alien to the ones for which the procedural rights at stake have been granted',⁸⁵ ie adjudicating a territorial dispute with a third state. The Special Chamber dismissed the Maldives' argument in this regard by stating that Mauritius' claims were confined to arts 74 and 83 of the *UNCLOS* and, accordingly, did not constitute an abuse of process.⁸⁶

C Conclusion

In sum, the Special Chamber rejected all preliminary objections. Judge ad hoc Oxman dissented regarding the Special Chamber's rejection of the Maldives' second and third preliminary objections. In Oxman's view, there was no dispute regarding the location of a maritime boundary or the method to determine it.⁸⁷ For Oxman, a crucial aspect seemed to be that Mauritius was seeking to force the Maldives to 'become entangled' in the dispute between Mauritius and the United Kingdom.⁸⁸ He also pointed out that the case was before the Special Chamber 'because one of the Parties has declined to proceed with delimitation negotiations', not because the parties disagreed about how a boundary should be delimited.⁸⁹ Therefore, Oxman argued that a 'reasonable period of time' under arts 74(2) and 83(2) of the *UNCLOS* to reach an agreement had not yet elapsed and the dispute was therefore not yet admissible.⁹⁰ He also claimed that the *Chagos Advisory Opinion* did not justify departing from the principle that rights to land territory could not be adjudicated under *UNCLOS*.⁹¹

Due to Oxman's dissent, the Special Chamber rejected the second and third preliminary objections with a majority of eight votes to one and the remaining objections unanimously.

III ANALYSIS

The second decision of a Special Chamber of ITLOS after *Ghana/Côte d'Ivoire*⁹² can be rightfully labelled a landmark judgment. By accepting jurisdiction over Mauritius' delimitation claims, the Special Chamber dealt a further blow to the United Kingdom's efforts to keep the fate of the Chagos Archipelago outside of international courtrooms. With the central place allocated

⁸⁵ Ibid 95 [339].

⁸⁶ Ibid 97 [348]–[349].

⁸⁷ Ibid 1 [2] (Judge Oxman).

⁸⁸ Ibid 14 [36] (Judge Oxman).

⁸⁹ Ibid 9 [24] (Judge Oxman).

⁹⁰ Ibid 14–15 [36]–[39] (Judge Oxman).

⁹¹ Ibid 11–12 [29] (Judge Oxman).

⁹² *Ghana/Côte d'Ivoire* (n 74). Special Chambers under the *Statute of the International Tribunal for the Law of the Sea* ('ITLOS Statute') are closely modelled after ad hoc chambers under the *Statute of the International Court of Justice*. They can be formed upon the request of the parties to adjudicate a particular dispute under art 15(2) of the *ITLOS Statute*. The main idea of Special Chambers is to 'enable the parties to choose, from among judges of the Tribunal, those whom they want to sit in their case': see Rüdiger Wolfrum, 'Ad Hoc Chambers' in Jon M Van Dyke et al (eds), *Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park* (Martinus Nijhoff Publishers, 2013) 275, 280.

by the Special Chamber to the ICJ's *Chagos Advisory Opinion* in its decision, the judgment will also undoubtedly encourage states not only to lobby for advisory opinions on disputed issues of international law, but also to subsequently instrumentalise these advisory opinions in other proceedings. In the following, I will analyse the implications of the Special Chamber's expansive interpretation of the *Chagos Advisory Opinion* as well as of its 'legal effect'.

A *Expansive Interpretation of the Chagos Advisory Opinion*

All of the Special Chamber's key arguments are premised on its interpretation of the ICJ *Chagos Advisory Opinion*, according to which 'Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations.⁹³ However, the ICJ had carefully avoided pronouncing directly on the sovereignty issue and merely held explicitly that the United Kingdom did not lawfully complete its decolonisation. Certainly, this at least implies the obligation of the United Kingdom to transfer sovereignty to Mauritius. Yet it is less clear whether the ICJ considered that Mauritius had already acquired sovereignty over Chagos the moment it gained independence. Generally, the consent of the colonising state is necessary to transfer sovereignty over the territory to the newly independent state, if the new state is not created by means of secession.⁹⁴ Accordingly, even though the United Kingdom detached the Chagos Archipelago and thereby prevented the lawful completion of decolonisation, it appears doubtful whether this can be equated with the actual transfer of sovereignty.⁹⁵

The Special Chamber, relying on Mauritius' argument, is right that the parts of the *Chagos Advisory Opinion* that refer to Mauritius' 'territorial integrity ... including the Chagos Archipelago' and the 'decolonization of its territory'⁹⁶ seem to suggest that the ICJ already considered the Chagos Archipelago to be part of Mauritius' territory. However, it appears rather unlikely that the Court would have carefully avoided pronouncing on the issue and explained expressly that it would not do so,⁹⁷ but then 'decide[d]' on the sovereignty question in passing. Probably because of these uncertainties, the Special Chamber was rather cautious when addressing the issue. When first assessing the meaning of the *Chagos Advisory Opinion*, it stated merely that the United Kingdom's claim to sovereignty over Chagos was 'contrary' to the ICJ's holding that the United Kingdom's continued administration of Chagos was an unlawful act of continuing character.⁹⁸ Only later when summarising its points did the Special

⁹³ *Delimitation in the Indian Ocean* (n 1) 73 [246].

⁹⁴ James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007) 330–49 (on consent), 375–88 (on secession). This does not mean that the colonising state may not be violating international law by only granting partial independence: at 333.

⁹⁵ Similarly, Chris Monaghan considers that the Advisory Opinion strengthened Mauritius' position but does not seem to assume that the ICJ made a determination on sovereignty: Chris Monaghan, 'Reflections on the UK's Assertion of Sovereignty over the Chagos Archipelago in the Wake of the *Chagos Advisory Opinion*' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, 2021) 144, 158.

⁹⁶ *Delimitation in the Indian Ocean* (n 1) 48 [157], 49 [160]–[161].

⁹⁷ *Chagos Advisory Opinion* (n 12) 117–18 [86]–[88], 129 [136].

⁹⁸ *Delimitation in the Indian Ocean* (n 1) 53 [173].

Chamber expressly infer Mauritius' sovereignty.⁹⁹ When interpreting the *Chagos MPA Award*, the Special Chamber gave preference to the express statement of the Tribunal that it would not exercise jurisdiction over the sovereignty issue, over making inferences from its application of UNCLOS articles that generally only apply to coastal states.¹⁰⁰ It is difficult to see why similar caution should not be warranted when interpreting the *Chagos Advisory Opinion*.

Maybe because its line of argument in this regard stood on shaky ground, the Special Chamber also claimed that its finding of how the United Kingdom's claim to sovereignty was contrary to the ICJ's determinations had been 'strengthen[ed]' by the passing of the time limit in UN General Assembly *Resolution 73/295*.¹⁰¹ The exact chain of reasoning in this regard is however nebulous. If the Chagos Archipelago had already been part of the territory of Mauritius when it achieved independence, this would have been the case irrespective of the passing of the time limit in 2020. At a more general level, the Special Chamber's statement could be understood to mean that it employed the Resolution as an interpretative aid,¹⁰² to support its understanding of the *Chagos Advisory Opinion* as resolving the sovereignty dispute. From this vantage point, however, instead of the passing of the time limit, it seems more important that the Resolution found that '[t]he Chagos Archipelago forms an integral part of the territory of Mauritius'.¹⁰³

Yet, the Special Chamber can rely on an unlikely advocate who seems to have favoured a similar interpretation of the *Chagos Advisory Opinion*. In her dissenting opinion, Judge Donoghue interpreted the Advisory Opinion not too differently from Mauritius when stating that 'the Court's pronouncements can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius'.¹⁰⁴ She also implicitly referred to the *Chagos Advisory Opinion* as an 'authoritative judicial pronouncement'.¹⁰⁵ However, both of these points were part of a broader argument that the ICJ should exercise its discretion and not give the Advisory Opinion because she considered the opinion a circumvention of the absence of consent of the United Kingdom to have its bilateral dispute with Mauritius settled judicially. Since Judge Donoghue already considered the Advisory Opinion a threat to the ICJ's judicial function, it is unlikely that she would have welcomed the effect which the Special Chamber later ascribed to the Advisory Opinion in its judgment.¹⁰⁶

⁹⁹ Ibid 73 [246].

¹⁰⁰ Ibid 42–3 [138].

¹⁰¹ Ibid 68 [229].

¹⁰² On the use of UNGA Resolutions to interpret international law, see Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16(5) *European Journal of International Law* 879.

¹⁰³ GA Res 73/295, UN Doc A/RES/73/295 (n 13) para 2.

¹⁰⁴ *Chagos Advisory Opinion* (n 12) 265 [19] (Judge Donoghue).

¹⁰⁵ Ibid 261 [3] (Judge Donoghue).

¹⁰⁶ Ibid 266 [23] (Judge Donoghue):

I consider that the Advisory Opinion ... signals that the advisory opinion procedure is available as a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases. Some may find this to be a welcome development, but I consider that it undermines the integrity of the Court's judicial function.

Despite her critical attitude towards the Advisory Opinion, she apparently did not believe that it contained a statement that the sovereignty over Chagos was already with Mauritius. When describing the consequences of the Advisory Opinion, Judge Donoghue only laments an implicitly stated obligation of the United Kingdom to ‘relinquish’ its sovereignty — not an observation by the ICJ that it did not possess sovereignty since the time of the independence of Mauritius.

In sum, these points urge caution when assuming that the ICJ actually held — implicitly — in its *Chagos Advisory Opinion* that the Chagos Archipelago was under the sovereignty of Mauritius. Some voices even described the ruling as a way to ‘punish’ Britain for ignoring the *Chagos Advisory Opinion*.¹⁰⁷ In a more favourable light, the Special Chamber’s interpretation of the *Chagos Advisory Opinion* was not an act of ‘punishment’ but merely an expansive interpretation with its promises and pitfalls.

B *The Mysterious ‘Legal Effect’ of the Chagos Advisory Opinion*

The Special Chamber’s judgment put the spotlight on the legal effect of advisory opinions. It considered the ICJ’s *Chagos Advisory Opinion* to be ‘authoritative’ and to have ‘legal effect’.¹⁰⁸ Based on this effect, the Special Chamber rejected most of the Maldives’ preliminary objections premised on its interpretation of the Advisory Opinion. Because the ICJ — in the Special Chamber’s interpretation — had found that Mauritius enjoyed sovereignty over the Chagos Archipelago, the United Kingdom could not be an indispensable party and the Special Chamber did not need to exercise jurisdiction over the sovereignty issue.

The Special Chamber addressed these objections by subsuming them both under the question of whether there still existed a ‘dispute’ over the status of Chagos. This angle may surprise some readers. The *Monetary Gold* doctrine, as well as the limitation to the exercise of jurisdiction over incidental issues, are based on the principle of consent in international dispute settlement.¹⁰⁹ The *Monetary Gold* doctrine protects third states who have not consented to have their rights and duties adjudicated on in the proceedings in question.¹¹⁰ In the case of incidental issues, it is the boundaries of the consent of the parties to the dispute that set the limits.¹¹¹ However, neither of the two tests necessarily presupposes a ‘dispute’ in the sense of *Mavrommatis* to exist. Under the *Monetary Gold* doctrine, a legal interest may exist where there is no dispute, and a dispute may exist where there is no legal interest, although the two frequently coincide. For example, an *UNCLOS* Tribunal would not have jurisdiction to

¹⁰⁷ Andrew Harding, ‘UN Court Rules UK Has No Sovereignty over Chagos Islands’, *BBC News* (online, 28 January 2021) <<https://www.bbc.com/news/world-africa-55848126>>, archived at <<https://perma.cc/GNH6-HTQ8>>.

¹⁰⁸ *Delimitation in the Indian Ocean* (n 1) 61 [202], 62 [205].

¹⁰⁹ ‘[N]o state can, without its consent, be compelled to submit its disputes ... to arbitration, or any other kind of pacific settlement’: *Status of Eastern Carelia (Advisory Opinion)* [1923] PCIJ (ser B) No 5, 27 (‘Eastern Carelia’).

¹¹⁰ *Monetary Gold* (n 20) 32–3.

¹¹¹ On incidental issues extensively, see Fabian Simon Eichberger, ‘Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues’ (2021) 81(1) *Heidelberg Journal of International Law* 235.

incidentally determine the undefined status of a maritime feature over which a third state is claiming sovereignty, even when no other state has presented the third state with opposing views, so that no dispute has come into existence.¹¹² One may suppose that the Special Chamber reformulated both tests to be about the existence of a dispute to make it fit more neatly with its invocation of the *Chagos Advisory Opinion*. From the perspective of the Special Chamber, it may have been easier to argue that the Advisory Opinion resolved a dispute between Mauritius and the United Kingdom than to hold that it was entitled to rely upon the determination of the status of Chagos by the ICJ. However, it is the Advisory Opinion's 'effect' which the Chamber actually ended up relying on.

To begin with, the Special Chamber's approach is reminiscent of applying the Advisory Opinion as a form of precedent. However, the Special Chamber was not bound by any rule of international law to follow interpretations of the ICJ. While the ICJ is the 'principal judicial organ of the United Nations',¹¹³ it is not formally superior to any other international court or tribunal. Also, even though international judicial bodies frequently refer to each other's jurisprudence, including advisory opinions, there is no rule of binding precedent or *stare decisis* under international law.¹¹⁴ Formally, the Special Chamber was, therefore, not obligated to adopt an interpretation by the ICJ.

The important question is what the Special Chamber actually means when it states that the *Chagos Advisory Opinion* has 'legal effect'.¹¹⁵ As the Special Chamber emphasised, any possible legal effect cannot lie in the binding character of the *Chagos Advisory Opinion* itself. Both parties and the Special Chamber acknowledged, in line with the ICJ's established jurisprudence, that ICJ advisory opinions are not binding.¹¹⁶ This means that neither the requesting UN organ nor states affected by the determinations in the Advisory Opinion are under an obligation to comply with the opinion.¹¹⁷ As Robert Jennings stated: '[t]he advice is simply advice and is not a binding decision of the Court'.¹¹⁸ The Special Chamber was well aware of this and introduced a distinction between the 'binding character and the authoritative nature' of an advisory opinion of the ICJ.¹¹⁹

¹¹² For the requirement of positively opposed views, see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 833, 849–51 [37]–[41], 855–6 [57]–[58].

¹¹³ *Statute of the International Court of Justice* art 1.

¹¹⁴ And advisory opinions in particular do not enjoy such status: Dharma Pratap, *The Advisory Jurisdiction of the International Court* (Clarendon Press, 1972) 228.

¹¹⁵ *Delimitation in the Indian Ocean* (n 1) 62 [205].

¹¹⁶ *Ibid* 61 [202]; *Peace Treaties* (n 57) 71: 'The Court's reply is only of an advisory character: as such, it has no binding force'. See also *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep 177, 188–9 [31]: '[Advisory] opinions are advisory, not binding'.

¹¹⁷ Pratap (n 114) 227. Robert Kolb, however, argues that it is binding on the requesting organ to the extent that the organ is applying international law: Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013) 1097.

¹¹⁸ RY Jennings, 'Advisory Opinions of the International Court of Justice' in UNESCO (ed), *Boutros Boutros-Ghali Amicorum Discipulorumque Liber: Paix, Développement, Démocratie* (Bruylants, 1998) 531, 532.

¹¹⁹ *Delimitation in the Indian Ocean* (n 1) 61 [203].

The Special Chamber derives this authoritative nature from the special place occupied by the ICJ in the international judiciary. While the individual opinion does not legally oblige any states as the *dispositif* of a judgment in a contentious case would, it has been drafted in an elaborate procedure and with the same rigour as any judgment by the ICJ.¹²⁰ The special persuasiveness this lends to ICJ advisory opinions has been widely accepted in scholarship.¹²¹ The ICJ, also, does not seem to differentiate between how it refers to previous judgments and advisory opinions in support of legal propositions.¹²² Accordingly, '[t]he legal issues clarified by the Court are, from a positivist perspective, "the law"' and 'become fully part of the Court's jurisprudence'.¹²³ However, it is difficult to see why the Special Chamber could not have done justice to these points by considering the *Chagos Advisory Opinion* as a secondary source of international law in line with art 38(1)(d) of the *Statute of the International Court of Justice* ('*Statute of the ICJ*'). Clearly it decided to go beyond that.

One can read between the lines to infer that it was the institutional authority of the most respected judicial organ of the UN which tipped the balance in favour of Mauritius. It is a normal feature of the decentralised nature of international law that states are free to put forward different interpretations of rules of international law, as Mauritius and the United Kingdom did regarding their sovereignty over the Chagos Archipelago in the case at hand. Because of the fundamental requirement of consent for judicial dispute settlement, no party can be forced before a court without agreeing to have the dispute settled this way. Without an authoritative decision by an international judicial body, all parties to the dispute can maintain their judicial interpretation and the dispute cannot be resolved. Following the interpretation of the Special Chamber, the *Chagos Advisory Opinion* brought the limbo of equally valid judicial interpretations about the sovereignty over Chagos to an end. Yet, general considerations about the authority of advisory opinions cannot camouflage that the Special Chamber failed to clearly express the doctrinal basis for its engagement with the Advisory Opinion.

In the Special Chamber's interpretation, the *Chagos Advisory Opinion* ruled out the possibility that the United Kingdom could possibly have a legal interest regarding the Chagos Archipelago and removed the hurdle for the Special Chamber to determine the territorial status. It simply inferred Mauritius' sovereignty over the Chagos Archipelago from the *Chagos Advisory Opinion*. By

¹²⁰ See Karin Oellers-Frahm, 'Lawmaking through Advisory Opinions?' (2011) 12(5) *German Law Journal* 1033, 1046.

¹²¹ Ibid 1046; Pierre d'Argent, 'Article 65' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 3rd ed, 2019) 1783, 1808–9 [48]; Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale: Étude des Notions Fondamentales de Procédure et des Moyens de leur mise en œuvre* [Preliminary Objections in the Procedure of the International Court: A Study of the Fundamental Principles of Procedure and the Means of Their Implementation] (Pedone, 1967) 74–5. See especially at 84: 'avis consultatifs ... sont, de même que les arrêts, l'issue de l'exercice par la Cour de sa fonction judiciaire' [advisory opinions ... are, like judgments, the result of the Court's exercise of its judicial function] [tr author].

¹²² Pratap (n 114) 231.

¹²³ d'Argent (n 121) 1809 [49]; Oellers-Frahm (n 120) 1053 considers advisory opinions to be an '*erga omnes* judicial statement of what is — in the view of the court — the law at large'.

relying on the resolution of the dispute this way, the Special Chamber seems to argue that third states' interests and incidental issues pose no limits to the jurisdiction of a judicial body if they have already been interpreted judicially in an ICJ advisory opinion.¹²⁴ As the *Chagos Advisory Opinion* could not have entailed *res judicata* on the issue, it seems that the Special Chamber rather accepted what it considered to be the implications of the Advisory Opinion as a 'given'.¹²⁵

A similar approach was once suggested by Portugal in *East Timor*. In that case, Portugal had argued that the UN General Assembly and the Security Council had already conclusively determined the status of East Timor.¹²⁶ Because of this interpretation, Portugal argued that the ICJ would not have to make any decision in this regard itself but could simply accept the status of East Timor as a given.¹²⁷ The Court rejected Portugal's substantive interpretation of the UN Resolutions and, therefore, did not have to decide on whether it accepted the argument of a given interpretation in substance.¹²⁸ While the ICJ never had to decide on whether this idea might apply to its advisory opinions, scholars have been critical of such an application because such an approach would allow the advisory opinion to *ex post* 'replace the missing consent for contentious proceedings'.¹²⁹ One could well argue that this is exactly what happened between the *Chagos Advisory Opinion* and the Special Chamber's judgment. In its judgment, the Special Chamber avoided wading into these murky waters by leaving it open what precisely it meant by 'legal effect'. Rather than examining the general viability of a rule that considers statements from advisory opinions as a 'given', it focused on the authority of the ICJ and the resolution of the concrete dispute in question.

Despite these ambiguities, the Special Chamber could rely on jurisprudence from the CJEU which accepted the interpretation in advisory opinions by the ICJ and seems to have laid it down as established in another case. Most importantly, in *Council of the European Union v Front Polisario*, the CJEU relied on the *Western Sahara Advisory Opinion* by the ICJ to establish that the people of Western Sahara were a 'third party' in relation to an Association Agreement between Morocco and the European Union.¹³⁰ Similarly, in *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Economie et des Finances*, the CJEU relied on the ICJ's *Israeli Wall Advisory Opinion* to establish violations of international humanitarian law.¹³¹ However, to the extent that they rely on the

¹²⁴ On previous judicial determinations as exceptions to the *Monetary Gold* doctrine, see Tobias Thienel, *Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs: Die Monetary Gold-Doktrin* [Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold-Doctrine] (Duncker & Humblot, 2016) 327–9.

¹²⁵ On the notion of a 'given' in the context of *Monetary Gold*, see *ibid* 329–36.

¹²⁶ *East Timor* (n 20) 103 [30].

¹²⁷ *Ibid.*

¹²⁸ *Ibid* 103–4 [30]–[31].

¹²⁹ Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 309. With regard to UN institutions and decisions of international courts that have been handed down without *res judicata* more generally, see also Thienel (n 124) 329, 334.

¹³⁰ *Front Polisario* (n 60) [104]–[106].

¹³¹ *Organisation juive européenne* (n 60) [48], [56].

advisory opinions as well as their substantive engagement with their findings, these decisions do not go as far as the Special Chamber's holding.

Beyond the doctrinal intricacies of how it incorporated the *Chagos Advisory Opinion* into its reasoning, a key problem of the Special Chamber's approach is the effect it ascribed to the Advisory Opinion. More precisely, one may wonder whether the Special Chamber made the ICJ's Advisory Opinion binding through the backdoor. Were the argument made by the Special Chamber accepted more broadly, there would in essence hardly be a difference between an advisory opinion on a legal question that is disputed between states and a binding judgment. While states would not be bound to follow the non-binding advisory opinion, they would be bound to comply with the underlying rules of international law established by the ICJ in the advisory opinion. Were this the case, more generally, it would seem strange that states would find the need to expressly lay down instances in treaties under which they would consider advisory opinions as 'decisive'.¹³² One could even go further and question whether the Special Chamber's approach does not even make advisory opinions more authoritative than judgments in contentious cases. The latter are only binding between the parties to the dispute under art 59 of the *Statute of the ICJ*. By severing the de facto binding 'legal effect' of the advisory opinion from its non-binding nature because the ICJ is pronouncing 'the law' more abstractly, advisory opinions seem to be placed outside of the limitations of art 59 of the Statute, which governs the Court's judgments. As a result, receiving an advisory opinion on a question disputed between several states would most likely be more effective than seeking judgments in contentious cases, which would only be binding *inter partes*.

IV OUTLOOK

Without question, the judgment of the Special Chamber was a resounding victory for Mauritius and gave the State what it sought: a judicial acknowledgment of its sovereignty over Chagos. In the aftermath of the decision, news outlets around the world touted that ITLOS had ruled that the Chagos Archipelago belonged to Mauritius.¹³³ The United Kingdom is not party to the ongoing proceedings before ITLOS, but the fact that the Special Chamber believes the proceedings can lawfully continue without participation of the United Kingdom will certainly prove a thorn in its side. While the Special

¹³² See *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) art VIII s 30; Roberto Ago, "'Binding' Advisory Opinions of the International Court of Justice" (1991) 85(3) *American Journal of International Law* 439; Charles N Brower and Pieter HF Bekker, 'Understanding "Binding" Advisory Opinions of the International Court of Justice' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) 351.

¹³³ See, eg, Patrick Wintour, 'UN Court Rejects UK Claim to Chagos Islands in Favour of Mauritius', *The Guardian* (online, 29 January 2021) <<https://www.theguardian.com/world/2021/jan/28/un-court-rejects-uk-claim-to-chagos-islands-in-favour-of-mauritius>>, archived at <<https://perma.cc/2YNX-CHSM>>; Michael Vosatka, 'Seegerichtshof spricht Chagos-Inseln samt US-Basis "Diego Garcia" Mauritius zu' [The International Tribunal for the Law of the Sea Awards the Chagos Islands including the US Base 'Diego Garcia' to Mauritius], *Der Standard* (online, 29 January 2021) <<https://www.derstandard.de/consent/tcf/story/2000123727770/seegerichtshof-spricht-chagos-inseln-mauritius-zu>>, archived at <<https://perma.cc/MD3L-U9DS>>.

Chamber's ruling on the merits will have no immediate legal effect on the United Kingdom because the judgment will only be effective *inter partes*, the import of the ruling goes beyond its legal implications.¹³⁴

Most immediately, the judgment further strengthens Mauritius' claim to the Chagos Archipelago and increases the pressure on the United Kingdom to end its administration of the territory.¹³⁵ Already in 2020 in reaction to the *Chagos Advisory Opinion*, the UN published an updated map of the world that explicitly considered the Chagos Archipelago part of Mauritius.¹³⁶ Mauritius might also use its victory to intensify efforts to have the United Kingdom removed from the Indian Ocean Tuna Commission.¹³⁷ On a practical level, Mauritius has extended offers to let the United States further use Diego Garcia for defence purposes after the end of the British administration, seeking to disrupt the support of the United States for the United Kingdom in the Chagos question.¹³⁸

With regard to international law, the judgment of the Special Chamber may increase the impact of advisory opinions in the future. The decision has shown what impact the advisory jurisdiction of the ICJ can have on ongoing disputes if employed strategically. At the same time, it seems likely that the scepticism of states generally reluctant to accept the jurisdiction and authority of international courts will be reinforced. The United States, for example, denounced the *Chagos Advisory Opinion* before the Special Chamber handed down its judgment because it considered it an intervention into a bilateral dispute.¹³⁹ In this light, it will likely be hesitant to endorse the Special Chamber's decision.

In sum, the Chamber seems to have attempted to navigate the thorny issue of how to deal with the absence of the United Kingdom in the proceedings by relying on the *Chagos Advisory Opinion*. Its decision to reframe the key question of the case about the legal status of the Chagos Archipelago into one about the existence of a 'dispute' cannot, however, veil that it left open what 'legal effect' it actually ascribed to the *Chagos Advisory Opinion*. But perhaps clarity was not

¹³⁴ The United Kingdom emphasised this *inter partes* effect together with its long-standing argument that it has exercised sovereignty over Chagos for many years in its response to the ruling of the Special Chamber: James Heappey, 'British Indian Ocean Territory: Navy: Question for Ministry of Defence', UK Parliament (Statement, 8 February 2021) <<https://questions-statements.parliament.uk/written-questions/detail/2021-02-03/148829>>, archived at <<https://perma.cc/7SRE-Q7T6>>.

¹³⁵ Claire Mills, *Disputes over the British Indian Ocean Territory: February 2021 Update* (Briefing Paper No 9134, House of Commons Library, 8 February 2021) 5: 'there is a broad consensus among commentators that the ruling puts greater international legal pressure on the UK Government'.

¹³⁶ UN Geospatial, 'Map of the World', *United Nations* (Web Page, 1 October 2020) <<https://www.un.org/geospatial/content/map-world>>, archived at <<https://perma.cc/2J3J-YMKU>>.

¹³⁷ Elizabeth Boomer, 'International: International Tribunal for the Law of the Sea Confirms Sovereignty of Mauritius over Chagos Archipelago', *Library of Congress* (Web Page, 23 February 2021) <<https://www.loc.gov/item/global-legal-monitor/2021-02-23/international-international-tribunal-for-the-law-of-the-sea-confirms-sovereignty-of-mauritius-over-chagos-archipelago/>>, archived at <<https://perma.cc/76W7-RKMK>>.

¹³⁸ Marwaan Macan-Markar, 'Mauritius Makes Play for Future with US Base on Diego Garcia', *Nikkei Asia* (online, 18 November 2020) <<https://asia.nikkei.com/Editor-s-Picks/Interview/Mauritius-makes-play-for-future-with-US-base-on-Diego-Garcia>>, archived at <<https://perma.cc/63C7-5APU>>.

¹³⁹ *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*, UN GAOR, 74th sess, Agenda Item 86, UN Doc A/74/834 (18 May 2020) 17–18.

the first priority of the Special Chamber in this regard. What it did certainly achieve was to open a new chapter in the engagement of the international judiciary with advisory opinions by the ICJ. Whether the state community and other international courts and tribunals accept the interpretation put forward by the Special Chamber is yet to be seen.