Separate and Dissenting Opinion of Judge *ad hoc* Oxman

1. I believe that the request of Mauritius for judicial determination of a permanent maritime boundary is not yet admissible. I also believe that paragraph 3 of article 74 and paragraph 3 of article 83 apply to the activities of the Parties in the area that is within 200 nautical miles of the coast of both the Maldives and the Chagos Archipelago. The reasons are set forth below.

* * *

2. The record in this case does not reveal a dispute regarding the location of a maritime boundary, or the method to be used to determine its location, that is comparable to the delimitation disputes that have been submitted for binding determination by an international court or tribunal on numerous occasions since proceedings were instituted before the International Court of Justice (hereinafter "the ICJ") over a half century ago in the *North Sea Continental Shelf* cases, or indeed since the *Grisbådarna* arbitration over a century ago.

3. The Notification and the Statement of the claim and grounds on which it is based (hereinafter "the Notification") avers that "[d]espite the efforts of Mauritius to engage Maldives in negotiations to agree upon a maritime boundary, other than agreeing to attend a single meeting in October 2010, Maldives has declined to participate in such negotiations." It goes on to indicate that proceedings were accordingly instituted by Mauritius under the compulsory jurisdiction provisions of Section 2 of Part XV of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

4. At the outset of the hearing, the Agent of the Maldives explained the reasons for its reluctance to accept Mauritius' invitation to engage in delimitation negotiations with respect to areas off the coast of the Chagos Archipelago. Those reasons relate to a principle to which reference is made in numerous maritime delimitation cases, namely, to cite one example, that coastal State

> maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as "the land dominates the sea" … Following this approach, sovereignty over the islands needs to be determined prior to and independently from maritime delimitation.
> (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), *Judgment, I.C.J. Reports 2007*, p. 659, at p. 699, para. 126) (hereinafter "*Nicaragua* v. *Honduras*")

This Tribunal referred to the principle that the land dominates the sea in its first maritime delimitation judgment (*Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), *Judgment, ITLOS Reports 2012*, p. 4, at p. 56, para. 185).

5. The Agent of the Maldives stated that it "cannot be expected to take sides" in a dispute between Mauritius and the United Kingdom regarding the Chagos Archipelago, "a conflict which is not of our making" and "a dispute in which the Maldives has repeatedly stated that it does not wish to interfere." He explained that the Maldives "is understandably reluctant to become entangled in a controversial dispute with two States with which it enjoys important and friendly relations," noting in this regard that since 2011 "the Maldives has adopted a policy of refraining from bilateral talks with either party to the exclusion of the other." He observed that if there were no such dispute, "there would be no issue with delimitation. The Maldives would eagerly negotiate an agreement on the maritime boundary."

6. The history of the dispute between Mauritius and the United Kingdom regarding the Chagos Archipelago is recounted in the *Chagos* arbitral award (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI*, p. 359, at pp. 383–440, paras. 54–157) (hereinafter "the *Chagos Arbitral Award*") and in the *Chagos* advisory opinion (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at pp. 107–111, paras. 25–53) (hereinafter "the *Chagos Advisory Opinion*").

7. There is nothing unusual in international relations about trying to avoid being drawn into a dispute between other parties. A compendium of State practice to this effect, having consumed volumes, might still be incomplete. Such restraint may have desirable effects with respect to the maintenance of public order in general, and the prevention of aggravation and extension of

disputes in particular. So much so that, absent countervailing rights and duties, the law may even encourage such restraint (see Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA resolution 2625 (XXV), 24 October 1970 ("States parties to an international dispute, *as well as other States*, shall refrain from any action which may aggravate the situation") (emphasis added)).

8. The question is whether the relevant provisions of the Convention compel a State to negotiate a maritime boundary notwithstanding the foregoing concerns and, in this connection, whether the compulsory dispute-settlement provisions of the Convention may be used directly or indirectly to achieve that result. These issues arise in the context of the requests for relief by Mauritius set forth respectively in paragraphs 27 and 28 of the Notification, namely:

> to delimit … the maritime boundary between Mauritius and Maldives … in the EEZ and continental shelf, including the portion of the continental shelf pertaining to Mauritius that lies more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured

and

> to declare that Maldives has violated its obligation to, pending agreement as provided for in paragraph 1 of Articles 74 and 83 of UNCLOS, make every effort to enter into provisional arrangements of a practical nature and, during such transitional periods, not to jeopardize or hamper the reaching of the final agreement.

Article 74 and article 83

9. Both of the foregoing claims relate to article 74 and article 83 of the Convention, the former article addressing the exclusive economic zone ("EEZ") and the latter the continental shelf in identical terms. The four paragraphs of each of these articles provide as follows:

> 1. The delimitation of the [exclusive economic zone] [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred

to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the [exclusive economic zone] [continental shelf] shall be determined in accordance with the provisions of that agreement.

10. The four paragraphs of article 74 and of article 83 of the Convention address both the substantive and procedural consequences of overlapping entitlements under article 57 and article 76, respectively. Article 74 and article 83 contemplate determination of a maritime boundary that ordinarily divides the overlapping entitlements. That is an outcome whose benefits arise from applying the same geographic allocation to all affected entitlements and duties. The fact that delimitation may not in itself adequately address regulatory needs is made clear with respect to living resources by article 63, paragraph 1, article 64, paragraph 1, article 66, paragraph 4, and article 67, paragraph 3; with respect to pollution by article 194, paragraph 2, article 208, paragraph 4, and article 210, paragraph 5; and with respect to both as well as marine scientific research by article 123. Also, many delimitation agreements contain special clauses regarding deposits in the seabed and subsoil of non-living resources, especially those in fluid form, that are traversed by a boundary.

11. "Article 83, paragraph 1, of UNCLOS, in providing that delimitation shall be effected by way of agreement, requires that there be negotiations conducted in good faith, but not that they should be successful" (*Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), *Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, at p. 37, para. 90; see *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Judgment, ITLOS Reports 2017*, p. 4, at p. 162, para. 604) (hereinafter "the *Ghana/Côte d'Ivoire Judgment*").[1]

1 See Judgment, para. 273.

One might add that the first judgment of the ICJ on delimitation of the continental shelf contains an oft-cited passage concerning the duty to negotiate (*North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands*), *Judgment, I.C.J. Reports 1969*, p. 3, at p. 87, para. 85(a)).

12. The agreements referred to in paragraphs 1 and 4 of article 74 and paragraphs 1 and 4 of article 83 may provide for joint or cooperative implementation of some or all of the coastal State rights with respect to some or all of the area of overlap. The existence of such agreements illustrates the fact that paragraph 1 does not necessarily require delimitation.

13. A further illustration may be found in the ubiquity of overlapping entitlements that have yet to be delimited, decades after the adoption and entry into force of the Convention. That does not mean that the coastal States concerned are in breach of the Convention. It also does not mean that the undelimited areas are not regulated by article 74 and article 83. What it means is that the areas of overlap are governed by paragraph 3 of those articles. The number and significance of these undelimited areas, and the fact that some are the object of serious political differences, suggest caution in considering limitations on the scope and application of paragraph 3 of those articles. The rules on how to live with unresolved issues are of no less importance than the rules on how to resolve them.

14. Only paragraph 2 of article 74 and paragraph 2 of article 83 may, but do not necessarily, compel delimitation. Some States have exercised the specific right under article 298, paragraph 1(a)(i), to exclude "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations" from compulsory arbitration or adjudication under the Convention. Whatever the jurisdictional constraints on a court or tribunal to which a delimitation dispute has been submitted, it also should be borne in mind that paragraph 2 of article 74 and paragraph 2 of article 83 refer to all of the dispute-settlement procedures provided for in Part XV, not just arbitration and adjudication. A possible consequence of applying those paragraphs is agreement on conciliation under article 284 or submission of the dispute to compulsory conciliation by one party under article 298, paragraph 1(a)(i). That may result, and indeed has resulted, in much more than simple

delimitation (see *Timor Sea Conciliation between Timor-Leste and Australia*, Report and Recommendations of 9 May 2018, paras. 303–306, Annex 28: Maritime Boundary Treaty, Arts. 2, 4, 7, Annex B) (PCA Case No. 2016-10) (hereinafter "the *Timor Sea Conciliation*").

15. Mauritius suggests that paragraph 2 of article 74 and paragraph 2 of article 83 impose no jurisdictional requirement additional to that contained in Part XV, notably article 283, paragraph 1. Were there any doubt about the importance and relevance of paragraph 2 of article 74 and paragraph 2 of article 83, it should be noted that their "reasonable period of time" requirement is repeated in article 298, paragraph 1(a)(i), as a condition for compulsory conciliation of a delimitation dispute that is excluded from arbitration or adjudication by a declaration under that article. In the first such conciliation, the refusal of a State to negotiate on delimitation was examined in the light of that condition (*Timor Sea Conciliation*, Decision on Australia's Objections to Competence of 19 September 2016, paras. 77–82).

16. The reference to a reasonable period of time in the cited provisions makes clear that the existence of overlapping entitlements under article 57 and article 76 does not, in itself, mean that a delimitation dispute has yet arisen that is ready to be addressed under Part XV in general, and Sections 2 and 3 of that part in particular. Such a dispute typically arises after one party claims or proposes a maritime boundary or a method of delimitation that the other party rejects. Even then, one might need to draw a distinction between a continuing negotiation and an impasse.

17. Paragraph 2 of article 74 and paragraph 2 of article 83 need not be regarded as imposing a jurisdictional limitation as such. The "reasonable period of time" requirement set forth in those paragraphs might better be regarded as regulating the admissibility of a delimitation claim arising in the specific context of paragraph 1 of each of those articles, with which it is directly associated. Those articles are found in Parts V and VI of the Convention on the EEZ and continental shelf, not Part XV on settlement of disputes. Jurisdiction over a dispute concerning the interpretation or application of those articles is not necessarily predicated on Part XV, as article 282 makes clear. The wording of the "reasonable period of time" requirement appears to confer some latitude. The process

presumably entails a case-specific evaluation directed to a question the answer to which will determine whether it is yet time for a court or tribunal to step in and establish a permanent maritime boundary itself, bearing in mind that the alternative is not a legal vacuum: paragraph 3 of each of those articles continues to regulate conduct within the area of overlapping entitlements pending delimitation.

The nature and scope of the dispute

18. The record in this case indicates that there is an area of overlapping entitlements that is within 200 nautical miles (nm) of the coasts of both the Maldives and the Chagos Archipelago. The map that accompanies the executive summary of the Maldives' submission to the Commission on the Limits of the Continental Shelf (hereinafter "the CLCS") indicates that the Maldives regards its entitlements as extending into that area.[2] Mauritius depicts its entitlements as extending into that area as well. The location of this area of overlap may be ascertained with reasonable clarity, as Mauritius illustrated from its perspective in its Written Observations.[3] It encompasses a discrete portion of the respective 200-mile zones at their far reaches, even taking into account the use of different basepoints to which reference was made in these proceedings.

19. There appears to be no evidence in the record that either Party made a concrete delimitation proposal with respect to that area of overlap prior to the institution of proceedings in this case. During the first round of oral proceedings, the Co-Agent of Mauritius showed a map that illustrates its view of the area of overlap within 200 nm and depicts a line running midway through it that is labelled "Potential Median Line".[4] There is, however, no indication that such a line had been claimed by Mauritius or proposed to the Maldives as either a permanent maritime boundary or a provisional limit.

20. The record does indicate the emergence of a difference between the Parties with respect to the submission of the Maldives to the CLCS. Such

2 The map is reproduced in Mauritius, Written Observations on the Preliminary Objections, Vol. 1, at p. 32 (Figure 3).

3 Mauritius, Written Observations on the Preliminary Objections, Vol. 1, at p. 34 (Figure 4).

4 A copy of that map is appended at the end of this opinion.

submissions concern the seaward limits of continental shelf entitlements beyond 200 nm under article 76, not delimitation of overlapping entitlements under article 83. The absence of delimitation is relevant to CLCS submissions because the CLCS, under its Rules of Procedure, may decline to review a submission without the consent of a State with potentially overlapping entitlements. While CLCS Rule 46 and Annex I to its Rules of Procedure speak of disputes in this context, the CLCS is not a dispute-settlement body and the reference to "land or maritime disputes" is much broader than a legal dispute with respect to delimitation.[5] Sometimes the State with potentially overlapping entitlements consents to consideration of the submission by the CLCS on the understanding that this is without prejudice to the question of delimitation. Sometimes it does not consent and the CLCS does not proceed.

21. The map that accompanies the executive summary of the submission of the Maldives illustrates the continental shelf entitlements of the Maldives in the area beyond 200 nm from its coast whose outer limits it is submitting for review by the CLCS under article 76, paragraph 8, and Annex II. That map reveals that the submission with respect to the continental shelf entitlements of the Maldives beyond 200 nm from its coast is not intended to extend within the EEZ of other States, whose limits are illustrated in yellow. In this regard the map depicts a 200-mile EEZ measured from the Chagos Archipelago.[6]

5 Rule 46 provides as follows:

> 1. In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States or in other cases of unresolved land or maritime disputes, submissions may be made and shall be considered in accordance with Annex I to these Rules.
>
> 2. The actions of the Commission shall not prejudice matters relating to the delimitation of boundaries between States.

Annex I to the Rules provides in pertinent part:

> 5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.
>
> (b) The submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the position of States which are parties to a land or maritime dispute.

6 See note 2 *supra*.

22. Mauritius informed the Maldives that there was an error in the map's depiction of the precise location of the 200-mile limit measured from the Chagos Archipelago, so that there is an area of limited size where the continental shelf entitlement beyond 200 nm from its coast that is illustrated by the Maldives overlaps with the area within 200 nm of the Chagos Archipelago as measured by Mauritius. When the Maldives failed to amend the map, Mauritius transmitted a note to the CLCS protesting the encroachment into its EEZ of the extended continental shelf entitlement depicted in the map.[7]

23. While the note addresses overlapping claims of entitlement, it does not address delimitation as such.[8] This is confirmed by the map shown by the Co-Agent of Mauritius during the first round of oral proceedings: the "Potential Median Line" is located only within 200 nm of both coasts.[9]

24. It is accordingly apparent, as previously noted, that this case is not before the Special Chamber because of a difference between the Parties regarding how overlapping entitlements should be delimited. It is here because one of the Parties has declined to proceed with delimitation negotiations. The reasons for doing so help to define the nature and scope of the dispute between the Parties.

25. The preliminary objections and the arguments of the Parties focus largely on the question of jurisdiction to decide on the status of the Chagos Archipelago in order to determine whether Mauritius is the State with opposite or adjacent coasts to which paragraph 1 of article 74 and paragraph 1 of article 83 refer.[10] Approaching that issue frontally engages the established jurisprudence that eschews the exercise of jurisdiction over issues regarding rights to land territory in proceedings under the compulsory jurisdiction provisions of Section 2 of Part XV of the United Nations Convention on the Law of the Sea (see *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, RIAA, Vol. XXX*, p. 1, at pp. 42–45, paras. 174–181, p. 86, paras. 307–308; *Chagos Arbitral Award*, at pp. 458–460, paras. 214–221; *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016, RIAA,*

7 See Judgment, paras. 66, 68.
8 See Judgment, paras. 331–333.
9 See note 4 *supra*.
10 See Judgment, para. 115.

Vol. XXXIII, p. 153, at pp. 184–185, para. 5 (hereinafter "*South China Sea Arbitral Award*");[11] *Arbitration concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait between Ukraine and the Russian Federation*, *Award concerning Preliminary Objections of the Russian Federation of 21 February 2020*, PCA Case No. 2017-06 at pp. 48–49, para. 156, p. 59, para. 197) (hereinafter "the *Coastal State Rights Arbitral Award*").

26. The *South China Sea* award makes a similar point with respect to the territorial claims of third States as well (*South China Sea Arbitral Award*, at p. 239, para. 157). This is one of the reasons given for concluding that the third-State claimants are not indispensable parties (*ibid.*). Although the situations are different, that reasoning tends to suggest that the predicate for the second preliminary objection subsumes the predicate for the first in this case (see *Monetary Gold Removed from Rome in 1943* (*Italy v. France, United Kingdom and United States of America*), *Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32 ("Albania's legal interests … would form the very subject-matter of the decision")).

27. Mauritius asserts at the outset of its Written Observations, "The existence of the ICJ Advisory Opinion and the UN General Assembly Resolution are matters of fact, which, as shown below, are determinative of the legal issues raised by the Maldives' Preliminary Objections." Mauritius thereby invites the Special Chamber to avoid the question of the existence of jurisdiction to determine disputed rights to land territory by attributing conclusive prescriptive and, in practical effect, *res judicata* consequences to the advisory opinion and the ensuing General Assembly resolution 73/295 of 22 May 2019. In doing so, Mauritius attempts to avoid the distinction between the authoritative nature of an advisory opinion of the ICJ and its legally binding effect, and the distinction between the competence of the General Assembly to deal with a matter and the legally binding effect of its conclusions. It may be noted in this regard that General Assembly resolution 73/295, like the General Assembly resolutions unsuccessfully invoked by Ukraine in the *Coastal State Rights* arbitration, was "not adopted unanimously or by consensus but with many States abstaining or voting against" it (see *Coastal State Rights Arbitral Award*, at p. 54, para. 175).[12]

11 See Judgment, para. 110.

12 See Judgment, para. 75.

28. Even if Mauritius correctly perceives the intended meaning of the advisory opinion and the ensuing General Assembly resolution, its understanding of their legal effects is clearly not embraced by the United Kingdom.[13] In this regard the question before the Special Chamber is not whether that difference would constitute a dispute for purposes of satisfying the requirements for adjudication.[14] The question is whether the issue posed is outside its jurisdiction.

29. It is not apparent how, or why, the established jurisprudence, which eschews the exercise of compulsory jurisdiction under the Convention with respect to issues regarding rights to land territory, can be or should be avoided where there is a disagreement regarding the legal effect of a treaty, or judgment, award, or advisory opinion, or resolution of an international organization that addresses such rights.[15] The *Coastal State Rights* award suggests otherwise:

> if the Arbitral Tribunal were to accept Ukraine's interpretation of those UNGA resolutions as correct, it would *ipso facto* imply that the Arbitral Tribunal finds that Crimea is part of Ukraine's territory. However, it has no jurisdiction to do so.
> (*Coastal State Rights Arbitral Award*, p. 54, para. 176)

It is not clear why that logic should not apply to the *Chagos* advisory opinion as well. Shortly after the hearing on preliminary objections in the present proceedings, the ICJ rendered a judgment in which it noted the close connection for jurisdictional purposes between a boundary dispute and a dispute regarding an arbitral award concerning the boundary (*Arbitral Award of 3 October 1899* (*Guyana* v. *Venezuela*), *Judgment on Jurisdiction,* para. 130, to be published in *I.C.J. Reports 2020*).

30. Approaching the issue of the status of the Chagos Archipelago frontally also magnifies the scope of the dispute between the Parties to this case. Mauritius maintains that its sovereignty over the Chagos Archipelago is beyond dispute as a matter of law. The Maldives, noting that there is in fact a dispute between Mauritius and the United Kingdom regarding the Chagos

13 See Judgment, paras. 73, 75–77.
14 But see Judgment, para. 243.
15 But see Judgment, para. 190.

Archipelago, declines to be drawn into that dispute. The differences between these positions are narrower than the arguments concerning the jurisdictional objections may suggest.[16] It is possible to apply article 74 and article 83 only where these positions necessarily conflict, that is to the narrow questions that are unavoidably in dispute between the Parties at this juncture.

31. This would be far from the first case where a court or tribunal took such a restrained approach. That does not mean that every case is necessarily best approached in this way. But prior to the institution of proceedings in this case, the ICJ in its advisory opinion addressed, in a manner and to an extent that the Court deemed appropriate, the nature and implications of basic principles invoked by Mauritius in the present proceedings, and made clear that it is for the United Nations General Assembly to consider the ensuing steps (*Chagos Advisory Opinion*, at p. 139, para. 179).

32. The question before the Special Chamber is not whether it should reach the same conclusion on the merits with respect to the status of the Chagos Archipelago as that which is expressed in or implied by the advisory opinion or the ensuing General Assembly resolution. That would require adjudicating the merits of the claims to the islands, which would run counter to the jurisdictional limitations recognized by the existing jurisprudence. Rather in this case, Mauritius invites the Special Chamber to treat the territorial dispute as resolved by the Advisory Opinion and the ensuing General Assembly action. Quite apart from its underlying analytical challenges, accepting that invitation risks complicating the exercise by the General Assembly of its political functions and the exercise by the ICJ of its discretion with respect to requests for advisory opinions.

33. The advisory opinion states "that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius" (para. 183(5)). It does not necessarily follow that this precludes the Maldives from declining to negotiate a maritime boundary with Mauritius for the time being. A more fulsome observation in this regard might, without questioning the authority or importance of the statement, nevertheless question whether its interpretation or application is within the

16 Cf. Judgment, para. 114.

jurisdiction of the Special Chamber, referring in this connection to the existing jurisprudence eschewing the exercise of jurisdiction under Section 2 of Part XV of the Convention with respect to issues regarding rights to land territory. In this connection it might be noted that questions regarding the right of self-determination and decolonization were addressed by the Third United Nations Conference on the Law of the Sea in resolution III rather than in the text of the Convention, that there is no reference to that resolution in the text of the Convention, that such matters are beyond the scope of the substantive and dispute-settlement obligations accepted by the States Parties in consenting to be bound by the Convention, and that the references to international law in article 74, article 83, and article 293 are not open-ended invitations to conclude otherwise.

The request for judicial determination of a permanent maritime boundary

34. It is difficult to reach a conclusion that there is jurisdiction to proceed with delimitation in this case that is compatible not only with a cautious view of the legally binding effect of the ICJ advisory opinion and ensuing General Assembly resolution but that is also compatible at the same time with a restrained view of the Special Chamber's jurisdiction to pronounce on rights to land territory. The two are in tension with each other, pulling in opposite directions in that context. There is little if anything in the record of this case to suggest that there is a need for a permanent maritime boundary to divide the area of overlapping entitlements that is pressing enough to require such an undertaking at present. In my view, it is preferable to consider alternatives under articles 74 and 83 that avoid foreclosing such action in the future if need be, and that for the time being restrain the activities of the Parties in the area of overlapping entitlements.

35. The object of paragraph 1 of article 74 and of paragraph 1 of article 83 is a maritime boundary. Land and maritime boundaries share the characteristics of formality and finality, whatever the conceptual distinctions between them (see *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), *Judgment, I.C.J. Reports 2009*, p. 61, para. 217). The "establishment of a permanent maritime boundary is a matter of grave importance" (*Nicaragua* v. *Honduras*, at p. 659, para. 253).

> Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances."
> (*Aegean Sea Continental Shelf* (*Greece* v. *Turkey*), *Judgment, I.C.J. Reports 1978*, p. 3, at pp. 35–36, para. 85; see Vienna Convention on the Law of Treaties, Art. 62, para. 2(a))

36. These characteristics amplify the differences between the Parties to this case. These characteristics also suggest that paragraph 1 of article 74 and paragraph 1 of article 83 should not be interpreted to require a State to negotiate on a permanent maritime boundary when it declines to do so on the grounds that this would require it to become entangled in a disagreement between other States that exists in fact with respect to the territory of which the opposite or adjacent coast forms part. From this it should ordinarily follow that the "reasonable period of time" referred to in paragraph 2 for reaching agreement under paragraph 1 has not yet elapsed. Otherwise, in situations of failure to negotiate, one would impose the same result as would obtain in the absence of a reasonable justification.

37. In the Timor Sea Conciliation, the Conciliation Commission did not accept Australia's asserted justifications for declining to negotiate on delimitation, and accordingly concluded that a reasonable period of time had elapsed under article 298, paragraph 1(a)(i) (*Timor Sea Conciliation,* Decision on Australia's Objections to Competence, paras. 77–82). It is evident that Australia's objective in that context was to preclude delimitation. It may be assumed for purposes of the present case that a comparable refusal to negotiate under paragraph 1 of article 74 and paragraph 1 of article 83 would ordinarily mean that a reasonable period of time had elapsed under paragraph 2.

38. The Maldives has made clear that its reluctance to negotiate a maritime boundary is based on its desire not to be drawn into a dispute between other States that is not of its making and to which it is not party. The Maldives has also indicated that it is prepared to proceed with delimitation negotiations once the dispute between the other States is resolved. As previously noted, that position in my view merits respect for important reasons of public order.

39. The effect to be accorded the reluctance of the Maldives to negotiate a permanent maritime boundary is not logically contingent on the legal merits of the respective positions taken by the disputing parties. Territorial claimants not infrequently insist that opposing claims are mere assertions that merit no legal cognizance; whether that view is or is not correct says little if anything about the posture of a third State that seeks to avoid entanglement in the disagreement. Nor is the effect to be accorded the reluctance of the Maldives to negotiate logically contingent on any particular characterization of the disagreement between Mauritius and the United Kingdom, be it one over territorial sovereignty or one over completion of the process of decolonization as envisaged in the ICJ advisory opinion and General Assembly resolution 73/295. Indeed, resolution III of the Third United Nations Conference on the Law of the Sea suggests that it could be both.

40. A conclusion for the foregoing reasons that the request of Mauritius for judicial determination of a permanent maritime boundary is not yet admissible renders it unnecessary to address and decide on each of the preliminary objections with regard to that claim. This in itself, in my view, is a helpful consequence of resolving in the foregoing manner the narrow questions that necessarily divide the Parties to this case.

41. The issue thereby decided under paragraphs 1 and 2 of article 74 and paragraphs 1 and 2 of article 83 is the effect of the position of the Maldives with respect to the negotiation of a maritime boundary under paragraph 1, not that of the sovereignty claim of another State. There is ample evidence in the record of this case that the Maldives' explanation of the reason for its reluctance to negotiate a maritime boundary with Mauritius is a not a mere fabrication or pretext for precluding delimitation (see *Coastal State Rights Arbitral Award*, at p. 57, para. 189). No additional pronouncement on the existence, let alone the merits, of a territorial dispute regarding the Chagos Archipelago is required.[17] That in turn avoids the risk of calling into question the coherence of the jurisprudence regarding jurisdiction to determine rights to land territory in proceedings instituted under the compulsory jurisdiction provisions of Section 2 of Part XV of the Convention.

17 Compare Judgment, paras. 243, 245.

42. A decision on jurisdiction and admissibility in this case need not, and preferably should not, amplify the dispute between the Parties by treating their basic positions of principle as being in fundamental and unavoidable conflict. Alternative inferences need not be excluded where this is unnecessary to decide the question. It might be maintained that the conclusion that a reasonable period of time for negotiation under paragraph 1 of article 74 and paragraph 1 of article 83 has not yet elapsed implies that Mauritius is the State with an opposite or adjacent coast under those paragraphs; it also might be maintained that all that is decided is that paragraph 1 does not require the Maldives to negotiate with Mauritius on a final boundary when the Maldives declines to do so pending resolution of a dispute regarding territory of which the opposite or adjacent coast forms part.

Obligations under paragraph 3 of article 74 and paragraph 3 of article 83

43. The conclusion, for the foregoing reasons, that the request of Mauritius for judicial determination of a permanent maritime boundary is not yet admissible would not necessarily mean that the Parties have no obligations under paragraph 3 of article 74 and paragraph 3 of article 83 pending delimitation.

44. The more flexible word "arrangements" in paragraph 3 may be compared with the more formal word "agreement" in paragraph 1 of each of those articles. The contrast is marked. The function of paragraph 3 is not delimitation, but rather management of the situation pending delimitation. It provides the basis for self-restraint and enhances both the willingness and the ability of governments to forestall and resist pressures for destabilizing action.

45. Paragraph 3 specifies two obligations in this regard (see *Ghana/Côte d'Ivoire Judgment*, at p. 166, para. 626). One is to make every effort to enter into provisional arrangements of a practical nature with the other party, on the understanding that such arrangements are without prejudice to the final delimitation. The other is to make every effort not to jeopardize or hamper the reaching of the final agreement. The latter obligation might be satisfied either by unilateral self-restraint or by provisional arrangements with the other party or both.

46. One may reasonably assume that the term "States concerned" in paragraph 3 of article 74 and paragraph 3 of article 83 includes the "States with opposite or adjacent coasts" referred to in paragraph 1. But that need not necessarily limit the application of paragraph 3. The immediate context for the interpretation of the words "States concerned" in paragraph 3 is that paragraph. Its function is different from that of paragraph 1. It is not apparent why the words "[p]ending agreement as provided for in paragraph 1" cannot be understood to embrace an impediment to agreement such as that which led the Maldives to decline to negotiate a maritime boundary for the time being

47. It is neither logically necessary nor consistent with the overall structure of article 74 and article 83 to conclude that relieving the Maldives for the time being of its obligation to negotiate under paragraph 1, in order to avoid being drawn into a dispute between other States, also relieves both Parties of their obligations under paragraph 3. While negotiating a permanent maritime boundary may be difficult to reconcile with a policy of avoiding involvement in a dispute between other States regarding land territory of which the opposite or adjacent coast forms part, that need not be the case with respect to self-restraint and informal arrangements. Self-restraint may be unilateral, need not be directed explicitly to any given State, and need not apply to all of the area in which the 200-mile zones overlap. The fact that both Parties are also flag States with respect to certain activities may provide a convenient basis for affirmative cooperation in a manner that avoids prejudice to either's position.

48. In its Written Observations, the Maldives asserts that the *Chagos* arbitral award "retains *res judicata* force between the United Kingdom and Mauritius." Similarly, counsel for the Maldives states that the award remains "pleinement pertinente" and has "le « caractère définitif » des décisions revêtues de l'autorité de la chose jugée." From that perspective, the reasons advanced by the Maldives for declining to negotiate a boundary under paragraph 1 of article 74 and paragraph 1 of article 83, and its jurisdictional objections in regard to the judicial determination of a permanent maritime boundary, need not extend to the question of its obligations under paragraph 3 with respect to the legal interests of Mauritius identified in the *Chagos* arbitral award. In addition to a

reversionary interest in the Chagos Archipelago itself, these interests include both fishing and the benefit of any minerals or oil discovered in or near the Chagos Archipelago (see *Chagos Arbitral Award* at pp. 539–542, paras. 429–434, p. 548, para. 448, pp. 550–551, para. 453). The inclusion of these legal interests as objects of the obligations of the Maldives under paragraph 3 would be consistent with the object and purpose of that paragraph, and would thereby embrace what are widely regarded as the principal economic benefits of EEZ and continental shelf entitlements.

49. Accordingly, I agree that the legal interests of Mauritius identified in the *Chagos* arbitral award may play a role in this case.[18] In my opinion that role is best directed to paragraph 3 of article 74 and paragraph 3 of article 83. The text of those paragraphs and their object and purpose lend themselves to flexible application of a transitional nature that, to the extent required, may be addressed in geographic and substantive detail.

(*signed*) Bernard H. Oxman

18 See Judgment, para. 139.

Mauritius map