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Did the Preliminary Objections Judgment Resolve the Chagos Archipelago Sovereignty Dispute?

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Abstract

Noticing the conclusion of the Preliminary Objections Judgment in the case of *Mauritius vs. Maldives Maritime Delimitation*, this paper asks whether the Special Chamber's decision has resolved the sovereignty dispute over the Chagos Archipelago. It re-examines the conclusion that the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago is a mere assertion and the UK has no legal interest in it. This paper argues that the legal system has a self-reproducing nature by which the Special Chamber regenerates decisions already established in the legal system as the distinction between lawful and unlawful is the most fundamental determination of this system. In this sense, the confirmation of the Advisory Opinion of the International Court of Justice by the Special Chamber should be regarded as a consequence of its subjectivity and the fact that it almost distinguishes the legal system from other systems outside the law. From a perspective outside the legal system, the claim of courts that its role of "dispute settlement" is more like "case settlement", since courts are resolving disputes after legalization, not the disputes themselves. The *de facto* settlement of disputes should be based on the elimination of the interests or claims of the disputing parties. In this sense, dispute settlement depends on how the legal and political systems work together in a coupling relationship.

Keywords

Dispute Settlement; Dispute Disappearance; Legal System; Preliminary Objections in the Mauritius/Maldives Case; Chagos Archipelago Advisory Opinion.

1 Introduction

On 28 January 2021, the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) delivered a judgment in the Preliminary Objections phase of a dispute concerning the delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean (*Mauritius/Maldives*).[1] The Special Chamber rejected all the Maldives' objections, finding it had jurisdiction over the dispute.[2] The most controversial decision of the Preliminary Objections Judgment is its judgment on the first objection concerning the Chagos Archipelago sovereignty dispute. Due to the principle of "the land dominates the sea",[3] without resolution of the sovereignty dispute over the Chagos Archipelago, it will be challenging to deal with the maritime delimitation issue between Mauritius and the Maldives, so the Special Chamber is facing a "mixed dispute". The point is that the dispute over the sovereignty of the Chagos Archipelago is not between the parties to the case, Mauritius and the Maldives, but between Mauritius and the United Kingdom.

The Chagos Archipelago, about 500 kilometres from the Maldives in the Indian Ocean, is the subject of overlapping claims by the Maldives and Mauritius. In the Preliminary Objection, the Maldives asserted that the Special Chamber has no jurisdiction to determine such a dispute of sovereignty because *"the question of whether Mauritius is the 'coastal state' in respect of the Chagos Archipelago is not a dispute concerning the interpretation or application of UNCLOS"*,

1 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 354 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

2 Ibid.

3 Judgment of the ICJ of 16. 3. 2001, *Qatar vs. Bahrain (Maritime Delimitation and Territorial Questions)*. In: *International Court of Justice* [online]. P. 97, para. 185 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/87/087-20010316-JUD-01-00-EN.pdf; Judgment of the ICJ of 20. 2. 1969, *Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands (North Sea Continental Shelf)*. In: *International Court of Justice* [online]. P. 51, para. 96 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf; Judgment of the ICJ of 8. 10. 2007, *Nicaragua vs. Honduras (Territorial and Maritime Dispute in the Caribbean Sea)*. In: *International Court of Justice* [online]. Para. 113, 126 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/120/120-20071008-JUD-01-00-EN.pdf

and the decision of the Special Chamber will inevitably determine whether the United Kingdom is the sovereign of the Chagos Archipelago. Therefore, it is manifestly outside the jurisdiction of the Special Chamber under Article 288 of the United Nations Convention on the Law of the Sea ("UNCLOS") and so the Special Chamber cannot make a decision until the dispute on the sovereignty over the Chagos Archipelago is settled.[4] The Maldives stated that the United Kingdom may be an indispensable party with a legal interest in the dispute concerning the delimitation case between Mauritius and the Maldives,[5] thus hindering the jurisdiction of the Special Chamber under the Monetary Gold principle, according to which *"a court or tribunal cannot exercise its jurisdiction in the absence of an indispensable party"*[6]. Therefore, the ruling of the Preliminary Objection depends on *"the validity of the premise of Mauritius' sovereignty over the Chagos Archipelagos"*[7].

However, as the Special Chamber observed in the Preliminary Objections Judgment, the pronouncement that the General Assembly did not submit to the ICJ a bilateral dispute over sovereignty does not necessarily infer that the Advisory Opinion therefore has no relevance or implication for the issue of sovereignty.[8] The Special Chamber referred to the Chagos Advisory Opinion. It distinguished between the binding force and the legal effect of an Advisory Opinion of the ICJ.[9] The Special Chamber observed that,

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4 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 105 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

5 Ibid., para. 81.

6 Ibid., para. 82; see also Judgment of the ICJ of 15. 6. 1954, *Italy vs. France, United Kingdom of Great Britain and Northern Ireland and United States of America (Case of the Monetary Gold Removed from Rome in 1943)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/19/019-19540615-JUD-01-00-EN.pdf; Judgment of the ICJ of 30. 6. 1995, *Portugal vs. Australia (Case Concerning East Timor)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/84/084-19950630-JUD-01-00-EN.pdf

7 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 114 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

8 Ibid., para. 166.

9 Ibid., para. 203.

in light of the Advisory Opinion, which determined the United Kingdom's continued administration of the Chagos Archipelago to be an unlawful act of a continuing character, the Special Chamber does not find the Maldives' argument as to the matter-of-fact existence of a sovereignty dispute over the Chagos Archipelago convincing.[10] The Special Chamber concluded that Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations.[11] The Special Chamber stated that the ICJ has determined that the Chagos Archipelago is part of the territory of Mauritius, so there remains no dispute concerning the sovereignty over the Chagos Archipelago.[12]

Then problems arose. The Advisory Opinion did not have the effect of settling the dispute directly,[13] which was recognized by the Special Chamber and the International Court of Justice; on the other hand, the court plays an important role in dispute settlement by judgment. Has the dispute over the sovereignty of the Chagos Archipelago been resolved through the Preliminary Objections Judgment of the Special Chamber? Or has it just disappeared, making it not possible to consider the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago anything more than "a mere assertion"? If the Special Chamber could regard the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago as a mere assertion, thereby establishing jurisdiction over the maritime delimitation between Mauritius and the Maldives, will this judgment result in a settlement or the disappearance of the Chagos Archipelago sovereignty dispute? If not, what prevented this from happening, and what consequences will entail for the Court?

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10 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 243, 245 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

11 Ibid., para. 246.

12 Ibid., para. 248.

13 Advisory Opinion of the ICJ of 8. 7. 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf; Advisory Opinion of the ICJ of 9. 7. 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In: *International Court of Justice* [online]. Pp. 136, 162 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf

To discuss the questions above, this paper is divided into three parts. It first examines whether the reasonings of the Preliminary Objections Judgment can be seen as a way to make the dispute concerning the sovereignty of the Chagos Archipelago disappear. To this end, this paper will review the International Court of Justice's criteria for the disappearance of disputes, and examine whether the Preliminary Objection Judgment of the Special Chamber has settled the dispute or made it disappear. In addition to resolving disputes through substantive court judgments, there are two other criteria for the disappearance of disputes. Secondly, it examines in more detail the conclusion of the Preliminary Objections Judgment that the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago is a mere assertion, discussing whether it has the practical effect of making the dispute disappear. This part discusses the contribution the legal system can make in dispute resolution. Several disputes that the court decided on, but where it eventually settled for a contribution from the political system, will be mentioned. Third, a brief review of the United Nations ("UN") Charter illustrates the roles of the political system and the legal system in dispute settlement will be given. An example of a territorial dispute shows that proper mutual functioning between the political system and the legal system is needed for successful dispute settlement because of their coupling relationship.

2 The Preliminary Objections Judgment: Did It Reproduce the Decision of the ICJ or Make the Dispute Disappear?

There has been a protracted debate over the sovereignty of the Chagos Archipelago. Historically, the Chagos Archipelago was a dependency of Mauritius. Yet in 1965, the United Kingdom separated the Archipelago from Mauritius and brought it into the British Indian Ocean Territory (BIOT) as its colony.[14] Mauritius has been independent since 1968 but has not been able to regain its sovereignty over the Chagos Archipelago, although it made an initial claim in the 1980s. In 2010, the United Kingdom

14 Definitive treaty of peace and amity between His Britannic Majesty and His Most Christian Majesty, signed at Paris, the 30 May 1814.

announced it would establish a "marine protected area" around the Chagos Archipelago. Mauritius then initiated the *"Chagos Archipelago Marine Protected Area Arbitration Case"* under Annex VII of the UNCLOS. The tribunal found that the United Kingdom had violated some of its obligations under the UNCLOS by failing to negotiate with Mauritius to establish a marine protected area.[15] However, in the arbitral award, the arbitral tribunal refused to make a decision on the sovereignty of the Chagos Archipelago since it believed that the tribunal had no jurisdiction over sovereignty disputes, as sovereignty disputes have nothing to do with the interpretation or application of the Convention.[16]

In 2017, a UN General Assembly resolution invited the ICJ to issue an Advisory Opinion on the Separation of the Chagos Archipelago. The ICJ issued an Advisory Opinion in February 2019, finding that the separation of the Chagos Archipelago was illegal and that the decolonization process of Mauritius had not yet been completed.[17] The ICJ further stated that the continued administration of the Chagos Archipelago by the United Kingdom constituted an unlawful act of a continuing nature, and therefore *"the United Kingdom is obliged to end its administration of the Chagos Archipelago as soon as possible"*[18]. In May of the same year, the UN General Assembly passed a resolution declaring that *"the Chagos Archipelago is an integral part of Mauritius"* and demanded that the United Kingdom *"unconditionally withdraw its colonial administration from the Chagos Archipelago"* within six months.[19]

While recognizing that the Advisory Opinion and Chagos Arbitration do not have the legal effect of a "sovereignty dispute settlement", the Special Chamber concluded that the United Kingdom's continued

15 Award of the PCA of 18. 3. 2015, *The Republic of Mauritius vs. The United Kingdom of Great Britain and Northern Ireland (Chagos Marine Protected Area Arbitration)*. In: *Permanent Court of Arbitration* [online]. Para. 417–420 [cit. 19. 5. 2022]. Available at: https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf

16 Ibid., para. 211–221, 544, 547.

17 Advisory Opinion of the ICJ of 25. 2. 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In: *International Court of Justice* [online]. Para. 183 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf

18 Ibid., para. 172, 174, 177–178, 183.

19 Resolution adopted by the United Nations General Assembly on 22. 5. 2019, 73/295. *United Nations* [online]. Para. 2–3 [cit. 19. 5. 2022]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/151/29/PDF/N1915129.pdf?OpenElement

claim to sovereignty over the Chagos Archipelago was contrary to those determinations, and that Mauritius' sovereignty over the Chagos Archipelago could be inferred from the ICJ's determinations.[20] Some papers argued that the decision of the Special Chamber meant the dispute was settled by the Special Chamber[21] and criticized the Special Chamber for determining beyond its jurisdiction. However, the Special Chamber never claimed it was settling a dispute over the sovereignty of the Chagos Archipelago.

2.1 Three Circumstances of Dispute Disappearance

If the sovereignty dispute between the United Kingdom and Mauritius over the Chagos Archipelagos remains open, the acceptance of jurisdiction over the demarcation between Mauritius and the Maldives could mean an incidental exercise of jurisdiction over this dispute. The Special Chamber held that it could not and did not incidentally exercise its jurisdiction over the sovereignty dispute over the Chagos Archipelagos. However, the Special Chamber finally concluded that the United Kingdom was not an indispensable party to the present proceedings.[22] It appears that the dispute disappeared without an agreement between the parties or a judgment by the ICJ. Therefore, sorting out the circumstances of the disappearance of disputes will be an essential step towards clarifying the question about a long-standing dispute that disappeared when the Special Chamber established its jurisdiction. To discuss the disappearance of disputes, the concept of "dispute" needs to be understood first. It is easy to acknowledge

20 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 246 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

21 EICHBERGER, F. S. The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case-Judgment on Preliminary Objections. *Melbourne Journal of International Law*. 2021, Vol. 22, no. 2, p. 392. GAVER, C. D. Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives). *American Journal of International Law*. 2021, Vol. 115, no. 3, p. 523.

22 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 248 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

the existence of a dispute but hard to give a definition. However, determining the definition of dispute is crucial to a court's jurisdiction, whether the International Court of Justice or the Special Chamber of the ITLOS. Black's Law Dictionary defines "dispute" as "a conflict or controversy, esp. one that has given rise to a particular laws*uit" 23. The standards of the "existence of a dispute", which have been develope*d since the *Mavrommatis Palestine Concessions Case* in the Judgment of the Permanent Court of International Justice (PCIJ) in 1924, stated that a dispute arises when parties have *"a disagreement on the point of law or fact, a conflict of legal views or interests"*[24]. The ICJ stated in another case that a dispute refers to *"a situation in which the two sides held opposite views concerning the question of the performance or non-performance of certain treaty obligations"*[25].

The above-mentioned definition of a dispute was developed by the International Court of Justice to establish jurisdiction. The legal system only seeks to define disputes brought before courts, and uses the limitation of "in legal" or "in law". The focus of the court's work turned to how to resolve disputes after confirmation of the existence of a dispute. Yet as part of this process, the court can either uphold or deny the parties' claims, thus resolving the dispute, or determine that the dispute has disappeared due to other criteria. There are three circumstances of dispute disappearance.

2.1.1 Achievement of the Object of the Claim

There is a direct reference to the concept of a dispute's disappearance in the Nuclear Test Case, where the ICJ found that *"… the dispute has disappeared because the object of the claim has been achieved by other means"*[26]. The unilateral

23 CAMPBELL BLACK, H. *Black's Law Dictionary*. St. Paul: West Publishing Company, 1968, p. 558.

24 Judgment of the PCIJ of 30. 8. 1924, *Greece vs. The United Kingdom (Mavrommatis Palestine Concessions)*. In: *Jus Mundi* [online]. P. 11 [cit. 19. 5. 2022]. Available at: https://jusmundi.com/en/document/decision/en-the-mavrommatis-palestine-concessions-judgment-objection-to-the-jurisdiction-of-the-court-saturday-30th-august-1924#decision_932

25 Advisory Opinion of the ICJ of 30. 3. 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*. In: *International Court of Justice* [online]. Pp. 65, 74 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/8/008-19500330-ADV-01-00-EN.pdf

26 Judgment of the ICJ of 20. 12. 1974, *Australia vs. France (Nuclear Tests Case)*. In: *International Court of Justice* [online]. Para. 55 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf

declarations made by the French government caused *"the object of the claim having disappeared, there is nothing on which to give judgment"*[27]. Australia *"asked the International Court of Justice to order that the French Republic shall not carry out any further such tests"*[28]. Yet the ICJ concluded that the object sought by Australia and New Zealand had been achieved since France, in various public statements, had announced its intention to carry out no further atmospheric nuclear tests after the completion of the 1974 series. Therefore, no further judicial action was required.[29] As a result, the first or original category of dispute disappearance is the "achievement of the object of the claims" during the arbitral or judicial process by other means parallel to the proceedings.

The court observed here that the object of the claims is the reason for the existence of the dispute between the parties. Hence the court's jurisdiction must be exercised on a contentious proceeding, but this was not satisfied in the case we are examining. A unilateral statement about a legal or factual situation could create a legal obligation. The validity of these statements does not require any subsequent exchange or acceptance by any country or even any response from other countries. It was by this declaration that France conveyed to the world, including Australia and New Zealand, its intention to effectively end its atmospheric nuclear tests. Therefore, the court's procedure for settling disputes with a judicial decision became unnecessary in that case. The court pointed out, in a more restrained manner, that although judicial settlement may provide a way to achieve international harmony in the event of conflict, unnecessary litigation may create obstacles to achieving such a balance. Therefore, the court refused further action and concluded that the dispute had disappeared. This is a typical case of a dispute disappearing without judicial settlement.

2.1.2 Mootness

The second category of dispute disappearance occurs when a dispute is rendered "moot", meaning the dispute has been *"deprived of practical*

27 Judgment of the ICJ of 20. 12. 1974, *Australia vs. France (Nuclear Tests Case)*. In: *International Court of Justice* [online]. Para. 59 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf

28 Ibid., para. 11.

29 Ibid., para. 56.

significance and made abstract or academic"[30], thus *"any adjudication is devoid of purpose"*[31]. For example, in the Northern Cameroon Case, the court found that the disputed treaty, the Trusteeship Agreement, had been terminated by General Assembly Resolution 1608(XV) before the party brought the case to the court. Therefore, the court declared that it *"may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties"* and that *"circumstances that have since arisen render any adjudication devoid of purpose. Any judgment which the Court might pronounce would be without object"*[32].

It is worth noting that not all international courts believe their actions should be limited by mootness, and conditions confirmed to be mootness are somewhat similar to the achievement of the object of the claims. In the European Union – Measures Related to Price Comparison Methodologies (DS 516)[33] – the European Union argued that since the rule claimed by China has already been repealed, *"any findings of the Panel on the repealed Article 2(7) would be of purely academic interest"*[34]. In this case, the repealing of the disputed legislation can be regarded either as an "achievement of the object of the claims" or "rendered academic for want of practical significance." However, even if trade restrictions are lifted or removed, the board continues its proceedings on investigating whether the

30 ROSENNE, S. *The Law and Practice of the International Court.* Leyden: Sijthoff, 1965, p. 309.

31 Preliminary Objections Judgment of the ICJ of 2. 12. 1963, *Cameroon vs. the United Kingdom (Case concerning the Northern Cameroons).* In: *International Court of Justice* [online]. P. 38 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/48/048-19631202-JUD-01-00-EN.pdf

32 Ibid., p. 27.

33 Art. 2 para. 7 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union.

34 Second Written Submission by the European Union, Geneva, of 27. 2. 2018, Case DS516, *China vs. European Union*, *European Union – Measures Related to Price Comparison Methodologies*. In: *World Trade Organization* [online]. [cit. 19. 5. 2022]. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

regulations align with the World Trade Organisation ("WTO") agreement.[35] The essential obligations stipulated in the WTO agreement are objective targets, such as the prohibition of quantitative restriction and national treatment. The principle of the WTO agreement is that the world economy is interdependent,[36] and trade restrictions implemented by one country will influence the global trading system rather than only affect the parties to the dispute. Therefore, the WTO dispute settlement is expected to work as judicial supervision and a mechanism to ensure compliance with the WTO agreement.[37] On the contrary, the International Court of Justice is designed to solve bilateral disputes. The consent of the parties is a precondition for the establishment of the jurisdiction of the International Court of Justice.[38] Its rulings do not spill over into other jurisdictions as under WTO rules, and are thus constrained by mootness.

In addition, the European Court of Human Rights[39] and the European Court of Justice[40] have ruled on cases that have become moot.[41] The European

35 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 295; see also GATT Panel Report of 14 March 1978, EC – Measures on Animal Feed Proteins, BISD 25S/49; GATT Panel Report of 10 November 1980, EC – Restrictions on Imports of Apples from Chile, BISD 27S/98; GATT Panel Report of 22 February 1982, US – Prohibition on Imports of Tuna and Tuna Products from Canada, BISD 29S/91; GATT Panel Report, EC – Restrictions on Imports of Dessert Apples, BISD 36S/93, adopted 21–22 June 1989; GATT Panel Report of 21–22 June 1989, EC – Restrictions on Imports of Apples, BISD 36S/135; GATT Panel Report, US – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, BISD 39S/1 28; WTO Panel Report of 23 May 1997, US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R; WTO Panel & Appellate Body Reports of 10 January 2001, US – Import Measures on Certain Products front the European Communities, WT/DS 1 65/R & WT/DS 1 5/AB/R.

36 WTO Agreement; DELABARRE, M. Interdependence Between States and Economies: The International Response. *SSRN* [online]. 6. 10. 2021, p. 2 [cit. 19. 5. 2022]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3917586

37 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 295.

38 Art. 36 Statute of the International Court of Justice.

39 Judgment of the European Court of Human Rights of 18. 1. 1978, *Ireland vs. United Kingdom*, Case No. 5310/71.

40 Judgment of the European Court of Justice of 9. 7. 1970, *Commission vs. France*, Case 26/69, pp. 575–76; Judgment of the European Court of Justice of 19. 12. 1961, *Commission vs. Italy*, Case 7/61, p. 326.

41 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 296.

Court of Human Rights *"not only to decide those cases brought before* [it] *but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention"*[42]. They are judicial supervision organs for human rights.[43] Courts are exempt from restrictions of mootness only when they exercise the role of supervision, which is not the case with the International Court of Justice and the Special Chamber.

2.1.3 Dispute Settled by Judgment

The third circumstance of a disappearing dispute is the most common one. A dispute disappears when it is settled by a court with a judgment. International law regards the maintenance of international peace as its fundamental goal,[44] and the judiciary is expected to settle the dispute by peaceful means.[45] Yet the problem is that the legal system only seeks to define disputes brought before courts, and it may only resolve a part it has defined. As the ICJ indicated in the Hostage Case, *"it is for the Court to resolve any legal questions that may be in issue between parties to a dispute, and the resolution*

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42 Judgment of the European Court of Human Rights of 18. 1. 1978, *Ireland vs. United Kingdom*, Case No. 5310/71, para. 154.

43 IWASAWA, Y. WTO Dispute Settlement as Judicial Supervision. *Journal of International Economic Law*. 2002, Vol. 5, no. 2, p. 296.

44 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1010; see also MERRILLS, J. G. *International Dispute Settlement*. Cambridge: Cambridge University Press, 1998, 354 p.; COLLIER, J. G., LOWE, V. *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford: Oxford University Press, 1999, 395 p.; UNITED NATIONS. *Handbook on the Peaceful Settlement of Dispute Between States*. New York: United Nations, 1992, 229 p.; HENKIN, L. *International Law cases and Materials*. St. Paul: West Publishing Company, 1993, Chapter 10; BOWETT, D. W. Contemporary Developments in Legal Techniques in the Settlement of Disputes. In: *Recueil des cours 1983*. The Hague, Boston, Leiden: Martinus Nijhoff Publishers, 1984, Vol. 180, p. 171; MURTY, B. S. "Settlement of Disputes". In: SØRENSEN, M. (ed.). *Manual of Public International Law*. London: Macmillan, 1968, p. 673; see also DAILLIER, P., PELLET, A., QUOC DINH, N. *Droit International Public*. Paris: LGDJ, 2002, p. 821; OELLERS-FRAHM, K., ZIMMERMANN, A. *Dispute Settlement in Public International Law*. Berlin: Springer, 2001, 2253 p.; ECONOMIDÈS, C. P. "L'Obligation de Reglement Pacifique des Differends Internationaux". In: *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*. Brussels: Bruylant, 1999, p. 405; PAZARTZIS, P. *Les engagements internationaux en matière de règlement pacifique des différends entre Etats*. Paris: LGDJ, 1992, 374 p.; BRUS, M., MULLER, S., WIEMERS, S. (eds.). The UN Decade of International Law: Reflections on International Dispute Settlement. Dordrecht: Springer, 1991, 168 p.

45 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1047.

of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute"[46].

The conclusion that the United Kingdom does not have any legal interest in the Chagos Archipelago is not based on any of the above criteria for the disappearance of the dispute. First, the sovereignty over the Chagos Archipelago that Mauritius claimed has not been achieved since the decolonization process has yet to be completed. Second, as far as the sovereignty of the Chagos Archipelago is concerned, there are still conflicting views between Mauritius and the United Kingdom. If both parties were willing to resolve the conflict through judicial bodies, a judgment on the sovereignty dispute would not be deprived of practical significance and made abstract or academic. The Special Chamber is here as a second-order observer, while the International Court of Justice became a primary observer when it issued the *Chagos Archipelago Advisory Opinion*. The International Court of Justice used the code of either lawful or unlawful to judge the United Kingdom's separation and continuing administration of the Chagos Archipelago, and identified the unlawful statutes of the United Kingdom's sovereignty interests over the Chagos Archipelago. When observing whether the United Kingdom has a legal interest in the Chagos Archipelago, which makes it an indispensable third party in the *Case Concerning the Maritime Delimitation Dispute between Mauritius and Maldives*, the Special Chamber, as a subject of the second-order observation, of course, also used the distinction of unlawful or lawful in relation to the United Kingdom's sovereignty interests in the Chagos Archipelago. However, unlike the ICJ as primary observer, it can obtain the materials used by the primary observer ICJ when making decisions and directly observe existing judgments it has made.

The various units in which the law operates and the interactions between them constitute a system, called the legal system. The system backtracks existing legal communications, creates new legal communications, and reproduces

46 Judgment of the ICJ of 24. 5. 1980, *United States of America vs. Iran (Case concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. Para. 40 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf

itself in a recursive manner.[47] All legal decisions, as communication within the legal system, must be made now, but the rationale for legal decisions indicates an essential direction in providing stable expectations for the parties' actions: the impact of this legal decision on the future. There are two explanations for the future here. It is the closest future that the Special Chamber establishes jurisdiction over the maritime delimitation case between Mauritius and the Maldives. Even if deciding whether it has such jurisdiction or not is acceptable, for the longer-term future the decolonization of the Chagos Archipelago and the return of the Chagos Archipelago to Mauritius was clearly stated in the Advisory Opinion, which is the future that the Special Chamber, as part of the international legal system, should promote. This paper argues that the Preliminary Objections Judgment is a reproduction of the opinion of the International Court of Justice within the international legal system. The Special Chamber is a part of this system. It can regenerate the elements conceived by the International Court of Justice, which is the principal judicial organ of the UN. The opinion of the International Court of Justice expressed in its Advisory Opinion – that the continued administration of the Chagos Archipelago by the United Kingdom is unlawful – was decided by the International Court of Justice in the legal system. This opinion has been stabilized as a premise for subsequent communication within the international legal system, and further constrains the Special Chamber's actions, guiding and reinforcing the subsequent selection and confirmation of information. This is not because the Special Chamber was bound by any rule of international law to follow interpretations of the ICJ or because the ICJ is a superior body to any other international court and tribunal as the *"principal judicial organ of the United Nations"*[48]. However, those courts are both in the legal system, as consistency is the essence of judicial reasoning[49] and also the essence of the legal system.

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47 LUHMANN, N. The Unity of the Legal System. In: TEUBNER, G. (ed.). *Autopoietic Law – A New Approach to Law and Society.* Berlin: De Gruyter, 1987, pp. 12–35.

48 Art. 1 Statue of the International Court of Justice.

49 Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby. *Serbia and Montenegro vs. United Kingdom (Legality of Use of Force).* In: *International Court of Justice* [online]. P. 52 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/111/111-20041215-JUD-01-01-EN.pdf

New cases should conform to the legal norms summarized in the existing judicial practice for consistency and unity of the legal system. In this way, the previous legal communication not only limits the new legal communication but also provides guidance for the latter. In doing so, the legal system thus highlights its subjectivity, distinguishing it from other systems.

It should be noted that the International Court of Justice sometimes reflects on previous decisions and formulates new decisions different from them. However, such a decision must be based on a specific case, which is distinct from the former only because the condition of the specific case is different. New legal reasoning must be proposed to mend cracks in the legal system, but in this case, no reason that would have justified the separation and continued administration of the Chagos Archipelago by the United Kingdom as a lawful act emerged. Given that the Special Chamber does not have jurisdiction over the sovereignty dispute and the purpose of the Advisory Opinion of the International Court of Justice is not to directly resolve the dispute, the Preliminary Objections Judgment should be considered a reproduction of the opinion already established in the Advisory Opinion of the International Court of Justice. This reproduction precludes the possibility of the United Kingdom's claim to the Chagos Archipelago being accepted by the legal system and serves as preparation for the processing of the maritime delimitation dispute between Mauritius and the Maldives in the legal system. Could the Special Chamber have developed a new circumstance for the disappearance of a dispute by confirming that a party has no legal interest in the subject of the "dispute"? The Special Chamber is not an institution addressing territorial disputes and cannot represent the position of the International Court of Justice, so the author cannot jump to a conclusion, but this paper will go a step further by discussing whether this circumstance, if it holds, could make the dispute disappear.

3 The Court's Role: Settle the Dispute or Settle the Case?

The International Court of Justice has never confirmed a dispute between the United Kingdom and Mauritius over the sovereignty of the Chagos Islands. According to the International Court of Justice, divergent views

between the two sides do not mean that the International Court of Justice is dealing with a dispute.[50] In the Preliminary Objections Judgment, the Special Chamber considered that whatever interests the United Kingdom may still have concerning the Chagos Archipelago, they would not render the United Kingdom a state with sufficient legal interests.[51] While acknowledging that the United Kingdom still has substantial administration in place, the Special Chamber concluded in the Preliminary Objections Judgment that the United Kingdom has no legal interest in the Chagos Archipelago. The Special Chamber reproduced the opinion of the legal system in the Preliminary Objections Judgment, in which interests and legal interests were distinguished. Does this then mean that when a court resolves disputes, is there a distinction between disputes as such and legal disputes? This distinction will affect whether the dispute over the sovereignty of the Chagos Archipelago is de facto resolved. The legal documents holding that a court can directly put the dispute to an end are, for example, that *"the Award* […] *puts an end to the dispute definitively and without appeal"* [52] and *"the Award* […] *settles the dispute definitively and without appeal"* [53]. Even if the Special Chamber's preliminary dissenting judgment is a reproduction of existing opinions within the legal system, can it exclude the United Kingdom from sovereignty over the Chagos Archipelago, thus making the Chagos Archipelago sovereignty dispute disappear? The court's role in dispute settlement will be discussed from the perspective of outside law in this part.

50 Advisory Opinion of the ICJ of 25. 2. 2019, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In: *International Court of Justice* [online]. Para. 79–91 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/169/169-20190225-ADV-01-00-EN.pdf

51 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 247 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

52 Art. 54 Convention for the Pacific Settlement of International Disputes of 1899.

53 Art. 81 Convention for the Pacific Settlement of International Disputes of 1907.

3.1 The Disputes Submitted to the Court Are "Legalized" but Comprehensive in Nature

Political factors cannot but be entwined with questions of law.[54] The court was only concerned with establishing that the dispute in question was a legal dispute *"in the sense of a dispute capable of being settled by the application of principles and rules of international law"*[55]. In the Hostage Case, the court said it resolved legal questions rather than legal disputes. The court recognized that it deals with only one aspect of a conflict. The existence of other factors will not affect the positive action of the court: *"yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them"*[56]. The ICJ recognized that political and legal organs deal with aspects of the same basic situation.[57]

The court recognized that the judiciary resolves disputes at the legal level, and the legal level was used in this process. A distinction is sometimes made between legal and political disputes or justiciable and non-justiciable disputes.[58] Since it is difficult to highlight the general objective criteria differentiating the legal and political aspects, the settlement method determines the nature of the conflict. This process can only resolve a specific aspect of a dispute. Scholars have taken this observation further, noting that legal or other aspects of a dispute are shown in the resolution process. The dispute cannot differentiate its legal part from other parts, as there is no such distinction before entering the dispute settlement procedure. Kelsen stated,

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54 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1065.

55 Judgment of the ICJ of 20. 12. 1988, *Nicaragua vs. Honduras (Case Concerning Border and Transborder Armed Actions)*. In: *International Court of Justice* [online]. Para. 52 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/74/074-19881220-JUD-01-00-EN.pdf

56 Judgment of the ICJ of 24. 5. 1980, *The United States of America vs. Iran (Case concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. Para. 37 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-00-EN.pdf

57 Judgment of the ICJ of 26. 10. 1984, *Nicaragua vs. The United States of America (Case Concerning Military and Paramilitary Activities in and Against Nicaragua)*. In: *International Court of Justice* [online]. Pp. 435–439 [cit. 19. 5. 2022]. https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf

58 LAUTERPACHT, H. *The Function of Law in the International Community*. Oxford: The Clarendon Press, 1933, pp. 19–20.

"the legal or political character of a dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of the norms to be applied in settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law"[59]. Jennings expressed similar views: *"the rubric legal dispute should be understood as indicating not only something about the objective character of a dispute submitted to a court but much more the highly technical procedure whereby the court and the parties together reduce their dispute into a form which renders it manageable in an adversarial proceeding in a court of law"*[60].

On the other hand, disputes do not have a specific nature. It is the method of settling them that outlines the type of dispute. Higgins believes that there is little relevance in any definition of a political or legal question; what is relevant is the distinction between a political method and a legal method for solving a dispute.[61] Jennings takes this view further and observes that disputes are of legal nature due to the structuring process brought to court: *"cases brought before a court of law,* […] *invariably have a pleadings procedure by which the matter is indeed 'reduced' to a specific issue, or a series of such specific issues* […] *Everyone with experience of preparing such pleadings knows that the drafting of the submissions will be the moment of truth for some arguments which, before the imposition of this discipline, had seemed cogent"*[62]. Lauterpacht stated that *"the State is a political institution and all questions which affect it as a whole, in particular its relations with other States, are therefore political"*[63]. However, this will not prevent a court from taking active action to resolve a dispute with legal means. There are also various dispute resolution models, and the judicial method is one of them.

59 KELSEN. H. *Principles of International Law.* New York: Holt, Rinehart and Winston, 1966, p. 56.

60 JENNINGS, R. Y. The Proper Work and Purposes of the International Court of Justice. In: SMITH, R. M. *Cambodia's Foreign Policy.* Ithaca, New York: Cornell University Press, 1965, 273 p.; MULLER, A. S., RAIČ, D., THURÁNSZKY, J. M. (eds.). *The International Court of Justice: Its Future Role after Fifty Years.* The Hague, Boston: Brill, Martinus Nijhoff, 1997, pp. 33–45.

61 HIGGINS, R. Policy Considerations and the International Judicial Process. *The International and Comparative Law Quarterly.* 1968, Vol. 17, no. 1, p. 74.

62 JENNINGS, R. Y., quoted in SUGIHARA, T. The Judicial Function of the International Court of Justice. In: MULLER, A. S., RAIČ, D., THURÁNSZKY, J. M. (eds.). *The International Court of Justice: Its Future Role after Fifty Years.* The Hague, Boston: Brill, Martinus Nijhoff, 1997, p. 118.

63 FRY, J. D. *Legal Resolution of Nuclear Non-Proliferation Disputes.* Cambridge: Cambridge University Press, 2013, p. 411.

When the international court asserts it is settling a dispute, it is settling a dispute that can be described and constructed by law.[64] Within the legal system, courts use legal methods to resolve the legal aspects of disputes. This work begins when courts establish their jurisdiction over disputes. Yet even if the legal system can seek to ignore other aspects of the dispute, that does not mean that the political aspects of the dispute will be diminished as a result. The response of the political system is beyond the control of the legal system.

The Advisory Opinion of the International Court of Justice did not confirm the existence of a dispute between the United Kingdom and Mauritius over the sovereignty of the Chagos Archipelago. While acknowledging that there were divergent views, the International Court of Justice did not "legalize" this disagreement. Without it being legalized, it is difficult for the legal system to respond effectively, not to mention resolve it. The Special Chamber concluded that there is no legal interest for the United Kingdom as far as the Chagos Archipelago is concerned. If there is no legal interest, it is impossible to legalize the divergent views as a dispute that can be dealt with by the Special Chamber. The Special Chamber, therefore, stated that the UK's claim was a mere assertion, not making it a party to the dispute.

3.2 Conclusions of the Legal System May Be Rejected by the Political System

This article does not deny that *"sometimes, of course, when an international tribunal settles a legal question, the underlying dispute is also settled"*[65]. However, practice has shown that disputes have not been settled because the court's judgment was not accepted by the political system. Law and politics belong to different functional subsystems, and the communication within the system is dominated by different binary codes. Therefore, the conclusions of the legal system need not necessarily be accepted by the political system. The court completes its task through a judgment. However, due to the refusal of the political system, the adjudicated dispute has not disappeared,

64 GALTUNG, J. Institutionalized Conflict Resolution: A Theoretical Paradigm. *Journal of Peace Research*. 1965, Vol. 4, no. 2, pp. 348–397.

65 TUMONIS, V. *Judicial Decision-Making: Interdisciplinary Analysis with Special Reference to International Courts*. Doctoral thesis. Mykolas Romeris University, 2012, p. 111.

and the parties remain in a state of conflict. In some cases, the political system deliberately distorts the conclusions given by the legal system so that the conclusion of the dispute settlement cannot affect the operation of the political system, nor can they be accepted as the communication precondition of the political system.

The *Corfu Channel Case* could be used as an example. The court made a judgment in 1949[66] and determined the amount of compensation Albania should pay to Great Britain, but Albania refused to enforce the judgment. The dispute wasn't resolved until 1992, when the diplomatic relations between the two countries began to warm up.[67] A Memorandum of Understanding on Compensation between Albania and the United Kingdom was concluded on 29 October 1996, meaning the issues left over by the *Corfu Channel Case* were only resolved almost 50 years after the judgment was made.[68] There are also other examples of diplomatic asylum cases. In its judgment relating to a diplomatic asylum case of 1950, the court ruled that Colombia's asylum practices of unilaterally determining Haya de la Torre's status as a political prisoner violated the Havana Asylum Convention.[69] On the other hand, Peru failed to prove Haya de la Torre guilty of ordinary crimes and was under no obligation to ensure his safe departure. However, the court did not specify whether Colombia was obliged to transfer Haya de la Torre. Colombia's request for further explanation of the judgment has since been rejected by the court.[70] The court pointed out that the parties rather than the court should consider not only the specific implementation of the judgment based on legal considerations but also the practical possibility and political expediency, which are not among the judicial functions of the court.[71]

66 ROSENNE, S. *The Law and Practice of the International Court 1920-2005*. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 233.

67 Ibid., p. 239.

68 SCHULTE, C. *Compliance with Decisions of the International Court of Justice*. Oxford: Oxford University Press, 2004, p. 98.

69 Judgment of the ICJ of 20. 11. 1950, *Colombia vs. Peru (Asylum case)*. In: *International Court of Justice* [online]. Pp. 287–289 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-FR.pdf

70 Request for the Interpretation of the Judgment of the ICJ of 20. 11. 1950, *Colombia vs. Peru*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-FR.pdf

71 Judgment of the ICJ of 13. 6. 1951, *Colombia vs. Peru (Haya de la Torre case)*. In: *International Court of Justice* [online]. Pp. 80–82 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/14/014-19510613-JUD-01-00-EN.pdf

A dispute between Thailand and Cambodia over the Temple of Preah Vihear was not resolved immediately after the court's judgment on 26 May 1961.[72] Thailand even strengthened military control over relevant border areas and took diplomatic and economic sanctions against the countries the three judges were from.[73] The authority and judgment of the International Court of Justice have been challenged by Thailand. The judicial solution may deteriorate the relations between the parties to a certain extent and intensify the conflict between the two sides. A gap between dispute settlement and court judgment also exists in international maritime law. In a fisheries jurisdiction case, Iceland's policy of expanding coastal fishing areas led to a dispute with Britain and Germany. Britain and Germany referred Iceland to the International Court of Justice. Based on the exchange of letters between Britain, Germany and Iceland in 1961, the first two countries questioned the legitimacy of Iceland's unilateral expansion of fishing areas.[74] The legal system sometimes chooses not to respond to signals from the political system due to its closed nature and self-referral between the different systems. Before the judgment of the International Court of Justice, Iceland and Britain reached a provisional agreement through an exchange of letters on 13 November 1973, allowing Britain to continue fishing in Iceland's 50-nautical-mile fishing area for two years.[75] However, a judgment of the International Court of Justice in 1974 was not affected by this provisional agreement, with the court holding that Iceland

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72 Judgment of the ICJ of 15. 6. 1962, *Cambodia vs. Thailand (Case concerning the Temple of Preah Vihear)*. In: *International Court of Justice* [online]. [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/45/045-19620615-JUD-01-00-EN.pdf

73 SMITH, R. M. *Cambodia's Foreign Policy*. Ithaca, New York: Cornell University Press, 1965, p. 150.

74 Exchange of notes constituting an agreement settling the fisheries dispute between the Government of Iceland and the Government of the United Kingdom of Great Britain and Northern Ireland. Reykjavik, 11 March 1961. *United Nations. Treaty Collection* [online]. [cit. 19. 5. 2022]. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20397/volume-397-I-5710-English.pdf; similarly Exchange of Notes constituting an Agreement concerning the Fishery Zone around Iceland, Reykjavik, 19. 7. 1961, 409 UNTS 47.

75 Judgment of the ICJ of 25. 7. 1974, *United Kingdom of Great Britain and Northern Ireland vs. Iceland (Fisheries Jurisdiction case)*. In: *International Court of Justice* [online]. Para. 35 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/55/055-19740725-JUD-01-00-EN.pdf

had no right to unilaterally exclude or restrict the traditional fishing rights of Britain and Germany in the relevant waters, but Iceland did not take action to comply with the judgment. The settlement of the dispute over fishery rights between Iceland and Britain was credited to an agreement signed by the two countries on 1 June 1976,[76] and the substantial resolution of the dispute between Iceland and Germany was through a compromise agreement of 28 November 1975.[77] In addition, the factors that escalated the cost of the conflict between the parties on fishery rights also included the development of the international law of the sea and the confirmation of the UNCLOS. However, the court's decision did not play a crucial part in the settlement of the dispute.

The incommensurability between court decisions and dispute resolution has led to discussions on the role of court decisions in dispute resolution. Scholars have different attitudes to this issue, but broadly they can be divided into optimistic and pessimistic. After a judgment is made, an optimistic person would say: *"Now that the judgment has, with the force of law, determined one of the major issues in question, it should, in my opinion, be possible for negotiations to be resumed to seek a peaceful solution to the dispute"*[78]. Pessimists will think that the role of court decisions is often overestimated in reality: *"It is too much to hope that the parties to a dispute would willingly agree to the resolution of the legal elements of their dispute by the international court as a preparation for settlement of the remaining political issues"*[79]. Yet in any case, no one would be so naive to conclude that after the judgment is made, one party will abandon its claim because of the legal differences that have been interpreted and adjudicated by the court, making the dispute disappear.

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76 Iceland-United Kingdom: Agreement Concerning British Fishing in the Icelandic Waters. *International Legal Materials*. 1976, Vol. 15, no. 4, p. 878.

77 Federal Republic of Germany-Iceland: Fisheries on the Extension of the Icelandic Fishery Limits to 200 Miles. *International Legal Materials*. 1976, Vol. 15, no. 1, pp. 43–47.

78 Separate Opinion of Judge Lachs to the ICJ Judgment of 24. 5. 1980, *The United States of America vs. Iran (Case Concerning United States Diplomatic and Consular Staff in Tehran)*. In: *International Court of Justice* [online]. P. 49 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/64/064-19800524-JUD-01-01-EN.pdf

79 BAXTER, R. The International Court of Justice: Introduction. *Virginia Journal of International Law*. 1971, Vol. 11, no. 3, p. 292.

3.3 Criteria for Dispute Settlement Within the Legal System: Res Judicata

The Special Chamber recognizes that the Advisory Opinion of the International Court of Justice cannot be considered legally binding but emphasizes the distinction between the binding and authoritative nature of the Advisory Opinion, holding that the Advisory Opinion entails an authoritative statement of international law on the questions with which it deals, and the judicial determinations made in advisory opinions carry no less weight and authority than those in judgments.[80] However, this paper argues that neither binding nature nor legal authority is sufficient to distinguish between advisory opinions and judgments. The fundamental difference between them lies in the *res judicata* effect.

Once a valid judgment has been issued, it has the effect of *res judicata* between the parties.[81] Both Article 94 of the UN Charter and Articles 59 and 60 of the Statute of the International Court of Justice provide for the binding nature and finality of the court's judgment and the effectiveness of *res judicata*. *Res judicata* and "bindingness" are different in the strict sense: *res judicata* is *"that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed"*[82]. The International Court of Justice further explained *res judicata* in its judgment, *"that principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose"*[83]. The court will not adjudicate on substantive

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80 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 203 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

81 COLLIER, J. G., LOWE, V. *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford: Oxford University Press, 1999, p. 261.

82 ZIMMERMANN, A. et al. *The Statute of the International Court of Justice: A Commentary*. Oxford: Oxford University Press, 2012, p. 1427.

83 Judgment of the ICJ of 26. 2. 2007, *Bosnia and Herzegovina vs. Serbia and Montenegro (Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*. *International Court of Justice* [online]. Para. 115 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf

disputes that have already been determined. The parties will not sue again on conflicts already determined by the court. The principle of *res judicata* has the effect of concluding arguments and plays an essential role in maintaining the closedness of the legal system. "Cases that have been adjudicated cannot be prosecuted" frees judges from endless debates for the same dispute. Once a court has passed judgment on a dispute, what the legal system can do for dispute resolution has been completed, thus giving the judiciary the ability to resist pressure from the political system.

It is generally recognized that advisory opinions do not have a *res judicata* effect. Since the Advisory Opinion of the International Court of Justice does not have *res judicata*, and the Preliminary Objections Judgment delivered by the Special Chamber is a reproduction of the Advisory Opinion, the dispute concerning sovereignty was not resolved. The United Kingdom can, of course, request the International Court of Justice to make a judgment with a *res judicata* effect by jointly filing a lawsuit with Mauritius to the International Court of Justice. Yet it will be impossible for the United Kingdom to regain legal confirmation of its sovereignty over the Chagos Archipelago by such judgment because the International Court of Justice has already given a clear opinion in its Advisory Opinion of 2019, which was an opinion based on the most fundamental code in the legal system: lawful or unlawful. Since the legal system needs to provide stable expectations for the global community, the possibility of overturning this opinion is slim. From the perspective of the legal system, whether it is an advisory opinion or a court decision, it is, of course, a reflection of the court's efforts to resolve disputes through legal methods, and they are the same in terms of authority. It is impossible for the court to find a party lawful in an advisory opinion and unlawful in the judgment for the same dispute. The sovereignty dispute over the Chagos Archipelago was not resolved by court decision because it is well known that the Advisory Opinion of the International Court of Justice does not have the function of resolving disputes, and the Special Chamber has no jurisdiction over sovereignty disputes.

Binding force is not a valid criterion for distinguishing between judgments and advisory opinions. The legal system produces a so-called "binding decision", hoping that the decision will be accepted by the political system.

As, within the legal system, consistent requirements make it impossible for each unit of the legal system to ignore its judgments, a statement with authority is enough to attract attention. Once it leaves the legal system, the reaction of the political system is not up to the court to decide. Especially for a legal sector such as international law, which lacks an enforcement mechanism, it is difficult to say that a judgment of the International Court of Justice has the force to make it binding. As explained below, this "force" may come from the political system itself.

4 Different Functions of Legal System and Political System in Dispute Settlement

After the Special Chamber issued the Preliminary Objections Judgment, the United Kingdom objected to the Special Chamber's determination of the legal status of the Chagos Archipelago,[84] although the United Kingdom has been deprived of the legitimacy of its sovereignty over the Chagos Archipelago in the legal system. The United Kingdom continues to manage and control the Chagos Archipelago.[85] This fact reminds us that the legal and political systems are separate and cannot replace or be commensurate with each other. The law provides general normative expectations for the parties to a dispute, legitimizes specific claims in a dispute, or confirms that the conduct of a party to a dispute is unlawful, as in the Advisory Opinion for the British administration of the Chagos Archipelago. Law and politics have different functions for settling disputes in the international community. Therefore, the communication between the legal system and the political system is one choice within a vast horizon, and it is possible to reject, misinterpret, or not respond to decisions made in another system.

84 MILLS, C., BUTCHARD, P. Disputes over the British Indian Ocean Territory: February 2021 update. *UK Parliament* [online]. 8. 2. 2021 [cit. 30. 5. 2022]. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-9134/

85 Preliminary Objections Judgment of the ITLOS of 28. 1. 2021, *Mauritius vs. Maldives (Dispute concerning the delimitation of the maritime boundary)*. In: *International Tribunal for the Law of the Sea* [online]. Para. 247 [cit. 19. 5. 2022]. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf

4.1 Dispute Settlement in the Political System

The role of politics is also recognized in the dispute settlement mechanism.[86] According to the UN Charter, the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.[87] Judicial settlement is an option for seeking a solution to a dispute. The political system may reject a judgment made by the international court, thus making it not binding in practical terms. The Commentary of the UN Charter refers to Professor Conforti and Focareellis' theory, suggesting that a dispute has failed to be resolved when *"the possibility of an agreement between the parties proves unrealistic"*[88]. If the Security Council deems that the continuance of the dispute is likely to endanger international peace and security, it will decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.[89] As the judicial organ of the UN system, the effectiveness of judgments and advisory opinions of the International Court of Justice depends on the Security Council as a political body which, in fact, appears to have the ultimate interpretive authority in dispute settlement.

The advantage of the political system in handling disputes is that it facilitates the implementation of a collective decision on disputes. Negotiation between the two parties to the dispute is considered the simplest and most helpful way of dispute settlement. Once the two parties reach a consensus on an understanding of the dispute and how to resolve it, it implies that serious efforts toward that end will be made.[90] The subsequent fulfilment will be much easier. The problem with the political system is that it struggles to provide stable expectations of behaviour. Countries have different political opinions and interests, and it is difficult to reach an agreement

86 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1047.
87 Art. 33 para. 1 UN Charter.
88 CONFORTI, B., FOCARELLI, C. *The Law and Practice of the United Nations*. Leiden: Martinus Nijhoff Publishers, 2010, p. 197.
89 Art. 37 UN Charter.
90 Kingdom of Greece v. Federal Republic of Germany. *International Law Reports*. 1974, Vol. 47, pp. 418, 454.

by diplomatic methods in which both parties share a consensus. However, the political system provides the possibility and factual guarantee for the implementation of the law. Without the Security Council as a political organ to exert pressure on the implementation of legal decisions, and without the implementation of the law by the domestic administration, it is difficult for the legal system to pass collectively binding decisions. This applies for the entire international community. In the forecited cases where decisions of the International Court of Justice may have an adverse effect on the settlement of disputes, it is through diplomacy that the political system has played a non-negligible role in implementing decisions of the International Court of Justice.

4.2 Cooperation Between the Political System and Legal System Is Required

This paper mainly discusses dispute settlement from the perspective of public international law because the author believes it is necessary to point out the limited role of the legal system in dispute settlement, which will in turn help international law scholars reflect on how the fundamental purpose of international law (the maintenance of peace) can be better achieved, especially noting the lack of powerful enforcement mechanisms in international law. Yet it does not mean that the stable expectations the legal system provides can be replaced by contributions from the political system in dispute settlement. Dispute settlement requires cooperation between the legal system and the political system. Under specific circumstances, the legal system and the political system also act at the same time.[91] The successful settlement of the Chad-Libya boundary dispute could be a good example.

Chad and Libya had a dispute over the sovereignty of the Aouzou Strip starting in 1973, with fierce armed conflict breaking out. The Organization of African Unity actively mediated the territorial dispute between Libya and Chad. In October 1988, Libya and Chad officially ended the war and agreed to resolve the boundary dispute peacefully. On 31 August 1989, Chad and Libya signed an agreement on principles for the peaceful settlement of the dispute. The two parties agreed to be heard by the International Court

91 SHAW, M. M. *International Law*. Cambridge: Cambridge University Press, 2008, p. 1011.

of Justice for a peaceful solution if the political method failed to settle the dispute within one year.[92] In the absence of a political settlement within the expected period, Libya and Chad submitted the matter to the International Court of Justice on 31 August and 3 September 1989, respectively, by notification of the Framework Agreement by the two parties.[93] The dispute between the two countries transitioned from seeking a political settlement to a new stage of seeking a judicial settlement.

The International Court of Justice delivered a decision on the boundary dispute between Libya and Chad on 3 February 1994, supporting Chad's view that the border between the two countries had been delimited by the "Franco-Libyan Treaty" of 10 August 1955.[94] Following the judgment, the two countries signed an agreement stipulating that Libya would retreat from the Aouzou Strip before 30 May 1994. The agreement also allowed the UN to monitor the withdrawal of Libya from the Aouzou Strip.[95] With the support of the Security Council and the UN, Libya and Chad delimited a common frontier following the International Court of Justice decision.[96] On 13 June 1994, the Council adopted resolution 926 (1994), confirming that the dispute over the territorial border between Libya and Chad had been resolved through acceptance and implementation by both parties.[97]

The settlement of this dispute was the result of the joint effort by both the political system and the legal system. However, the effect is coupling, which

92 See Report of the Secretary-General of 27. 4. 1994 Concerning the Agreement on the Implementation of the Judgment of the International Court of Justice Concerning the Territorial Dispute Between Chad and the Libyan Arab Jamahiriya, S/1994/512. *United Nations Peacekeeping* [online]. [cit. 19. 5. 2022]. Available at: https://peacekeeping.un.org/mission/past/n9419431.pdf; and generally RICCIARDI, M. Title to the Aouzou Strip: A Legal and Historical Analysis. *The Yale Journal of International Law*. 1992, Vol. 17, no. 2, p. 301.

93 Judgment of the ICJ of 3. 2. 1994, *Libya Arab Jamahiriya vs. Chad (Case concerning the territorial dispute).* In: *International Court of Justice* [online]. Para. 18 [cit. 19. 5. 2022]. Available at: https://www.icj-cij.org/public/files/case-related/83/083-19940203-JUD-01-00-EN.pdf

94 Ibid., para. 77.

95 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad). *International Law Reports*. 1995, Vol. 100, p. 102.

96 Ibid., p. 103; see also the Letter dated 13. 4. 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/432. *United Nations Peacekeeping* [online]. [cit. 19. 5. 2022]. Available at: https://peacekeeping.un.org/sites/default/files/past/n9417796.pdf

97 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad). *International Law Reports*. 1995, Vol. 100, p. 111.

means they interact with each other, but their causal effects on the other's systems are neither necessary nor impossible. When two systems operate separately using different divisions of global society, the relationship between the two is coupling. Just as it is impossible to assert the Court's decision that the absence of a dispute between the parties will necessarily lead to settlement of the dispute, nor can we infer from the state's opposition that some change must occur in the legal system. Though the political system and the legal system have their own paces and schedules, we can still hope that communication between the two systems will produce the results we want.

5 Conclusion

The Preliminary Objections Judgment of the Special Chamber in the *Dispute Concerning the Maritime Delimitation Dispute between Mauritius and Maldives* does not meet the criteria used in the past practice of the International Court of Justice to judge the disappearance of a dispute. The Special Chamber does not have jurisdiction over such a territorial dispute, so cannot resolve it. The decision of the Special Chamber to deny that the United Kingdom could have any legal interest in the permanent delimitation between the Maldives and Mauritius of the maritime boundary around the Chagos Archipelago, which could make it an indispensable third party in the *Case Concerning the Maritime Delimitation Dispute between Mauritius and Maldives*, did not make the dispute concerning the sovereignty of the Chagos Archipelago disappear, nor did it resolve the sovereignty dispute, even if the Special Chamber took a positive attitude towards the settlement of the dispute. The decision of the Special Chamber should be seen as a reproduction of the existing observation of the legal system.

From the perspective of the political system, even a judgment does not necessarily result in a dispute being resolved. The information produced by the legal system, when it encounters the political system as an independent system, is at risk of being broadly rejected and misunderstood. Although the existing opinion that continued British administration of the Chagos Archipelago is unlawful and the obligation to complete the decolonization process has been confirmed by the Special Chamber within the legal system, neither the Advisory Opinion of the International Court of Justice nor

the Preliminary Objections Judgment of the Special Chamber concerning the Maritime Delimitation Dispute has a *res judicata* effect. The decision on the legal statutes of the sovereignty of the Chagos Archipelago may be challenged by the United Kingdom, even though the legal system and the political system do not support the United Kingdom's claim at present. However, the settlement of the dispute over the sovereignty of the Chagos Archipelago requires the cooperation of the political system. In this regard, the Security Council, as a political organ, plays a very important role, especially as a body that may have final interpretation and further processing powers over disputes.

The more far-reaching impact of the Special Chamber's decision is that it may significantly change the way parties seek to settle disputes. It may deter parties from pursuing a binding decision as judgment as, realizing that such a binding decision presents difficulties, the parties may increasingly prefer an advisory opinion that relies less on the debate and does not require the consent of both parties, changing the direction to the International Court of Justice for an authoritative decision within the legal system concerning the dispute. It is not yet foreseeable whether this will produce the undesirable consequence of less attention being paid to the parties' jurisdictional objections. Still, it may significantly affect how states involved in a dispute seek resolution. One concern is that various UN organs, such as the General Assembly and the Security Council, clearly have convenient conditions when requesting an advisory opinion from the International Court of Justice, which will make the role of the Security Council as a political body more prominent. If certain countries can carve out an advantage in these institutions, the resulting advice may be rejected or misinterpreted by potentially recalcitrant countries due to the lack of *res judicata*. This may interfere with the independence and closed nature of the legal system, which in turn would affect the ability of the political and legal systems to cooperate in resolving disputes.

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