Introduction

On 28 January 2021, a Special Chamber established under Article 15 para. 2 ITLOS Statute[1] ruled on the preliminary objections in an Annex VII arbitration between Mauritius and the Maldives.[2] The case concerned the delimitation of the maritime boundaries between the two states. Among other matters, the judges had to determine the territorial status of the Chagos Archipelago[3]. From the 19th to the 20th century, the Chagos Archipelago was part of the British colony of Mauritius. Before Mauritius became independent on 12 March 1968, the United Kingdom concluded the "Lancaster House Agreement" with its then colony of Mauritius on 23 September 1965. As a result of this agreement, the United Kingdom separated the Chagos Archipelago from the rest of the colony of Mauritius. The United Kingdom has administered the Chagos Archipelago as a separate colony under the name British Indian Ocean Territory (BIOT) and has leased parts of it to the USA for military purposes. There has been an ongoing dispute between the United Kingdom and Mauritius over the territorial sovereignty over the Chagos Archipelago since at least 1980, when Seewoosagur Ramgoolam, Prime Minister of Mauritius at the time, called for the reintegration of the Chagos Archipelago into the Mauritian territory before the UN General Assembly.

After Mauritius initiated proceedings before the ITLOS Special Chamber against the Maldives, the Maldives raised preliminary objections against the

1 The Statute of the International Tribunal for the Law of the Sea is listed in Annex VI to the Convention on the Law of the Sea (UNCLOS) and constitutes an integral part of the Convention pursuant to Art. 318 UNCLOS; United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force on 16 November 1994).

2 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17.

3 The Chagos Archipelago is a group of islands, the largest of which is the island of Diego Garcia, which is about 27 km² in size and lies about 2,200 km north-east of Mauritius in the Indian Ocean, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (107, paras. 25 et seq).

tribunal's jurisdiction.[4] Most notably, the Maldives invoked the Monetary Gold principle[5] arguing that the Special Chamber could not exercise its jurisdiction *ratione personae* because the United Kingdom was an indispensable party to the proceedings and had neither participated in nor consented to the proceedings in any other manner.[6] The Maldives argued that in proceedings between two states, during which the court would necessarily have to decide upon the legal position of a third state, the court could not exercise its jurisdiction without the participation of that third state.[7] The Maldives pointed out that the Special Chamber would necessarily have to rule on the legal position of the UK regarding the Chagos Archipelago. Since the United Kingdom had neither participated in nor agreed to the proceedings, the Special Chamber could not rule over the matter.[8] The Special Chamber accepted the doctrinal premise of this argument:

> "[I]f a sovereignty dispute over the Chagos Archipelago exists, the United Kingdom may be regarded as an indispensable party and the Monetary Gold principle would prevent the Special Chamber from exercising its jurisdiction. On the other hand, if such sovereignty dispute has been resolved in favour of Mauritius, the United Kingdom may not be regarded as an indispensable party and the Monetary Gold principle would not apply."[9]

The Special Chamber noted that while there had indeed been a dispute between Mauritius and the United Kingdom regarding the territorial sovereignty over the Chagos Archipelago, this dispute had been resolved

4 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Written Preliminary Objections of the Republic of Maldives, ITLOS Reports 2021 (15 et seq., paras. 45 et seq.).

5 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19; for an extensive study of the Monetary Gold principle, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016. See also *infra*: §6.D.I.

6 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Written Preliminary Objections of the Republic of Maldives, ITLOS Reports 2021 (15 et seq., paras. 45 et seq.).

7 Ibid. (18, para. 52).

8 Ibid. (19, paras. 56-57).

9 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (48, para. 99).

by the 2019 *Chagos* advisory opinion[10] of the International Court of Justice (ICJ):

> "The determinations made by the ICJ with respect to the issues of the decolonization of Mauritius in the *Chagos* advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago. The United Kingdom's continued claim to sovereignty over the Chagos Archipelago is contrary to those determinations. […] [The United Kingdom's] claim to sovereignty over the Chagos Archipelago is contrary to the authoritative determinations made in the advisory opinion."[11]

Although the ITLOS Special Chamber found that the ICJ advisory opinion was not binding in principle,[12] it nevertheless held that it had "legal effect" and that the ICJ had made "authoritative determinations". Specifically, the 2019 *Chagos* advisory opinion had the effect of settling the dispute between Mauritius and the United Kingdom regarding the territorial sovereignty over the Chagos Archipelago. If the dispute had continued to exist, the Special Chamber would have been forced to decline its jurisdiction in line with the *Monetary Gold* principle. Despite the fact that the ICJ had explicitly emphasized that its *Chagos* opinion did not serve to settle the territorial dispute between Mauritius and the UK,[13] the ITLOS Special Chamber found that the advisory opinion had precisely that effect. With the underlying dispute settled, the United Kingdom lost its status as an indispensable third party to the dispute between Mauritius and the Maldives concerning the sovereignty over the Chagos Archipelago and the ITLOS Special Chamber could consider the merits of the case.

The 2019 *Chagos* advisory opinion and the reliance thereupon by the ITLOS Special Chamber in its 2021 decision on preliminary objections bring to the fore a crucial question: What is the relationship between the ICJ's advisory opinion procedure and the judicial settlement of international legal disputes? As will be demonstrated below, the ICJ consistently emphasized that its advisory opinion procedure may not be used to settle

10 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95.

11 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (88, para. 246).

12 Ibid. (62, para. 205).

13 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (117-118, para. 86).

international disputes as this would circumvent the principle of consent in international dispute settlement. States may not be forced to have their legal disputes with other states settled by judicial means. This is an expression of their sovereign equality. There are several safeguards within the procedural law of the ICJ to protect this fundamental right of states. Chief among them is the contentious procedure's strict consent requirement (see Article 36 ICJ Statute). To prevent this consent requirement from being circumvented, the Court developed the *Monetary Gold* doctrine. According to the Monetary Gold doctrine, the Court will not decide a dispute between two states that have given their consent to the contentious proceedings if doing so would require the Court to decide upon the legal rights and obligations of a third state which has not given or refused its consent.[14] The Court has developed a similar doctrine regarding its advisory opinion procedure: the Eastern Carelia doctrine.[15] According to the Eastern Carelia doctrine, the Court will refuse to give an advisory opinion if to do so would require the Court to decide a pending bilateral dispute against the will of the disputing states and thereby circumvent the principle according to which a state may not be forced to have its disputes settled by judicial means. The Eastern Carelia doctrine was first developed by the PCIJ in 1923 in the eponymous *Eastern Carelia* case.[16] Since then, states have invoked the Eastern Carelia doctrine in numerous PCIJ and ICJ cases, with some states continuing to adhere to its basic line of argument until today.[17]

The aim of this study is to analyze the relationship between the principle of consensual dispute settlement and the Court's advisory jurisdiction. The question at the heart of the study is whether there is – as the Eastern Carelia doctrine asserts – an inherent tension between the principle of consensual dispute settlement and the use of advisory opinions to address legal questions arising in inter-state disputes. To approach this question, the study first lays out the history of the international advisory function (§ 1). Finding that the application of advisory procedures to inter-state disputes

14 For a detailed account of the Monetary Gold doctrine, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016.

15 Arguing that the Eastern Carelia doctrine (or "non-circumvention rule") is an application of the Monetary Gold doctrine in advisory proceedings, see *R. Kolb*, The International Court of Justice, 2013, 1073.

16 *Status of Eastern Carelia*, Advisory Opinion, PCIJ Series B 1923, 7.

17 The PCIJ and ICJ cases in which states have made arguments in line with or similar to the Eastern Carelia doctrine are analyzed below, see *infra* § 2 for the PCIJ and § 3 for the ICJ.

has been central to the advisory function from its inception, the study examines the Eastern Carelia doctrine as it emerged in the jurisprudence of the Permanent Court of International Justice (§ 2) and developed in the case law of the ICJ (§ 3). The study then compares the approach developed by the ICJ to approaches of other international courts and tribunals in dealing with inter-state disputes in their advisory capacity (§ 4). The study proceeds to examine if the Court's constituent instrument – the UNC and the ICJ Statute – provides a legal basis for the Eastern Carelia doctrine (§ 5). Finding that the Court's constituent instrument does not mandate a restrictive subject-matter advisory jurisdiction, the study examines other potential justifications for the Eastern Carelia doctrine, primarily the protection of the Court's judicial function (§ 6).