

Declaration of Judge Heidar

1. I have voted in favour of the present Judgment and concur with most of its reasoning. Nonetheless, I consider it necessary to append this declaration regarding two issues, both of which are addressed in section IX of the Judgment on the delimitation of the continental shelf beyond 200 nautical miles.

2. First, in my view, a more straightforward reasoning should have been provided for the rejection by the Special Chamber of the Maldives' second objection, i.e., that Mauritius' claim to the continental shelf beyond 200 nautical miles (hereinafter "nm") is inadmissible on the grounds that Mauritius' submission to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS" or "the Commission") was not filed in a timely manner (paragraphs 376–383 and operative paragraph 466(3) of the Judgment). In my opinion, the Special Chamber should have addressed the broader question of whether the filing of a submission with the CLCS is a procedural requirement for the delimitation by a court or tribunal of the continental shelf beyond 200 nm. The Special Chamber should have seized the opportunity to clarify this question in light of the inconsistent jurisprudence, which would have, in turn, enabled it to dispose of the objection in a more direct and convincing manner.

3. Second, I would like to offer a few comments on the question of entitlement to the continental shelf beyond 200 nm (paragraphs 427–456 and operative paragraph 466(4) of the Judgment). This includes the rationale for the application of the standard of "significant uncertainty", with which I believe the Special Chamber has made an important contribution to the jurisprudence, and the question of whether it would have been appropriate to arrange for an expert opinion in the present case, which I will answer in the affirmative.

4. I shall address these issues in turn.

Whether the filing of a submission with the CLCS is a procedural requirement for the delimitation by a court or tribunal of the continental shelf beyond 200 nautical miles

5. The first ground, on which the second objection by the Maldives is based, is that Mauritius' claim of entitlement to the continental shelf beyond 200 nm is inadmissible because it had not filed a full submission with the CLCS prior to its commencement of the proceedings (paragraph 376 of the Judgment). The Special Chamber notes in paragraph 377 that "this argument presupposes that the filing of a submission with the CLCS *prior to the institution of the proceedings* is a procedural requirement for the delimitation of the continental shelf beyond 200 nm" [*emphasis added*]. It further notes that it does not consider that there is any rule requiring that a submission be made prior to the institution of delimitation proceedings and that, in any event, Mauritius has filed a submission with the CLCS with respect to the Northern Chagos Archipelago Region.

6. However, logically, the presupposition of the Maldives' argument is in fact broader than that indicated in the Judgment, namely, that the filing of a submission with the CLCS is in itself – irrespective of timing – a procedural requirement for the delimitation of the continental shelf beyond 200 nm.

7. In this regard, it should be emphasized that the delimitation of the continental shelf beyond 200 nm under article 83 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), on the one hand, and the delineation of its outer limits under article 76 of the Convention, on the other hand, are two distinct processes, albeit complementary in some cases. The following statements by the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") in *Bangladesh/Myanmar* may be recalled:

376. There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part xv of the Convention, which include international courts and tribunals.
[...]

378. Article 76, paragraph 10, of the Convention states that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

This is further confirmed by article 9 of Annex II, to the Convention, which states that the “actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts”.

379. Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

(*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4, at pp. 99–100, paras. 376–379)

8. The distinct functions of the two processes are further underlined by the fact that there is no requirement for delineation of the outer limits of the continental shelf to precede its delimitation. In fact, delimitation may precede delineation. There is no temporal requirement in this respect.

9. It should be noted that, while article 76, paragraph 8, of the Convention and article 4 of its Annex II provide for the submission of information by the coastal State to the CLCS for the purpose of the delineation of the outer limits of the continental shelf, there is no such procedural requirement for the purpose of the delimitation by an international court or tribunal of the continental shelf between States with opposite or adjacent coasts.¹ Parties to a dispute concerning the delimitation of the continental shelf beyond 200 nm are required to demonstrate their entitlements to the outer continental shelf and that those entitlements overlap. This substantive requirement may be fulfilled by providing sufficient evidence in the form of a CLCS submission, but it may potentially take other forms. There are no formal, procedural requirements in this respect.

¹ The same view is expressed in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge ad hoc Brower, I.C.J. Reports 2016, p. 100, at p. 142, para. 3, and pp. 154–160, paras. 40–58.

10. In this regard, it should be recalled that in *Bangladesh/Myanmar*, the Tribunal found that the entitlement to the continental shelf beyond 200 nm does not depend on any procedural requirements (*Bangladesh/Myanmar*, at p. 107, para. 408).

11. In light of the above, the first ground advanced by the Maldives is without basis.

12. The second ground, on which the objection is based, is that Mauritius has failed to comply with the mandatory time-limits for outer continental shelf claims, meaning both that its preliminary information was filed contrary to its obligations under the Convention and that it was no longer entitled to make a full submission to the CLCS (paragraph 379 of the Judgment).

13. In this regard, it should be noted, as was concluded in paragraph 9 above, that a submission by the coastal State to the CLCS is not a procedural requirement for the purpose of the delimitation by an international court or tribunal of the continental shelf between States with opposite or adjacent coasts. From that follows that the question of the timing for making a submission to the CLCS is not relevant in the present case.

14. For the foregoing reasons, I concur with the Special Chamber's rejection, in paragraph 383 and operative paragraph 466(3) of the Judgment, of the Maldives' objection to the admissibility of Mauritius' claim on the grounds that its submission to the CLCS was not filed in a timely manner.

Question of entitlement to the continental shelf beyond 200 nautical miles

15. As stated above, the delimitation of the continental shelf beyond 200 nm under article 83 of the Convention, on the one hand, and the delineation of its outer limits under article 76, on the other hand, are two distinct processes, albeit complementary in some cases. What these processes have in common, however, is that both delimitation and delineation rest on the existence of a continental margin beyond 200 nm. A coastal State must therefore demonstrate its entitlement to an outer continental shelf in both processes.

16. As far as delineation is concerned, the CLCS has adopted, as an initial step, the test of appurtenance (paragraph 2.2 of its Scientific and Technical Guidelines), which the coastal State must satisfy. If a coastal State is able to

demonstrate to the Commission that the natural prolongation of its submerged land territory to the outer edge of its continental margin extends beyond the 200 nm distance criterion, the outer limit of its continental shelf can be delineated by applying the set of rules described in paragraphs 4 to 10 of article 76 of the Convention. If, on the other hand, a coastal State is unable to demonstrate the above, the outer limit of its continental shelf is automatically delineated up to the 200 nm distance.

17. As regards delimitation by an international court or tribunal, the parties to the case must demonstrate that they have entitlements to a continental shelf beyond 200 nm and that they overlap. If they are unsuccessful, the court or tribunal cannot exercise its jurisdiction to delimit the outer continental shelf, as it would be without object.

18. In relation to the question of entitlement before a court or tribunal, circumstances may vary from one case to another. The following questions may be relevant in this respect: If the parties have made submissions to the CLCS and given their consent to the Commission allowing it to consider each other's submissions, has the Commission considered them and made recommendations to the parties? If so, have the parties established final and binding outer limits of the continental shelf on the basis of those recommendations in accordance with article 76, paragraph 8, of the Convention? If no recommendations have been made by the Commission, have the parties provided the court or tribunal with other evidence, for example in the form of CLCS submissions? As reflected in paragraph 9 above, it is the substance – and not the form – of the evidence that is relevant for the purpose of delimitation. This also implies that the fact that a party has made a submission to the CLCS does not *per se* constitute proof of its entitlement to a continental shelf beyond 200 nm.

19. The parties to a maritime delimitation case may agree on each other's entitlements to an outer continental shelf. While this may be a relevant factor, the absence of adversarial scrutiny by the parties should not relieve the claimant of the need to satisfy the court or tribunal that it has an entitlement under article 76 of the Convention, taking into account the interests of the international community with regard to the Area. Similarly, while disagreement between the parties concerning their entitlements may be a factor to be considered, it is open for a party to provide evidence to demonstrate its entitlement.

Standard of significant uncertainty

20. In *Ghana/Côte d'Ivoire*, one of the Parties, Ghana, had already received affirmative recommendations from the CLCS and the Special Chamber in that case had “no doubt” that a continental shelf beyond 200 nm existed for both Parties. The Special Chamber stated:

The Special Chamber can delimit the continental shelf beyond 200 nm only if such a continental shelf exists. There is no doubt about this in the case before the Special Chamber. Ghana has already completed the procedure before the CLCS. Côte d'Ivoire has made its submission to the CLCS and, although as yet the latter has not issued any recommendation, the Special Chamber has no doubt that a continental shelf beyond 200 nm exists for Côte d'Ivoire since its geological situation is identical to that of Ghana, for which affirmative recommendations of the CLCS exist. (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4, at p. 136, para. 491)

21. The circumstances were different in *Bangladesh/Myanmar*. Both Parties had filed submissions with the CLCS and their claims overlapped, but the Commission had not made any recommendations to them. As reflected in paragraphs 431–432 of the present Judgment, in *Bangladesh/Myanmar*, the Tribunal laid out and applied the standard of “significant uncertainty” when assessing the existence of a continental margin beyond 200 nm. It stated that, “[n]otwithstanding the overlapping areas indicated in the submissions of the Parties to the Commission, the Tribunal would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question” (*Bangladesh/Myanmar*, at p. 115, para. 443). In this regard, the Tribunal noted that “the Bay of Bengal presents a unique situation, as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea”, took note of “uncontested scientific evidence” and concluded that “both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 nm” (*Bangladesh/Myanmar*, at pp. 115–116, paras. 444, 446 and 449).

22. As noted in paragraph 430 of the present Judgment, to the extent that both Parties have made submissions to the CLCS with respect to the area at issue in this case and their claims overlap but the Commission has

not yet made recommendations to them, the situation is similar to that in *Bangladesh/Myanmar*.

23. Accordingly, as reflected in paragraph 433 of the Judgment, the Special Chamber decided to apply the standard of significant uncertainty in the present case. It should be highlighted that the Special Chamber builds on and clarifies the Tribunal's jurisprudence in this regard by providing rationale for the application of the standard of significant uncertainty. It notes that "this standard serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or tribunal in a judgment." In my view, this is imperative, taking into account the provisions of article 296, paragraph 1, of the Convention, on the one hand, and article 76, paragraph 8, on the other. While the former provides that "[a]ny decision rendered by a court or tribunal having jurisdiction under [section 2 of Part XV] shall be final and shall be complied with by all the parties to the dispute", the latter provides that "[t]he limits of the shelf established by a coastal State on the basis of [the CLCS'] recommendations shall be final and binding."

24. In this regard, the Special Chamber notes that, "in maritime delimitation cases, international courts and tribunals refrain from delimiting areas where the rights of other coastal States may be affected" and that the "[a]pplication of the standard of significant uncertainty affords similar protection to the interests of the international community in the Area and the common heritage principle" (paragraph 452). It takes the view that "the exercise of caution is called for in the circumstances of the present case, where there may be a risk of prejudice to the interests of the international community in the Area and the common heritage principle" (paragraph 453).

Question of expert opinion

25. As reflected in paragraph 45 of the Judgment, the Special Chamber considered whether it would be necessary to arrange for an expert opinion in the present case, pursuant to article 82 of the Rules of the Tribunal (hereinafter "the Rules"), on scientific and technical issues concerning the delimitation of the continental shelf beyond 200 nm. The Special Chamber took note of the views expressed by the Parties in this regard and came to the conclusion that, "in the circumstances of this case, it would not be appropriate to arrange for such an opinion" (paragraph 454).

26. In my view, however, the Special Chamber would have benefited from an expert opinion in the circumstances of the present case.

27. As described in paragraphs 436–449 of the Judgment, Mauritius has presented three different routes for natural prolongation to the foot of slope point, FOS-VIT31B, on which it bases its claim of entitlement to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region. As regards the first route, the Special Chamber concludes that it is “impermissible on *legal grounds* under article 76 of the Convention” [*emphasis added*] (paragraph 449, see also paragraphs 441–444).

28. As far as the other two routes presented by Mauritius are concerned, however, the Special Chamber, “[o]n the basis of its assessment of the Parties’ pleadings in the present proceedings, and taking into account the fundamental disagreement between the Parties on ... *scientific and technical issues*, ... is of the view that there is *significant uncertainty* as to whether the second and third routes presented by Mauritius could form a basis for its natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 nm” [*emphasis added*] (paragraph 448, see also paragraphs 445–447 and 449).

29. In light of the significant uncertainty, the Special Chamber was not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region. Consequently, it was not necessary for the Special Chamber to address the Maldives’ entitlement in the present case (paragraph 450).

30. In my view, an expert opinion would have served to strengthen the scientific and technical basis for the Special Chamber’s conclusions with respect to the second and third routes advanced by Mauritius in support of its natural prolongation to the foot of slope point on which it bases its claim of entitlement to the continental shelf beyond 200 nm. In this regard, it should be noted that both of these routes raise a number of complex scientific and technical issues on which there is fundamental disagreement between the Parties.

31. While Mauritius was in favour of arranging for an expert opinion, the Maldives was opposed. The Maldives argued, *inter alia*, that seeking an expert opinion would be inappropriate as it could relieve Mauritius from its burden

of proof regarding its entitlement to the outer continental shelf. It also maintained that an expert opinion was clearly unnecessary and manifestly inconsistent with principles of procedural fairness (paragraphs 423–424).

32. In my opinion, these arguments are unfounded. In this regard, it should be underlined that the task of the experts would have been limited to assessing the scientific and technical data presented by the Parties in the proceedings, relevant to determining whether the Parties had demonstrated beyond significant uncertainty their entitlements to the continental shelf beyond 200 nm in the area concerned.

33. In light of the aforementioned, in my view, it would have been appropriate for the Special Chamber to arrange for an expert opinion in the present case.

34. In this context, it may be observed that there is a growing legal, scientific and technical interface in ocean affairs. Many law of the sea cases before international courts and tribunals involve complex scientific or technical issues, which may make it necessary to have recourse to scientific or technical experts. The Tribunal and its special chambers have the option, which has thus far to be taken, under article 82 of the Rules, to arrange for an expert opinion, after consultation with the parties. Another option, which is also yet to be tested, is contained in article 289 of the Convention. This provision enables an international court or tribunal to select, in consultation with the parties, two or more scientific or technical experts in any dispute involving scientific or technical matters. These experts sit with the court or tribunal and participate in the deliberations but without the right to vote.

35. In my view, international courts and tribunals should more readily avail themselves of the aforementioned options in order to properly assess evidence placed before them involving complex issues of a scientific or technical nature.²

(signed)
Tomas Heidar

² A similar view is expressed in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, I.C.J. Reports 2010, p. 108, at p. 112, para. 9.