

DECLARATION OF PRESIDENT PAIK

1. I fully agree with the conclusion of the Special Chamber. I wish to make a brief observation on the Special Chamber's reasoning relating to subparagraph (4) of the operative clauses of the Judgment.

2. In subparagraph (2) of the operative clauses, the Special Chamber finds that its jurisdiction includes the delimitation of the continental shelf beyond 200 nm. In subparagraph (4), however, it decides that, in the circumstances of the present case, it is not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nm and that, consequently, it will not proceed to delimit the continental shelf between the Parties beyond 200 nm. This decision requires explanation, and the Special Chamber offers its reasons in paragraphs 427 to 453 of the Judgment. In particular, the Special Chamber notes in paragraph 448 that, "[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 the ... scientific and technical issues", there is a significant uncertainty as to Mauritius' entitlement to the continental shelf beyond 200 nm and that, given such uncertainty, it is not in a position to make a determination on that matter.

3. In this regard, I would like to caution against reading these paragraphs as implying that an international court or tribunal should necessarily refrain from proceeding to delimitation if there is a disagreement between the parties as to their entitlements to the continental shelf beyond 200 nm. The function of an international court or tribunal is to give an authoritative ruling on any disagreements between the parties, including a disagreement on the scientific aspects put forth in support of entitlement to the continental shelf beyond 200 nm. Therefore, the test to be applied for the exercise of restraint is not whether there is a disagreement between the parties but rather whether there is "significant uncertainty" about the existence of such an entitlement which may arise from the competing scientific points of view between the parties.

4. In the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (hereinafter “*Bangladesh/Myanmar*”), upon which the present Judgment heavily relies, Bangladesh contested Myanmar’s entitlement to the continental shelf beyond 200 nm on the grounds that Myanmar’s land territory has no natural prolongation into the Bay of Bengal beyond 200 nm. According to Bangladesh, Myanmar could not meet the physical test of natural prolongation in article 76, paragraph 1, which requires evidence of a geological character connecting the seabed and subsoil directly to the land territory, because of the significant discontinuity dividing the Burma Plate and the Indian Plate. For its part, Myanmar maintained that an entitlement to the continental shelf beyond 200 nm is not dependent on any test of natural “geological” prolongation but on the physical extent of the continental margin. Faced with that disagreement, the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”) observed that the parties did not differ on the scientific aspects of the seabed and subsoil of the Bay of Bengal but rather on the interpretation of article 76 of the Convention, in particular the meaning of “natural prolongation”. (*Bangladesh/Myanmar*, para. 412) It then undertook to clarify the notion of natural prolongation and rejected Bangladesh’s contention. The Tribunal concluded that “[i]n view of uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings”, there is a continuous and substantial layer of sedimentary rocks extending from Myanmar’s coast to the area beyond 200 nm and that both parties therefore have entitlements to a continental shelf extending beyond 200 nm. (*Ibid.*, para. 446) I observe in this regard that uncontested scientific evidence as to the continental margin in the Bay of Bengal played a crucial role in reaching the above conclusion. Thus, the fact that there is a disagreement between the parties, fundamental as it may be, does not necessarily lead to significant uncertainty, resulting in the exercise of restraint by a court or tribunal.

5. In the present case, like in *Bangladesh/Myanmar*, the Parties fundamentally disagree as to whether Mauritius’ natural prolongation extends beyond 200 nm. However, unlike in *Bangladesh/Myanmar*, the Parties’ disagreement involves scientific and technical issues as well as legal issues. With respect to Mauritius’ claim of entitlement to the continental shelf beyond 200 nm, the Parties present competing scientific assessments of the seabed and subsoil of the Northern Chagos

Archipelago Region in accordance with article 76 of the Convention. In particular, they disagree as to whether the Chagos-Laccadive Ridge and adjoining elevated areas are a single geomorphological continuity; whether there is a morphological break within the Chagos Trough; and whether Mauritius has validly identified a base of slope region and, consequently, a crucial foot of slope point, FOS-VIT31B, in accordance with the Scientific and Technical Guidelines of the CLCS. The Parties further disagree on the adequacy and relevance of the data submitted by Mauritius in support of its claim. Thus, the nature of the disagreement in the present case is significantly different from that in *Bangladesh/Myanmar*.

6. The Special Chamber carefully considered the three different routes laid out by Mauritius for its natural prolongation to the foot of slope point, FOS-VIT31B. It found the first route to be impermissible on legal grounds under article 76 of the Convention. With respect to the validity of the second and third routes, however, the Special Chamber came to the conclusion that, given such a divergence between the Parties' scientific assessments, it was not well positioned to determine which of them were better founded or more convincing.

7. In such a situation, one option available to the Special Chamber is to seek the assistance of experts, either under article 289 of the Convention or under article 82 of the Rules. Such option was recognized by the Tribunal in *Bangladesh/Myanmar*, when it stated that "the Tribunal can interpret and apply the provisions of the Convention, including article 76. This may include dealing with uncontested scientific materials or require recourse to experts." (*Bangladesh/Myanmar*, para. 411) As stated in paragraph 45 of the Judgment, the Special Chamber considered that option and invited the Parties to submit their views on the need to arrange for an expert opinion in the present case pursuant to article 82 of the Rules.

8. In my view, in considering the assistance of experts under article 82 of the Rules as to the question of entitlement, the following factors, *inter alia*, may be relevant: the exact nature of the disagreement between the parties; an institutional framework set up by the Convention in which the CLCS is entrusted to consider scientific and technical issues arising in the implementation of article 76 of the Convention on the basis of the submissions made by coastal States; the risk of the

CLCS later taking a different position regarding entitlements from that taken by a court or tribunal; whether experts could convincingly address significant uncertainty, with which a court or tribunal is faced, on the basis of scientific evidence presented by the parties to the proceedings; and whether the determination of entitlement by a court or tribunal is likely to be the only path towards the resolution of the pending delimitation dispute under the circumstance. Seeking the assistance of experts for the determination of entitlement is by no means a simple step to take, and requires the consideration of various factors. As stated in paragraph 454 of the Judgment, the Special Chamber decided, in the circumstances of the present case, not to arrange for an expert opinion.

9. As the ICJ stated in the *Case concerning the Continental Shelf (Libya/Malta)*, “[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent.” (*Libya/Malta*, para. 19) Thus, unless there is a clear reason to do so, an international court or tribunal should not easily decide to decline to pass judgment. Nor – I might add – should a court or tribunal, in addressing a dispute involving scientific and technical issues, be overly hesitant to enlist the assistance of experts whenever such needs arise. This is all the more so for the Tribunal, a specialized court established to settle any dispute concerning the interpretation or application of the Convention submitted to it. While the Special Chamber decided in the dispute at hand not to proceed to delimit the continental shelf beyond 200 nm or to seek the assistance of experts to address significant uncertainty, that decision was made essentially on account of the special circumstances of the present case. No sweeping implications should be drawn from the present Judgment in this regard.

(signed)
Jin-Hyun Paik