

DECLARATION OF JUDGE *AD HOC* SCHRIJVER

1. Both Mauritius and the Maldives have declared themselves archipelagic States within the meaning of the terms given in Part IV of the United Nations Convention on the Law of the Sea (hereafter “the Convention”). Therefore, the present case relates to the delimitation of the maritime boundary between two archipelagic States. As carefully outlined in the Judgment (see, in particular, section VII.D. 1 (c)), the special regime of archipelagic States is subject to various conditions and obligations and seeks to balance the interests of the archipelagic State with those of other States.

2. As both Parties stated in the written and oral proceedings, some of their low-lying islands and other maritime features face a significant risk of sea-level rise as a result of the adverse effects of climate change. Furthermore, these maritime features are also vulnerable to ocean warming and ocean acidification. It is not unlikely that a feature which currently still qualifies as an island, namely, “a naturally formed area of land, surrounded by water, which is above water at high tide” (article 121, paragraph 1, of the Convention), may in the near future turn into a low-tide elevation, defined as “a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide” (article 13, paragraph 1). In addition, a drying reef, as a low-tide elevation, is at risk of losing its baseline status either because it is no longer within 12 nm of an island or because it becomes a permanently submerged feature.

3. Such a change in the geographic status of a natural maritime feature has considerable legal consequences: for example, whereas every island has at least a territorial sea and under certain circumstances can also generate an exclusive economic zone and continental shelf (article 121, paragraph 2), a low-tide elevation has no territorial sea of its own (article 13, paragraph 2).

4. One particular result of judicial settlement of a dispute on the delimitation of the maritime boundary between States is the legally binding recording of the geographical coordinates of points specifying geodetic datum of the maritime

boundary between the States concerned as of the time of the rendering of the judgment (e.g., ICJ, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 2009, p. 61, para. 131; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, 2014, 167 ILR 1, para. 212). Under current international law, the judgment “freezes”, so to speak, the physical reality at the time of the delimitation and fixes the boundary upon the basis of contemporary evidence, regardless of any geographical changes that may occur later (article 296, paragraph 1). In this way the judicial decision vests the archipelagic States with permanent sovereignty over their islands, interconnecting waters and other natural features. In doing so, judicial decisions contribute to the stability and permanence of boundaries in the same vein as the exclusion of boundary agreements from the rule of fundamental change of circumstances does (article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties).

5. Similarly, should the two Parties contemplate giving the Commission on the Limits of the Continental Shelf their consent to consider each other’s submissions (see the encouragement of the Special Chamber to do so in paragraph 456 of the Judgment), this could set in motion a process that could lead to their establishment of seaward limits of the continental shelf beyond 200 nm (article 76 of the Convention) that are “final and binding” *erga omnes* without regard to subsequent changes in their coastal configuration.

6. In various recent contentious cases, it was apparent that international courts and tribunals were particularly aware of the relevance of the question of determining the legal status of islands and other natural maritime features. This was certainly also true in the current proceedings on the delimitation of the maritime boundary between Mauritius and the Maldives.

7. In the course of these proceedings, the characterization of Blenheim Reef emerged as one of the central issues of the present case. Blenheim Reef qualifies as “other natural features” as referred to twice in the description of the term “archipelago” in article 46 (b) of the Convention, defined as “a group of islands, including parts of islands, interconnecting waters and other natural features which

are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.”

8. Blenheim Reef lies in the Northern Chagos Archipelago Region, south of the Maldives. Its northern coast is directly opposite the coast of the Maldives. Reportedly, Blenheim Reef is estimated to consist of 57 maritime features with numerous coral heads according to the detailed nautical BA chart 727 of the UKHO, extends for approximately 9.6 km from north to south and at its widest point 4.6 km from west to east. Therefore, Blenheim Reef is calculated to cover roughly 36 km².

9. Since part of Blenheim Reef is situated within 12 nm from the south-western Île Takamaka, one of the islands in the ring-shaped atoll of the Salomon Islands, Blenheim Reef “may be used as the baseline for measuring the breadth of the territorial sea” (article 13, paragraph 1, of the Convention). Consequently, Blenheim Reef is an intrinsic component of the Chagos Archipelago and, given its location within the territorial sea of Mauritius, also part of its geographical configuration which determines its archipelagic baselines and entitlements to maritime zones (see also paragraph 146 of the Judgment). Nonetheless, the Special Chamber arrived at the conclusion that, in the geographical circumstances of the present case, Blenheim Reef, as a low-tide elevation, is not an appropriate site for the selection of base points for the purpose of the construction of the provisional equidistance line (paragraphs 155 and 230), notwithstanding the fact that it is a drying reef within the meaning of article 47, paragraph 1, of the Convention (paragraph 192).

10. Both Parties, as well as the Special Chamber, paid particular attention to the question of whether Blenheim Reef could be identified as one single entity or rather as comprising multiple separate low-tide elevations. I would like to record my view that it is the former, whereas the Special Chamber concludes that it is the latter (paragraph 219), nevertheless finding that “a low-tide elevation of Blenheim Reef, situated wholly or partly within 12 nm of Île Takamaka, can be used as a baseline for measuring the 200 nm limit of Mauritius” (paragraph 230).

11. My own view is based upon a combination of arguments relating to the proximity and nature of the numerous maritime features at Blenheim Reef in a relatively small span of the Indian Ocean (in terms of geography, geology, hydrography and marine biology), the depiction of Blenheim Reef as a notable and recognizable natural feature on the relevant nautical maps and snapshots from space (cartography and satellite imagery) and the consistent usage of Blenheim Reef as a geographic name in the singular form in all relevant documents and references consulted during the proceedings.

12. In measuring the 200 nm limit of Mauritius, as far as Blenheim Reef is concerned, the Special Chamber has not used the archipelagic baselines as drawn and published by Mauritius pursuant to article 47 of the Convention but instead measured from the northern intersection point of the low-water line of Blenheim Reef with the 12 nm limit measured from the low-water line of Île Takamaka (paragraph 235).

13. At the second stage of the conventional three-stage delimitation method (paragraph 97), which consists of determining whether any relevant circumstances exist requiring an adjustment of the provisional equidistance line (drawn at stage 1) in order “to achieve an equitable solution” as stipulated in paragraphs 1 of articles 74 (exclusive economic zone) and 83 (continental shelf) of the Convention, the Special Chamber returned to the question of the potential impact of Blenheim Reef on the delimitation of the maritime boundary between Mauritius and the Maldives. In the opinion of the Special Chamber, ignoring Blenheim Reef completely “would not lead to an equitable solution in the present case, given the presence of extensive areas of drying reefs as shown by the geodetic survey carried out by Mauritius” (paragraph 245 of the Judgment). Therefore, the Special Chamber decided that, in light of the geographical circumstances in the present case, Blenheim Reef constitutes a relevant circumstance and that the adjustment of the provisional equidistance line in stage 2 should give half effect to Blenheim Reef (paragraph 247).

14. Although I hold the view, upon the basis of the arguments provided above, that Blenheim Reef should be considered a single low-tide elevation and a natural feature which is an intrinsic component of the Chagos Archipelago over which

Mauritius has only recently been able to recover its territorial sovereignty (ICJ, *Chagos Advisory Opinion*, 2019, p. 137, paragraph 173; Special Chamber ITLOS, *Preliminary Objections Delimitation Mauritius/Maldives*, Judgment, 2022, paragraphs 174, 205, 206 and 246), I consider that the final outcome of the three-stage delimitation method in the present case is balanced and constitutes an equitable solution to the maritime dispute between Mauritius and the Maldives in the Indian Ocean.

(signed)

Nicolaas J. Schrijver