

SEPARATE OPINION
OF PRESIDENT DONOGHUE

Reasons for vote in favour of subparagraph (5) of the dispositive paragraph of the Judgment — Both Parties consider that the Court has sufficient information to delimit the outer continental shelf — However, Court has scant evidence regarding any outer continental shelf — Methodology that achieves an equitable delimitation of the 200-nautical-mile zones does not necessarily result in equitable delimitation of the outer continental shelf.

1. I have voted in favour of subparagraph (5) of the dispositive paragraph of the Judgment, pursuant to which the maritime boundary continues beyond 200 nautical miles until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected. I submit this opinion in order to indicate the reasons why I have cast this vote and why I do so with reluctance.

2. As the Court notes, both Parties have asked the Court to delimit the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (the “outer continental shelf”). Each Party has proposed that the Court do so by extending the boundary line that it proposes — an equidistance line on the part of Somalia and the parallel of latitude on the part of Kenya. The Court can reasonably assume that each Party has called upon the Court to delimit the outer continental shelf in full awareness of the fact that a maritime boundary established by the Court need not follow the course proposed by a party.

3. Each Party also has a comprehensive appreciation of the strength, and potential weaknesses, of its own submission to the Commission on the Limits of the Continental Shelf (the “CLCS” or “the Commission”). Neither Party has questioned the other Party’s entitlement to outer continental shelf or the other Party’s claim that, in certain parts of the area in which the Parties’ claims overlap, such entitlement extends to the 350-nautical-mile constraint set out in Article 76, paragraph 5, of the United Nations Convention on the Law of the Sea (“UNCLOS”). All indications, therefore, are that both Parties consider that the Court has sufficient information to arrive at an equitable delimitation of the outer continental shelf. It is on this basis that I have reached the conclusion that the Court should delimit the outer continental shelf in this case.

4. My hesitancy about the Court’s decision to delimit the outer continental shelf in this case stems from the fact that the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties. The Court is not

well positioned to identify, even approximately, any area of overlapping entitlement and thus to arrive at an equitable delimitation of any area of overlap.

5. For avoidance of doubt, I note that my misgivings about the Court's decision to delimit the outer continental shelf are not animated by procedural concerns. The fact that the CLCS has not yet made a recommendation relating to the outer limits of the continental shelf of either State is not in itself an obstacle to equitable delimitation of the outer continental shelf.

6. This case is entirely different from other cases in which a tribunal has delimited the outer continental shelf of two States. In *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, the International Tribunal for the Law of the Sea ("ITLOS") noted that there was "uncontested scientific evidence" that "practically the entire floor of the Bay of Bengal, including areas appertaining to [both Parties]", was covered with a "thick layer of sedimentary rocks" (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 115, paras. 445-446). The Annex VII Tribunal in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* took note of the reasoning of ITLOS and of the maritime delimitation between Bangladesh and Myanmar and concluded that both Bangladesh and India had entitlements to outer continental shelf (*Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, Reports of International Arbitral Awards, Vol. XXXII, p. 138, paras. 457-458).

7. In *Ghana/Côte d'Ivoire*, the Special Chamber of ITLOS had the benefit of an affirmative CLCS recommendation in relation to Ghana. It observed that the geological situation of Côte d'Ivoire was "identical" to that of Ghana (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 136, para. 491).

8. In the present case, the Court has no comparable evidence regarding the existence, extent, shape or continuity of any outer continental shelf appertaining to either Party. The Parties submitted to the Court the executive summaries of their submissions to the Commission (although not the submissions themselves). Submissions by States to the CLCS are unilateral assertions made with a view towards maximizing the area of continental shelf that the State can claim. It cannot be assumed that the Commission will adopt any State's submission.

9. My doubts about the Court's decision to delimit the outer continental shelf do not result from the particular course of the boundary that the Court has established. The lack of information about any area of overlapping entitlement would be of concern whether that delimitation had proceeded along the parallel of latitude, as Kenya proposed, along an

equidistance line, as Somalia proposed, or along the adjusted equidistance line established in the Judgment.

10. I also offer a brief observation about the methodology that is appropriate to the delimitation of the outer continental shelf.

11. In relation to delimitation of the 200-nautical-mile zones, the key determinant of an equitable delimitation is normally the coastal configuration of the two States (represented by base points when an equidistance methodology is applied). The area of overlapping entitlement is identified on the basis of the projection in the seaward direction of each party's relevant coast, i.e. "the coast [of each Party] . . . [that] generate[s] projections which overlap with projections from the coast of the other Party" (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 97, para. 99). An equidistance line, constructed using base points on the parties' coasts, provides an initial indication of an equitable apportionment of the area of overlap, to be adjusted if special and/or relevant circumstances so warrant.

12. Beyond 200 nautical miles from the coasts of two adjacent States, on the other hand, any area of overlapping entitlement is not determined by the configuration of the coasts of the two States, but rather by application of the geomorphological and geological criteria set out in Article 76 of UNCLOS. Coastal configuration only becomes relevant to a State's entitlement to outer continental shelf if it has been established (on the basis of the criteria set out in Article 76, paragraph 4, of UNCLOS) that the outer edge of a State's continental margin extends so far as to reach a distance of 350 nautical miles from the baselines from which the breadth of its territorial sea is measured, where the State's entitlement is limited by the 350-nautical-mile constraint contained in Article 76, paragraph 5, of UNCLOS.

13. In delimitation between two adjacent States, it is simple (and therefore inviting) to continue a delimitation line past the 200-nautical-mile limit, using a directional arrow. However, because the juridical basis for entitlement to outer continental shelf is entirely different from the basis for entitlement within 200 nautical miles, it cannot be presumed that a line that achieves an equitable delimitation of the 200-nautical-mile zones will also result in equitable delimitation of overlapping areas of two States' outer continental shelf.

(Signed) Joan E. DONOGHUE.
