

INTERNATIONAL COURT OF JUSTICE

Maritime Delimitation in the Indian Ocean
(Somalia v Kenya)

COUNTER-MEMORIAL OF THE REPUBLIC OF KENYA

VOLUME I

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INTRODUCTION

1. In response to the Memorial of the Federal Republic of Somalia of 13 July 2015, the Republic of Kenya submits this Counter-Memorial in accordance with the Order of the Court dated 2 February 2017 fixing 18 December 2017 as the time-limit for the filing of this written pleading. As provided in Article 49(2) of the Rules of Court, this Counter-Memorial addresses points of agreement and disagreement regarding the factual and legal statements made in Somalia's Memorial.
2. This case concerns a dispute in regard to the delimitation of a "single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone ... and continental shelf, including the continental shelf beyond 200 nautical miles".¹ Somalia's case is that absent an agreement between the Parties, equidistance is the applicable method for delimitation of the maritime boundary, and that there are no special circumstances requiring its adjustment. Kenya's case is that from at least 1979 until 2014, Somalia has acquiesced in a maritime boundary at the parallel of latitude, and that the Parties have considered this to be an equitable delimitation in light of both geographical context and regional practice.
3. In this Introduction, Kenya will summarise its case on the merits and set out the structure of this Counter-Memorial. Without prejudice to the Court's Judgment on Preliminary Objections to Jurisdiction, Kenya maintains the belief that under the specific circumstances of the present case (in particular Kenya's border security concerns), delimitation of the maritime boundary between the Parties is a complex issue that is best resolved by a negotiated solution.

A. Summary of Kenya's Case

4. Since at least 1979, Kenya has claimed and exercised jurisdiction at the parallel of latitude as its maritime boundary with Somalia, based on the principle of equitable delimitation. Somalia has, until 2014, acquiesced in that boundary with binding legal effect.
5. The essential facts are not in dispute. Somalia admits in its Memorial that:

¹ Application Instituting Proceedings (28 August 2014), para. 2.

in 1979 and then again in 2005 the President of Kenya made unilateral Proclamations laying claim to a parallel boundary in both the territorial sea and the EEZ. Consistent with these Presidential Proclamations, Kenya has offered a number of petroleum blocks for deep-water exploration and drilling in areas across the equidistance line that extend up to the claimed parallel boundary.²

6. Somalia does not point to any protest against Kenya's claimed maritime boundary until 2014, shortly before the initiation of this proceeding before the Court. It asserts nonetheless that despite such prolonged acquiescence over a period of 35 years, "the Parties have never concluded any agreement, written or otherwise, concerning the delimitation of their maritime boundary".³
7. Kenya agrees with Somalia that it has claimed the parallel of latitude as the maritime boundary and exercised uncontested jurisdiction on that basis since at least 1979. Kenya however disagrees that Somalia's prolonged acquiescence carries no legal effect. This Counter-Memorial will demonstrate that through its consistent conduct, Somalia has consented to the parallel of latitude as its maritime boundary with Kenya, and that both Parties considered this to be an equitable delimitation.
8. Kenya, Somalia and other States in the region agreed on the principle of equitable delimitation during the Third UN Conference on the Law of the Sea ("UNCLOS III") and even insisted on deletion of any reference to equidistance in Articles 74 and 83 of the UN Convention on the Law of the Sea ("UNCLOS").
9. Somalia was notified of Kenya's claim to the boundary at the parallel of latitude on at least three occasions: in 1979 (Kenya's 1979 Presidential Proclamation on the Exclusive Economic Zone); in 2005 (Kenya's 2005 Presidential Proclamation on the Exclusive Economic Zone, adjusting the coordinates for accuracy); and in 2009 (Kenya's submission to the Commission on the Limits of the Continental Shelf ("CLCS")) extending the parallel of latitude to the outer limits of the continental shelf. From the outset of Kenya's claim in 1979, Somalia had a clear interest in the maritime areas in question, having claimed a 200M territorial sea in 1972.⁴

² MS, Vol. I, para. 1.28.

³ MS, Vol. I, para. 1.18.

⁴ Somali Democratic Republic, Law No. 37, *Law on the Somali Territorial Sea and Ports* (10 Sept. 1972), MS, Vol. III, Annex 9, Art. 1.

10. Throughout this period, Somalia did not lodge any protest with Kenya; nor did Somalia claim an alternative maritime boundary. In fact, as demonstrated by its own Memorial, Somalia's first assertion that Kenya's claim was "exaggerated" was in February 2014.⁵
11. In addition to Somalia's lack of protest against Kenya's claim between 1979 and 2014, the Parties' other conduct was consistent with the parallel of latitude as the maritime boundary. Kenya's practice encompassed naval patrols and maritime enforcement, fisheries, marine scientific research, and oil exploration. During this period, Kenya incurred significant costs for the protection and development of this maritime area. For its part, Somalia's practice also included fisheries, marine scientific research, and oil concession practice, consistent with a maritime boundary at the parallel.
12. Somalia seeks to erase its history of acquiescence. Its Memorial proceeds with a *tabula rasa* as if before 2014 nothing happened between Somalia and Kenya in regard to their maritime boundary.⁶ But the Court cannot ignore the consistent conduct of the Parties over a period of 35 years, especially when it establishes binding consent to the parallel of latitude as the equitable delimitation of their maritime boundary.

B. Structure of the Counter-Memorial

13. This Counter-Memorial consists of a Volume I divided into four chapters with annexes in the accompanying Volumes.
14. Following this Introduction, **Chapter I** sets out the historical conduct of the Parties regarding the maritime boundary. It demonstrates that contrary to Somalia's assertion, the dispute does not arise from a factual *tabula rasa*. It sets out four official notifications by Kenya to Somalia of the maritime boundary at the parallel of latitude, in 1979, 2005, 2009 and January 2014. Between 1979 and 2014, these notifications were met with silence and acquiescence by Somalia. Furthermore, from 1979 to 2014, the practice of both Parties, in regard to fisheries, marine scientific research, and oil exploration, was also consistent with the parallel of latitude.

⁵ MS, Vol. I, para. 3.32 and Letter from Dr. Abdirahman Beileh, Minister of Foreign Affairs and International Cooperation of the Somali Federal Republic, to H.E. Ban Ki-Moon, Secretary-General of the United Nations, No. MOFA/SFR/MO/259/2014 (4 Feb. 2014). MS, Vol. III, Annex 48, para. 4.

⁶ MS, Vol. I, para. 1.19.

15. **Chapter II** demonstrates that under international law, Somalia must be held to have acquiesced in Kenya's consistent and official claim to and exercise of jurisdiction at the parallel of latitude since 1979. Indeed, the only reasonable conclusion derived from the conduct of the Parties is that they have consented to the parallel of latitude as the maritime boundary.
16. **Chapter III** establishes that notwithstanding Somalia's prolonged acquiescence in the maritime boundary claimed by Kenya since 1979, the equidistance/special circumstances methodology is not mandatory for achieving the objective of an equitable solution, as argued by Somalia. In particular, where the parties have indicated what they regard as an equitable solution, this must be respected. In the present case, the Parties' prolonged conduct confirms their common understanding that delimitation at the parallel of latitude is equitable.
17. **Chapter IV** briefly addresses Somalia's claim that Kenya has conducted illegal activities in the "disputed area". This claim is wrong in law as to both the existence of a "disputed area" before 2014 and the type of activities that may be carried therein. Somalia also fails to prove its case on the facts.
18. The Counter-Memorial concludes with Kenya's submissions to the Court.

CHAPTER I. THE OFFICIAL CLAIMS AND CONDUCT OF THE PARTIES

A. Introduction

19. This Chapter outlines the official claims and conduct of the Parties in regard to the maritime boundary dispute before the Court.

20. As demonstrated in **Figure 1-1**, the African coast on the Indian Ocean is broadly concave. The Kenyan coast⁷ is bordered by Somalia to the north and Tanzania to the south. The Somali and Kenyan coastal territories immediately adjacent to the boundary are Lower Juba and Lamu County respectively. Pemba Island, which is part of Tanzania, is situated opposite the Kenya–Tanzania land boundary terminus. Kenya’s maritime boundary with Tanzania has been settled throughout all maritime areas, including the outer continental shelf. Kenya has no disputes except with Somalia. Somalia has no settled maritime boundaries with either Kenya, Yemen, or Djibouti: all of these boundaries have been in dispute since 2014.⁸

⁷ The sea is central to Kenyan history and culture. The name of the national language, Swahili, is derived from the Arabic word “sawahil” which means “coast”; and the language is a fusion of Arabic and Bantu which arose from the sea trade between the two civilisations.

⁸ See Note Verbale from Djibouti dated 31 January 2017, and Communication from Yemen dated 25 July 2014 and 10 December 2014: <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm>

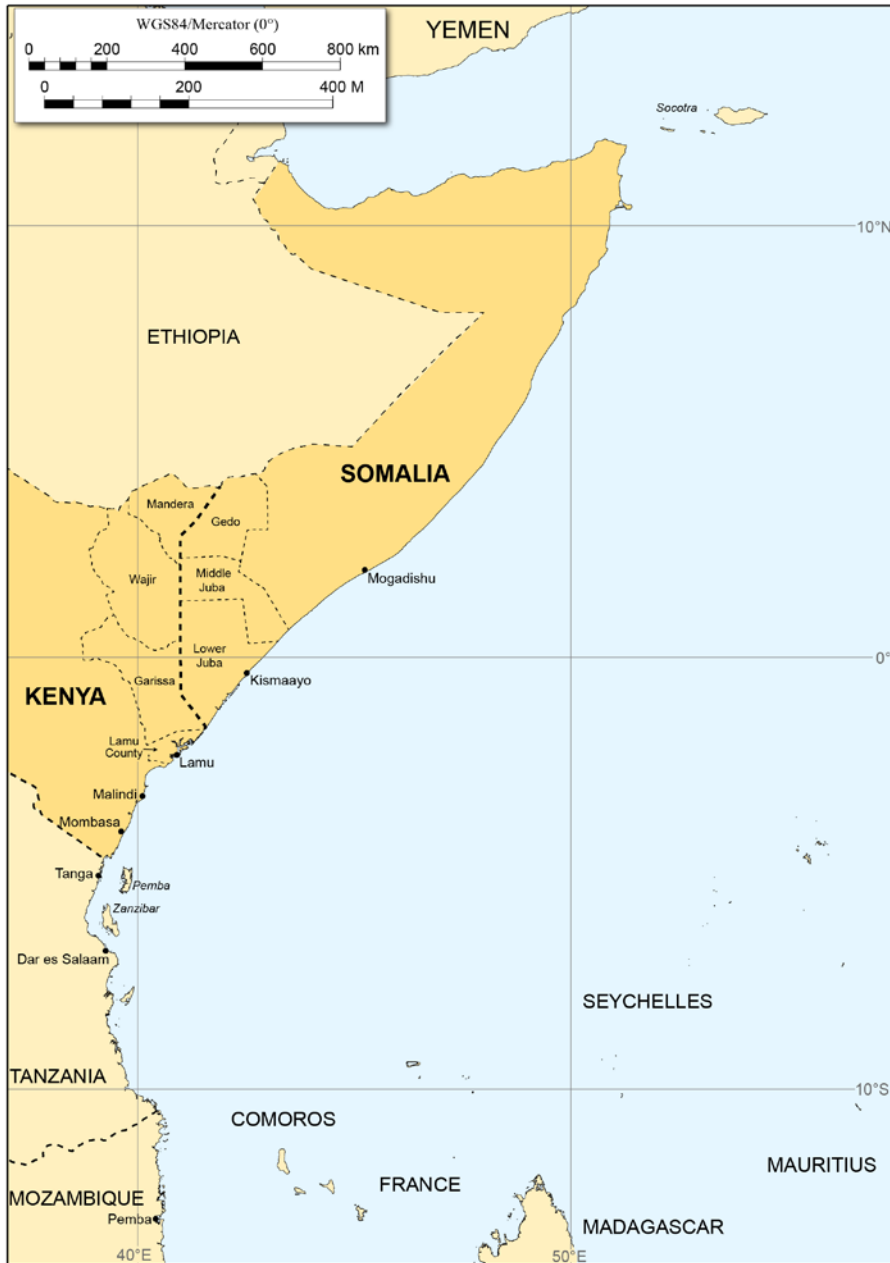


Figure 1-1: The Regional Geographic Context

21. The conduct of the Parties demonstrates that during the 35 year period from 1979 when Kenya’s EEZ Proclamation first established the parallel of latitude as its maritime boundary, until shortly before the initiation of this proceeding before the Court in 2014, Somalia did not either protest or claim a contrary delimitation based on equidistance. The parallel was based on the principle of equitable delimitation in light of geographic context and regional practice and the Parties’ conduct was consistent with that line until 2014.

22. Contrary to Somalia’s assertion that “[t]he parallel boundary claimed by Kenya has no historical or legal basis”,⁹ the conduct of the Parties between 1979 and 2014 is consistent with Kenya’s position that the parallel of latitude was accepted as the maritime boundary. As set out in Chapter II, the absence of protest when a reaction is called for amounts to acquiescence. Furthermore, as set out in Chapter III, there is no mandatory application of the equidistance/special circumstances methodology as claimed by Somalia. In particular, the Court must respect what the parties have considered to be an equitable delimitation.
23. Kenya’s maritime boundary with Somalia first emerged in 1975. Following an agreement between Kenya and Tanzania that the parallel of latitude was an equitable solution for maritime delimitation,¹⁰ Kenya decided¹¹ to adopt a similar parallel of latitude on its northern maritime boundary with Somalia. In 1979, Kenya issued a Presidential Proclamation which formally adopted the parallel of latitude as the maritime boundary with Somalia up to 200 nautical miles (“M”).¹² During this period, other States had also adopted the simplified method of using a parallel of latitude for their maritime boundary.¹³ In 2005, Kenya adjusted its coordinates for greater accuracy in a second Presidential Proclamation.¹⁴ Both in 1979 and 2005, Kenya gave official notice of its claim to all UN Member States including Somalia, and Somalia did not protest. Kenya’s submission to the CLCS in 2009 extended the parallel of latitude beyond 200M to the outer continental shelf; again Somalia was notified of this claim, and did not protest until 2014.
24. Kenya adopted the parallel of latitude in 1975 with a view to achieving an equitable delimitation in the newly emerged EEZ. This approach was consistent with the position of many African States, including Kenya and Somalia, at UNCLOS III that maritime delimitation should be based not on equidistance but on equitable

⁹ MS, Vol. I, para. 5.29.

¹⁰ Exchange of Notes Constituting an Agreement between the Republic of Kenya and the United Republic of Tanzania on the Territorial Sea Boundary, 1039 U.N.T.S. 148 (17 Dec. 1975 & 9 July 1976), entered into force 9 July 1976. MS, Vol. III, Annex 5. See further section B3 below.

¹¹ Ministry of Foreign Affairs (‘MFA’) Internal Memo from A.S. Legal to Dr Adede on the Consultative Interministerial Meeting of the Law of the Sea Group held at Harambee House on 12 August 1975 (‘MFA’. 273/430/001A/66), 26 August 1975, Annex 12, ‘A. Boundary Issues’, pp. 2–3; Letter from the Permanent Mission of Kenya to the United Nations (Frank X. Njenga) to the Permanent Secretary of the Ministry of Foreign Affairs (att: Dr Adede) (KMUN/LAW/MSC/23A/16), *Law of the Sea: Kenya’s National Jurisdiction*, 19 September 1975, Annex 13. See further paras. 52–6 below.

¹² See section B4 below.

¹³ See para. 304 below.

¹⁴ See section D1 below.

principles.¹⁵ It was also consistent with the approach taken with respect to Kenya's southern maritime boundary with Tanzania; the 1975–6 agreement adopted the parallel of latitude as an equitable solution beyond the 12M limit of the territorial waters surrounding Pemba Island to a notional 200M limit,¹⁶ and in 2009 that parallel line was formally extended to both the EEZ and the Continental Shelf.¹⁷ The 1988 Mozambique–Tanzania agreement adopted a similar approach.¹⁸

25. Whilst recorded evidence of further practice of the Parties is limited,¹⁹ the evidence presented in section F below (over a 35 year period) is significant and consistent with Kenya's present claim to the parallel of latitude. Notably, during the 1980s, in addition to fisheries and marine scientific research, Somalia delimited offshore oil exploration blocks along the parallel of latitude. When a production-sharing contract was concluded in July 2000 between Kenya and Star Petroleum International (Kenya) Limited for a block along the parallel of latitude, Somalia did not protest. To the contrary, in 2013 Somalia itself issued its first exploration license, to Soma Oil & Gas Exploration, along the parallel of latitude; and seismic testing was conducted for the first time off the southern coast of Jubaland at the parallel line.
26. For 35 years, Kenya has relied in good faith on the parallel of latitude as the maritime boundary and spent considerable resources on the protection and development of this maritime area. It was not until 2014, shortly prior to filing its Application before the Court, that Somalia formally asserted to Kenya a contrary delimitation of the maritime boundary based on equidistance.
27. This Chapter is structured as follows: section B covers the events from 1924 to 1979 leading to Kenya's maritime boundary at the parallel of latitude in the Presidential Proclamation; section C examines the absence of protest from Somalia after the 1979 EEZ Proclamation and during the UNCLOS III negotiations in the 1980s; section D

¹⁵ In 1980, shortly after notice of Kenya's 1979 EEZ Proclamation, Somalia insisted on deletion of any reference to equidistance in Articles 74 and 83 of the UNCLOS. See further section C2 below.

¹⁶ MS, Vol. III, Annex 5.

¹⁷ Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, 2603 U.N.T.S. 37 (23 June 2009), entered into force 23 June 2009. MS, Vol. III, Annex 7.

¹⁸ Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique Regarding the Tanzania/Mozambique Boundary, 28 December 1988, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 898, Annex 143. See at Article 4.

¹⁹ Somalia states that "As a result of its long civil war, many of Somalia's historical records, including sometimes even legislation and related materials, have been lost or destroyed." (MS, Vol. I, para. 3.6, fn 62.)

describes Kenya's 2005 EEZ Proclamation and the continuing absence of protest by Somalia; section E describes Kenya's extension in its 2009 CLCS submission of the maritime boundary at the parallel of latitude in the outer continental shelf beyond 200M and the absence of protest by Somalia; section F sets out the conduct of the Parties consistent with the parallel of latitude from 1979 to 2013; and section G outlines Somalia's first protest and claim to an equidistance line as its maritime boundary in 2014.

B. 1924–79: Events leading to Kenya's Maritime Boundary Claim at the Parallel of Latitude in the 1979 EEZ Proclamation

28. This section considers the period from 1924 to 1979. It first addresses the land boundary terminus and the territorial sea up to 3M with reference to the 1924–33 Anglo-Italian Agreement (section 1). Kenya's post-independence period 1963–75 is then considered including Somalia's repudiation of the land boundary and territorial aggression against Kenya (section 2), before turning to the events leading to the Kenya–Tanzania Boundary Agreement of 1975–6 (section 3) and Kenya's 1979 EEZ Proclamation which adopted the parallel of latitude as the maritime boundary with Somalia up to 200M (section 4).

1. The land boundary terminus and territorial sea delimitation under the 1924 Anglo-Italian Treaty: 1924–33

29. The 1924 *Treaty between Italy and the United Kingdom regulating certain questions concerning the boundaries of their respective territories in East Africa* established the current land boundary between Kenya and Somalia.²⁰ The Jubaland Boundary Commission was established under Article 12 of the Treaty to implement the agreement. On 17 December 1927, Italy and the UK recorded the Commission's decisions in an Agreement which provided for the establishment of both the land

²⁰ Treaty between Italy and the United Kingdom regulating certain Questions concerning the Boundaries of their Respective Territories in East Africa, signed at London (15 July 1924), and Exchange of Notes defining a Section of the said Boundaries, Rome, (16 & 26 June 1925), 35 L.N.T.S. 380 (1925). MS, Vol. III, Annex 2. The United Kingdom ceded Jubaland from British East Africa to Italian Somalia. Article 1 provided that, at its southern portion, the boundary should be such that the Ras Kambione promontory and immediately adjacent Diua Damasciaca islets fall within Italian territory. The 1924 Treaty entered into force with the exchange of the instruments of ratification on 1 May 1925. There is no mention of a territorial sea boundary in the Treaty. An official 1924 Map of the Italian Colonial Ministry, however, appears to depict the international boundary as a line extending approximately 3M into the territorial sea along the parallel of latitude (Map of Italian Somalia by "Servizio Cartografico del Ministero Jelle Colonie", *Rivista Coloniale* XIX July–August 1924 No. 7–8 at p. 231, Annex M1).

boundary terminus (“LBT”) as well as the boundary of the territorial sea²¹ which was then up to 3M.²² The 1927 Agreement was adopted in a 1933 Exchange of Notes.²³

30. As stated in Somalia’s Memorial, in order to determine the precise location of the Parties’ LBT, it was necessary to identify the location of Primary Beacon No. 29 (“PB29”, also known as Boundary Pillar 29 “BP29”), referred to in the 1927 Agreement;²⁴ and Somalia gives the coordinates as 1° 39’ 43.3”S.²⁵ Kenya’s position is that the precise coordinates are slightly different, at 1° 39’ 43.2”S.²⁶
31. At the meeting held by the Parties in March 2014 (discussed in further detail at section G2 below) Kenya and Somalia agreed that the starting point for the delimitation of the maritime boundary is PB29.²⁷
32. The letters exchanged between the British and Italian Embassy on 16 June 1925 and 26 June 1925 respectively state that “The coast shall be defined as the line of mean sea level ordinary spring tides”.²⁸ This is confirmed in the 1927 Agreement at Article 4.²⁹ Somalia’s Memorial, however, identifies the coast as the low water line.³⁰

²¹ Agreement between Italy and the United Kingdom in which are recorded the decisions of the Commission appointed under Article 12 of the Treaty between His Britannic Majesty and His Majesty the King of Italy, signed at London on July 15, 1924, regulating certain questions concerning the boundaries of their respective territories in East Africa (17 Dec. 1927). MS, Vol. III, Annex 3. See First Part of the 1927 Agreement, “General Description” of Appendix I “Description of the Boundary between the Colony and Protectorate of Kenya and Italian Somaliland”.

²² J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn., OUP 2012) pp. 259–60; M. Evans “The Law of the Sea” in M. Evans (ed.) *International Law* (4th edn., OUP 2014) p. 667; D.R. Rothwell *et al.* (eds.), *The Oxford Handbook of the Law of the Sea* (OUP 2015) p. 93.

²³ Exchange of Notes between His Majesty’s Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian Somaliland (22 Nov. 1933), U.K.T.S. No. 1, Cmd. 4491 (1934). MS, Vol. III, Annex 4.

²⁴ MS, Vol. I, para. 4.18.

²⁵ MS, Vol. I, para. 4.20.

²⁶ Technical Report on Kenya–Somalia Boundary, *Re-establishment of Boundary Pillar BP29 at Dar Es Salam Border Point*, prepared by Julius K. Rotich, Surveyor/Team Leader, Survey of Kenya, August 2003, Annex 40, p. 13.

²⁷ Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26–27 Mar. 2014* (1 Apr. 2014). MS, Vol. III, Annex 31, p. 3 “the delegations discussed and agreed to rely on Pillar BP29 as reflected in the 1924 Anglo-Italian Treaty to constitute the starting point solely for the purposes of establishing a maritime boundary pending confirmation of the co-ordinates”. See also MS, Vol. III, Annex 24 at p. 2 “[t]he parties were able to agree that the starting point for land boundary terminal (LBT) between both countries is BP29, which is reflected in the Anglo-Italian Treaty of 1933 establishing the boundary between both countries. The Somali delegation stated that its agreement to BP29 as the LBT should not imply any explicit or implicit position of the Somali Government in regard to the Anglo-Italian Treaty of 1933.”

²⁸ MS, Vol. III, Annex 2, pp. 387–8.

²⁹ MS, Vol. III, Annex 3.

³⁰ MS, Vol. I, para. 4.21 “The beacon is not, however, the LBT as such, as it is still necessary to connect the beacon to the low-water line”.

33. The 1927 Agreement describes a line proceeding from PB29 “in a south-easterly direction, to the limit of territorial waters in a straight line at right angles to the general trend of the coastline at Dar Es Salam, leaving the islets of Diua Damasciaca in Italian territory.”³¹ Somalia’s Memorial depicts the line perpendicular to the “general direction of the coast” in Figure 4.4 to determine the location of the LBT at the low water tide 41 metres from PB 29. It does not however extend that same line further “to the limit of territorial waters” as indicated in the 1927 Agreement.
34. It results from the 1927 Agreement that (i) PB29 must be connected to the “line of mean sea-level ordinary spring tides”, and (ii) the perpendicular line must be extended further into the territorial sea (which extended up to 3M at the time).
35. **Figure 1-2** illustrates the 3M Territorial Sea boundary established by the 1933 Exchange of Notes compared to Somalia’s equidistance claim in MS Figure 5.1. It indicates that the agreed Anglo-Italian boundary is situated to the north of Somalia’s proposed line.

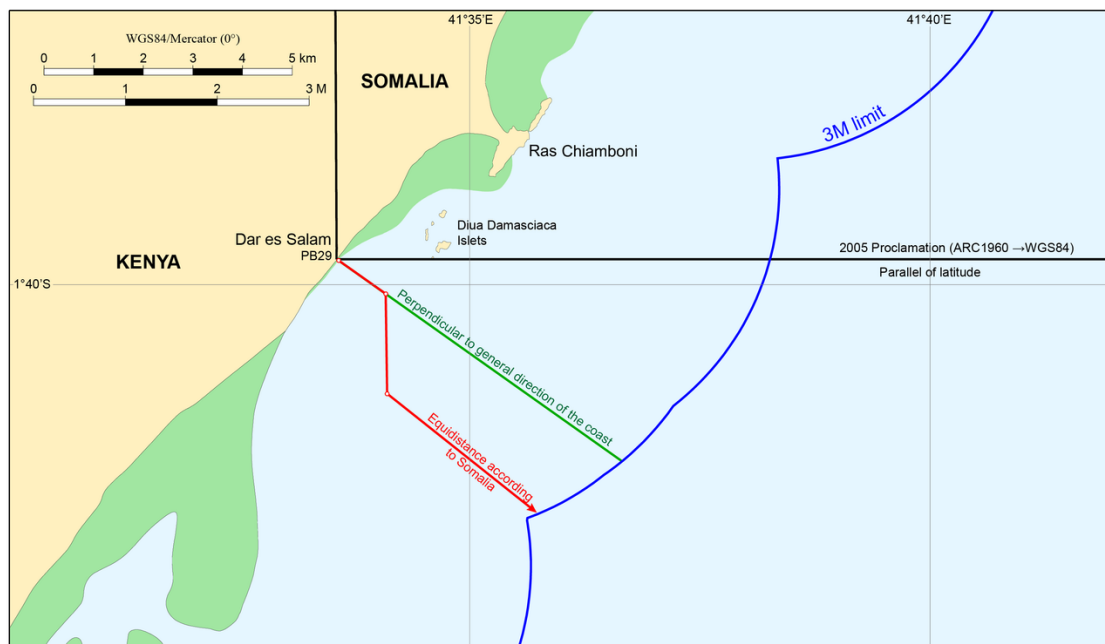


Figure 1-2: The 3 Nautical Mile Territorial Sea Boundary established by the 1933 Exchange of Notes compared to Somalia’s Equidistance Claim (MS, Vol II, Fig 5.1)

³¹ MS, Vol. III, Annex 3, p. 9 (emphasis added).

2. Somalia's repudiation of the land and sea boundary with Kenya under the 1924 Anglo-Italian Treaty and the 1972 maritime laws of the Parties: 1963–75

36. Following Kenya's independence in 1963, Somalia openly rejected the principle of the intangibility of boundaries³² before the newly established Organisation of African Unity ("OAU").³³ It made irredentist claims to Kenya's Northern Frontier District ("NFD", which now consists of four counties: Mandera, Wajir, Garissa and Lamu as marked on **Figure 1-1** above), and thus repudiated the 1924–33 Anglo-Italian Agreement (including the Territorial Sea boundary up to 3M) in pursuit of a "Greater Somalia" (Soomaaliweyn) (depicted at **Figure 1-3** below). The "union of Somali territories" was even incorporated into the Somali Constitution.³⁴ Somalia's policy of territorial expansionism led to the 1963–7 secessionist "Shifta War" with devastating consequences.³⁵ As set out below (at para. 68) Somalia only withdrew its claim to Kenya's NFD beginning in 1978 because of diplomatic isolation following its failed invasion of Ethiopia in the Ogaden War. Historical irredentism however remains a political force in Somalia to this day (para. 194 below). This context has had far-reaching consequences on Kenya's border stability and security, and impeded the conclusion of a formal agreement on a maritime boundary with Somalia.

³² The OAU Charter enshrined the principle of respect for existing borders on achievement of independence. It was reinforced in 1964 by Resolution AHG/Res. 16(I) on Border Disputes among African States adopted in Cairo in July 1964.

³³ P. Nugent, *Africa Since Independence, A Comparative History* (2nd edn., Palgrave Macmillan 2012) p. 105, Annex 123.

³⁴ Article 6(4) of the Somali Constitution as amended up to 31 December 1963, Annex 8, provides that "[t]he Somali Republic shall promote, by legal and peaceful means, the union of Somali territories and encourage solidarity among the peoples of the world, and in particular among African and Islamic peoples."

³⁵ See generally V. B. Thompson, *Conflict in the Horn of Africa: The Kenya–Somalia Border Problem 1941–2014* (University Press of America 2015) and H. Whittaker, *Insurgency and Counterinsurgency in Kenya: A Social History of the Shifta Conflict, c. 1963–1968* (Brill 2014).

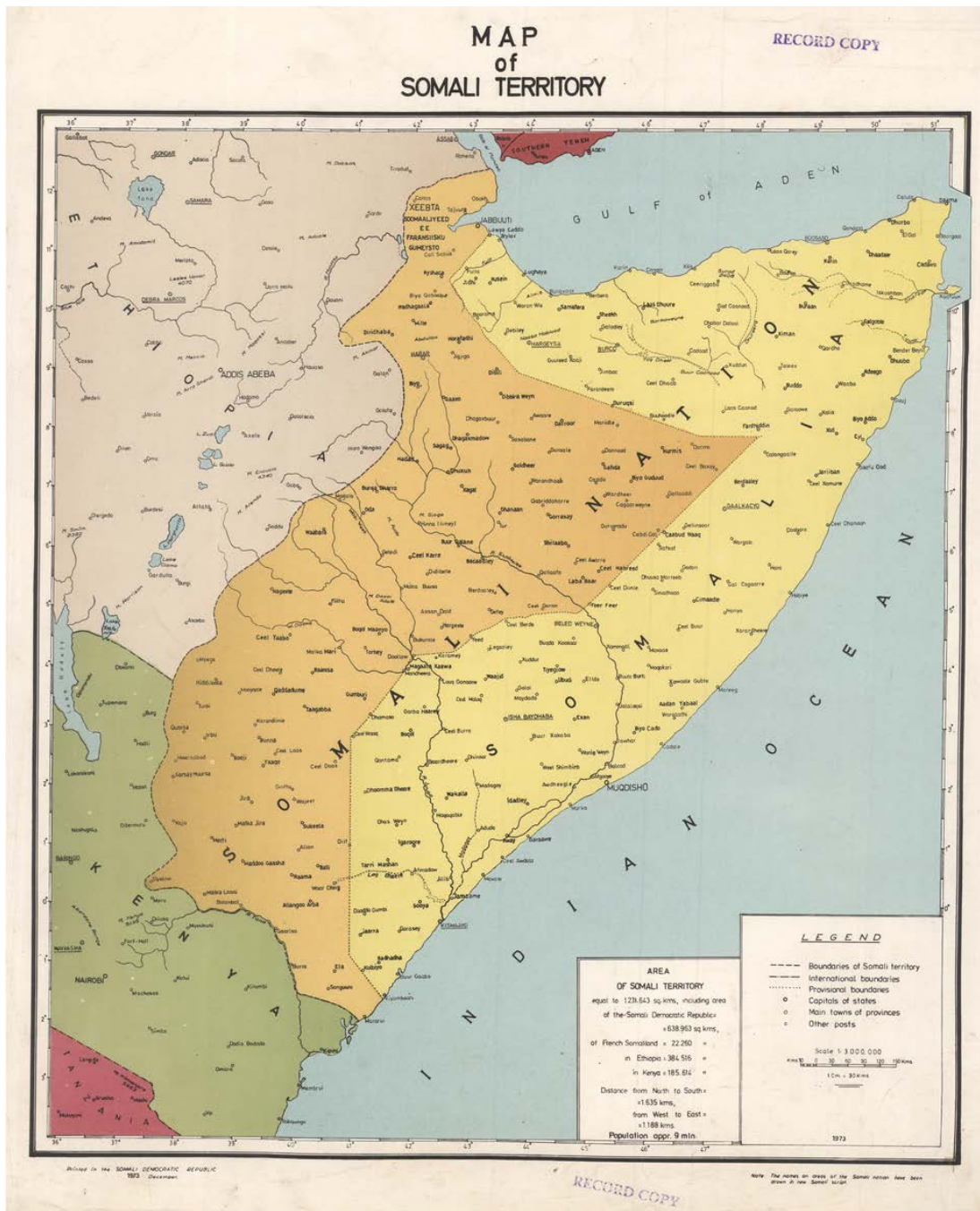


Figure 1-3: Map of “Greater Somalia” including Kenya’s NFD Territory

37. In June 1969, Kenya acceded to all four of the 1958 Conventions on the Law of the Sea.³⁶ In view of Somalia’s policy of territorial aggression, Kenya focused on resolving the maritime delimitation with Tanzania to the south. In particular, the arrest

³⁶ i.e. the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf.

of Kenyan fishermen in the Pemba Channel in 1970 made agreement on the territorial sea boundary a pressing matter.³⁷

38. This focus on Tanzania is reflected in the legislative history of Kenya's Territorial Waters Act enacted on 16 May 1972 ("the 1972 Act").³⁸ The 1972 Act extended Kenya's territorial sea to 12M in accordance with the emerging State practice.
39. Somalia makes much of the reference to a "median line" in Article 2(4) of the 1972 Act, characterizing it as a "contradictory and unpredictable approach" in relation to the parallel of latitude.³⁹ However, the Act was adopted before the emergence of the EEZ at UNCLOS III and seven years prior to the 1979 EEZ Proclamation. Furthermore, the reference to the "median line" in that Article merely incorporated the provisional principle in Article 12(1) of the 1958 Convention on the Territorial Sea that "failing agreement" a State is not to extend its territorial sea "beyond the median line". This corresponds to Article 15 of UNCLOS, which is similarly incorporated in Article 3(4) of the 1989 Maritime Zones Act. In other words, beyond a provisional

³⁷ East African Standard, 21, 23 and 24 September, 5 and 6 October 1970, Annex 103; Exchange of Notes between the United Republic of Tanzania and Kenya Concerning the Delimitation of the Territorial Waters Boundary between the Two States, 9 July 1976, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 876, Annex 136: "The negotiations which led to the exchange of notes between the two States constituting the maritime delimitation agreement in question were prompted by an incident concerning the arrest in 1971, by the Tanzanian authorities, of certain members of the Pemba Fisheries Club based in Vanga, Kenya. The Tanzanian authorities alleged that these Kenyans had been carrying out fishing activities in the maritime areas claimed by it."

³⁸ MS, Vol. III, Annex 16. For the legislative history see the following: The 1969 Proclamation of the President of the Republic of Kenya Concerning the Convention on Territorial Sea and Contiguous Zone of the Republic of Kenya, Kenya Gazette Supplement No. 44, Legislative Supplement No. 31, Legal Notice No. 147, 13 June 1969, Annex 1 (para. 2: "This declaration shall not extend to the waters lying between the Republic of Kenya and the Republic of Tanzania in the Pemba Channel, where the width of such waters measured from the appropriate baselines is less than twenty-four miles, but the extent of the territorial waters shall be taken as a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of the two States is measured"); A Confidential Memorandum on "Territorial Waters Legislation" from the Minister of Foreign Affairs to the Cabinet dated 8 August 1970 (noting that legislation was required to enable the Government to issue any prospecting licences for oil and other minerals in this area). It noted that it was "thought advisable that Kenya and Tanzania representatives should meet to agree on the boundary before we enacted the legislation and published the boundary maps" but that a meeting with Tanzania had been indefinitely postponed because of the "refusal of the Zanzibar Government to cooperate in this matter." (para. 5) (Zanzibar was an independent country 1963–4 before uniting with Tanzania.) The recommendation was that "Kenya should go ahead on its own to enact the necessary legislation" both because "[i]t is vital for our economy that exploration for minerals and petroleum in the territorial sea be commenced but this cannot be done before legislation extending Kenya's jurisdiction to this area is passed", and because "[b]oth Kenya and Tanzania have agreed on the Median Line formula. Our legislation and baselines have strictly followed this formula and so Tanzania, which has passed its own legislation on this topic, should not complain as Kenya's unilateral action has been occasioned by Tanzania's lack of co-operation" (para. 6) (Confidential Memorandum from the Minister of Foreign Affairs to the Cabinet, *Territorial Waters Legislation*, containing the 1970 Territorial Waters Bill, 8 August 1970, Annex 2). See also the Territorial Waters Bill 1970, attached to that Memorandum.

³⁹ See, e.g., MS, Vol. I, para. 1.27.

principle, Kenyan legislation neither asserted nor required territorial sea delimitation based on a median line. Given Somalia's rejection of the land boundary, Kenya had no choice but to adopt this default position until such time as a maritime boundary agreement could be concluded.

40. Unlike Kenya, Somalia did not become a party to any of the 1958 Conventions on the Law of the Sea. Its 1972 Law No. 37 on Territorial Sea and Ports claimed a 200M territorial sea. Somalia's legislation made no reference to a "median line" even as a provisional principle failing agreement with Kenya. In fact, Article 4(6) of its subsequent Law No. 5 of 1989 (discussed further at para. 81 below) referred to the territorial sea boundary with Kenya as a "straight line" in contrast with its description of its boundary with Yemen as a "median line".
41. The 1972 legislation of Kenya and Somalia on the territorial sea was soon overtaken by the revolutionary developments in the international law of the sea. In the following year, in 1973, UNCLOS III commenced, and both the EEZ and a more expansive definition of the continental shelf based on "natural prolongation" were proposed as new maritime areas. Kenya played a significant pioneering role in developing the concept of the EEZ. It was the first State to officially propose the creation of the EEZ as a new maritime area under international law.⁴⁰ It had submitted draft articles on the concept to the UN Sea-Bed Committee (which prepared the way for UNCLOS III) as early as 1972.⁴¹ Despite its novelty, Kenya attached great importance to the EEZ in light of the shift in its fisheries from "a domestic consumption-oriented industry to an export-oriented industry with value-added processing",⁴² and encroachment by foreign fishing fleets, as well as rapid technological advances in offshore oil exploration. UNCLOS III would lead to the adoption of UNCLOS in 1982, but Kenya set out to establish its maritime boundaries at the earliest opportunity, making it among the first African States to do so.

⁴⁰ At the thirteenth meeting of the Asian-African Legal Consultative Committee in January 1972, Kenya submitted a working paper on the "Exclusive Zone Concept" in which the term "exclusive economic zone" was used (pp. 155–60), Annex 66.

⁴¹ The working paper was turned into draft articles submitted to the sub-committee II of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction and issued as Draft articles on exclusive economic zone concept, submitted by Kenya, U.N. Doc A/AC.138/SC.II/L.10, *Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, GAOR, Twenty-Seventh Session, Supp. No.21 (A/8721), 1972, pp. 180–2, Annex 67.

⁴² FAO Fishery and Aquaculture Country Profiles: The Republic of Kenya, available at <http://www.fao.org/fishery/facp/KEN/en>

3. Kenya–Tanzania maritime boundary agreement: 1975–6

42. As noted above (at para. 37 above), Kenya’s primary concern in its territorial sea was delimitation with Tanzania. In light of their favourable diplomatic relations, Kenya and Tanzania reached an agreement at a meeting in Arusha, Tanzania on 6–8 August 1975, which was subsequently formalized in an Exchange of Notes in 1975–6 (“the Kenya-Tanzania Boundary Agreement 1975–6”).⁴³ Whilst Kenya claimed a 12M territorial sea and an EEZ up to 200M, Tanzania’s territorial sea claim extended to 50M. The extent of these maritime areas was still being negotiated in UNCLOS III.
43. Beyond the 12M territorial sea surrounding Pemba Island, the Parties adopted the parallel of latitude up to 200M as the outermost limit of their maritime boundary. Thus, paragraph 2(d) of the Kenyan Note of 1975 stated that: “The eastward boundary ... shall be the latitude extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States.”
44. Kenya subsequently gave notice of the agreement by requesting its circulation to all UN Member States.⁴⁴
45. The Kenya-Tanzania Boundary Agreement 1975–6 was analysed in the “Limits in the Seas” series issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, of the United States Department of State.⁴⁵ It described the maritime boundary (with reference to a map duplicated below at **Figure 1-4**) as follows:

The boundary consists of three turning points and an undefined seaward terminus. The turning points are located in the Pemba Channel area and are all within 12 nautical miles of the coast; but, as Article 2 (d) of the agreement states, the boundary shall follow the latitude of point C (4°40'52"S) “...extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of [the] two States.” Kenya currently claims a 12-nautical-mile

⁴³ MS, Vol. III, Annex 5.

⁴⁴ “It should be appreciated if all States Members of the United Nations and Permanent Observers to the United Nations are notified of the substance of the Agreement and the date of the entry into force thereof.” Letter from the Permanent Mission of Kenya to the United Nations to the United Nations Secretary-General (KMUN/LAW/MSC/23A/7) forwarded to the Ministry of Foreign Affairs, *Agreement on the Territorial Sea Boundary between Kenya and Tanzania*, 18 April 1977, Annex 14.

⁴⁵ <https://www.state.gov/e/oes/ocns/opa/c16065.htm> (Report No. 92 dated 23 June 1981), Annex 52. The series “aims to examine coastal States’ maritime claims and/or boundaries and assess their consistency with international law” and represents the views of the United States Government.

territorial sea, and Tanzania claims a 50-nautical-mile territorial sea. The intersections of their claimed territorial seas with the boundary are depicted as points 1 and 2, respectively, on the attached map.

46. It went on to note:

With reference to Article 2 (d), point 4 illustrates where Kenya's claimed 200-nautical-mile economic zone intersects the 4°40'52" parallel of south latitude, and point 3 identifies where a potential Tanzanian 200-nautical-mile claim would intersect this parallel of latitude.⁴⁶

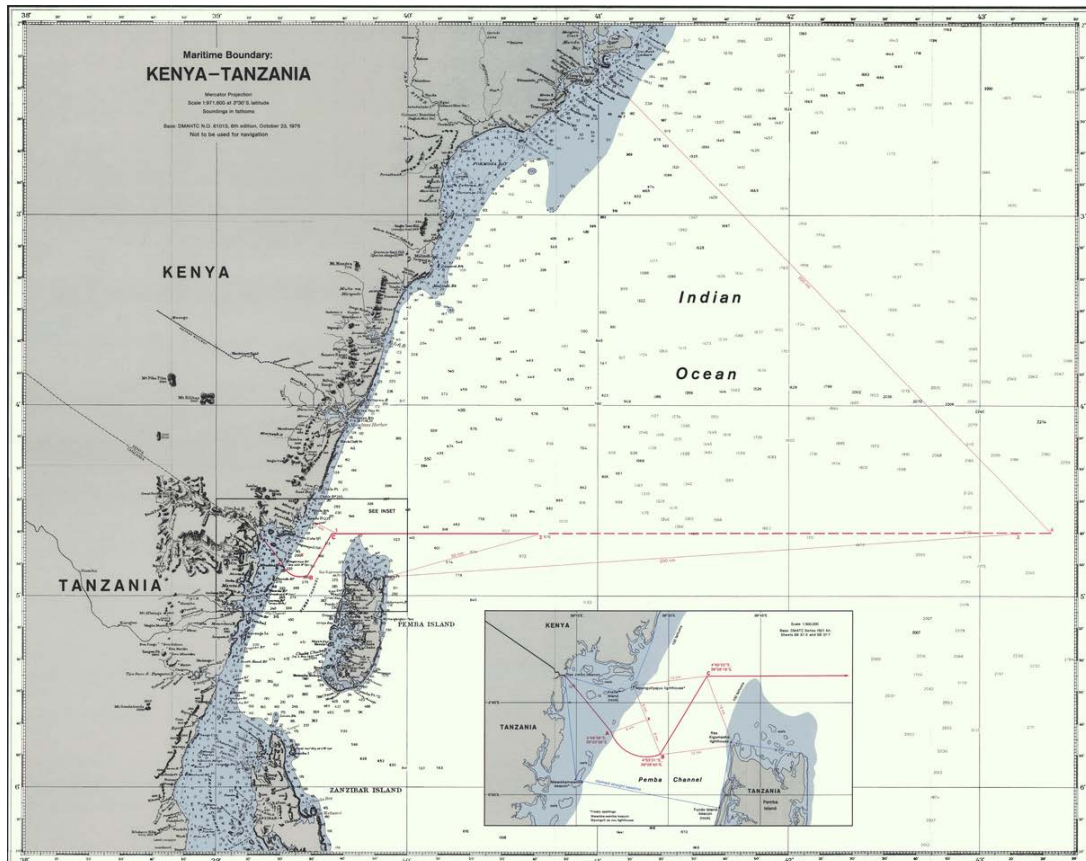


Figure 1-4: The Kenya–Tanzania Boundary 1975–6 (published in the “Limits in the Seas” series, United States Department of State, Report dated No. 92, 23 June 1981)

47. The Report noted further that the use of the parallel of latitude was an equitable delimitation:

The course of the final boundary combines numerous delimitation methodologies. The first boundary segment is equidistant between the two claimed straight baselines. Segment A-B has been developed by drawing an arc from point X, an artificially established point. Segment B-C is equidistant between selected coastal points one from each country. The seaward extension of the boundary from point C is based on a parallel of latitude. Thus, the boundary represents an agreement which has been

⁴⁶ United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, *Limits in the Sea, Kenya–Tanzania Maritime Boundary*, Report No. 92, 23 June 1981, Annex 52, p. 4.

established in accordance with equitable principles and which is satisfactory to both countries.⁴⁷

48. **Figure 1-5** below contrasts an equidistance line with the parallel of latitude in the Kenya-Tanzania Boundary Agreement 1975–6. It demonstrates that in achieving an equitable delimitation, the parallel of latitude compensated for the distorting effect of the concavity resulting from the change in direction of the Tanzanian coast south of Kenya.⁴⁸

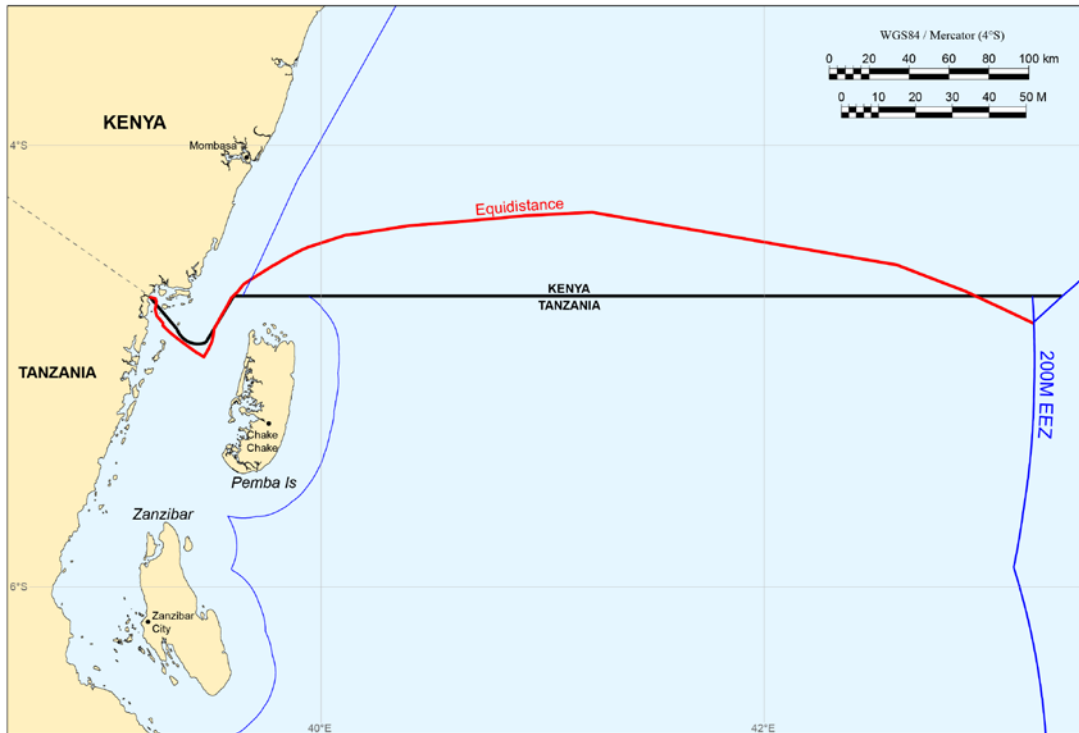


Figure 1-5: The Kenya-Tanzania Boundary compared to Equidistance

49. Pursuant to a 2009 Agreement, Kenya and Tanzania subsequently confirmed the position with respect to the delimitation of their maritime boundary up to 200M, namely the parallel of latitude, and extended the same line to the outer limits of the continental shelf.⁴⁹
50. Subsequent to the 1975–6 Kenya–Tanzania agreement, further south on the African coast of the Indian Ocean, Mozambique and Tanzania adopted the same approach and

⁴⁷ United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, *Limits in the Sea, Kenya–Tanzania Maritime Boundary*, Report No. 92, 23 June 1981, Annex 52, p. 5 (emphasis added) <https://www.state.gov/documents/organization/58819.pdf>. See figure US State Department, DMAHTC N.O. 61015, 6th edition, 23 October 1976 (emphasis added).

⁴⁸ See para. 347 below.

⁴⁹ MS, Vol. III, Annex 7.

used the parallel of latitude for an equitable delimitation of the EEZ.⁵⁰ Article 4 of the Agreement on the Tanzania/Mozambique Boundary of 28 December 1988 provided:

The delimitation of the Exclusive Economic Zone between the two countries is delimited in conformity with the equidistance method by prolonging the median straight line used for the delimitation of the territorial sea from point “C” to a point 25.5 nautical miles, located at latitude 10° 05' 29" S and longitude 41° 02' 01" E, hereinafter referred to as point “D”. From this point, the Exclusive Economic Zone is delimited by application of the principle of equity, by a line running due east along the parallel of point “D”. The point to termination of this line will be established through exchange of notes between the United Republic of Tanzania and the People's Republic of Mozambique at a future date.⁵¹

4. Kenya’s 1979 EEZ Proclamation: 1975–9

51. During the 1970s Kenya continued to grapple with Somalia’s policy of territorial expansion and rejection of the land boundary which made an agreement on the maritime boundary impossible. It also had to contend with the problem of illegal fishing in its emerging EEZ, in particular the North Kenya Bank adjacent to Somalia.⁵² On 25 March 1975 furthermore, Kenya adopted the Continental Shelf Act.⁵³ This coincided with the concurrence of Kenya and Somalia during UNCLOS III negotiations from 1973 onwards that equitable principles (as opposed to equidistance) should apply to maritime delimitation in the EEZ and continental shelf (see section C2 below). It was against this confluence of circumstances that Kenya first adopted its northern maritime boundary with Somalia in 1975.
52. On 12 August 1975, a week after the meeting at which Kenya and Tanzania agreed in principle on a maritime boundary at the parallel of latitude (see para. 42 above), the Kenyan Consultative InterMinisterial Meeting of the Law of the Sea Group deliberated, *inter alia*, the equitable delimitation of the northern maritime boundary

⁵⁰ See MS, Vol. III, Annex 7. See also Agreement between the Government of the United Republic of Tanzania and the Government of the People’s Republic of Mozambique Regarding the Tanzania/Mozambique Boundary, 28 December 1988, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), Annex 143.

⁵¹ Emphasis added.

⁵² See the Internal Memo dated 26 August 1975 from the Ministry of Foreign Affairs which advised the Ministry of Defence to “take a stern action” on “sovereignty [*sic*] violations” by “some foreign companies (i.e. a Japanese Company)” exploiting the marine resources of the North Kenya Bank, MFA Internal Memo from A.S. Legal to Dr Adede on the Consultative Interministerial Meeting of the Law of the Sea Group held at Harambee House on 12 August 1975 (MFA. 273/430/001A/66), 26 August 1975, Annex 12.

⁵³ Republic of Kenya, The Continental Shelf Act No. 3 of 1975, Annex 3, Article 3 provides that “All existing rights in respect of the continental shelf and the natural resources thereon, therein and thereunder, and all such rights as may from time to time hereafter by right, treaty, grant, usage, sufferance or other lawful means become exercisable by the Government or appertain to Kenya, shall be vested in the Government”.

with Somalia. The Ministry of Foreign Affairs Internal Memo (dated 26 August 1975) records that at that meeting:

In connection with the drawing of the northern territorial sea boundary with Somalia, it was suggested that [it] should be drawn using the line of latitude as the basis as was done in the case of the southern boundary with Tanzania. The median line should not be relied on because that would deflect the Kenya boundary inwards towards the Kenya side which is bound to be inequitable... The meeting was further informed that a precedent has been established on the southern sea boundary of Kenya and Tanzania where the problem was even more complicated in that the boundary touched upon Pemba Island.⁵⁴

53. **Figure 1-6** below demonstrates the contrast between delimitation of Kenya's EEZ boundaries based on equidistance lines rather than parallels of latitude.

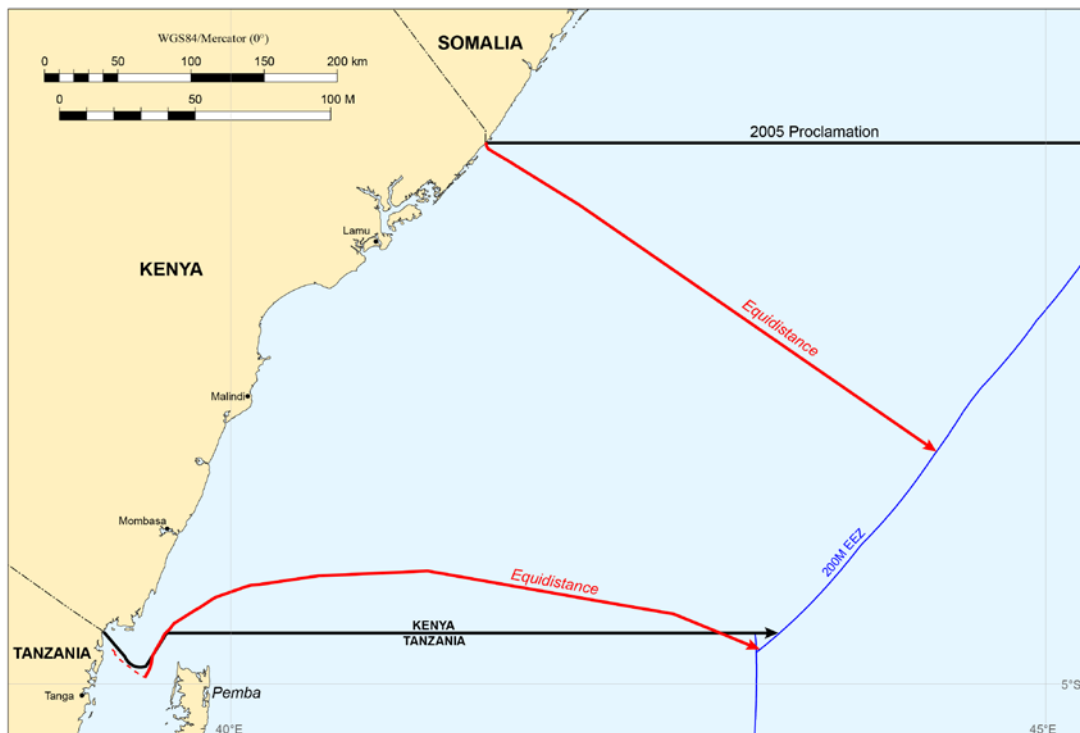


Figure 1-6: Delimitation of the EEZ contrasting the use of Equidistance and Parallels of Latitude

54. It was therefore proposed that “the boundary should commence from Pillar 29 edging through Kiungamwina Island about roughly 1° 38’ or 39’ S. to continue straight on

⁵⁴ MFA Internal Memo from A.S Legal to Dr Adede on the Consultative Interministerial Meeting of the Law of the Sea Group held at Harambee House on 12 August 1975 (MFA. 273/430/001A/66), 26 August 1975, Annex 12, “A. Boundary Issues”, pp. 2–3 (emphasis added). The Kenya–Tanzania Boundary delimitation is discussed above (see section B3).

parallel to that latitude”.⁵⁵ Those geographic coordinates corresponded generally to the parallel of latitude between Ras Kambione and Dar Es Salam.

55. The memorandum records that it was resolved that a draft Proclamation would be drafted and that the Kenya Department of Surveys⁵⁶ would expeditiously produce a map of the co-ordinates of the line of latitude in the northern maritime boundary.

56. On 19 September 1975, a letter from the Permanent Mission of Kenya to the UN to the Kenyan Ministry of Foreign Affairs commented on the draft Proclamation suggesting that:

another provision be added on the question of delimitation of our Exclusive Economic Zone and that of Somalia and Tanzania in accordance with the agreement arrived at in Arusha with respect to Tanzania and our agreement to use the latitude at the boundary point on the Kenya-Somali border for the delimitation of the respective Exclusive Economic Zones.⁵⁷

57. In 1976 the Survey of Kenya issued a map with the parallel of latitude as the maritime boundary in both the north and the south. Although the map is entitled “Kenya Territorial Sea”, it also depicts the EEZ boundary out to 200M, as indicated by **Figure 1-7** below. In regard to Somalia, the parallel line commenced from PB29 and continued through the territorial sea to the 200M limit of the EEZ.⁵⁸

⁵⁵ *Ibid.*, p. 3.

⁵⁶ The Department of Surveys (or Survey of Kenya) is the official agency of the government of Kenya on all matters affecting land surveys and mapping. It has been in existence since 1903 and is one of the oldest Departments in the country. The department is responsible for national surveying and mapping. UN Office of Outer Space Affairs website, Survey of Kenya (SOK), available at http://www.un-spider.org/links-and-resources/institutions/survey-kenya-sok;_http://www.ardhi.go.ke/?page_id=212

⁵⁷ Letter from the Permanent Mission of Kenya to the United Nations (Frank X. Njenga) to the Permanent Secretary of the Ministry of Foreign Affairs (att: Dr Adede) (KMUN/LAW/MSC/23A/16), *Law of the Sea: Kenya’s National Jurisdiction*, 19 September 1975, Annex 13.

⁵⁸ The legend of the map refers to the territorial sea boundary as a “median line”, but such language was recognised as a mistake in terminology. A letter from F.X. Njenga to the Director of Surveys of the Survey of Kenya, *Kenya Territorial Sea/Economic Zone* (MFA. 273/430/001A/49), 26 October 1979, Annex 21, notes that “[t]he words ‘Median Line’ in the Map ‘Series SK 74 North Sheet — Edition 2-SK’ should be deleted.”

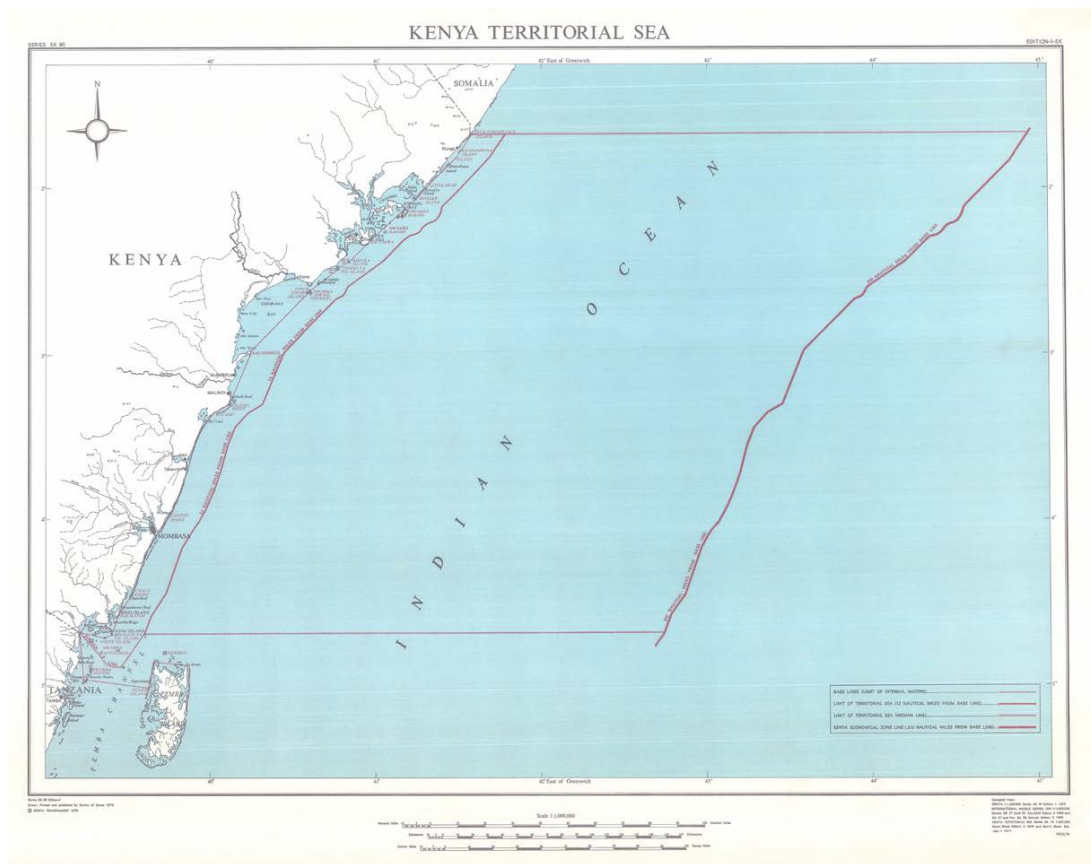


Figure 1-7: Kenya Territorial Sea and Economic Zone, Survey of Kenya, SK-90 Edition 1, 1976

58. On 28 February 1979, a Presidential Proclamation was issued (“the 1979 Proclamation”).⁵⁹

59. By that Proclamation, Kenya formally claimed an EEZ of 200M. Article 1 provided:

That notwithstanding any rule of law or any practice which may hitherto have been observed in relation to Kenya or the waters beyond or adjacent to the territorial Sea of Kenya, the Exclusive Economic Zone of the Republic of Kenya extend across the sea to a distance of two hundred nautical miles measured from the appropriate base line from where the territorial sea is measured as indicated in the Map annexed to this Proclamation.

60. Article 1 then provided for the maritime boundary with Tanzania (reflecting the 1975–6 agreement: see section B3 above), and with Somalia, as follows:

Without prejudice to the foregoing, the Exclusive Economic Zone of Kenya shall:

(a) in respect of its southern territorial waters boundary with the United Republic of Tanzania be an eastern latitude north of Pemba island to start at a point obtained by the northern intersection of two arcs one from the Kenya

⁵⁹ MS, Vol III, Annex 19.

Lighthouse at Mpunguti ya Juu, and the other from Pemba island Lighthouse at Ras Kigomasha.

(b) in respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38' South.

61. It is recalled that the starting point for delimitation of the maritime boundary in the 1924–33 Anglo-Italian Agreement was PB29.⁶⁰
62. Although the Proclamation refers to an “annexed map”, there was no map attached. The Canadian Government, which had been providing technical assistance, had informed Kenya that the 1976 map showing the 200M outer limits of the EEZ (**Figure 1-7** above) was not entirely accurate and needed to be corrected to properly represent the full extent of Kenya’s entitlement.⁶¹ In 1983, the Survey of Kenya published the correct map that relates to the 1979 Proclamation (**Figure 1-8** below).

⁶⁰ See para. 30 above.

⁶¹ Letter from the Canadian High Commission in Nairobi (MFA 273/430/XII), *Note for Mr. Njenga, Kenya — Territorial Sea and Economic Zone*, undated, Annex 16. Though the letter is undated, Mr. Njenga then forwarded by letter dated 11 October 1978 the Canadian comments to the Survey of Kenya, requesting the latter to examine said comments (Annex 17).

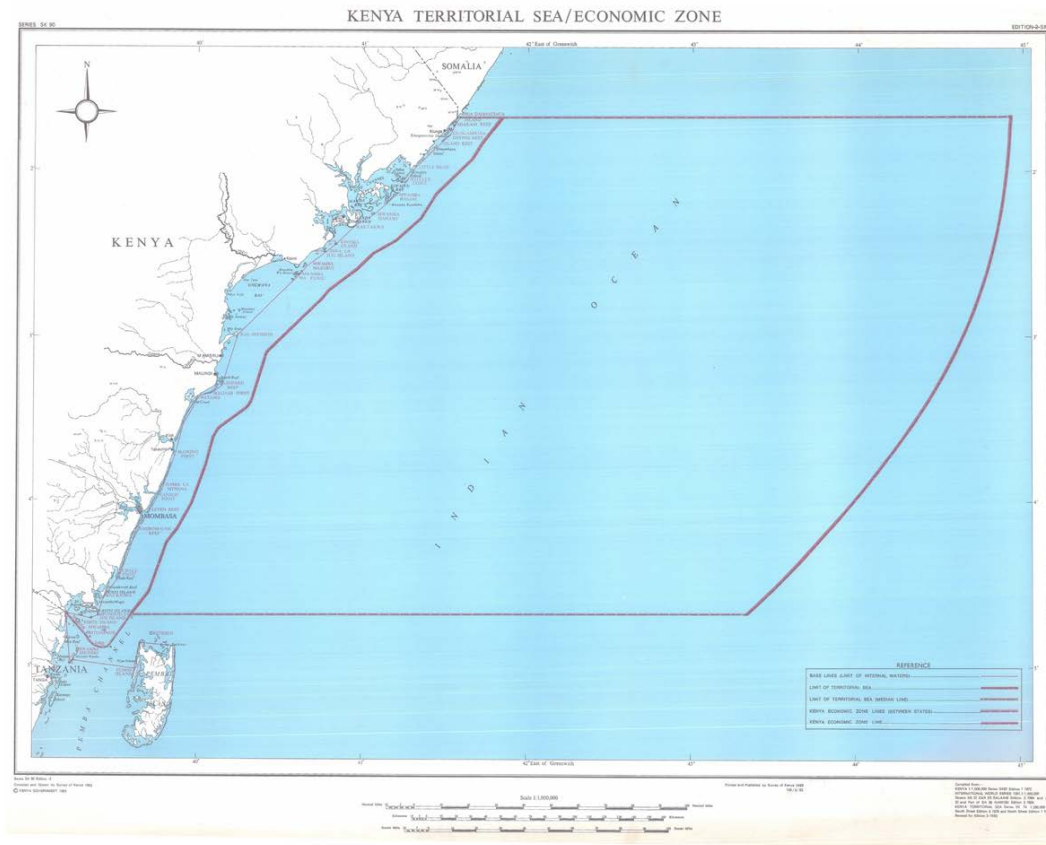


Figure 1-8: Kenya Territorial Sea and Economic Zone, Survey of Kenya, SK-90 Edition 2, 1983

63. While no map datum is specified in the Proclamation, regional usage at that time indicates that ARC 1960 was applied.⁶² When converted to WGS84, this gives a latitude of 1° 38' 9.2"S.

C. Somalia's Absence of Protest against Kenya's 1979 EEZ Proclamation and Maritime Boundary Claim at the Parallel of Latitude

1. First notification to Somalia: 1979

64. On 5 March 1979 — within a week of the Proclamation — the Minister of Foreign Affairs of Kenya gave notice of its maritime boundary claim by requesting the UN Secretary-General to transmit the text of the 1979 EEZ Proclamation to all the Permanent Missions of UN Member States.⁶³ The same request for circulation was made by the Kenya Permanent Representative at the UN on 9 March 1979.⁶⁴

⁶² C. Mugnier, "Republic of Kenya" (June 2003) Photogrammetric Engineering and Remote Sensing pp. 593–7, Annex 122.

⁶³ Letter from the Kenyan Ministry of Foreign Affairs to the Kenya Permanent Mission to the United Nations (MFA.273/430/001A/81), *Proclamation by the President of the Republic of Kenya on Kenya's Exclusive Economic Zone*, 5 March 1979, Annex 18. See the cover letter from the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs, *Proclamation of the President of the Republic of Kenya on Kenya's Exclusive Economic Zone* (KMUN/LAW/MSC/23A/50), 9 March 1979, Annex 19: "In reference to

65. By a letter dated 19 July 1979, the UN Secretary-General confirmed transmission of the 1979 EEZ Proclamation to UN Member States.⁶⁵ By a letter dated 8 November 2017, the UN Office of Legal Affairs confirmed the process of notification and publication as follows:

The Office of Legal Affairs notes that the 1979 Proclamation, which predates the conclusion of the 1982 United Nations Convention on the Law of the Sea, was transmitted by the Secretariat to the Permanent Missions of Member States of the United Nations on 19 July 1979, upon a request of the Minister of Foreign Affairs of the Republic of Kenya dated 5 March 1979. The 1979 Proclamation was also published on the website of the Division for Ocean Affairs after its launch in 2001 as well as in the publication “National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone” (United Nations — 1986).⁶⁶

66. Thus, in addition to its circulation to UN Member States in 1979, in 1986 the UN published the Proclamation in *National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone*, which is an official UN publication.⁶⁷ Furthermore, after the launch of the website of the UN Division for Ocean Affairs and the Law of the Sea (“DOALOS”) in 2001, the Proclamation was also published online.⁶⁸
67. Despite receiving formal notice of Kenya’s claim to its EEZ at the parallel of latitude, Somalia did not protest. In its letter of 8 November 2017, the UN confirmed that:

After an extensive research in the archives of the Office of Legal Affairs no communications from other States concerning the two Proclamations [1979 and 2005] were found.⁶⁹

your letter reference MFA.273/430/001A/81 dated March 5th 1979, please find enclosed herein a copy of the letter written to the Secretary-General of the United Nations on the process of transmitting the above underlined Proclamation.”

⁶⁴ Letter from the Permanent Mission of Kenya to the United Nations to the United Nations Secretary-General (KMUN/LAW/MSC/23A/49), 9 March 1979, Annex 19: “The Permanent Representative of the Republic of Kenya to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to transmit to the latter for circulation to all State Members of the United Nations, a Proclamation, by His Excellency the President of the Republic of Kenya, signed and sealed with the Public Seal of the Republic of Kenya at Nairobi on 28th day of February, One Thousand, Nine Hundred and Seventy-nine.”

⁶⁵ Letter from the United Nations Secretary-General (LE 113 (3-3)), 19 July 1979, forwarded by the Permanent Mission of Kenya to the United Nations to the Ministry of Foreign Affairs, *Proclamation of Kenya’s Exclusive Economic Zone* (KMUN/LAW/MSC/23/18), 25 October 1979, Annex 20.

⁶⁶ Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

⁶⁷ UN publication sales no. E.85.V.10, ISBN 9211332729.

⁶⁸ Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

⁶⁹ *Ibid.*, Annex 65.

68. In fact, soon after the 1979 EEZ Proclamation, Somalia would abandon its “Greater Somalia” policy that gave rise to the 1960s Shifta War, and pursue a détente with Kenya. Faced with military defeat and diplomatic isolation after the 1977-78 Ogaden war against Ethiopia, Somalia was forced to retreat from its catastrophic irredentist policy. In particular, facing abandonment by the Soviet Union in favour of Ethiopia, Somalia had a strong interest in purchasing weapons from the United States, which required improved diplomatic relations with Kenya.⁷⁰ Thus, beginning in 1978, Somalia abandoned its territorial claim against Kenya’s NFD, and pursued what Somali President Siad Barre called a new policy of “accommodation”.⁷¹ In this

⁷⁰ Letter from the Office of the President to the Permanent Secretary of the Ministry of Foreign Affairs (OP.31/5A/VIII/70), *Clearing Kenya–Somalia Border*, 12 October 1982, enclosing the minutes of meetings of the Kenya Intelligence Committee held on 28 September 1982, *Relations between Kenya and Somalia* (Min. 254/82) and *Clearing of Kenya/Somalia Border* (Min. 268/82), Annex 29.

⁷¹ The Somali Minister of Minerals and Water Development insisted to the Kenyan Ambassador in Mogadishu that the fact that Somalis lived in Kenya did not necessarily mean that Somalia should claim that part of Kenya and that those Somalis were free to remain under the government of their country, i.e. Kenya. The Minister pointed out that this statement had been stressed by Siad Barre and the Somali Vice-President Afrah Kulmie, Report from the Kenyan Embassy in Somalia to the Ministry of Foreign Affairs, Mission Mogadiscio (KES.105A.Vol.II/73), *The Ambassador’s Meetings with Somali Ministers*, 4 April 1978 Annex 15, p. 4. When meeting with Chinese Vice-Minister Ho Ying, Siad Barre apparently claimed that Somalia had unsuccessfully made constant overtures to Kenya for bilateral discussion of ways for lowering the tension in the two countries’ relations, repeating that Somalia had no territorial claim over Kenyan territory (Letter from the Kenyan Embassy in China to the Ministry of Foreign Affairs (KEP/POL/GEN/1A/59), *Vice-Minister Ho Ying’s Tour*, 30 January 1980, Annex 22, p. 1). At a mass rally at Mogadishu Stadium, Siad Barre said that Somalia did not nurse any territorial ambitions against Kenya, Telegram to the Ministry of Foreign Affairs, No. 227 (MFA/231/21/001A/245), *Account of Siad Barre’s Address at Mass Rally*, 2 December 1980, Annex 25). During a meeting with President Moi, Siad Barre noted that Somalia was keen to cooperate fully with Kenya and restated that Somalia had no territorial claims on Kenya (Minutes of a Meeting between H.E. President Daniel T. Arap Moi and H.E. President Siad Barre of Somalia on June 29, 1981, at State House, Nairobi (MFA/231/21/001A/28), 10 July 1981, Annex 26, pp. 3–4. During a meeting between the Kenyan Office of the President and the Somali Ambassador to Kenya, the latter insisted that Somalia had no claim on Kenyan land and that “there [was] not a single Somali against Kenya” or such entity called the North-Eastern Province Liberation Front in Mogadishu, Note on a Meeting between Hon. Ole Tipis, Minister of State in the Office of the President and the Somalia Ambassador to Kenya, H.E. MR. Abdirahman Hussein Mahamoud (MFA/231/21/001A/68), 7 September 1982, Annex 27, pp. 3–4. A meeting between the Kenyan Minister of State and the Somali Ambassador to Kenya confirmed that Somalia had no claim over Kenyan territory and agreed to clear the border. Moreover, President Barre ordered that Somalia should show friendship and destroy any enemy against Kenya (see Annex 29, Letter from the Office of the President to the Permanent Secretary of the Ministry of Foreign Affairs (OP.31/5A/VIII/70), *Clearing Kenya–Somalia Border*, 12 October 1982, enclosing the minutes of meeting of the Kenya Intelligence Committee held on 28 September 1982, *Relations between Kenya and Somalia* (Min. 254/82) and *Clearing of Kenya/Somalia Border* (Min. 268/82). In 1985, the Kenyan Embassy in Somalia informed the Kenyan Minister of Foreign Affairs that Somalia had refused the publication of some anti-Kenya articles given the good relations between them, Letter from the Kenyan Embassy in Somalia to the Ministry of Foreign Affairs (KES.152A/ VOL.X/233), *Ngugi Wa Thiongo*, 7 April 1985, Annex 30. See also statement of Mr. Khalif before the National Assembly that Somalia had renounced her claims on Kenyan territory, Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol LIX, 4 December 1979, 4th session, 28 September 1982 to 9 December 1982, Committee of Supply, Vote 4 Ministry for Foreign Affairs, 27 October 1982, col. 871-872, Annex 6, col. 871. As reported in the *New York Times* on 30 June 1981, Annex 105: “President Siad Barre also said Somalia was seeking ‘accommodation’ with Kenya, with whom Somalia has had a border dispute for many years. (...) ‘Somalia is not seeking any territorial gain from Kenya,’ Mr. Siad Barre said. ‘We are for accommodation. We are not seeking any territory from Kenya.’”

context, at a meeting on 20 April 1980 in Nairobi, the Vice-President of Somalia, Hussein Kulmie Afrah, offered the Vice-President of Kenya, Mwai Kibaki, Somalia's cooperation in "marine exploitation" and other areas.⁷² This change in Somalia's policy thus coincided with Somalia's lack of protest following Kenya's 1979 EEZ Proclamation.

2. Kenya and Somalia's support for equitable delimitation during UNCLOS negotiations: 1980–2

69. The records of UNCLOS III show that in 1980, shortly after Kenya's 1979 notification of its EEZ claim at the parallel of latitude based on equitable delimitation, both Somalia and Kenya concurred that the delimitation of the EEZ and continental shelf must be based on principles of equity, rather than equidistance.⁷³
70. As early as 1974, at the second session of the negotiations, Kenya had firmly rejected the use of equidistance, and specifically made clear its position that "application of equidistant rule of delimitation of the economic zone with both Tanzania and Somalia would lead to severe distortion".⁷⁴ By 1978, the Negotiating Group 7 ("NG7") established at UNCLOS III to find a compromise solution on delimitation, had been divided into the "equidistance group" and the "equity group". Kenya and Somalia were both members of the "equity group" which opposed any reference to "equidistance" in the provisions on delimitation. More than half of the delegations composing the "equity group" were from the African continent.⁷⁵

⁷² Letter from the Permanent Secretary to the Vice President, Minister for Finance and the Office of the President (MFA.231/21/001A/92), 6 May 1980, enclosing the minutes of a meeting held at the Inter-continental Hotel Nairobi on 20th April 1980 between H.E. Kenya's Vice President Mr. Mwai Kibaki and H.E. the Somali Vice President Mr. Hussein Kulmie Afrah, Annex 24, p. 2 of the minutes.

⁷³ 128th Plenary meeting, 3 April 1980, A/CONF.62/SR.128, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIII, Ninth Session, para. 43, p. 35 (Somalia) and para. 168, p. 44 (Kenya), Annex 71.

⁷⁴ Report from the Kenya Permanent Mission to the United Nations on the Work of the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas, Venezuela, from 20th June to 29th August 1974 (273/430/001A/15), received by the Kenyan Ministry of Foreign Affairs on 28 October 1974 Annex 11, para. 79 "An automatic application of the equidistance principle can lead to numerous injustices which would be compounded by the presence of islands in the vicinity of the border area. In Kenya's specific situation, application of equidistant rule of delimitation of the economic zone with both Tanzania and Somalia would lead to severe distortion due to the presence of Pemba Island and some Somali islands which would cause the marine borders to veer sharply inwards, almost meeting at the 200 miles point. This should never be allowed and this is why as early as 30th July, 1974 we joined with Tunisia to propose the (...) formula on delimitation in document A/CONF.62/C.2/L.28".

⁷⁵ Third UNCLOS, *Informal Suggestions* NG7/4, NG7/10, NG7/10/Rev.1 and NG7/10/Rev.2, 1978–1980, reproduced in *Third United Nations Conference on the Law of the Sea: Documents by Renate Platzöder*, Oceana Publications, 1986, Vol. IX, Annex 69. For NG7/4, 11 out of the 22 sponsoring States were African (Algeria, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nigeria, Senegal, Kenya and Somalia); for NG7/10, 14

71. In this context, the deliberations of Ninth Session of UNCLOS III held in New York record that on 3 April 1980 (just nine months after the UN Secretary-General had circulated the 1979 EEZ Proclamation), the Somali representative, Mr. Yusuf, rejected the proposal by some States that Articles 74 and 83 of the draft UNCLOS should retain wording equivalent to that in Article 6 of the 1958 Convention on the Continental Shelf, referring to equidistance. In his statement, Mr. Yusuf:

... regretted the fact that no compromise formula had been found for the delimitation of the exclusive economic zone and continental shelf between adjacent or opposite States. Such delimitation should be effected in accordance with equitable principles and all the relevant circumstances. The practice of States and judicial and arbitral precedents provided clear evidence of the widespread use of those criteria by the international community.⁷⁶

72. Following the Ninth Session of the Conference, on 22 May 1980, the Kenyan representative to UNCLOS III Mr. Mulwa made a report to the Kenya National Assembly regarding the April negotiations in New York. In the context of Somalia's rapprochement (including cooperation on "marine exploitation")⁷⁷ and the position of both Parties that the reference to equidistance should be deleted from the provisions on the EEZ and continental shelf, he stated as follows in regard to "the question of putting boundaries between the States":

We in Kenya do not have that problem. Our only problem was between us and Tanzania, but we have already put that boundary. As regards our problem with Somalia, there is no question about it because we are using what we call equitable principles to see how we can put a boundary between the two States without affecting the existing structures. For instance, with regard to our boundary with Tanzania, we had to take into account the presence of Pemba. Likewise, with regard to our boundary with Somalia, we had to take into account that if we did put the boundary as it was, we would have completely diminished our economic zone. So, we had to take into

out of the 27 sponsoring States were African (Algeria, Benin, Congo, Ivory Coast, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Nigeria, Senegal, Kenya and Somalia); for NG7/10/ Rev.1, 15 out of the 29 sponsoring States were African/Indian Ocean (Algeria, Benin, Burundi, Congo, Ivory Coast, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Senegal, Kenya and Somalia); for NG7/10 Rev.2, 15 out of the 30 sponsoring States were African (same delegations as NG7/10/Rev.1 and Suriname). See also the list set out in the Dissenting Opinion of Judge Oda in *Continental Shelf (Tunisia/Libya) Judgment, I.C.J. Reports 1982*, para. 135(ii).

⁷⁶ 128th Plenary meeting, 3 April 1980, A/CONF.62/SR.128, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIII, Ninth Session, para. 43, p. 35 Annex 71. See also para. 168, p. 44 (Kenya).

⁷⁷ Referred to at para. 68 above.

account the equitable principle of putting a parallel line which gives us a sizeable economic zone.⁷⁸

73. He explained further that there was “no problem” with the parallel of latitude because it took special circumstances into consideration and that while delimitation under draft articles 74 and 83 of UNCLOS was still being negotiated, an agreement with Somalia would follow that line:

As far as the northern side is concerned, that is, between us and Somalia, Kenya’s stand is that we will use the same criteria as we did with Tanzania. That is, we used the limitation through negotiations taking into account the surrounding circumstances. And as far as the Kenya delegation is concerned we have no problem with that part of the boundary. We shall follow a parallel line so that one taking into account the boundary on the lower side between Kenya and Tanzania, we shall have our 200 miles of the economic zone without any problem. ... Although this subject of delimitation is still being discussed, as far as we are concerned here in Kenya, this point is for the purpose of the proposed convention because our pact will be that way.⁷⁹

74. On 26 August 1980, at the Resumed Ninth Session of UNCLOS III, the Somali representative, Mr. Robleh, continued to insist on deletion of any reference to an equidistance or “median line” with respect to delimitation of the EEZ and continental shelf:

Turning to the highly sensitive issue of the delimitation of the exclusive economic zone and continental shelf between States with opposite or adjacent coasts, he expressed consternation at the wording of article 83 in the second revision. As was generally acknowledged, that wording did not reflect any final compromise. His delegation considered that such delimitation should be determined on the basis of the principle of equity. It was convinced that a serious analysis of customary international law, as articulated in the 1969 North Sea cases and the 1977 arbitral decision on the Channel case between France and the United Kingdom, would prove that equity and equitable principles rather than the purely geometric methods of the median or equidistance line had become consecrated as the general rule in international law in delimitation matters.⁸⁰

75. At the final Eleventh Session of the Conference, held in Montego Bay 6-10 December 1982, Somalia was one of the few delegations that offered its interpretation of Articles

⁷⁸ Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December, 1979, Second Session, Tuesday, 4th December, 1979 to Wednesday, 18th June, 1980, Records of 22 May 1980, col. 1225–1226 and 27 May 1980, col. 1281–1282, Annex 5, at col. 1225 (emphasis added).

⁷⁹ *Ibid.*, Annex 5, at col. 1281.

⁸⁰ 138th Plenary meeting, 26 August 1980, A/CONF.62/SR.138, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIV, Resumed Ninth Session, para. 73, p. 56, Annex 72 (emphasis added).

74 and 83 of the Draft UNCLOS, seizing the opportunity during its final statement to the Conference to emphasize once again that delimitation should be effected through equity rather than equidistance. On 9 December 1982 at the 192nd meeting, Mr. Robleh, made the following interpretive statement on behalf of Somalia:

With regard to the important question, contained in articles 74 and 83, of delimitation of maritime boundaries, Somalia's understanding of these key provisions is that the goal or objective in all adjudications relating to delimitation shall be to secure an equitable solution. It follows that equity can never be achieved in such situations without having due regard to all relevant circumstances.⁸¹

76. Aside from Kenya, Somalia had two other unresolved delimitations, with Djibouti and Yemen respectively. Its maritime boundary with Djibouti in the Gulf of Aden only involved 30–40M of EEZ. Its other boundary with Yemen was based on opposite, not adjacent, coasts, with no overlapping territorial seas and only about 60M of EEZ. In contrast, the maritime boundary with Kenya required a delimitation extending from adjacent coasts for the full length of 200M and beyond, uninterrupted by islands or other features. Somalia's statements on equitable delimitation between 1980 and 1982 were thus particularly relevant to the maritime boundary that Kenya had proclaimed in 1979.

3. Ratification of UNCLOS and implementing legislation on maritime zones: 1989

77. Kenya and Somalia ratified UNCLOS on 2 March and 24 July 1989 respectively.⁸² In the same year, both Parties adopted implementing legislation. Somalia adopted Law No. 5 dated 26 January 1989 approving the Somali Maritime Law of 1988.⁸³ Kenya adopted the Maritime Zones Act dated 25 August 1989.⁸⁴

78. In regard to the territorial sea, Article 3(4) of Kenya's 1989 Act replicated the exact terms of Article 2(4) of Kenya's 1972 Act, corresponding to Articles 12 and 15 of the

⁸¹ 192nd Plenary meeting, 9 December 1982, A/CONF.62/SR.192, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XVII, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion, para. 159, p. 127, Annex 73.

⁸² Kenya and Somalia both signed UNCLOS on 10 December 1982.

⁸³ Somali Democratic Republic, Ministry of Fisheries and Sea Transport, *Somali Maritime Law* (1988) and Somali Democratic Republic, Law No. 5, *Somali Maritime Law* (26 Jan. 1989). MS, Vol. III, Annexes 10 and 11.

⁸⁴ Republic of Kenya, Chapter 371, Maritime Zones Act (25 Aug. 1989), § 4(4). MS, Vol. III, Annex 20. The purpose of the 1989 Act is stated to be "to consolidate the law relating to the territorial waters and the continental shelf of Kenya; to provide for the establishment and delimitation of the exclusive economic zone of Kenya; to provide for the exploration and exploitation and conservation and management of the resources of the maritime zones".

1958 and 1982 Conventions respectively. Those provisions it may be recalled, applied the median line in the territorial sea as a provisional method “failing agreement” on delimitation. This was without prejudice to the parallel of latitude maritime boundary adopted in the 1979 EEZ Proclamation in both the territorial sea and the EEZ. This is confirmed by Kenya’s subsequent conduct set forth below in sections D to F, including the 2005 EEZ Proclamation that maintained the parallel of latitude throughout Kenya’s maritime areas up to 200M, including in the territorial sea.

79. In regard to the EEZ, Article 4 of the 1989 Act provided that: “The southern boundary of the exclusive economic zone with Tanzania shall be on an easterly latitude north of Pemba Island obtained by the northern intersection of two arcs one from the Kenya lighthouse at Mpunguti Ya Juu Island, and the other from Pemba Island lighthouse at Ras Kigomasha.” Article 4 further provided that: “The northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law”, recognizing that unlike Tanzania (and notwithstanding the 1979 EEZ Proclamation) a formal agreement had not been concluded with Somalia.
80. Somalia’s Memorial asserts that the 1989 Act “reaffirmed the existence of an ‘equidistant’ boundary in 1989” and that “[i]t is therefore unclear on what legal basis Kenya claims that the boundary follows the parallel of latitude that transects the LBT”.⁸⁵ It is not clear on what basis Somalia arrives at this conclusion. While the 1989 Act recognized the absence of a formal agreement with Somalia, the 1979 EEZ Proclamation still delimited Kenya’s maritime boundary. Furthermore, the median line was a provisional principle “failing agreement” on delimitation consistent with UNCLOS Article 15, and it only applied to the territorial sea (the 1989 Act’s provisions on the EEZ make no such reference). Somalia further ignores the fact that its own 1989 Maritime Law made no reference to an equidistance line in regard to the maritime boundary with Kenya. To the contrary, it adopted a maritime boundary in the territorial sea that was definitely not a “median line”.
81. Article 4(6) of Somalia’s 1989 Law provided that in the absence of an agreement, “the Somali Democratic Republic shall consider that the border between the Somali

⁸⁵ MS, Vol. I, para. 5.29.

Democratic Republic and the Republic of Djibouti and the Republic of Kenya is a straight line toward the sea from the land as indicated on the enclosed charts”.⁸⁶

82. Somalia’s Memorial makes two claims in regard to Article 4(6) of the 1989 Law, both of which are incorrect.
83. First, Somalia states that Article 4(6) refers “to the delimitation of Somalia’s maritime boundaries with its neighbours”⁸⁷ whereas Article 4, as indicated by its title, only applies to “The Territorial Sea”.⁸⁸ There are separate provisions for the EEZ and Continental Shelf in Articles 7 and 8 respectively without any reference to delimitation. Therefore, the “straight line” applies only to the territorial sea and not the maritime boundary throughout its length.
84. Second, Somalia asserts that in Somali, “straight line” actually means “median line”. It maintains that “[t]he Somali language does not contain a word precisely equivalent to ‘equidistance line’ in English. The Government of Somalia considers that the phrase ‘straight line toward the sea’ was intended to be equivalent to an equidistance line”.⁸⁹ However, Somalia’s own translation of Article 4(6) in Annex 10 of its Memorial indicates that there is a difference in Somali between a “straight line” and a “median line”. In the third paragraph of Article 4(6), following the reference in the second paragraph to a “straight line”, there is a reference to a “median line” in regard to the territorial sea boundary with Yemen:

Regarding the delimitation of maritime zones in the Gulf of Aden pertaining to the People’s Republic of Yemen and to the Indian Ocean around the Island of Socotra, if those borders are merely claimed by those nations and if there is no treaty deciding the exact border, then a median line between them shall be the baseline of the basic measurement for each country.⁹⁰

85. The “enclosed charts” referred to in Article 4(6) depicting the “straight line” have not been produced by Somalia.⁹¹ Kenya has requested copies of the chart on two

⁸⁶ MS, Vol. III, Annex 10. Emphasis added.

⁸⁷ MS, Vol I, para. 3.6.

⁸⁸ MS, Vol. III, Annex 10.

⁸⁹ MS, Vol. I, para. 3.6, fn. 62.

⁹⁰ MS, Vol. III, Annex 10. Emphasis added.

⁹¹ Somalia states that “as a result of its long civil war, many of Somalia’s historical records, including sometimes even legislation and related materials, have been lost or destroyed. Somalia has, after diligent investigation, been unable to locate any copies of the ‘enclosed charts’ referenced in the 1988 Maritime Law”. MS, Vol. I, para. 3.6, fn. 62.

occasions.⁹² Somalia says that it has been unable to locate the charts.⁹³ Without Somalia's official charts, it is not possible to definitively conclude what the "straight line" on the Kenya-Somalia territorial sea boundary refers to. However, a plain reading of Article 4(6) in the translation submitted by Somalia in its Annex 10 indicates that whatever the "straight line" may be, it is clearly not a "median line" as maintained by Somalia. In fact, Somalia's contemporaneous oil concession practice suggests that in regard to Kenya the "straight line" was at the parallel of latitude (see para. 142 below).

86. The 1988 Somali Maritime Law is not available on the website of the UN Division for Ocean Affairs and the Law of the Sea ("DOALOS").⁹⁴ Nor is the 1988 Maritime Law mentioned in any of the 91 volumes of the Law of the Sea Bulletin.⁹⁵ The 1972 law however is available on the DOALOS website.⁹⁶ Until 2014, there were questions at the UN as to whether Somalia continued to claim a 200M territorial sea.⁹⁷

D. Kenya's 2005 EEZ Proclamation and Somalia's Continuing Absence of Protest to Kenya's Maritime Boundary Claim at the Parallel of Latitude

87. In 2005 Kenya issued a further Presidential Proclamation reaffirming that its maritime boundary follows the parallel of latitude (section 1). Again, Somalia was given formal notice, but did not make any protest or claim an equidistance line, despite its extensive engagement with Kenya on a wide range of matters (section 2).

⁹² Letters from the Kenyan Office of the Attorney-General and Department of Justice to the Somali Minister of Foreign Affairs dated 22 February 2016 and 29 April 2016 (AG/CONF/19/153/2 VOL. III), Annex 59. Kenya additionally sent a request to the Norwegian Ambassador to the Netherlands, Letter from the Kenyan Office of the Attorney-General and Department of Justice to the Embassy of Norway in the Netherlands (AG/CONF/19/153/2 VOL. III), 8 June 2016, Annex 63.

⁹³ Letter from the Somali Ministry of Foreign Affairs to the Registrar of the International Court of Justice, 13 May 2016 (Annex 60).

⁹⁴ Somalia DOALOS Page, updated 10 April 2017, Annex 102, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SOM.htm>

⁹⁵ http://www.un.org/Depts/los/doalos_publications/los_bult.htm

⁹⁶ See, e.g. Law of the Sea Bulletin, No. 73, 2010, p. 68, in Somalia's consistent assertion of a 200-nautical mile territorial sea before the United Nations, Law of the Sea Bulletins, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1993-2010, Annex 80, available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin73e.pdf.

⁹⁷ The UN Security Council repeatedly urged Somalia to declare an EEZ in accordance with UNCLOS, e.g. Security Council Resolution 1976 (2011), S/RES/1976 (2011), 11 April 2011 (Annex 95), para.6; Security Council Resolution 2067 (2012), S/RES/2067 (2012), 18 September 2012 (Annex 97), para. 13; Security Council Resolution 2077 (2012), S/RES/2077 (2012), 21 November 2012 (Annex 98), para. 4.

1. Kenya's 2005 EEZ Proclamation

88. On 9 June 2005, a Proclamation by the President of the Republic of Kenya was issued (“the 2005 EEZ Proclamation”).⁹⁸
89. Article 2 provided that “this Proclamation replaces the earlier Proclamation [i.e. of 1979] by Kenya but shall not affect or be in derogation of the vested rights of the Republic of Kenya over the Continental Shelf as defined in the Continental Shelf Act, 1973 [*sic*] [1975].”
90. The 1979 EEZ Proclamation provided in paragraph 1(b) that “in respect of its northern territorial waters boundary with Somali Republic [the EEZ of Kenya shall] be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38' South”.
91. In the 2005 Proclamation the parallel of latitude was adjusted, for greater accuracy, to 1° 39' 34” S (i.e. by 00° 01' 34”).⁹⁹ Although no map datum is specified, ARC 1960 was the prevailing regional datum. The parallel becomes 1° 39' 43.2”S when converted to WGS84, thus coinciding with the tangent to the southernmost islet as seen below in **Figure 1-9**.

⁹⁸ MS, Vol. III, Annex 21.

⁹⁹ M.Z.N. 58. 2006 LOS (Maritime Zone Notification), 25 April 2006, Deposit by the Republic of Kenya of lists of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention, MS. Vol. III, Annex 56, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn58.pdf. Coordinates can be found in (2006) *Law of the Sea Bulletin* No. 61, p. 97, Annex 92, available at www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin61e.pdf. According to the M.Z.N., the *note verbale* dated 11 April 2006 accompanying the deposit specified that “the Proclamation, the first and second schedules attached thereto, together with the illustrative map deposited herewith constitute an adjustment to and are in replacement of the Proclamation made by the President of the Republic of Kenya on 28 February 1979”. The map appended to the 2005 EEZ Proclamation is at MS, Vol. III, Annex 22.

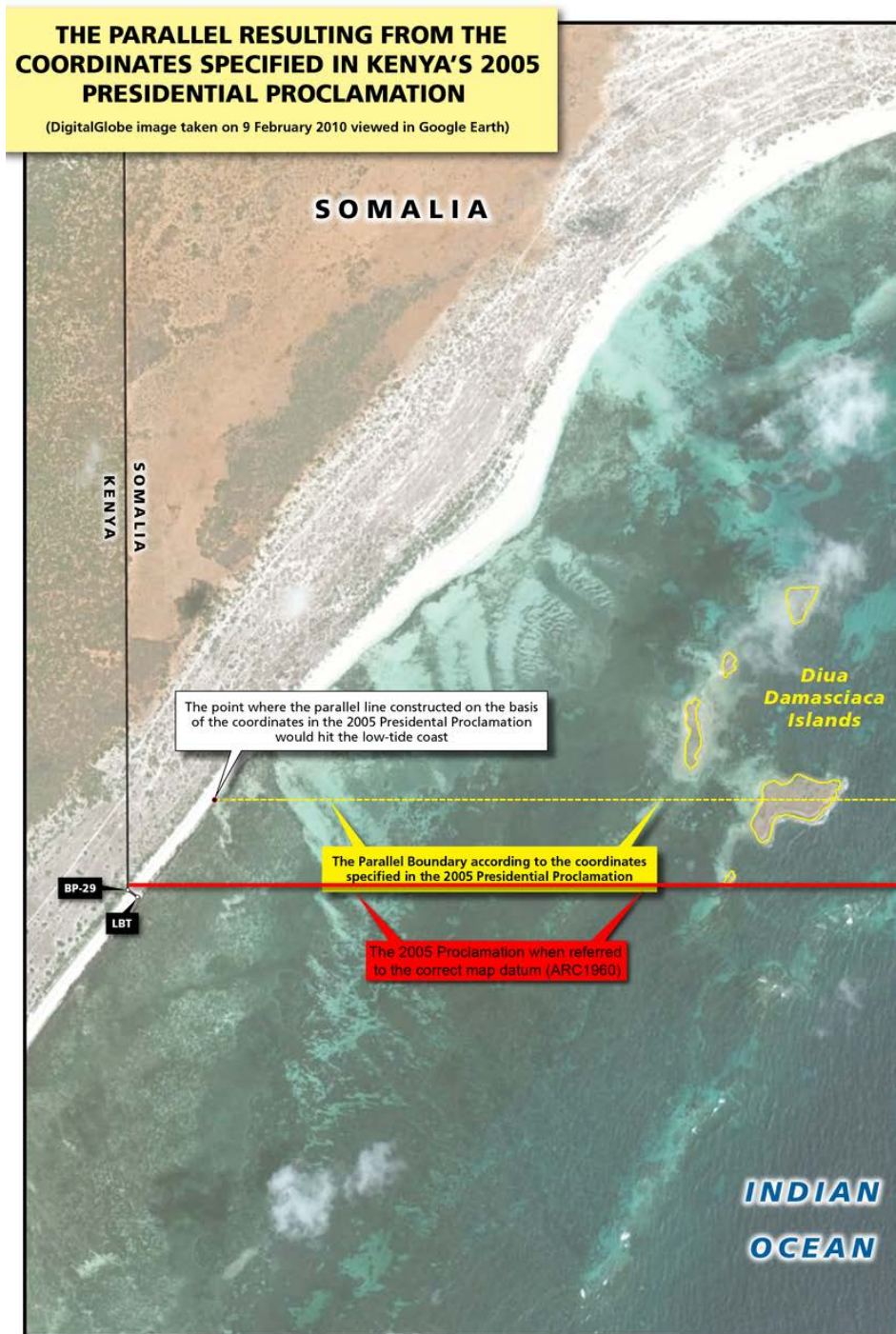


Figure 5.2 from Somalia Memorial - overprinted in red

Figure 5.2

Figure 1-9. The Correct Location of the 2005 Presidential Proclamation (overlaid on MS, Vol. II, Figure 5.2)

2. Second notification to Somalia: 2006

92. The 2005 EEZ Proclamation was published in the Kenya Gazette.¹⁰⁰ On 11 April 2006, the 2005 EEZ Proclamation, together with the adjusted coordinates and a map,

¹⁰⁰ Legal Notice No. 82 (Legislative Supplement No. 34), Kenya Gazette No. 55 of 22 July 2005. MS Vol. III, Annex 21.

was deposited with and circulated by the UN Secretary-General.¹⁰¹ The UN letter of 8 November 2017 describes the notification and publication process as follows:

The Office of Legal Affairs also notes that the 2005 Proclamation was transmitted to the Secretariat on 11 April 2006. On 25 April 2006, the Secretary-General circulated Maritime Zone Notification M.Z.N.58.2006 informing all Members States of the United Nations and States Parties to the United Nations Convention on the Law of the Sea that Kenya had deposited lists of geographical coordinates of points, as contained in the 2005 Proclamation, under articles 16, paragraph 2, and 75, paragraph 2, of the Convention.¹⁰²

93. The letter further noted that the 2005 EEZ Proclamation was also published on the website of DOALOS and in the *Law of the Sea Bulletin* 61.
94. Just as in 1979, Somalia did not protest Kenya's reaffirmation that the maritime boundary limit is at the parallel of latitude.¹⁰³ The UN notes that:

[a]fter an extensive research in the archives of the Office of Legal Affairs no communications from other States concerning the two Proclamations [1979 and 2005] were found.¹⁰⁴

95. This absence of protest is despite the fact that Somalia had an internationally recognised government, representing and acting on behalf of the State.¹⁰⁵ The Transitional National Government ("TNG") had been established in 2000¹⁰⁶ and was

¹⁰¹ MS, Vol. III, Annex 56 and available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn58.pdf

¹⁰² Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65. See also Kenya's 2005 EEZ Proclamation with Coordinates, (2006) *Law of the Sea Bulletin* No. 61, pp. 96–7, Annex 92, available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin61e.pdf, referring also to the *note verbale* dated 11 April 2006 from the Permanent Mission of the Republic of Kenya to the United Nations addressed to the Secretary-General of the United Nations.

¹⁰³ See further para. 151 in section F below, noting that 2006 was the year that drilling commenced in Block L5 (demarcated along the parallel of latitude), to which Somalia did not protest.

¹⁰⁴ Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

¹⁰⁵ Somalia refers to "the collapse of effective central government" from 1991 to 2012 (MS, Vol. I, paras. 1.11–1.12). However, even during the worst period of armed conflict in the early 1990s, Somalia continued to be actively represented at the UN. By way of example, in 1991 Somalia co-sponsored no fewer than 17 General Assembly draft resolutions (United Nations General Assembly draft resolutions sponsored by Somalia, 1991, Annex 77), in 1992 Somalia took part in the drafting of resolutions for the admission of four new Member States to the UN (United Nations General Assembly draft resolutions sponsored by Somalia, 1992, Annex 78) and between 1993 and 1995 Somalia co-sponsored nine draft resolutions before the Economic and Social Council and the Commission on Human Rights (ECOSOC draft resolutions sponsored by Somalia, 1993–1995, Annex 79).

¹⁰⁶ Following the Somalia National Peace Conference in 2000 in Arta, Djibouti (under Inter-Governmental Authority for Development ("IGAD") auspices) the TNG was established. The inauguration ceremony of the President of the TNG (Abdikassim Salad Hassan) was attended by senior officials of neighbouring governments, including Kenya, and by OAU, IGAD and the League of Arab States representatives, while the Representative

succeeded by the Transitional Federal Government (“TFG”) in 2004,¹⁰⁷ with both receiving recognition and playing an active role in diplomatic relations at the UN, African Union (“AU”), and other international organizations during the period from 2000 to 2012¹⁰⁸ when the government of the Somali Federal Republic was established.¹⁰⁹

96. Furthermore, throughout this transitional period, Kenya and Somalia had strong bilateral relations, actively co-operating on a wide range of matters. This included Somalia’s negotiation and conclusion of various agreements with Kenya.¹¹⁰ Kenya was also providing support for the Somali Government at this time, including through military, political and humanitarian assistance. In fact, because of the insecurity in Mogadishu, the TFG was based in Nairobi until June 2005;¹¹¹ and Kenya played a crucial role in supporting the TFG including making possible its return to Mogadishu. From January 2007, Kenya played a key role in the African Union Mission in Somalia (“AMISOM”). Its participation in AMISOM included a maritime component, and the

of the United Nations Secretary-General read a message on his behalf, United Nations Security Council, Report of the Secretary-General on the situation in Somalia, S/2000/1211, 19 December 2000, para. 14, (Annex 84). Somalia was subsequently represented by the TNG at the UN, the African Union (AU), the IGAD, and other regional organizations.

¹⁰⁷ Throughout this transitional period, the Somali Government enjoyed international recognition and conducted foreign affairs on behalf of Somalia (Country Information & Policy Unit, Somalia, Immigration and Nationality Directorate, Home Office, United Kingdom, April 2004, paras. 4.27–4.30) (Annex 57); Executive Board of the UN Development Programme and of the UN Population Fund, Assistance to Somalia (2002–2004), Note by the Administrator, DP/2002/29, 8 August 2002, para. 3, Annex 86. In its Judgment on Preliminary Objections, the Court recognized the legal personality of the TFG to conclude binding agreements on behalf of Somalia: I.C.J. Reports 2017, para. 43. See also: Yearbook of the United Nations, 2004, Volume 58, Department of Public Information, UN, New York, pp. 256–7, Annex 90; Report of the Secretary-General on the situation in Somalia, S/2004/115, 12 February 2004, Chapter II, Annex 87; United Nations Security Council, Report of the Secretary-General on the situation in Somalia, S/2004/469, 9 June 2004, paras. 4–7, Annex 88.

¹⁰⁸ Somalia, for example, actively participated in drafting resolutions and sponsored over 280 texts which related to a wide array of issues including Palestine, human rights, the protection of the environment, the situation of civilians in times of war, and the cooperation between the UN and regional organisations. Somali representatives spoke at 20 of the 22 Security Council meetings which they attended and addressed nine General Assembly committees as well as 16 plenary meetings. See further U.N. Doc A/55/PV.16, United Nations General Assembly, *Official Records*, Fifty-fifth session, 16th plenary meeting, 15 September 2000, Address by Mr. Salim Abdikassim Salad Hassan, President of the Somali Republic, Annex 83 and Letter dated 21 March 2001 from the Prime Minister of Somalia addressed to the President of the Security Council, S/2001/263, 23 March 2001, Annex 85.

¹⁰⁹ MS, Vol. I, para. 1.12.

¹¹⁰ See e.g. Agreement on Technical and Economic Cooperation between Kenya and the TFG (6 September 2005) Annex 149; Agreement on Natural Disasters Prevention, Management and Humanitarian Relief Aid Delivery Cooperation between Kenya and the TFG (8 March 2006) Annex 150; Memorandum of Understanding between Kenya and the TFG on Training of Somali Policemen in Kenya (3 May 2006) Annex 151; Memorandum of Understanding on Technical Assistance and Capacity Building between Kenya and the TFG (18 March 2009) Annex 153; Tripartite Agreement between Kenya, the TFG and the UNHCR governing the Voluntary Repatriation of Somali refugees Living in Kenya (10 November 2013) Annex 158.

¹¹¹ United Nations Security Council, Report of the Secretary-General on the situation in Somalia, S/2005/642, 11 October 2005, para. 4: “Relocation of the transitional federal institutions began in the middle of June, following a farewell ceremony in Nairobi presided over by President Mwai Kibaki of Kenya.” Annex 91.

Kenyan Navy incurred significant costs in patrolling both Somali and Kenyan maritime areas north and south of the parallel of latitude.¹¹² The UN and AU recognized Kenya's "huge"¹¹³ and "extraordinary sacrifices".¹¹⁴ Kenya also provided humanitarian relief to an estimated half a million Somalis at Dadaab, which was the largest refugee camp in the world.¹¹⁵

97. Despite such extensive bilateral relations and full engagement, and despite receiving a second official notification that the parallel of latitude constituted the maritime boundary with Kenya, Somalia did not protest or even question Kenya's claim dating back to 1979.

E. Kenya's 2009 CLCS Submission and Extension of the Maritime Boundary at the Parallel of Latitude in the Outer Continental Shelf beyond 200M

98. Kenya's submission to the CLCS on 6 May 2009 extended the parallel of latitude beyond 200M to the outer continental shelf (section 1). Somalia was notified of this claim but, yet again, did not protest (section 2). This was in the same year that Kenya and Tanzania concluded a further agreement on their maritime boundary delimitation, confirming that the delimitation at the parallel of latitude as established in the Kenya-Tanzania Boundary Agreement 1975–6 and extending it beyond 200M to the outer continental shelf (section 3).

1. Kenyan 2009 CLCS submission extending the parallel of latitude to the outer limits of the continental shelf

99. At the time of its CLCS submission on 6 May 2009, Kenya had not claimed a maritime boundary beyond its territorial sea and EEZ: the 1979 and 2005 EEZ Proclamations did not extend beyond 200M. In its CLCS submission, however, Kenya extended its claim to the parallel of latitude beyond 200M to the outer limits of its continental shelf.

¹¹² Kenya's Preliminary Objections ("KPO"), para. 16 referring to the Statement of Kenya at the Twenty-Fifth meeting of the States Parties to UNCLOS, 11 June 2015.

¹¹³ See e.g. the statement of the Chairperson of the AU Commission in April 2015 (reported at <http://www.herald.co.zw/au-condemns-kenya-terrorist-attack/>). AU Condemns Kenya Terrorist Attack, *The Herald*, 4 April 2015; KPO, para. 15.

¹¹⁴ See e.g. the Communiqué on the United Nations Secretary-General's Mini-Summit on Somalia dated 26 September 2012 available at <http://www.un.org/press/en//2012/sg2187.doc.htm>; KPO, para. 15.

¹¹⁵ Article from the website of the Office of the United Nations High Commissioner for Refugees (UNHCR) "Dadaab — World's Biggest Refugee Camp 20 Years Old" (21 February 2012), available at <http://www.unhcr.org/4f439dbb9.html>; KPO, para. 14.

100. The Executive Summary of Kenya's submission set out the legal framework as follows:

Kenya is a Party to the Convention, which it signed on the day it was opened for signature on 10 December 1982 and later ratified it on 2 March 1989. The maritime space over which Kenya exercises sovereignty, sovereign rights and jurisdiction has been determined on the basis of the provisions of the Convention, as implemented by the following legislation and Proclamations: the Territorial Waters Act, 1972; the Maritime Zones Act, 1989, Cap. 371; and, the Presidential Proclamation of 9 June 2005 published in the Kenya Gazette Notice No. 55 of 22 July 2005 in respect of Kenya's territorial sea and exclusive economic zone (Legal Notice No. 82 (Legislative Supplement No. 34)). This Proclamation, which was deposited with the United Nations and reproduced in Law of the Sea Bulletin No. 61, contains an illustrative map number SK 90 (edition 4) and two lists of geographical coordinates of points, specifying the straight baselines from which the breadth of the territorial sea is measured and the outer limits of the Exclusive Economic Zone (EEZ).¹¹⁶

101. In regard to the EEZ boundary with Somalia, Kenya's CLCS Submission noted that:¹¹⁷

Section 4(4) of the Maritime Zones Act, 1989 provides that the exclusive economic zone boundary between Kenya and Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law. Subsequently, the two countries have signed a Memorandum of Understanding (MOU) dated 7 April 2009 granting each other no objection in respect of submissions on the outer limit of the continental shelf to the Commission on Limits of the Continental Shelf.¹¹⁸

102. The Submission also states that "Kenya has overlapping maritime claims with the adjacent coastal States of Somalia to the north and with the United Republic of Tanzania to the south."¹¹⁹ This recognised that there was no formal agreement on the maritime boundary with Somalia and in regard to Tanzania no agreement on the continental shelf boundary beyond 200M.¹²⁰ The subsequent 2009 Agreement between Tanzania and Kenya encompassing the outer continental shelf was concluded on 23 June 2009 i.e. shortly after Kenya's CLCS submission.

¹¹⁶ Republic of Kenya, Submission on the Continental Shelf Submission beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf: Executive Summary (Apr. 2009). MS, Vol. III, Annex 59, para. 1.3.

¹¹⁷ MS, Vol. III, Annex 59, para. 7-3.

¹¹⁸ In anticipation of the deadline in 2009 for submissions to the CLCS, the Government of Somalia and Kenya concluded the MOU of April 2009 by which they granted to each other "no-objection" in respect of submissions to the CLCS on the outer limits of the continental shelf beyond 200M.

¹¹⁹ MS, Vol. III, Annex 59, para. 7-1.

¹²⁰ MS, Vol. III, Annex 59, paras. 7-2 and 7-3.

103. Consistent with its obligations under UNCLOS in regard to the role of the CLCS, the Executive Summary of Kenya’s Submission stated that:

The Government of Kenya intends to proclaim the outer limits of the continental shelf following the making of recommendations by the Commission pursuant to paragraph 8 of Article 76. The proclaimed outer limits will be established on the basis of those recommendations.¹²¹

104. Based on scientific data gathered from surveys, and subject to the recommendations of the CLCS, Kenya claimed the continuation of its maritime boundary beyond 200M to the outer limits of the continental shelf, along the parallel of latitude. This was indicated by the maps in the Executive Summary, reproduced below as **Figures 1-10** and **1-11**. As the legend on those maps indicated, the orange dash line depicted the “maritime boundary”.

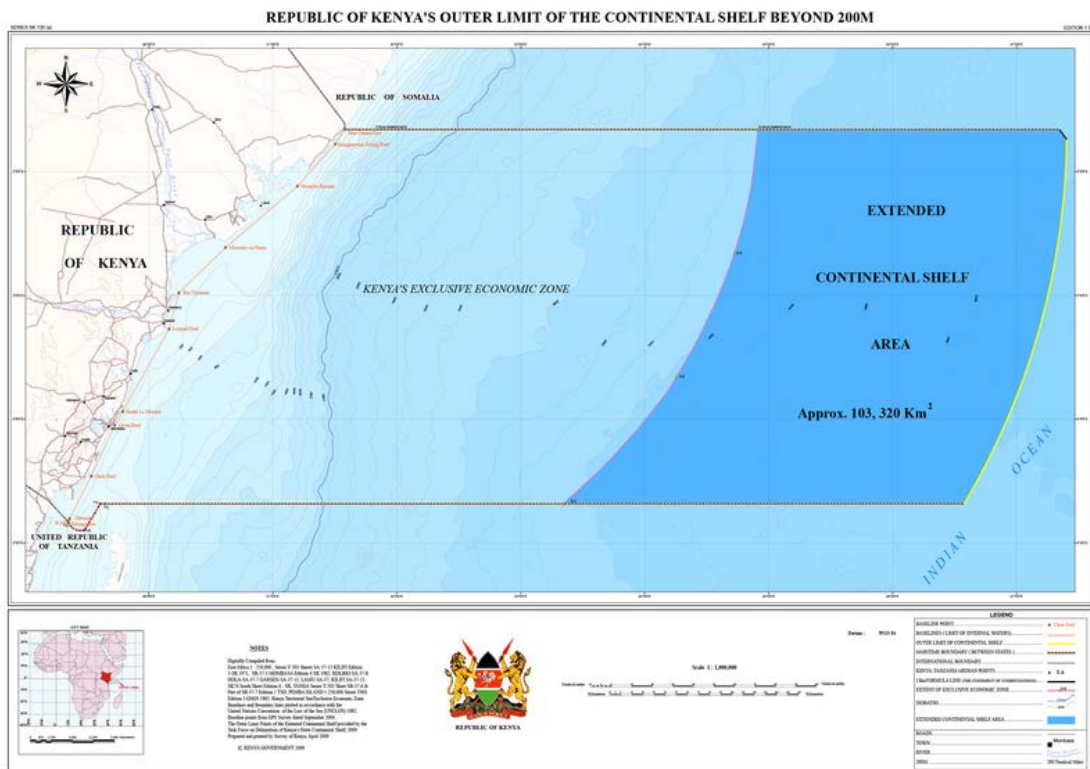


Figure 1-10: The Outer Limit of the Extended Continental Shelf of Kenya (KEN-ES-DOC-MAP 1, p. 9 of Kenya’s 2009 CLCS Submission)

¹²¹ MS, Vol. III, Annex 59, para. 1-4.

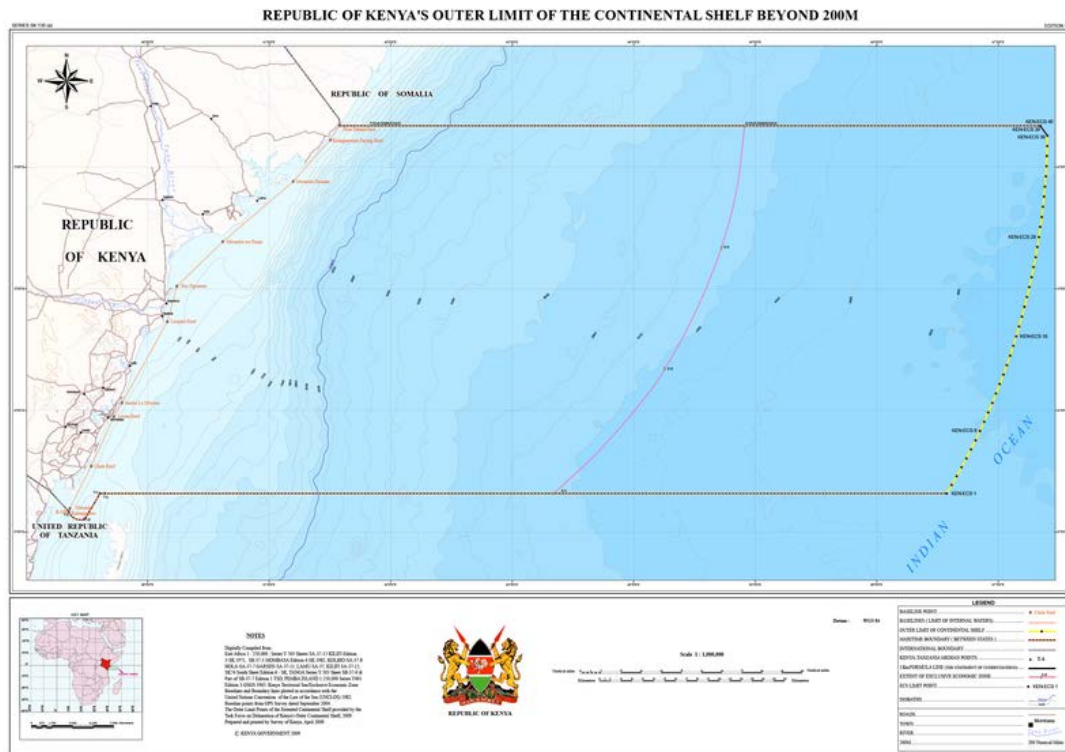


Figure 1-11: The Outer Limit of the Extended Continental Shelf of Kenya showing the Provisions of Article 76 and the Statement of Understanding invoked (KEN-ES-DOC-Map 2, p. 15 of Kenya’s 2009 CLCS Submission)

2. Third notification to Somalia: 2009

105. The Executive Summary of Kenya’s CLCS submission was circulated by the UN Secretary-General to UNCLOS States parties, including Somalia.¹²² In May 2009, therefore, Somalia was put on notice for a third time since 1979 and 2005 that Kenya claimed the parallel of latitude as the maritime boundary, and that the same line was now claimed beyond 200M to the outer limits of the continental shelf, subject to delineation pursuant to the recommendations of the CLCS.

106. For its part, Somalia’s submission to the CLCS on 8 April 2009 (the day after the conclusion of the MOU)¹²³ of the Preliminary information indicative of the outer limits of its continental shelf neither protested Kenya’s maritime boundary nor claimed an alternative boundary. It simply stated that: “Unresolved questions remain in relation to bilateral delimitation of the continental shelf with neighbouring States.”

¹²² As noted on the UN DOALOS website “In accordance with the Rules of Procedure of the Commission, a communication is being circulated to all Member States of the United Nations, as well as States Parties to the Convention, in order to make public the executive summary of the submission, including all charts and coordinates contained in that summary”. Submissions to the CLCS: Submission by the Republic of Kenya, CLCS website, updated 6 November 2014, available at http://www.un.org/depts/los/clcs_new/submissions_files/submission_ken_35_2009.htm

¹²³ See para. 101 above.

Other than Kenya, this included Djibouti and Yemen. Somalia simply observed that: “Such questions will have to be considered by reference to Rule 46 and Annex I of the Rules of Procedure of the Commission.”¹²⁴ In regard to Kenya, it referred to the agreement on “no objection” in the MOU of 7 April 2009 but did not protest or otherwise claim an alternative to the maritime boundary at the parallel of latitude.¹²⁵

107. As set out in Kenya’s Preliminary Objections, the MOU was rejected by the Transitional Federal Parliament on 1 August 2009.¹²⁶ This followed the disinformation campaign by the Al Shabaab terrorist organization that by concluding the MOU, Somalia was “selling the sea” to Kenya.¹²⁷ This controversy occurred against the backdrop of Kenya’s role in support of the TFG and the historical irredentist claims to Kenya’s territory in pursuit of a “Greater Somalia”.¹²⁸
108. In this context, on 19 August 2009, the Prime Minister of Somalia wrote to the UN Secretary-General, reaffirming the validity of the MOU, and observing that “an equidistance line normally constitutes the point of departure for the delimitation of the continental shelf between two States with adjacent coasts”.¹²⁹ This reference was the first suggestion in 30 years that Somalia could potentially claim an equidistant maritime boundary at some point in the future. It was neither a formal protest nor a claim to an equidistance line. To the contrary, it confirmed that at least until 2009, Somalia had never questioned the parallel line.
109. The events of the following weeks confirmed that instead of a new maritime boundary claim, the Somali Government’s position was motivated by mounting pressure to appease nationalist sentiments, aroused by the misleading rumours that Al Shabaab had circulated regarding the MOU. On 10 October 2009, the Prime Minister of Somalia was forced to repudiate the MOU. He wrote again to the UN Secretary-

¹²⁴ Federal Republic of Somalia, Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf for Somalia (14 Apr. 2009). MS, Vol. III, Annex 66, p. 7.

¹²⁵ *Ibid.*, pp. 7–9.

¹²⁶ KPO, para. 77.

¹²⁷ KPO, paras. 65–7; see also paras. 86–7. See Judgment on Preliminary Objections at para. 38 “The MOU caused some domestic controversy in Somalia in the months after it was signed.”

¹²⁸ See para. 36 above.

¹²⁹ MS, Vol. III, Annex 37. Letter from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the UN, No. XRW/00506/08/09 (19 Aug. 2009), p. 1.

General (the letter was apparently conveyed only on 2 March 2010 by its Permanent Representative)¹³⁰ noting on this occasion that the MOU:

... was considered by the Transitional Federal Parliament of Somalia and the members voted to reject the ratification of that MOU on August 1st, 2009. We would, therefore, request the relevant offices of the U.N. to take note of the situation and treat the MOU as non-actionable.

3. Kenya–Tanzania maritime boundary agreement: 2009

110. In the same year, 2009, Kenya and Tanzania reached an agreement confirming the 1975–6 maritime boundary at the parallel of latitude and extending it beyond 200M to the outer limits of the continental shelf.¹³¹

111. That agreement referred to Kenya’s 2005 EEZ Proclamation (“the Proclamation made by the President of the Republic of Kenya on the Exclusive Economic Zone of the Republic of Kenya, deposited at the UN and published in the UN *Law of the Sea Bulletin* Number 61 of 2006”). It also reaffirmed the desire of “reaching an amicable and equitable agreement pertaining to the maritime boundary between the Parties”.

112. By Article 2 (“Basis of Delimitation of the Maritime Boundary”) of the 2009 Agreement, Kenya and Tanzania confirmed that:

[t]he basis of maritime boundary delimitation shall be the parallel of latitude as established in the 1976 Maritime Boundary Agreement. To this extent and in furtherance of the objectives of this Agreement, the Parties agree that the boundary line extends eastwards to a point where it intersects the outermost limits of the continental shelf and such other outermost limits of national jurisdiction as may be determined by international law.

113. Article 3 accordingly provided that

The boundary line of the Exclusive Economic Zone and the Continental Shelf between the Parties is hereby delimited [sic] along the parallel of latitude from Point T-C eastwards to a point that it intersects the outermost limits of the Continental Shelf.

114. The parallel of latitude agreed to pursuant to this 2009 Agreement is depicted in the marine chart annexed to the 2009 Agreement.¹³²

¹³⁰ See Judgment on Preliminary Objections at para. 38 “In a letter addressed to the Secretary-General of the United Nations dated 10 October 2009, but only forwarded to him under cover of a letter from the Permanent Representative of Somalia to the United Nations dated 2 March 2010...”. Letter at MS, Vol III, Annex 38.

¹³¹ MS, Vol. III, Annex 7.

¹³² MS, Vol. III, Annex 7 (Annex 1 referred to at Art. 3).

F. Further Conduct of the Parties Consistent with the Parallel of Latitude: 1979–2013

115. This section considers further conduct of the Parties subsequent to the 1979 EEZ Proclamation. The practice is significant and consistent with the maritime boundary at the parallel of latitude. The following practice is considered below: maps produced by the Survey of Kenya (section 1); maritime patrols and enforcement by the Kenyan Navy (section 2); fisheries and marine scientific research (section 3); and the Parties' oil concession practice (section 4).

1. The Survey of Kenya

116. As stated above at para. 57, the Survey of Kenya issued an official map in 1976 showing Kenya's maritime boundaries with both Somalia and Tanzania at the respective parallels of latitude. Following technical input from Canada, the map was re-printed in 1983 with a more accurate depiction of the outer limits of the EEZ. Two further editions of the map were published in 1984 and 2004.¹³³

117. That map became the basis for issuing other maps for more specific purposes including a 1989 map issued by the Survey of Kenya showing Kenya's transport network. It also shows the maritime boundary at the parallel of latitude.¹³⁴

118. By contrast, Somalia has not produced any evidence that it printed official maps claiming a maritime boundary different from the parallel of latitude after Kenya's 1979 EEZ Proclamation.

2. Maritime patrols and enforcement by the Kenyan Navy

119. The Kenyan Navy was established on 12 December 1964. Its mandate is to protect Kenya's sovereignty.¹³⁵

120. In May 1980, shortly after the 1979 EEZ Proclamation, the Kenyan Navy issued a map labelled "Secret" and entitled "Naval Command Areas of Responsibility". It is

¹³³ SK90-3 of 1984 (Annex M2) and SK90-4 of 2004 (Annex M4).

¹³⁴ Railway and road map depicting "Kenya Territorial Sea/Economic Zone" at parallel line and legend of the map, Edition 1 SK 118, Survey of Kenya, 1989, Annex M3. It shows railways and roads, as well as the maritime boundary at the parallel of latitude. The legend at the bottom indicates in English, French, and German: "Kenya Territorial Sea/Economic Zone, Eaux Territoriales/La Zone Economique du Kenya, Kenia Landwehrmann See/Okonomisch erdgurtel"

¹³⁵ Defence White Paper, Republic of Kenya, Ministry of Defence, May 2017, Annex 46, p. 21, para. 4.6: "The Kenya Navy is mandated to defend the Republic against all armed threats from the sea." The Kenyan Navy is headquartered in Mombasa.

reproduced in **Figure 1-12** below. The purpose of this map was to define the extent of the Kenyan Navy patrols and enforcement of Kenya’s maritime jurisdiction.¹³⁶

121. The map divided Kenya’s territorial waters and EEZ into a “Northern Command Area” and “Southern Command Area” bordering Somalia and Tanzania respectively. Consistent with the 1979 EEZ Proclamation, the northern limit of the Northern Command Area (“NCA”) is delimited by a parallel of latitude. Similarly, consistent with the 1975–6 Kenya–Tanzania Boundary Agreement, the southern limit of the Southern Command Area (“SCA”) is also delimited by a parallel of latitude.

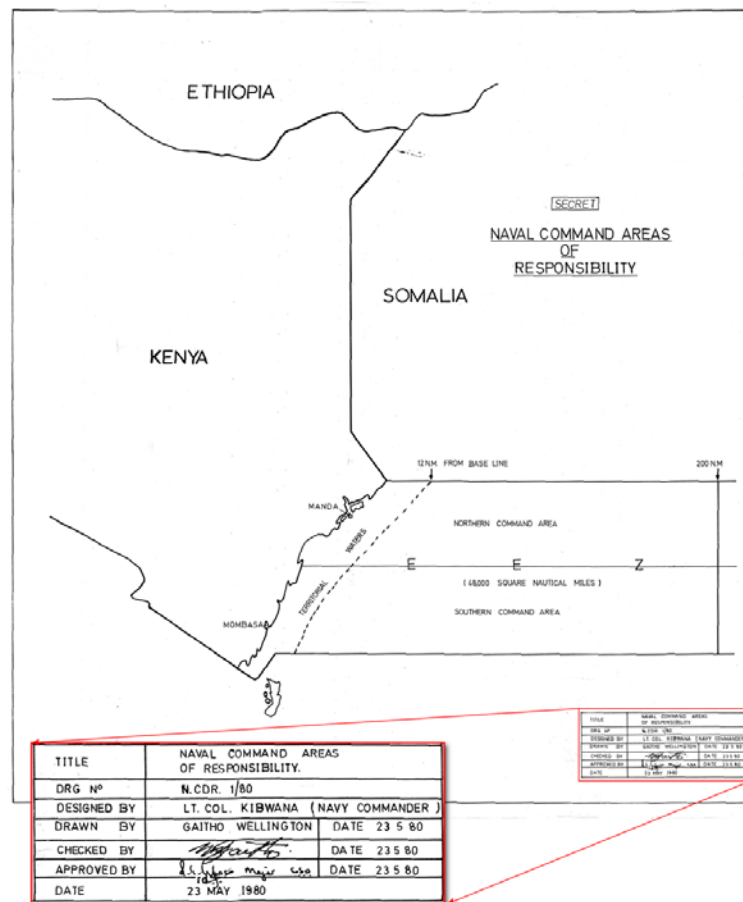


Figure 1-12 Kenya Naval Command Areas of Responsibility (Map of 23 May 1980)

¹³⁶ See e.g. a confidential telegram dated 21 April 1989 ordering the Kenyan naval ship Jamhuri (copied for information to the other Kenyan naval ship Umoja) to conduct surveillance through a North Coast Patrol: “While on NCP/SCP [North Coast Patrol/South Coast Patrol] maintain vigilant surveillance at sea and look out for a fishing trawler (No 5. Pescamal) registered in Panana [*sic*] believed to be engaged in illegal fishing in our territorial [*sic*] waters. Investigate if sighted and take appropriate action as per KN GOPS.” (Confidential telegram (Conf. C4. Fishing Trawler) from Kenya Navy Headquarters to KNS JAMHURI, 21 April 1989, Annex 31).

122. By contrast, Somalia has not produced any evidence that it ever patrolled or exercised jurisdiction in these waters, either following its claim of a 200M territorial sea in 1972 or following Kenya’s 1979 EEZ Proclamation.
123. As demonstrated by the period of 1990–2014 for which navy logs are available, the Kenyan Navy patrolled and intercepted vessels up to the parallel of latitude. The charting of the Kenyan Navy ships’ movements has been recorded in the ship logs. **Figure 1-13** plots the coordinates of patrols and interceptions based on extracts from Kenyan Navy ship logs including “the shared border with Somalia”.¹³⁷

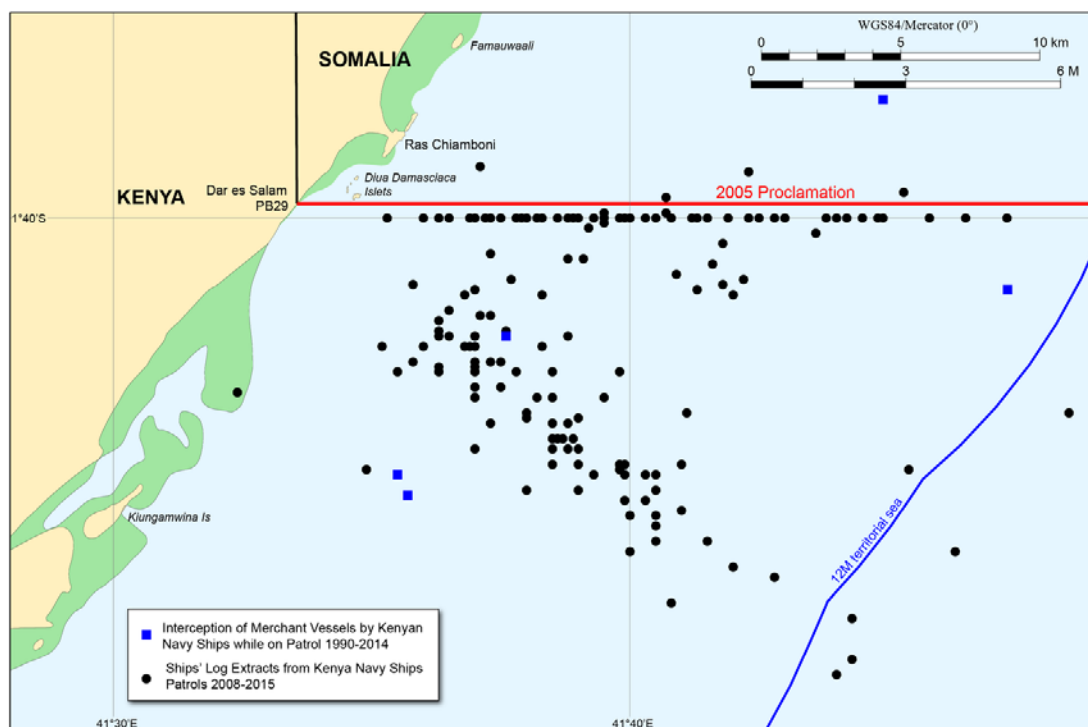


Figure 1-13: Kenyan Naval Patrols and Interceptions in the Territorial Sea

124. The outbreak of the Somali armed conflict beginning in 1991 created grave security threats on the northern boundary of Kenya’s territory that persist to this day. The exodus of refugees, maritime banditry and terrorist activities stretched the resources of the Kenyan Navy as it protected and enforced Kenya’s sovereignty along the parallel of latitude.

¹³⁷ See the following documents at Annex 44: Brief by Lt Col J.S. Kiswaa for Commander Kenya Navy, Information on Extent of Military Vessel Patrols in the Indian Ocean (KN/56/Ops/Trg), Kenya Navy, July 2015, para. 1; Annex A to KNS/32/OPS/TRG, *Ships Log Extracts From Kenya Navy Ships Patrols Within The Common Border*, June 2015; Annex C to KN/56/OPS/TRG — *Interception of Merchant Vessels by Kenya Navy Ships while on Patrol in the Common Border FM 1990–2014*, 23 July 2015). Data presented are from Kenya Navy Ships MAMBA, NYAYO, UMOJA, HARAMBEE, and SHUPAVU on North Border Patrols.

125. Contemporaneous logs of five naval ships — the *Jamhuri*, *Umoja*, *Nyayo*, *Harambee* and *Mamba* — indicate considerable activity at Kenya’s “North border” or “Northern border” with Somalia. For instance, in February 1990 the KNS *Jamhuri* conducted a North Coast Patrol along the “North” or “Somali” border, altering course just short of the Somali border.¹³⁸ In August 1990 the KNS *Umoja* performed patrol duties including a North Coast Patrol up to the “North Border.”¹³⁹ Similarly, in September 1990, the KNS *Jamhuri* conducted a North Coast Patrol to “carry out fishery protection within Kenya’s Territorial waters”,¹⁴⁰ with the ship altering course just 2.5M short of the Somali border.¹⁴¹ In September 1990, the KNS *Nyayo* also conducted a North Coast Patrol, arriving at the north border before altering course.¹⁴² In October 1991, the KNS *Harambee* patrolled up to the north border while on a North Coast Patrol/Operation Exodus, altering course off Ras Chiamboni.¹⁴³ And in September–October 1991, the KNS *Mamba* while on North Coast patrol — *inter alia* for fishery protection purposes and to stop the influx of refugees — also altered course “just short of the North border.”¹⁴⁴

126. The Kenyan Navy has explained that:

For military purposes, areas of operations are always defined. In Kenya Navy operations, Northern border refers to the northern limits of our Naval operations ... Northern border refers to that area that is bound or lies in parallel latitude 01°38’S. This is the outermost limits of Northern border patrols.¹⁴⁵

¹³⁸ Report of Proceeding of KNS JAMHURI on a North and South Coast Patrol from 20 February to 25 February 1990, Kenya Navy, Report dated 28 February 1990, paras. 4–5. (Annex 32)

¹³⁹ Report of Proceedings of KNS UMOJA while on a North/South Patrol from 19 September 1990 to 25 September 1990, Kenya Navy, Report dated 12 October 1990, Annex 35, paras 3 and 5.

¹⁴⁰ Report of Proceedings of KNS JAMHURI on a North Coast Patrol from 4 September to 10 September 1990 (KNS/32/Ops/Trg), Kenya Navy, Report dated 16 September 1990 (Annex 33), para. 2a.

¹⁴¹ *Ibid*, Annex 33, para. 4.

¹⁴² Report of Proceedings of KNS NYAYO while on a North Coast Patrol from 12th Sept 90 to 18 Sept 90, KNS NYAYO at Mkunguni, Kenya Navy, 29 September 1990, paras. 3 and 6. (Annex 34)

¹⁴³ Report of Proceeding of KNS HARAMBEE on North Coast Patrol/Operation Exodus from 20 Sep to 27 Sep 1991, Kenya Navy, Report dated 3 October 1991, para. 8. The aims of the patrol were: “a. Stop the influx of Somali Refugees from entering Kenya waters; b. fishery protection; c. [training]; and d. normal border patrols.” (Annex 36), para. 2.

¹⁴⁴ Report of Proceeding of KNS MAMBA on a North and South Coast Patrol from 26 Sep to 3 Oct 91, Kenya Navy, Report dated 17 October 1991 (Annex 37), para. 8.

¹⁴⁵ Letter from Lt-Col Atodonyang, to Ms Juster Nkoroi, Kenya Navy, *Evidence Gathering in Respect of Maritime Border Dispute between Kenya and Somalia*, 1 September 2017, Annex 47, para. 1.b.

127. A letter of 5 October 2017 clarified that “Kenya Navy Area of Responsibility (AOR) is guided by the Proclamation of 1979 coordinates and thereafter the Proclamation of 2005 coordinates as far as North border is concern[ed]”.¹⁴⁶

3. Fisheries and marine scientific research

128. The fisheries sector is important to Kenya. It consists of both artisanal and industrial fishing. In regard to artisanal fishing, both Somalia and Kenya have traditional fishing communities. Somalia’s Memorial notes that “the Baajuun and Reer Maanyo ethnic groups, have traditionally harvested the waters off Somalia’s coast”.¹⁴⁷ It fails to mention that the Baajuun (or Bajuni, as they are known in Kenya) are also on the Kenyan side of the border.¹⁴⁸ The Kenyan Government regards it as important that the traditional access of the Bajuni communities to the fishing grounds adjacent to the land boundary between Kenya and Somalia be secured.

129. In regard to industrial fishing, Somalia’s marine fisheries industry witnessed significant development and industrialization during the 1970s-80s coinciding with Kenya’s 1979 EEZ Proclamation. Consistent with its mandate under the 1985 Somali Fishery Law,¹⁴⁹ the Ministry of Fisheries and Marine Resources (established in 1977) identified seven “Fishery Development Regions”. These regions are shown in a map published by the Ministry entitled “Fisheries development regions of Somalia”, which was reproduced in a 1987 Report of the UN Environment Program (“UNEP”).¹⁵⁰ That map is at **Figure 1-14** below. In the southern portion, the depiction of Fisheries Development Region 1 on the Jubaland coast bordering Kenya is consistent with there being no Somali claim south of the parallel of latitude.¹⁵¹ It is noted that the southern area of Fisheries Development Region 1 (i.e. near the Kenyan border) concerned a significant area for the Somali fisheries industry; a fishery production cooperative was

¹⁴⁶ Letter from Lt-Col Atodonyang to Ms Juster Nkoroi, Kenya Navy, *Evidence Gathering in Respect of Maritime Border Dispute between Kenya and Somalia*, 5 October 2017, Annex 48.

¹⁴⁷ MS, Vol. I, para. 2.11.

¹⁴⁸ J.T. Juxon Barton, “Report on the Bajun Islands” (1922) 17 *Journal of the East Africa and Uganda Natural History Society* p. 24, Annex 115.

¹⁴⁹ Article 4.3 of the Somali Fishery Law No. 23 of 1985 (Annex 10) provided that: “The Ministry is responsible for implementing the development of fishery activities in the country.”

¹⁵⁰ *Coastal and Marine Environmental Problems of Somalia*, UNEP Regional Seas Reports and Studies No. 84, UNEP 1987, Na. 88-5161, p. 100. The source of the map is cited as “Ministry of Fisheries”. Report prepared in cooperation with the UN Economic and Social Commission for Western Asia, FAO, UNESCO, IMO, IAEA and IUCN.

¹⁵¹ The Court has inferred the extent of maritime boundaries from the exclusion of maritime areas on maps: *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, para. 64.

established at Ras Kambone¹⁵² that contributed catch to the cold storage complex in Kismaayo belonging to the State-owned company Somali Marine Products (“SMP”).¹⁵³ Given the importance of Region 1 therefore, it is unlikely that its southern limit was inadvertently cut off at the parallel of latitude.

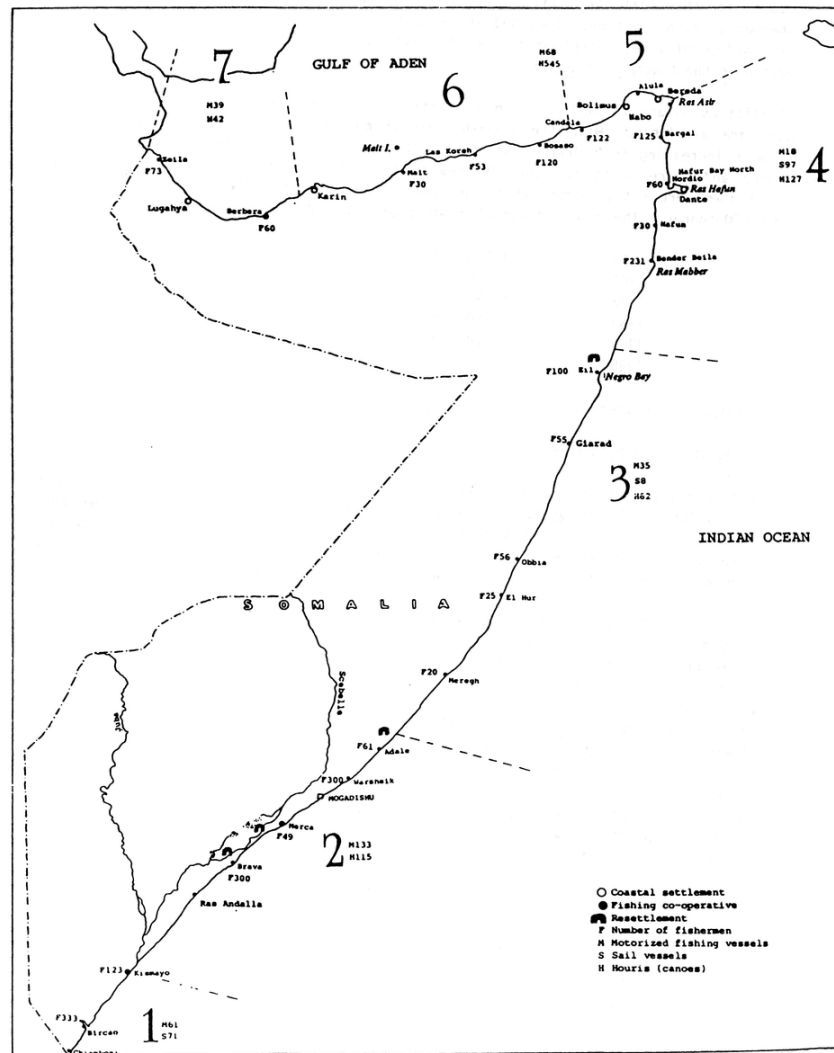


Figure 1. Fishery development regions of Somalia. (Source: Ministry of Fisheries)

Figure 1-14: Fishery Development Regions of Somalia (Source: Somali Ministry of Fisheries, 1986–7)

¹⁵² See listing at Somalia’s Fisheries Joint Venture Guidelines, 1985 (Guidelines for Fisheries Joint Venture with Foreign Partners, Somali Democratic Republic, Ministry of Fisheries & Marine Resources, 1 April 1985, Annex 9), Table 3; Somalia: An Evaluation of the Coastal Development Agency’s Fisheries Program, Report for USAID Mogadishu by International Science and Technology Institute Washington, July 1985, Annex 55, Appendix 9: Biologist/statistician, Stellan Elmer, End of Assignment Report, February 1985, pp. 1–3 providing details on Ras Chiambone cooperative fisheries, including contribution to SMP fish factory in Kismaayo.

¹⁵³ Yearly Fisheries [sic] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, Annex 50, pp. 26–7, also confirming two vessels of the SMP fleet operated at Ras Chiambone fishing site.

130. The map at **Figure 1-14** above may be contrasted with a similar but much more recent map depicting the “Fishery Development Zones of Somalia”, also published by the Somali Ministry of Fishery and Marine Resources, and included in Somalia’s 2015 National Biodiversity Strategy and Action Plan (“NBSAP”)¹⁵⁴ (i.e., after the submission of the present case to the Court). Unlike the map reproduced in the 1987 UNEP Report, the corresponding Fishery Development Zone 1 extends south of the parallel of latitude consistent with an equidistant line. This is shown in **Figure 1-15**.

¹⁵⁴ National Biodiversity Strategy and Action Plan, Federal Republic of Somalia, FAO, Convention on Biological Diversity, GEF, December 2015 (Figure 8, p. 43).



Figure 1-15: Fishery Development Zones of Somalia, 2015, NBSAP Report.

131. In the same year that UNEP published the map set out at **Figure 1-14** depicting the Somali Fisheries Development Regions (1987), the Somali Fisheries Ministry authorized and participated¹⁵⁵ in a survey of fisheries in Somalia’s EEZ (the ‘Georgy

¹⁵⁵ Yearly Fisheris [*sic*] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, Annex 50, pp. 8–10. The Report at p. 8 indicates that on 6 September 1987, a Soviet research vessel identified as “GEORGY U SHAKOV” “visited the Southern part of the Somali waters and carried out investigations on some Oceanographic parameters. Two scientists from the Ministry of fisheries & Marine Transport were put onboard to takepart [*sic*] in this scientific cruise. The objective of the programme was implemented with the framework of the International Scientific and Technological Cooperation of Developing Countries of East Africa under the auspices of I.O.C./UNESCO.”

Ushakov' survey). The survey was conducted under the auspices of the Intergovernmental Oceanographic Commission of UNESCO.¹⁵⁶

132. The coordinates of that survey are available in the Fisheries and Marine Transport Report of the Somali Ministry of Fisheries for the period 1987–8. It states that “[t]he survey was conducted near the coast (about 5–10kms from the coast-line between Mogadishu and Kismaayo) and following positions were studied”.¹⁵⁷ The positions form an arc, with a southernmost point 6 located at 1° 36 S and 44° 37 E, approximately 180M from the LBT.¹⁵⁸ The southernmost point of this arc (point 6) corresponds to the parallel of latitude at 1° 39 S. By contrast, it is 120M north of the equidistance line (see **Figure 1-16** below). This is consistent with the Ministry of Fisheries’ depiction of Somalia’s EEZ at the parallel of latitude in Development Region 1 adjacent to Kenya (**Figure 1-14**).

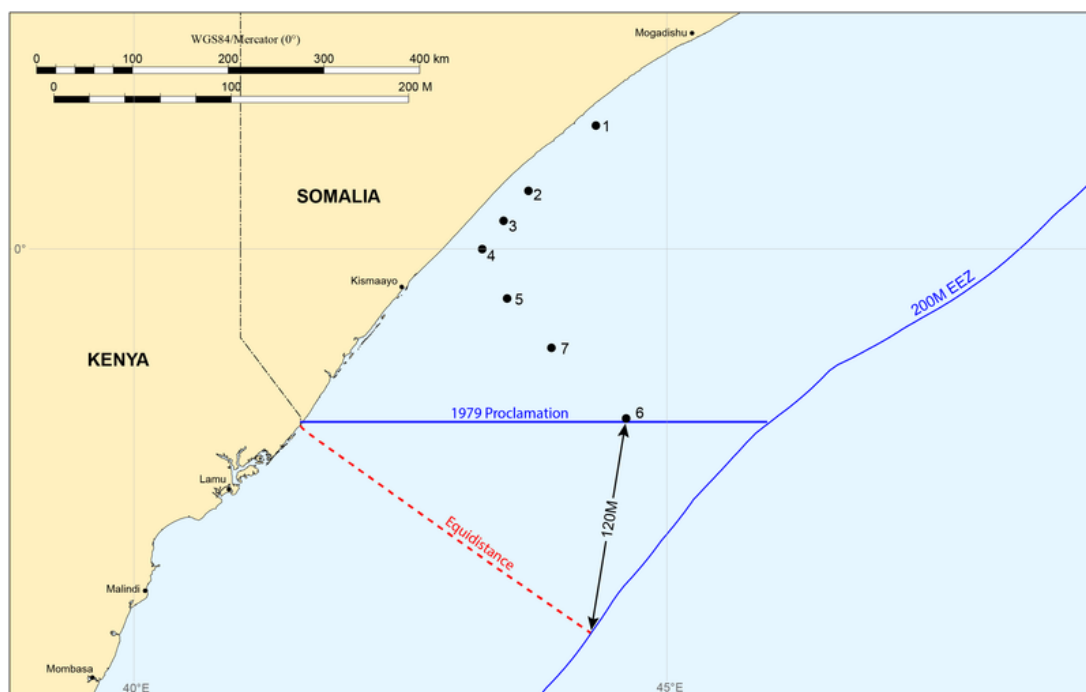


Figure 1-16: 1987 Ushakov Fishery Survey Locations

133. The conduct of the 1987 *Georgy Ushakov* survey in regard to the parallel is also consistent with the 1975–84 surveys of the Dr. Fridtjof Nansen Program, involving a Norwegian vessel operating under the auspices of the UN Food and Agriculture

¹⁵⁶ The Intergovernmental Oceanographic Commission (IOC) was established in 1960 as a functionally autonomous body within UNESCO.

¹⁵⁷ Yearly Fisheries [*sic*] and Marine Transport Report 1987/1988, Somali Democratic Republic, Ministry of Fisheries and Marine Transport, Annex 50, p. 8.

¹⁵⁸ *Ibid.*, Annex 50. Instead of “1 36’S”, the co-ordinates for Point 6 are mistakenly indicated as “1N 36’S”, Annex 50, p. 8.

Organization (“FAO”) and the UN Development Program (“UNDP”).¹⁵⁹ Conducted with the consent and participation of coastal States,¹⁶⁰ the Nansen survey was exploring the fisheries potential of the EEZ on the African coast of the Indian Ocean (including Kenya and Somalia), providing “inventories by countries”, and thus operating within the presumed boundaries of their respective EEZs.¹⁶¹

134. The Nansen survey of the Kenya coast was conducted between 1980 and 1983.¹⁶² It identified the “North Kenya Bank” as part of the northernmost “investigative area” within Kenya’s “shelf”. In the FAO/UNDP offshore trawling survey of Kenya that took place in this period and which included Nansen survey data, the “north boundary” of this area is variously defined as 1° 39’ S and “approximately” 1° 40’ S on the parallel of latitude.¹⁶³ That is in close proximity to the 1979 EEZ Proclamation line. **Figure 1-17** below is a map from the Nansen Programme Report, depicting the northern limit of the “investigated area” just 3.5M south of the parallel of latitude line claimed in the 1979 EEZ Proclamation (due to the non-trawlable nature of the

¹⁵⁹ The Programme was coordinated and implemented by the Institute of Marine Research in Bergen, Norway, the FAO and the UN Development Program. The vessel carried “the UN flag throughout this period, facilitating its deployment in many different countries.” G. Saetersdal *et al.*, *The Dr. Fridtjof Nansen Programme 1975–1993. Investigations of Fishery Resources in Developing Regions. History of the Programme and Review of Results*, *FAO Fisheries Technical Paper*. No. 391. Rome, FAO. 1999, Annex 82, p. 9. Referred to below as the Nansen Programme Report.

¹⁶⁰ *Ibid.*, Annex 82, p. 19 (“in each assignment arrangements were made for participation in the survey of a contingent of scientists and technicians from the countries included in the programme. They were selected and appointed by the respective government authorities”) and p. 394 *Appendix III List of Participants from Cooperating Countries* for Somalia 1984 lists “Abdi Ismail Abdi and Omar Haji Ahmed Dubad”). Cf. also Letter from Fisheries Officer (IDA) D. Opere Jr. to the Ag. Assistant Director of Fisheries (FISH/MSA/118/VOL. III/48), *Report on the Survey Carried out in the Kenyan Waters by R/V “DR. FRIDTJOF NANSEN”*, 14 September 1982, Annex 28, showing that Kenya authorized the research on its EEZ as proclaimed in 1979.

¹⁶¹ “Most of the subsequent assignments in the Indian Ocean had a character of providing inventories by countries. This period coincided with that of the establishment of EEZs by many coastal States and there was a great interest in obtaining descriptions of the resources found in these zones. These surveys were detailed and comprehensive and in most cases repeated in order to confirm main findings and to study seasonal variations”. G. Saetersdal *et al.*, *The Dr. Fridtjof Nansen Programme 1975–1993. Investigations of Fishery Resources in Developing Regions. History of the Programme and Review of Results*. *FAO Fisheries Technical Paper*. No. 391. Rome, FAO. 1999, Annex 82, pp. 18–19: “... most States in the region had by the late 1970s established EEZs in accordance with the provisionally agreed text of the Law of the Sea Convention and were conscious of a need for more information on the fishery resources within their EEZs” *Ibid.*, Annex 82, pp. 43–4.

¹⁶² The period 1980–3 relates specifically to surveys of the Kenyan coast, G. Saetersdal *et al.*, *The Dr. Fridtjof Nansen Programme 1975–1993. Investigations of Fishery Resources in Developing Regions. History of the Programme and Review of Results*. *FAO Fisheries Technical Paper*. No. 391. Rome, FAO. 1999, Annex 82, p. 169; 1975–84 includes the Nansen survey of the coast of Somalia (1975–7, 1984).

¹⁶³ The Stock Assessment of the Kenyan Demersal Offshore Resources, Surveyed in the Period 1979-1980-1981, Project KEN/74/023 “Offshore Trawling Survey”, Work Report No. 8, UNDP, FAO, Government of Kenya, Ministry of Environment and Natural Resources, January 1982, Annex 74, p. 5; Offshore Trawling Survey Kenya, Project Findings and Recommendations, FI:DP/KEN/74/023 Terminal Report, FAO/UNDP, Rome 1983, Annex 76, p. 4.

northern tip of the North Kenya Bank)¹⁶⁴ and approximately 38M along the EEZ boundary.

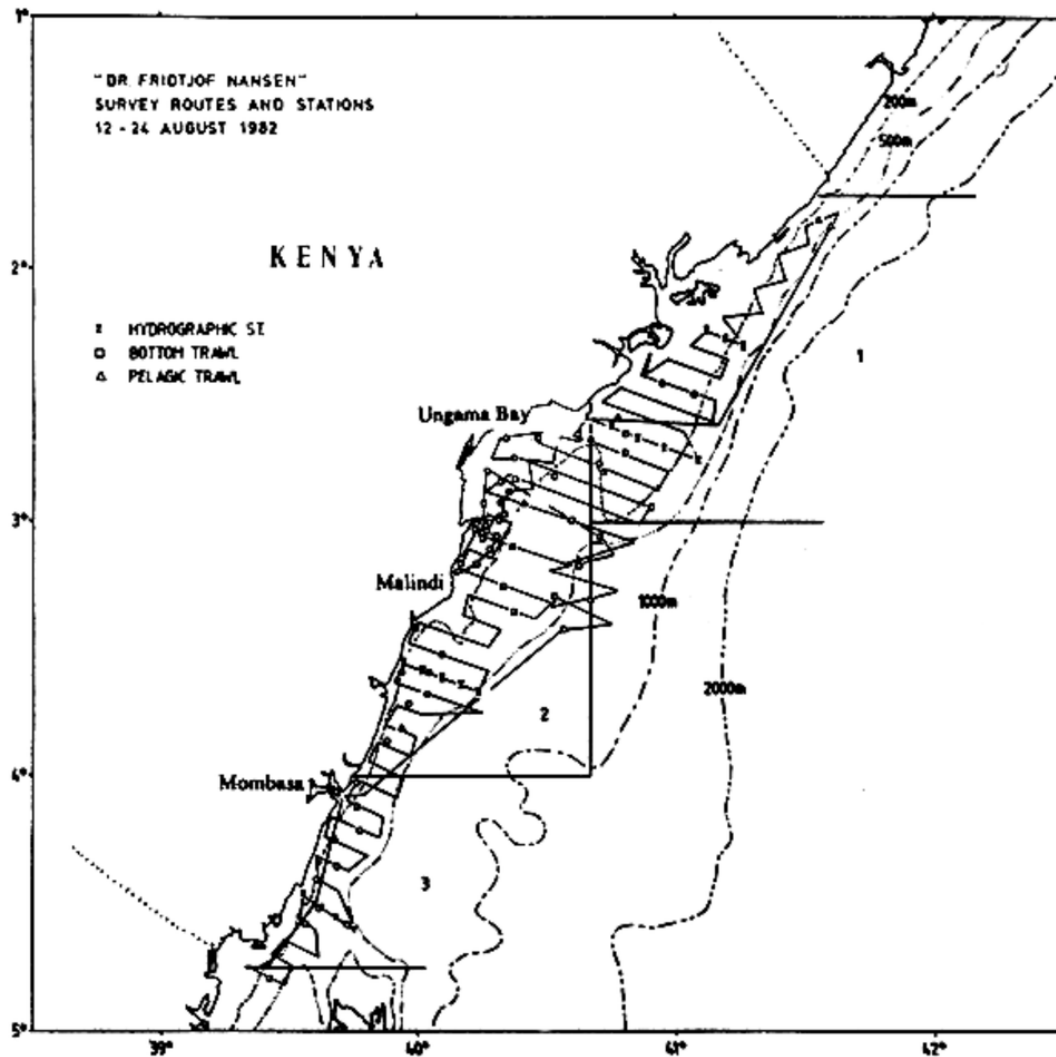


Figure 1-17: The Nansen Survey of the Kenyan Shelf: Survey Routes and Stations (Figure 5.1 of the Nansen Report)

135. The conduct of these surveys was in part motivated by the importance of Kenya’s marine fisheries industry, which like Somalia’s, witnessed significant development and industrialization during the 1970s–80s.¹⁶⁵ Shortly after the 1979 EEZ

¹⁶⁴ The “northern tip” of the North Kenya Bank was considered “non-trawlable” on account of “[t]he combination of difficult bottom and strong currents [that make] trawling hazardous.” Offshore Trawling Survey Kenya, Project Findings and Recommendations, FI:DP/KEN/74/023 Terminal Report, FAO/UNDP, Rome 1983, Annex 76, p. 4.

¹⁶⁵ The Proceedings of the NORAD-Kenya Seminar to Review the Marine Fish Stocks and Fisheries in Kenya, Mombasa, Kenya, 13–15 March 1984, Kenya Marine and Fisheries Research Institute, Mombasa, Norwegian Agency for International Development, Institute of Marine Research, Bergen, Norway, 1984, para. 6.2.42 (Annex 54); FAO Fishery Country Profile: The Republic of Kenya FID/CP/KEN, April 2007, Annex 93, para. 4.3.1. The large variety of fish species hosted in Kenyan marine waters includes demersal and pelagic species, as well as crustaceans and deep sea/big-game fish. The deeper waters support pelagic species such as tuna, with Kenyan waters being situated “within the rich tuna belt of the West Indian Ocean where about 25% of the

Proclamation was issued, in a statement to the Kenya National Assembly on 4 May 1979, the Assistant Minister for Tourism and Wildlife declared that¹⁶⁶ “Fishing within Kenya’s 200-mile exclusive economic zone, recently proclaimed by the President, will be regulated in accordance with the laws of Kenya”.¹⁶⁷ He added that “No foreign vessels will be allowed to fish within the 200-mile exclusive economic zone area unless they comply with the Kenya Government regulations” and that “The Government has already made appropriate arrangements for effective and efficient patrols to ensure that Kenya’s exclusive economic zone area will not be fished illegally by poaching foreign vessels”. These patrols were conducted by the Kenyan Navy which was authorised under specific legislation.¹⁶⁸

136. In 1998, the UNESCO Intergovernmental Oceanographic Commission (“IOC”) and the Western Indian Ocean Marine Science Association (“WIOMSA”) produced the Kenya Marine Science Country Profile (“IOC/UNESCO Report”) “as a contribution to the International Oceanographic Data and Information Exchange (IODE) programme”.¹⁶⁹ The IOC/UNESCO Report detailed Kenya’s marine science activities and defined Kenya’s maritime areas by reference to Figure 1, entitled “Kenya Territorial Sea and Exclusive Economic Zone” (reproduced here as **Figure 1-18**). The

world’s tuna is harvested.” FAO Fishery and Aquaculture Country Profiles: The Republic of Kenya, available at <http://www.fao.org/fishery/facp/KEN/en>

¹⁶⁶ Republic of Kenya, The National Assembly, Official Report, Third Parliament Inaugurated 6th November 1974, Vol. L, Wednesday 2nd May, 1979 to Friday 29th June, 1979 (Hansard), Friday, 4th May, 1979, Oral Answers to Questions, No. 246, col. 125–126, Annex 4, col. 125

¹⁶⁷ Fisheries in Kenya were principally regulated, first by the Fish Industry Act 1968, revised 1970, Chapter 378 Laws of Kenya and later by the Fisheries Act (Cap 378) of 1989 and the Maritime Zones Act (Cap 371) of 1989. These are supplemented by other laws such as the Wildlife Conservation and Management Act (Cap 376) of 1985], the revised 1991 Fisheries Act (Cap 378) with Regulations of 1991, the revised Maritime Zones Act (Cap 371) of 1991, the Environmental Management and Co-ordination Act (No. 8 of 1999), and the Wildlife (Conservation and Management) Act of 2002 (revised).

¹⁶⁸ Fisheries Act Cap. 378 of 1968 sections 2 and 12; Fisheries Act of 1989, sections 2 and 18; Fisheries Management and Development Act No. 35 of 2016, part 3, section 18.

¹⁶⁹ M. Odido, Marine Science Country Profiles: Kenya, IOCINCWIO-IV/Inf.5, UNESCO, IOC and Western Indian Ocean Marine Science Association, 1998, Annex 81, p. 3. Although focused on Kenya’s marine science capabilities, the IOC/UNESCO Report also addresses the vital importance of the coast to Kenya and its management of the coastal environment and resources. It notes that Kenya both participates in the marine related activities of international organizations, and hosts the headquarters of the UN Environment Programme and the regional offices of the World Conservation Union (IUCN), the UNESCO (Science and Technology in Africa) and the FAO (p. 27). Annex III of the Report contains numerous “Statutes relating to Coastal Zone and Enforcement Agencies” (including the Maritime Zones Act, the Continental Shelf Act, the Water Act, the Kenya Ports Authority Act, the Fisheries Act, the Wildlife Management and Conservation Act, the Coast Development Authority Act, Merchant Shipping Act, and the Carriage of Goods at Sea Act), and Annex V lists initiatives and projects in the area of coastal resources and environmental protection and management.

map shows the maritime boundary with Somalia at the parallel of latitude consistent with the 1979 EEZ Proclamation.¹⁷⁰

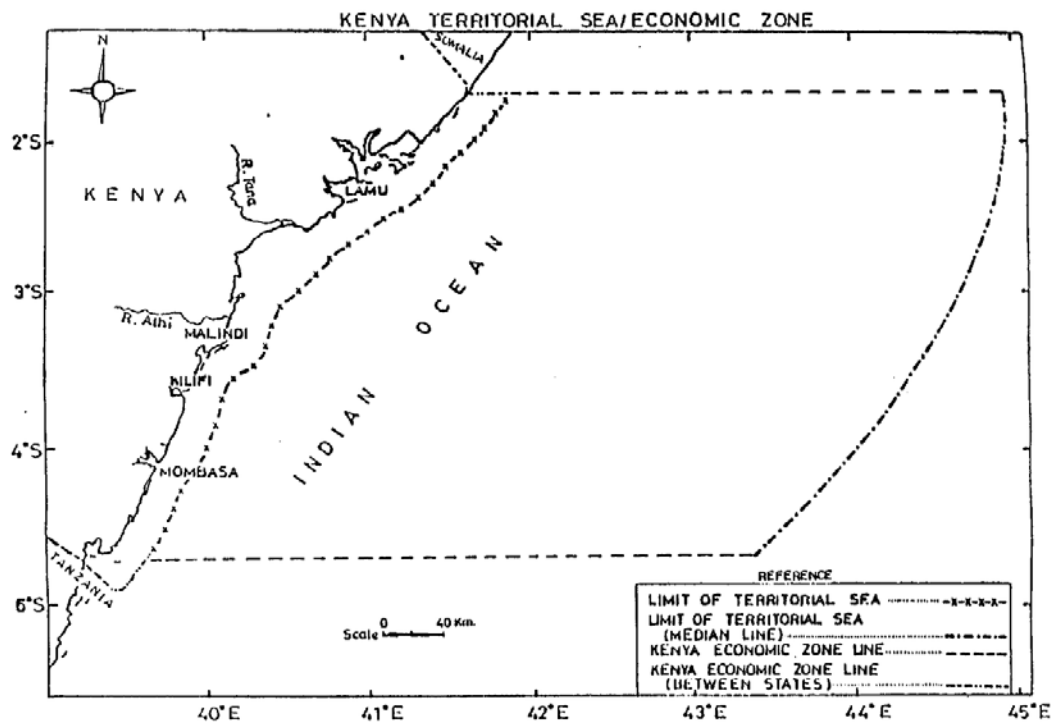


Figure 1-18: Kenya Territorial Sea/Economic Zone (Intergovernmental Oceanographic Commission & Western Indian Ocean Marine Science Association, Marine Science Country Profiles: Kenya (1998) Figure 1)

137. Kenya also issued fishing licences to foreign vessels indicating the parallel of latitude as the maritime boundary with Somalia. For instance, a licence was granted on 20 June 2011 to a French vessel “Franche Terre” for the period 1 July 2011 to 30 June 2012 with the following coordinates: “Kenyan EEZ 1°39’34.253”S; 41°34’44.196”E; 1°39’36.000”S; 44°54’47.520”E; 1°39’36.000”S; 44°54’47.000”E; 2°39’36.000”S; 44°43’19.092”E; 3°39’36.000”S; 44°15’3.896”E; 4°40’53.004”S; 43°20’36.204”E; 4°40’55.740”S; 39°36’30.240”E; 4°40’52.000”S; 39°36’18.000”E; 4°49’56.000”S; 39°20’58.000”E; 4°49’51.636”S; 39°20’59.2544”E.”¹⁷¹ These are plotted on **Figure 1-19** below.

¹⁷⁰ As noted above with respect to the 1976 map (at fn 58), the legend of the map refers to the territorial sea boundary as a “median line”, but this was recognised as a mistake in terminology. The 1979 letter from Mr. F.X. Njenga to the Director of Surveys notes that “[t]he words “Median Line” should be deleted”. Letter from F.X. Njenga to the Director of Surveys of the Survey of Kenya (MFA. 273/430/001A/49), *Kenya Territorial Sea/Economic Zone*, 26 October 1979, Annex 21.

¹⁷¹ Republic of Kenya, Fishing Licence for French vessel “Franche Terre”, 0000455, r.6/LN.35/91, 1 July 2011–30 June 2012, granted on 20 June 2011, Annex 41.

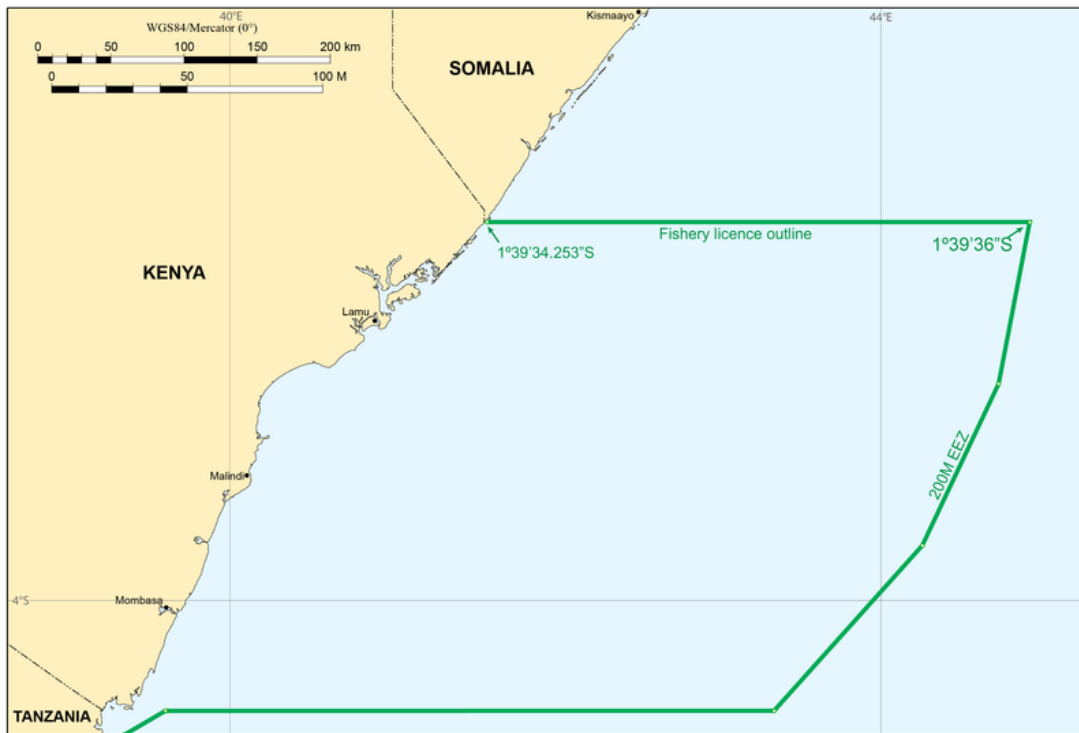


Figure 1-19: Outline of “Franche Terre” Fishery Licence Block (2011)

4. Oil concession practice

138. This section begins by addressing the Parties’ oil concession practice in the period 1979–2000, i.e. the period following the 1979 EEZ Proclamation to the year of the production sharing contract between Kenya and Star Petroleum International (Kenya) Limited for Block L5 along the parallel of latitude. In the section that follows, the practice of the Parties from 2000 to 2013 (i.e. the year that Somalia granted Soma Oil a Seismic Option Agreement extending along the parallel of latitude) is considered.

1979–2000

139. At the time of the 1979 EEZ Proclamation, Kenya’s oil-related activity was located close to shore,¹⁷² with some offshore wells being drilled to the south,¹⁷³ reflecting the available data and commercial interest,¹⁷⁴ as well as the limited technology for deep-water drilling.

140. Somalia asserts that “Until at least 1996, none of these [offshore petroleum exploration blocks offered by Kenya] extended beyond the equidistance line with

¹⁷² C. A. Rachwal and E.R. Destefano, *Petroleum Developments in Central and Southern Africa in 1979*, *The American Association of Petroleum Geologists Bulletin* V. 64, No. 11 (November 1980), pp. 1785–1835, at p. 1816, Figure 18 (Exploration Licences), reproduced at **Figure 1-33**.

¹⁷³ *Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report*, National Oil Corporation of Kenya, 1995, Annex 38, pp. 3–4.

¹⁷⁴ Nina Rach, *Kenyan Explorers Look Deeper Offshore* (*OE Digital*, 1 July 2014). MS, Vol. IV, Annex 120.

Somalia.”¹⁷⁵ An examination of the eight maps relied upon by Somalia (M1–M8) shows that this is an incorrect assertion.¹⁷⁶ Furthermore, the Memorial ignores Somalia’s own oil concession practice. In fact, the progression of this practice demonstrates that after Kenya’s 1979 EEZ Proclamation, Somalia’s petroleum exploration blocks were adjusted in line with the parallel of latitude.

141. The industrial map of Kenya’s oil concessions (M1)¹⁷⁷ (produced by Petroconsultants S.A.) that Somalia emphasises most is dated 1978, the year before Kenya’s 1979 EEZ Proclamation. The northern limit of the relevant block follows a line perpendicular to the direction of the coast up to 13.5M. As indicated below, after 1978, that block was no longer offered by Kenya. In the same year, 1978, Somalia also had a relinquished¹⁷⁸ licensing block along a line perpendicular to the general direction of the coast. This is demonstrated by **Figure 1-20** which is a map from the 1979 Bulletin of the American Association of Petroleum Geologists (“BAAPG”). But from 1979 onwards, it appears that the block was no longer offered by Somalia either, and by 1986, it was replaced by Block M1 which followed the parallel of latitude. This is demonstrated by the 1987 BAAPG map in **Figure 1-21**.¹⁷⁹

¹⁷⁵ MS, Vol. I, para. 3.20.

¹⁷⁶ M1–M8 are located in MS, Vol. II.

¹⁷⁷ M1 is a map produced by Petroconsultants S.A which depicts a block in the territorial sea up to 12M, and an extract of that map is reproduced at Figure 3.5A of Somalia’s Memorial, Vol. II. That extract is then used to produce Figure 3.5B of Somalia’s Memorial. Figure 3.5B is a map produced by Somalia to show how the line drawn by Petroconsultants S.A compares to an equidistance line (see MS, Vol. I, para. 3.21). Figure 3.5B in fact appears to extend the line a considerable distance beyond the licensing block shown in M1.

¹⁷⁸ P. Giorgio Scorcelletti and B. M. Abbott, Petroleum Developments in Central and Southern Africa in 1978, *The American Association of Petroleum Geologists Bulletin* V. 63, No. 10, pp. 1689–1742, October 1979, p. 1694, Annex 104, “Elf-Aquitaine relinquished its remaining permits on May 19, 1978. There are no petroleum rights in force in the Somali Republic. No exploration activity has been reported.” See also Figure 28 at p. 1738 of the report which indicates that “Elf – Aquitaine – Total” held the permit for this block, reproduced at **Figure 1-20**.

¹⁷⁹ J. B. Hartman, Oil and Gas Developments in Central and Southern Africa in 1986, *American Association of Petroleum Geologists Bulletin/World Energy Developments*, V. 71, No. 10B (October 1987-Part B), pp. 190–225, at p. 223, figure 29, reproduced at **Figure 1-21**. See further J. B. Hartman and T.L. Walker, Oil and Gas Developments in Central and Southern Africa in 1987, *The American Association of Petroleum Geologists Bulletin* V. 72, No. 10B (October 1988), pp. 196–227, p. 224, Figure 21, reproduced at **Figure 1-34**. See further J. B. Hartman and T.L. Walker, Oil and Gas Developments in Central and Southern Africa in 1988, *The American Association of Petroleum Geologists Bulletin* V. 73, No. 10B (October 1989), pp. 189–230, p. 227, Figure 26, reproduced at **Figure 1-35**.

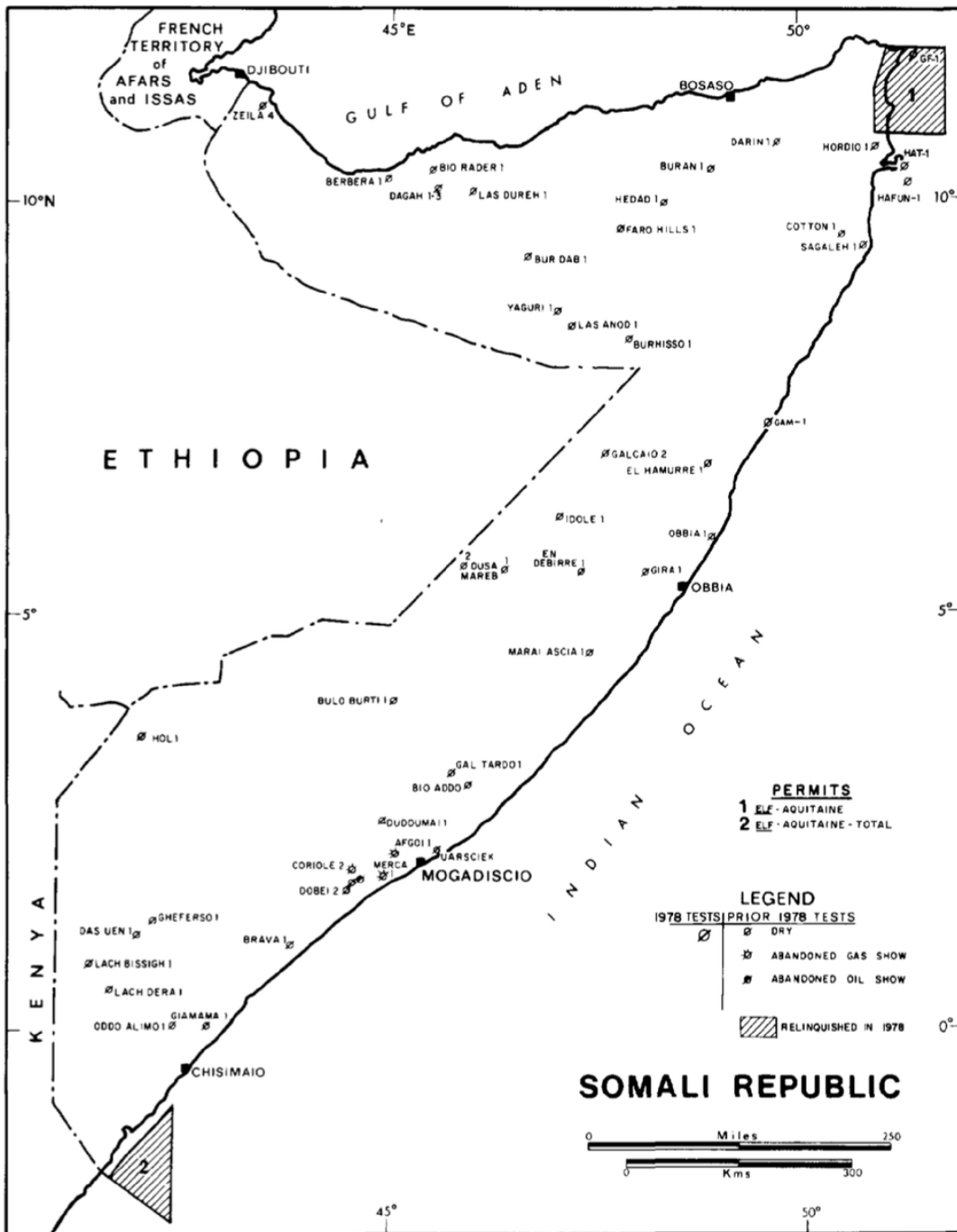


Figure 1-20: Somali Concession Blocks for the year 1978. Oil and Gas Developments in Central and Southern Africa in 1978, 1979 Bulletin of the American Association of Petroleum Geologists (BAAPG) Fig. 28.

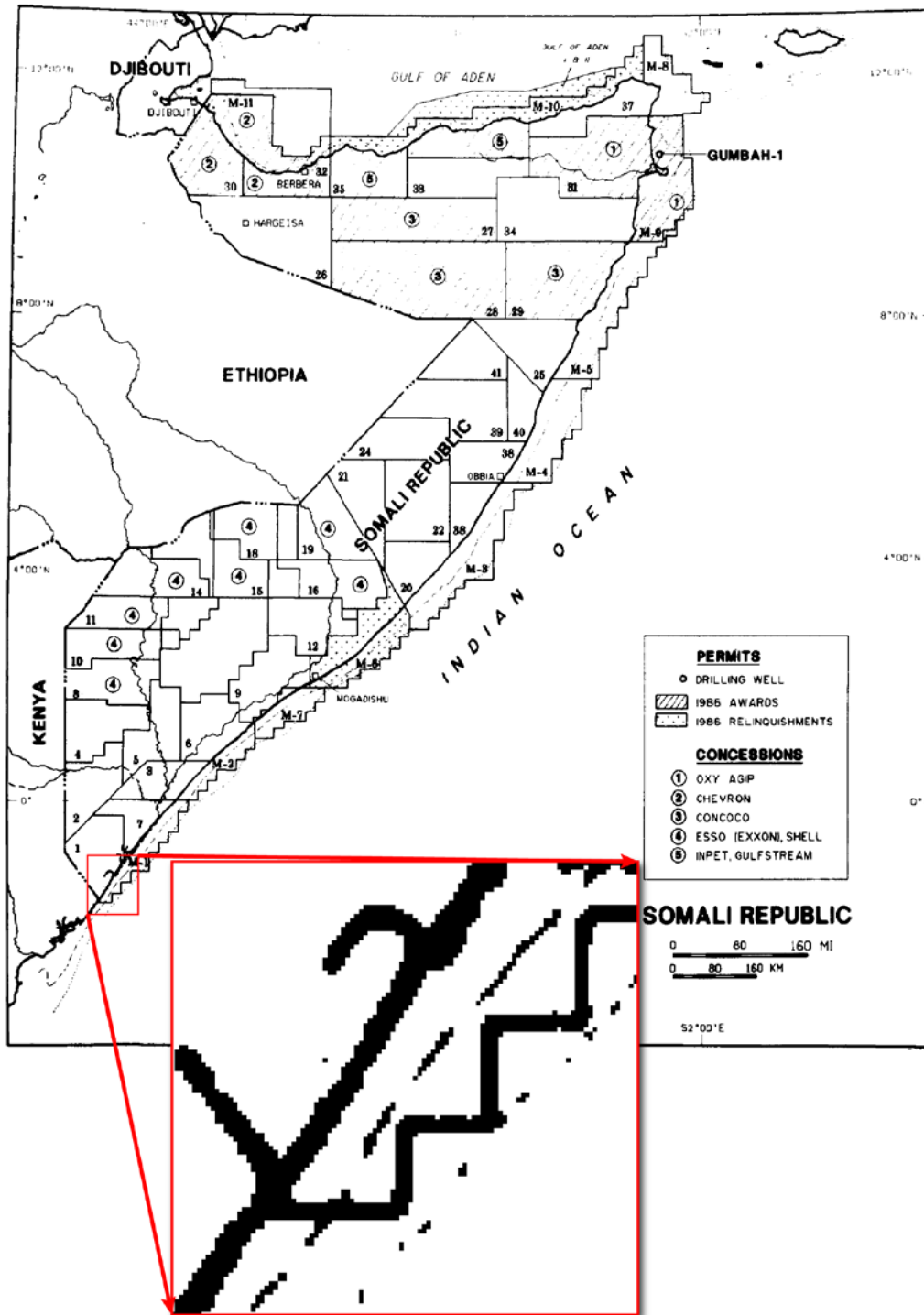


Figure 1-21: Somali Concession Blocks for the year 1986. Oil and Gas Developments in Central and Southern Africa in 1986. 1987 Bulletin of the American Association of Petroleum Geologists (BAAPG) Fig. 29.

142. In 1989, the Somali Ministry of Minerals and Water Resources commissioned a Report on the oil and gas potential of Somalia, which confirmed the 1987 BAAPG map as regards the location of Block M1 at the parallel of latitude.¹⁸⁰ This is shown in

¹⁸⁰ Harms & Brady Geological Consultants, Inc., *Oil and Gas Potential of the Somali Democratic Republic*, June 1989 (Figure 2 on the 14th page). It confirms BAAPG maps from 1988 and 1989 (Figures 1-33 and 1-34).

Figure 1-22 which appears as Figure 2.1 in the Report. It may also be observed that Block M11 follows Somalia's claimed maritime boundary with Djibouti. This Report was published shortly after the 1988 Somali Maritime Law, which described the territorial sea boundary as a "straight line" for both Kenya and Djibouti (see paras. 81-85 above). The oil concession practice of Somalia suggests that the "straight line" was in fact the parallel of latitude.

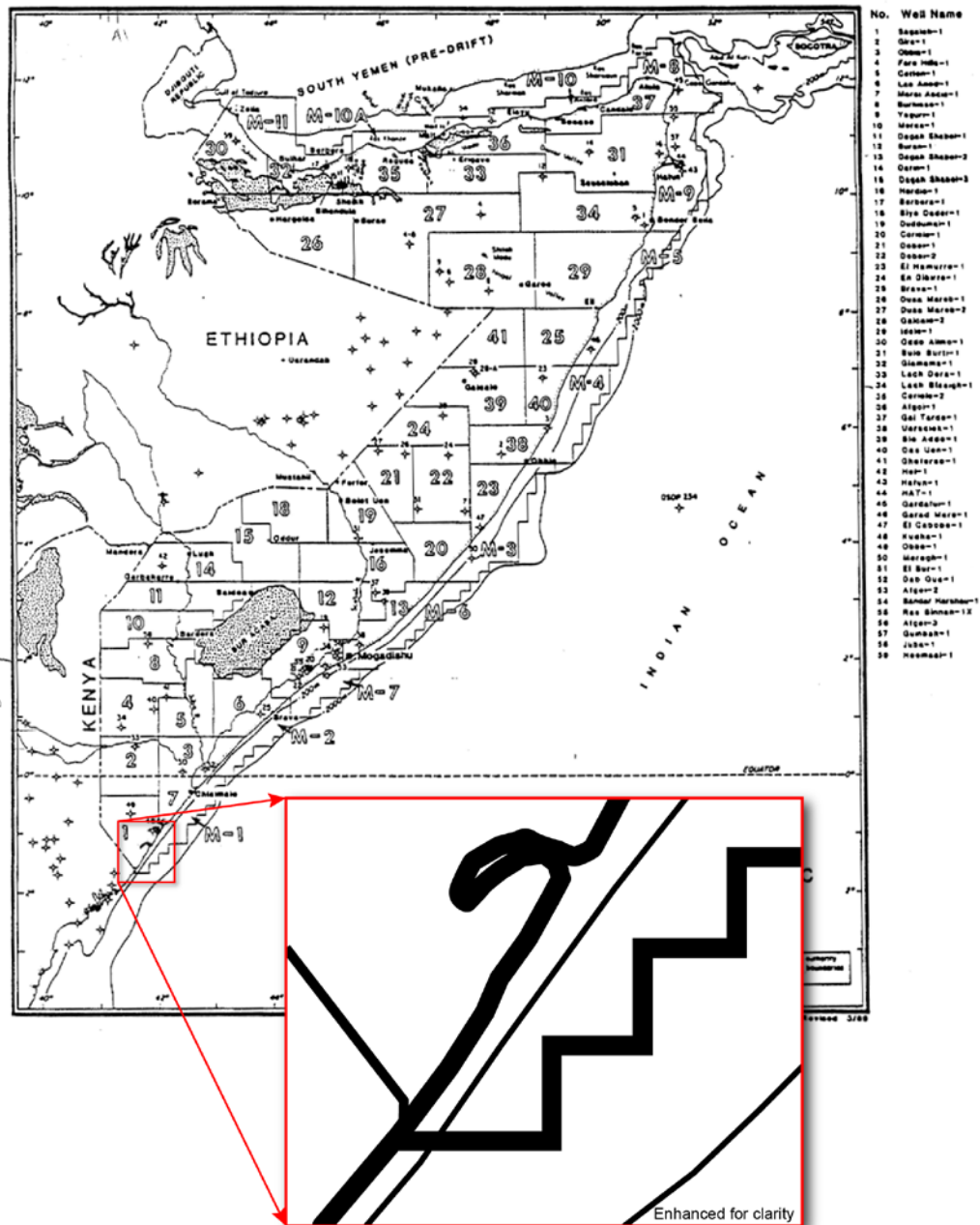


Figure 1-22: Somali Licence Blocks (Harms & Brady Geological Consultants, Oil and Gas Potential of the Somali Democratic Republic, June 1989, Figure 2-1)

143. By contrast, the Petroconsultants Maps M-2 to M-5 in the Somali Memorial (dated 1979, 1982, 1984, and 1985 respectively) do not “show that Kenya’s northernmost

offshore blocks respected the equidistance line”, as claimed by Somalia. The first two maps (M2–M3) indicating activity in 1979 and 1982 respectively, simply show a single line that purportedly indicates the maritime boundary according to a third party (i.e. Petroconsultants, and not Kenya) without any explanation as to the basis for this line. It clearly does not show a Kenyan oil concession block at that line, nor does it accurately represent the maritime boundary claimed by the 1979 EEZ Proclamation. As such it is wholly irrelevant to Kenya’s practice. The following two maps (M4–M5) indicating activity in 1984–5 do not even draw the single line purporting to show the maritime boundary. In fact, during this period, Kenya did not award blocks in that maritime area. Nonetheless, as early as 1984, the Survey of Kenya had issued a map (reproduced in **Figure 1-23** below) depicting Block L5 at the parallel of latitude (extending through the territorial sea and the EEZ up to 66M along Kenya’s maritime boundary with Somalia).¹⁸¹

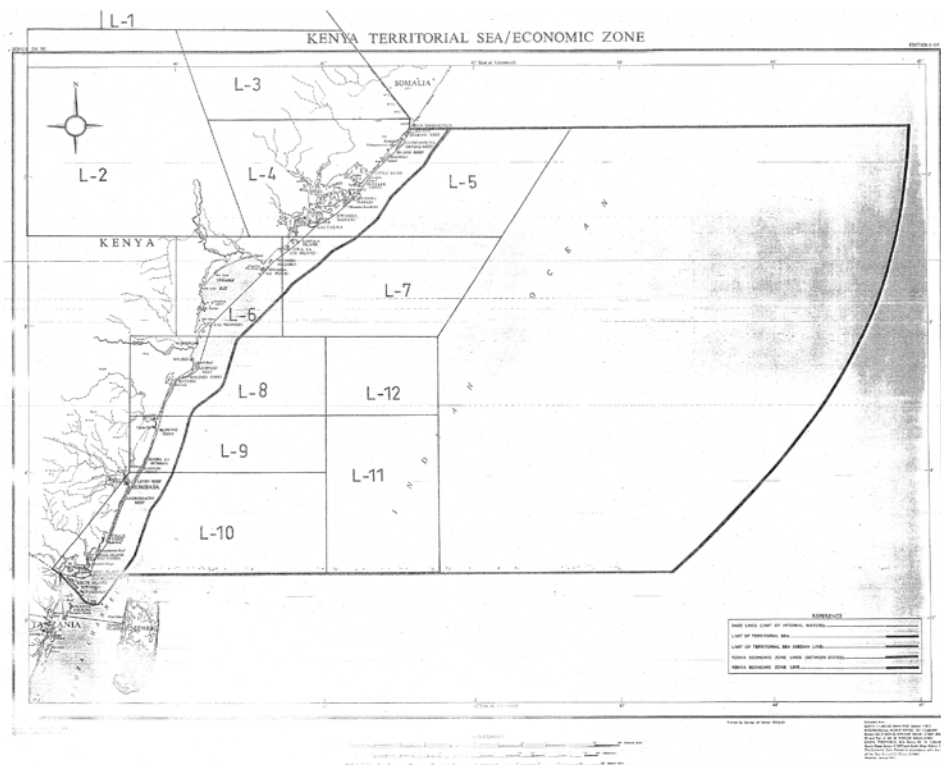


Figure 1-23: Map showing Kenya’s EEZ and prospective licensing blocks for oil exploration along the parallel of latitude, Survey of Kenya, 1984

¹⁸¹ In 1980, the delegate of Kenya to UNCLOS expressed Kenya’s desire to “find ways and means of finding whether we might have oil in the sea”, Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December, 1979, Second Session, Tuesday, 4th December, 1979 to Wednesday, 18th June, 1980, Records of 22 May 1980, col. 1225–1226 and 27 May 1980, col. 1281–1282 (Annex 5), col.1226.

144. Petroconsultants maps M6–M8 do appear to show Block L5 drawn at the equidistance line in the territorial sea (but not in the EEZ) for the brief period between 1994 and 1996. Within the EEZ, the block was extended southwards away from the Somali maritime boundary (rather than eastwards along the parallel) reflecting the focus of offshore activity in the southern portion of the Lamu basin. Nonetheless, a contemporaneous 1995 study on hydrocarbon potential by the National Oil Corporation Kenya (NOCK)¹⁸² included maps depicting Block L5 and the EEZ (e.g. at p.16) with a dotted line indicating the parallel of latitude as the maritime boundary consistent with the 1979 EEZ Proclamation.¹⁸³ Furthermore, as indicated in the following section, soon after in 2000, Block L5 was extended eastwards along the parallel of latitude (as envisaged in the 1984 Survey of Kenya map). Further offshore, Block L21 was offered in 2012 along the same maritime boundary up to the 200M limit of the EEZ.

145. Thus, the oil concession practice of the Parties between 1979 and 2000 was consistent with the parallel of latitude.

2000–2013

Kenyan practice 2000–2013: the 2000 PSC at Block L5 and 2012 PSC at Block L21

146. From 2000, Kenya’s oil concession practice in the Lamu Basin witnessed a significant increase, in particular in the northern part of the EEZ along the parallel of latitude, as described below. The extension of Kenya’s licensing blocks further offshore into the EEZ coincided with the advancement of deep-water drilling technology together with rising commercial interest.¹⁸⁴

147. In particular, Block L5 was reconfigured to extend eastwards along the parallel of latitude up to 66M (as envisaged in the 1984 map), while a new Block L13 covered both the offshore and the territorial sea also along the parallel. In the outer regions of the EEZ, a new Block L21 extended up to the 200M limit along the parallel. Together with Blocks L22 to L28, the licensing blocks covered the entirety of Kenya’s EEZ,

¹⁸² Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report, National Oil Corporation of Kenya, 1995, Annex 38.

¹⁸³ MS, Vol. III, Annex 19.

¹⁸⁴ See para. 139 above.

with both the Tanzania and Somalia maritime boundaries at the parallel. These blocks are depicted in **Figure 1-24** below.

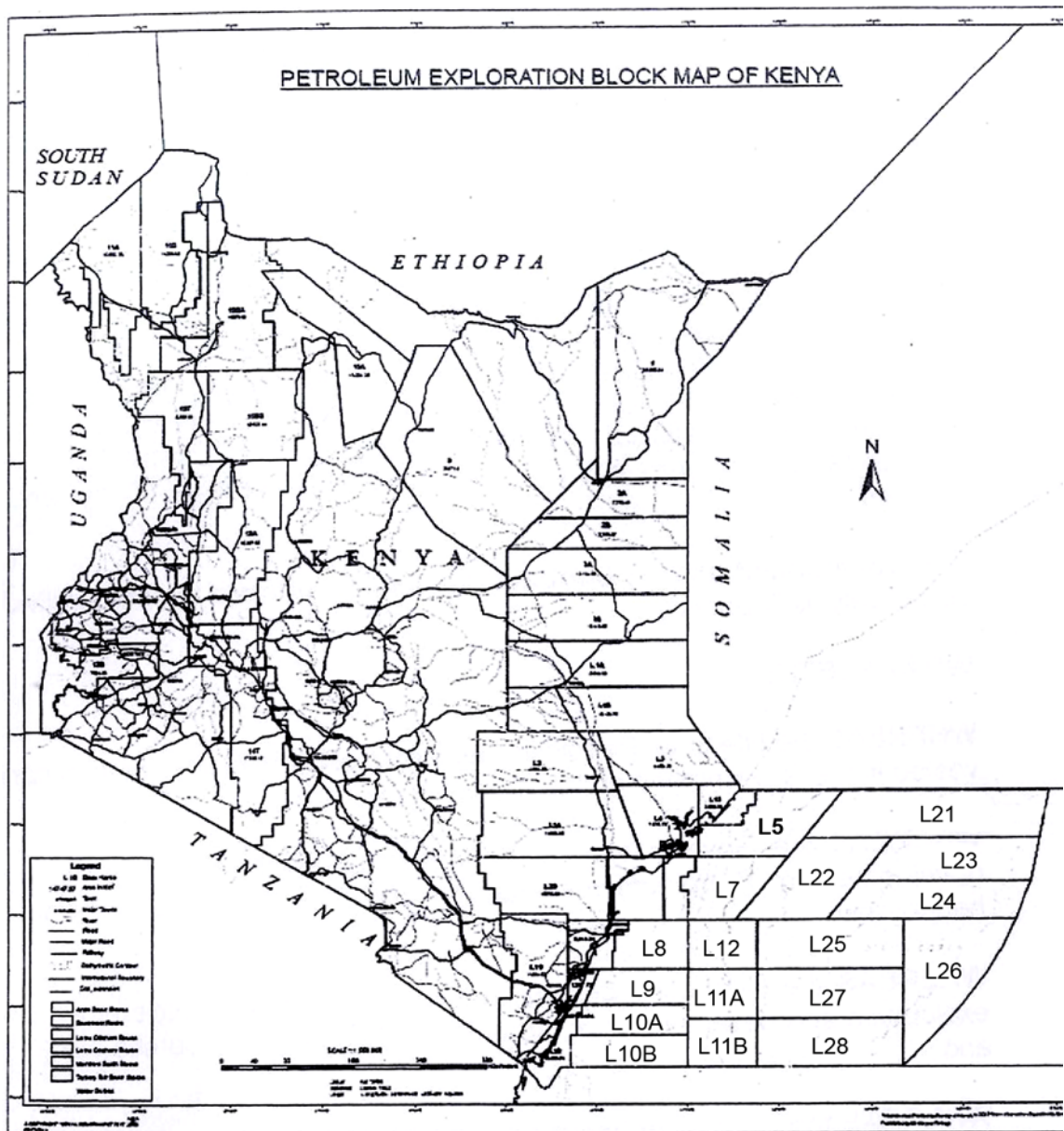


Figure 1-24: Exploration Blocks of Kenya, 2012 (Source: Production Sharing Contract between the Government of the Republic of Kenya and Eni Exploration and Production Holding B.V. relating to Block L21, 29 June 2012, page 4). Block numbers have been enhanced for clarity.

148. A production sharing contract (“PSC”) for Block L5 was concluded on 11 July 2000 between the Government of Kenya and Star Petroleum International (Kenya) Limited.¹⁸⁵

¹⁸⁵ Production Sharing Contract between the Government of the Republic of Kenya and Star Petroleum

149. The preamble recognised that “title to all petroleum resources existing in their natural conditions in Kenya is vested in the Government”, that “the Government wishes to promote and encourage the exploration and development of petroleum resources in and throughout the Contract Area” and that the “Contractor desires to join and assist the Government in accelerating the exploration and development of the potential petroleum resources within the [C]ontract [A]rea”.¹⁸⁶ Appendix A of the PSC sets out the co-ordinates of the Contract Area and Appendix A-2 of the PSC shows the Contract Area on a map with Block L5 in close proximity to the parallel in the 2005 EEZ Proclamation.¹⁸⁷
150. The Contract was widely publicised and led to more interest in the oil industry towards East Africa as “the next big thing”.¹⁸⁸ The inaugural East African Petroleum Conference was held in Nairobi in March 2003, drawing more attention to the area.¹⁸⁹
151. In 2003, Woodside Energy Ltd (“Woodside”)¹⁹⁰ acquired an interest in the permit to Block L5 from Star Petroleum and was elected operator.¹⁹¹ Following its proposal dated June 2006,¹⁹² from December 2006 to January 2007,¹⁹³ Woodside drilled the first exploratory well in Block L5 (Pomboo-1). The Kenya Gazette Notice no. 9800 (1 December 2006) gives the coordinates of Block L5 in close proximity to the parallel of latitude.¹⁹⁴ The location of Pomboo is detailed, with the co-ordinates of WGS84

International (Kenya) Limited for Block L5 Lamu Basin, 11 July 2000, Annex 39. See further MS, Vol. I, para. 8.21.

¹⁸⁶ *Ibid.*, Annex 39, p. 5. The “Contract Area” is defined in the PSC at Part I, Art. 2 as the “area covered by this contract, and described in Appendix ‘A’ and any part thereof not previously surrendered”, p. 7.

¹⁸⁷ *Ibid.*, Annex 39, pp. 47–8.

¹⁸⁸ T. Griffiths, Woodside’s Kenya Deal Raises Hopes: Is East Africa the Next Big Thing?, *African Energy*, June 2003, pp. 4–6, Annex 107.

¹⁸⁹ Griffiths highlights that it “raised several companies’ interest in the region”, *Ibid.*, Annex 107, p. 4.

¹⁹⁰ An Australian oil and gas company. It describes itself as “an explorer, a developer, a producer and supplier of energy”: <http://www.woodside.com.au/Pages/home.aspx>

¹⁹¹ See Woodside Controlled Document, Pomboo-A Well Proposal, Block L-5 Deepwater, Kenya East Africa, June 2006, Annex 110, at para. 3.2: “The original permit was awarded to Star Petroleum in October 2000 who subsequently farmed out equity to Dana Petroleum. Woodside acquired its initial interest in May 2003 and was elected operator. The joint venture has elected to enter into the first additional exploration term in Block L5 and relinquished 25% of the original permit area in this block”. See also para. 3.4. At para. 3.1, it is stated that “[t]he Pomboo prospect is located in Block L5, offshore Kenya, 80km from the Kenyan coast, in a water depth of approximately 2203m (Figure 1). Pomboo is proposed as the first well to be drilled in Block L5. This will fulfill the work program commitment of the 1st additional exploration term in Block L5.”

¹⁹² Woodside Controlled Document, Pomboo-A Well Proposal, Block L-5 Deepwater, Kenya East Africa, June 2006, Annex 110.

¹⁹³ Kenya Offshore Exploration Drilling Blocks L5 and L7, Environmental Audit Report, Woodside, March 2007, Annex 111, para. 1.1.

¹⁹⁴ Republic of Kenya, Gazette Notice no. 9800 of 1 December 2006, The Petroleum (Exploration and Production) Act, Cap. 308, pp. 2861–2875, Annex 7, at p. 2870.

Latitude: 01° 57' 16.28"S Longitude: 41° 56' 27.83"E.¹⁹⁵ This is represented at **Figure 1-25**. Somalia’s Memorial recognizes that “Woodside drilled the first deep-water well off Kenya, the Pomboo-1, on Somalia’s side of the equidistance line”.¹⁹⁶

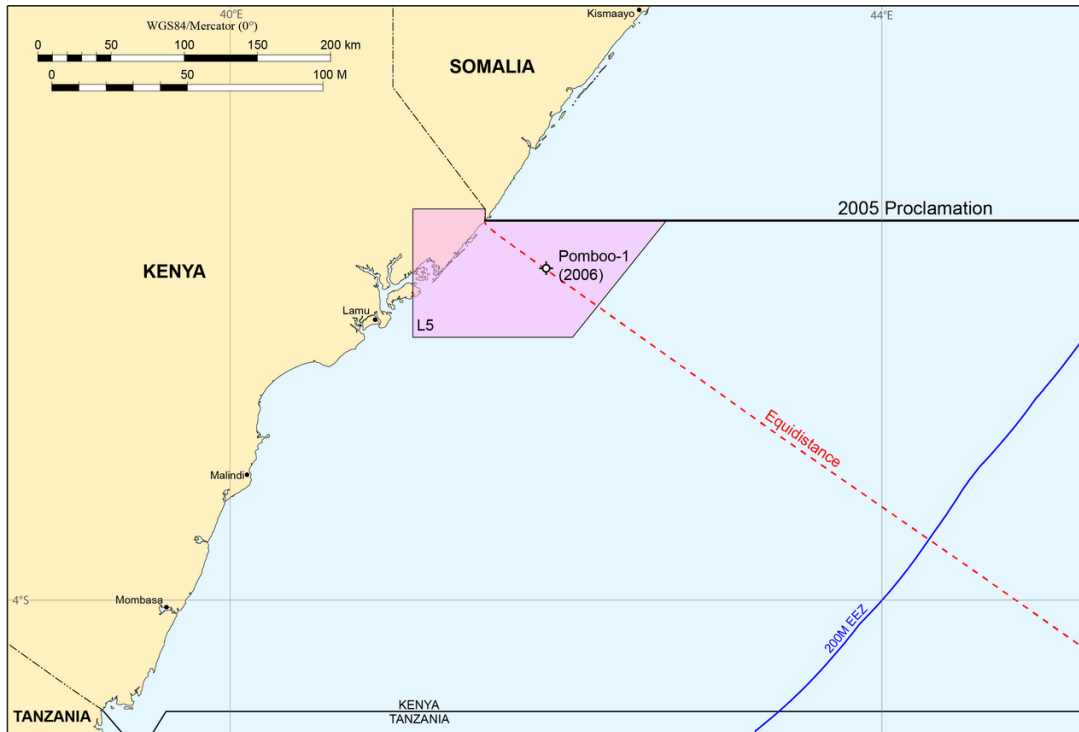


Figure 1-25: Location of Licence Block L5 and Pomboo-1 Exploration Well

152. The drilling was a matter of public notoriety, including through the deliberations of the Kenya National Assembly,¹⁹⁷ as well as being readily available in media and industry sources.¹⁹⁸ By Somalia’s own account, it did not protest this drilling.¹⁹⁹
153. A PSC for Block L21 was concluded on 29 June 2012 between the Government of Kenya and Eni Exploration and Production Holding B.V.²⁰⁰ Part 1B defines the “Contract area” as “Block L21”²⁰¹ and states that it is “described in ‘Appendix A’”.²⁰²

¹⁹⁵ Woodside Controlled Document, Pomboo-A Well Proposal, Block L5 Deepwater, Kenya East Africa, June 2006, Annex 110, Prospect Summary Sheet, p. 6.

¹⁹⁶ MS, Vol. I, para. 8.21.

¹⁹⁷ MS, Vol. I, para. 8.21., fn. 346 i.e. Republic of Kenya, National Assembly, *Official Report* (24 Apr. 2007), p. 858. MS, Vol. III, Annex 26; Republic of Kenya, National Assembly, *Official Report* (8 Aug. 2007), p. 3057. MS, Vol. III, Annex 27.

¹⁹⁸ Woodside Concise Annual Report, 2005, Annex 108, p. 16: “Woodside is working to secure an offshore rig to drill a well in its Kenyan exploration permits before the end of 2006.”; Woodside Spuds Offshore Well; Kenya’s Oil Future to be Determined in 2007, *IHS Same-Day Analysis*, 12 May 2006, Annex 109.

¹⁹⁹ MS, Vol. I, para. 8.21. This paragraph refers to the drilling by Woodside in 2006, but does not refer to any protest.

²⁰⁰ Production Sharing Contract between the Government of the Republic of Kenya and Eni Exploration and Production Holding B.V. relating to Block L21, 29 June 2012, Annex 42.

²⁰¹ *Ibid.*, Annex 42, p. 7.

154. A presentation issued by the Kenyan Ministry of Energy in February 2011 confirms extensive seismic activity in the EEZ up to the parallel of latitude, as depicted in the slide reproduced at **Figure 1-26** below.²⁰³

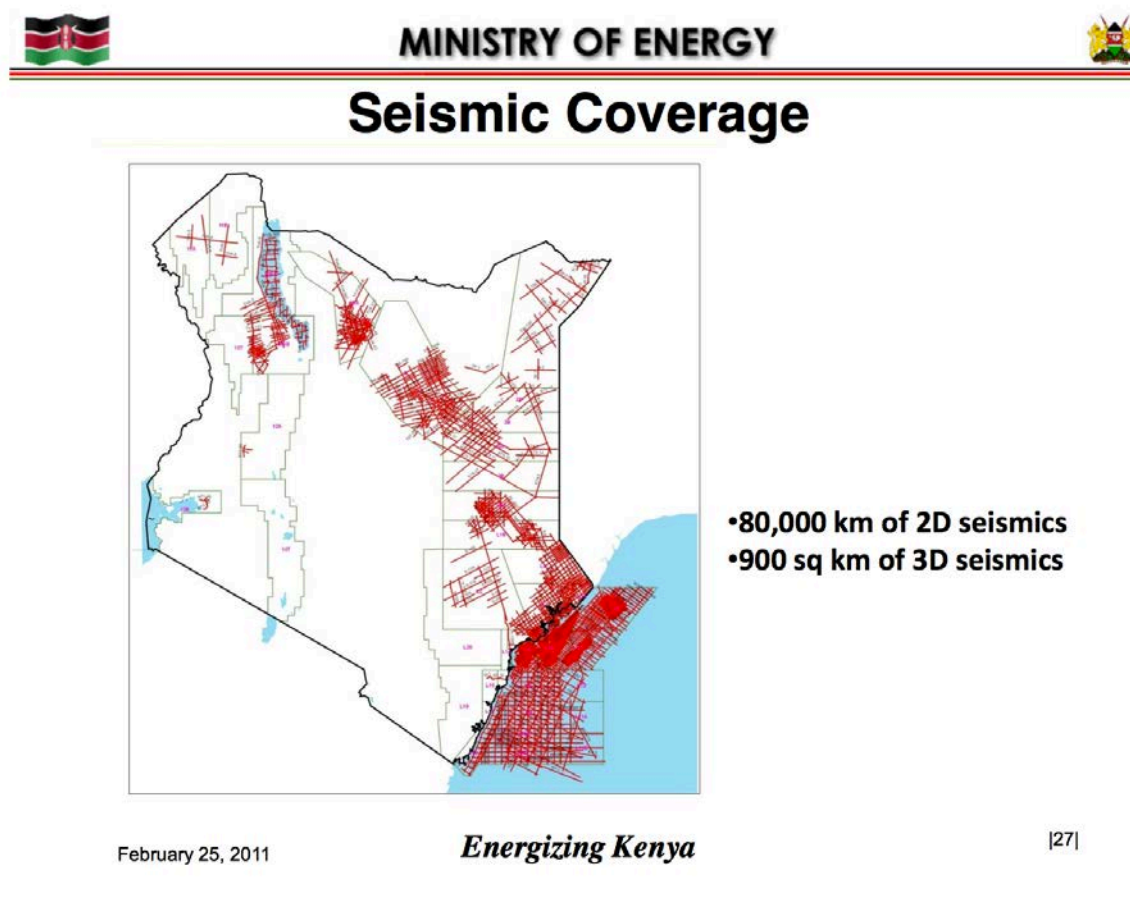


Figure 1-26: Seismic Coverage (2011). (Source: M.M. Heya (Commission for Petroleum Energy, Ministry of Energy Kenya), Overview of Petroleum Exploration in Kenya, (Presentation to 5th East African Petroleum Conference and Exhibition, Kampala 2011), map at p. 27)

Somalia's practice 2000–2013

155. During this period, Somalia's oil concession practice was consistent with Kenya's maritime boundary along the parallel of latitude. **Figure 1-27** depicts a "PetroView" map of African oil concessions prepared by the Petroleum Service Group of Deloitte

²⁰² *Ibid.*, Annex 42, p. 52, Appendix "A" 'The Contract Area — Block L21' lists coordinates for points L96–99 and L79 that outline the Contract area.

²⁰³ M.M. Heya (Commissioner for Petroleum Energy, Ministry of Energy, Kenya), Overview of Petroleum Exploration in Kenya (Presentation to the 5th East African Petroleum Conference and Exhibition, Kampala, Uganda), 25 February 2011, Seismic coverage map at p. 27 (see **Figure 1-26**).

in 2007.²⁰⁴ Notably, Somalia's southernmost block (Jorre) follows the parallel of latitude.

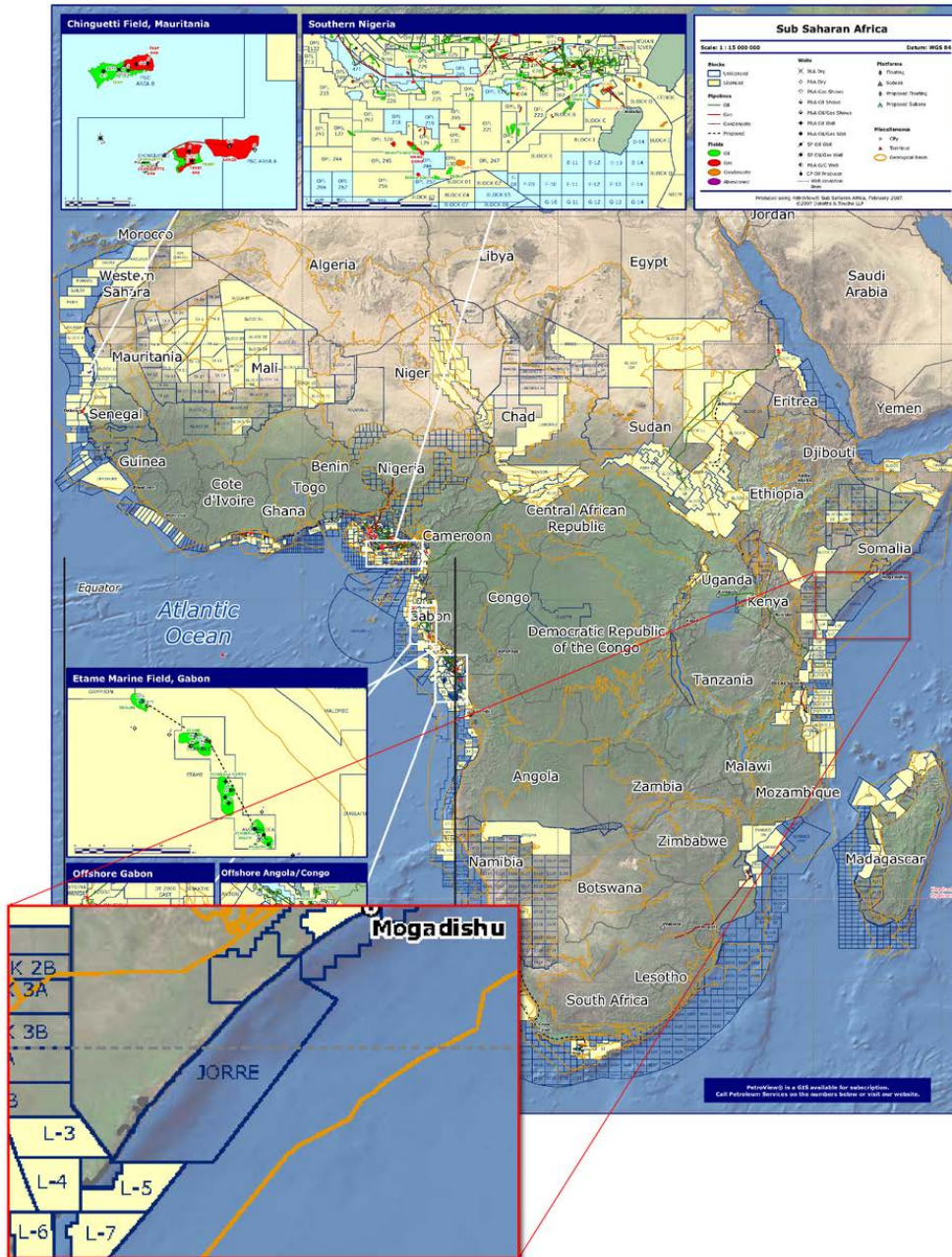


Figure 1-27: African Oil Concession Map — April 2007 (Source: Deloitte ‘PetroView’ North Africa and Sub-Saharan Africa (April 2007))

²⁰⁴ PetroView is a widely respected database and Geographical Information System for spatial analysis of upstream oil and gas industry exploration and production information. It was a part of the Petroleum Service Group (PSG) of Deloitte LLP until acquisition by Wood Mackenzie in March 2015.

156. In 2008 Somalia adopted a Petroleum Law to regulate the development of its oil and gas resources.²⁰⁵ It adopted a policy of preserving the pre-1991 *status quo* by only recognising the validity of oil concession blocks either prior to 30 December 1990 or after 7 August 2008.²⁰⁶
157. In 2010, the Agulhas and Somali Current Large Marine Ecosystems Project (“ASCLME Project”)²⁰⁷ (supported by the Global Environment Facility and the UN) produced an assessment report on Somali coastal livelihoods entitled “Coastal Livelihoods in the Republic of Somalia.”²⁰⁸ The assessment included sector reports “prepared by specialists in that particular sector drawn either from the country or internationally.”²⁰⁹ The sector report on Energy includes a map of the oil and gas activities in Somalia,²¹⁰ reproduced at **Figure 1-28** below, confirming that at its southern limits the Somali Jorre block followed the parallel of latitude.

²⁰⁵ Unlocking Somalia’s Potential, Soma Oil & Gas, Company Presentation, Q2 2016, Annex 114 states that “Petroleum Law enacted by the TFG in 2008” (slide 4). See also *Preparing for Hydrocarbon Exploration Somalia*, Federal Ministry of Petroleum and Mineral Resources, Federal Republic of Somalia, 2016, Annex 51, p. 2 which refers to “amendments” to “Petroleum Law”.

²⁰⁶ The Ministry of Petroleum and Mineral Resources indicates that the “Federal Government’s Petroleum Strategy” was to preserve the pre-1991 *status quo* by respecting the “legacy” oil concessions of the 1980s: Federal Government’s Petroleum Strategy: <http://mopetmr.gov.so/resources-regimes/petroleum-regimes/petroleum-law/> “A very large area within Somalia is the subject of prior petroleum concessions made in the 1980s. These grants were made by the Government of Somalia. The Federal Government of the Republic of Somalia is the successor of the granting government—not any regional government. The companies holding these grants are respectable and capable international oil companies, including BP, Shell, ExxonMobil, ConocoPhillips, ChevronTexaco, ENI, Talisman, Murphy, Canadian Natural Resources and Neste (the ‘Prior IOCs’). The Federal Government is committed to develop a legally and commercially sound strategy in order for Somalia to (1) honour prior concessions with reputable companies, while (2) prompting those companies to recommence performance of those concessions or else relinquish them”. In that context, Article 48 of the Petroleum Law contained a “Transitional Provision” that distinguished between “Prior Grants” (rights granted by the Somali Democratic Republic on or before 30 December 1990) and “Post-1990 Grants” (rights granted after that date). As to “Prior Grants”, section 48.1.1 of the Petroleum Law provided “Prior Contractors” with the right of conversion of concessions that had been suspended under *force majeure* into Production Sharing Agreements. As to “Post-1990 Grants”, section 48.4.1 of the Petroleum Law provided that “Effective on the date of the coming into force of this Law: any right to conduct Petroleum Operations in Somalia granted after December 30, 1990 shall terminate and cease to be a binding obligation on the Government” (based on text of Law available online:

http://www.somalitalk.com/oil/Somalia_oil_Law.pdf)

²⁰⁷ The Agulhas and Somali Current Large Marine Ecosystems Project (“ASCLME Project”) is part of a multi-project, multi-agency programme — The Agulhas and Somali Current Large Marine Ecosystem Programme (“ASCLMEs”) supported by the Global Environment Facility (“GEF”), with UNEP as Implementation Agency under the execution responsibility of the UN Office of Project Services (“UNOPS”). The ASCLME Project was completed on 31 March 2014. The website at www.asclme.org/country-profiles.html states that the ASCLME Project is a partnership between various international donors and the nine countries of the western Indian Ocean region (the Comoros, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, South Africa, Tanzania) (emphasis added).

²⁰⁸ ASCLME Project, 2010, Annex 94.

²⁰⁹ *Ibid.*, Annex 94, p. ii.

²¹⁰ *Ibid.*, Annex 94, pp. 48–9.

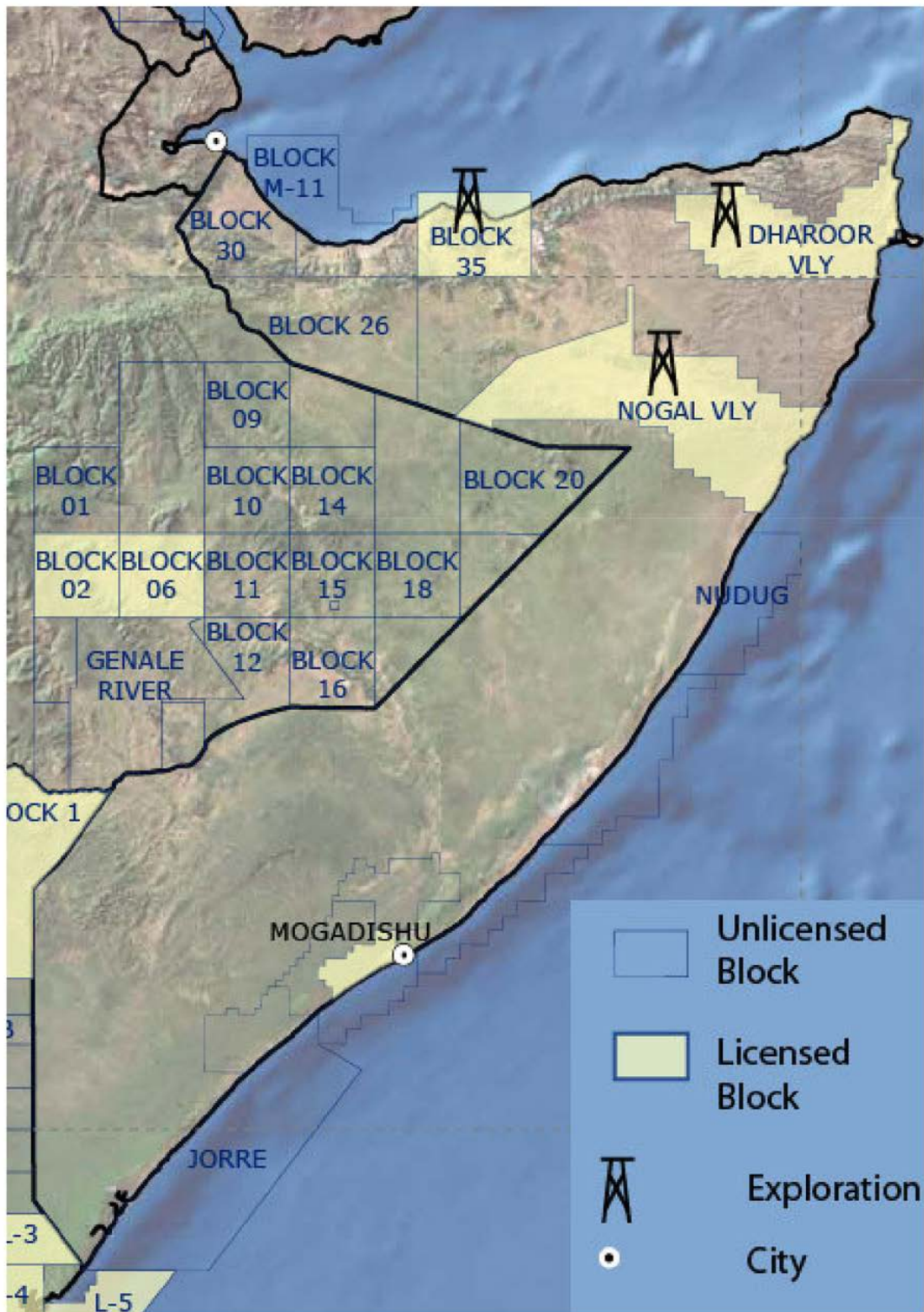
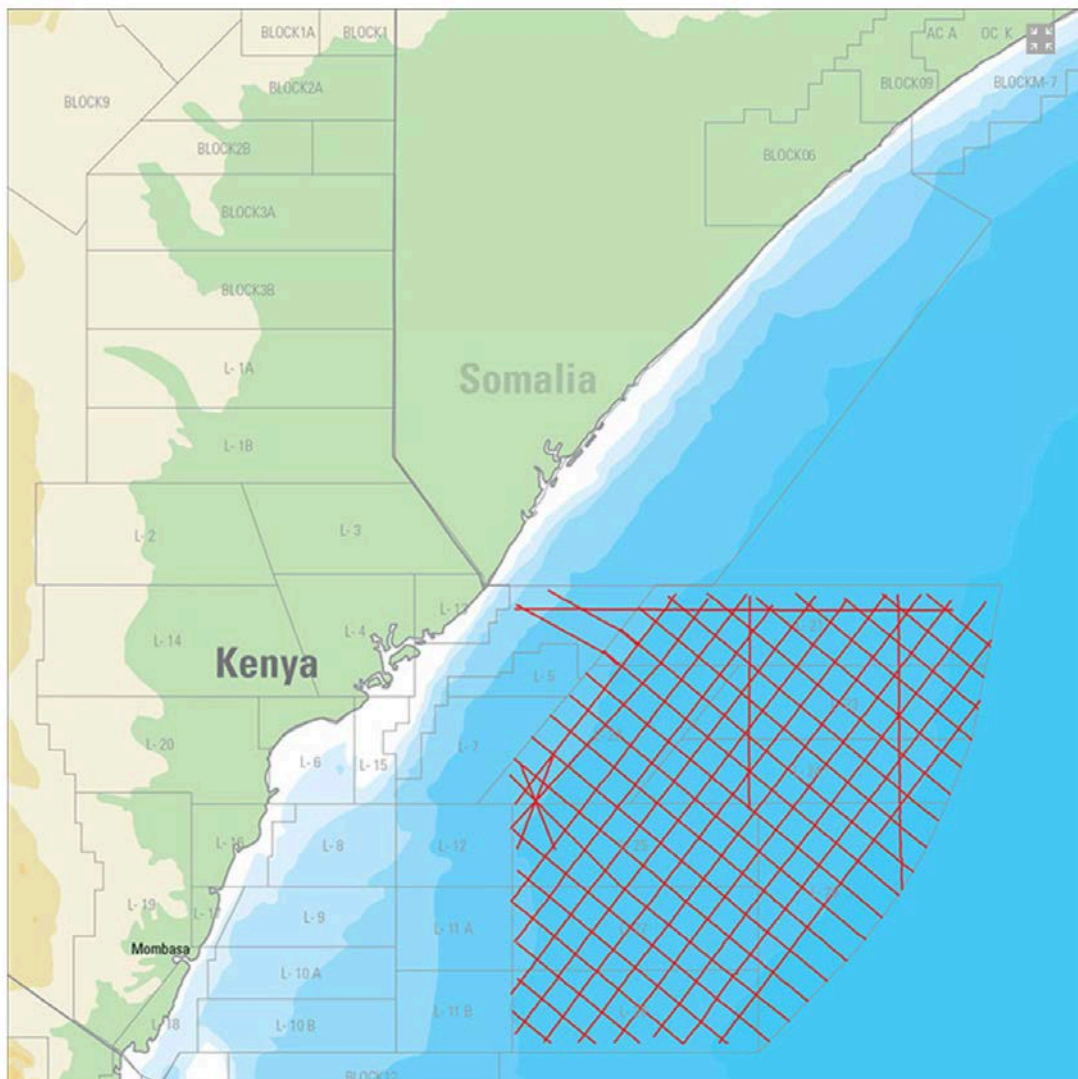


Figure 1-28: Map of the Oil and Gas Activities in Somalia (adapted from Deloitte, 2009). (Source: Coastal Livelihoods in the Republic of Somalia, Agulhas and Somali Current Large Marine Ecosystems Project, Part V, Figure 1)

158. Similarly, an industry map of the Lamu Basin Seismic Survey produced by Schlumberger in 2013 also depicts the boundary of Somalia's Jorre block at the

parallel of latitude (see **Figure 1-29** below).²¹¹ This is further confirmed by Somalia's issuance of its first exploration license in that same block in 2013.



More than 9,000 km of high-res 2D multichannel seismic data aids geological understanding of the largely underexplored Deepwater Lamu basin.

Figure 1-29: 2013 Schlumberger Lamu Basin Seismic Survey. (Source: Multichannel Latest Projects: Kenya Deepwater 2D Multichannel Seismic Survey, Schlumberger)

159. In August 2013, Somalia concluded a Seismic Option Agreement (“SOA”) with Soma Oil & Gas Exploration (“Soma Oil”)²¹² to conduct offshore exploration in the “Jorre” Evaluation Area off the Jubaland coast.²¹³ As described in the 2014 Report of the

²¹¹ http://www.multichannel.slb.com/latest-projects/africa/kenya_2d.aspx

²¹² A private UK company founded in 2013 to pursue oil and gas exploration opportunities in Somalia, Soma Oil & Gas, Website, Home Page, last accessed 21 November 2017 and available at <http://www.somaoilandgas.com>

²¹³ Unlocking Somalia's Potential, Eastern African Oil, Gas — LNG Energy Conference, Soma Oil & Gas Presentation, Nairobi, Kenya, 29–30 April 2014, Annex 112, p. 13 (“Somali Minister of National Resources Abdirizak Omar Mohamed shakes hands with Lord Howard of Lympne CH, QC after signing the Seismic

UN Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013):²¹⁴

In August 2013, Soma Oil and Gas Exploration, a United Kingdom-registered company created in 2013 and chaired by the former leader of the United Kingdom Conservative Party, Lord Michael Howard, announced an agreement on 6 August 2013 signed with the FGS [Federal Government of Somalia] to conduct seismic surveys in Somalia's territorial waters and to collate and process historic seismic data, which would be placed into a data room controlled by the FGS. In return, Soma Oil would receive the right to apply for up to 12 oil licenses covering a maximum of 60,000 square kilometres of territory in Somalia.²¹⁵

160. The seismic testing was conducted the following year, during the first half of 2014.²¹⁶ At its southern limit, the southern boundary of the SOA extended to the parallel of latitude, consistent with Kenya's EEZ Proclamation. This is shown by graphics included in a presentation by Soma Oil in 2014 (for the Eastern African Oil, Gas — LNG Energy Conference in Nairobi, Kenya held on 29–30 April 2014) (“the 2014 Soma Oil Presentation”).²¹⁷
161. Two graphics in the 2014 Soma Oil Presentation are particularly instructive. They are entitled “South Somalia Offshore vs North Sea” and “Hydrocarbons in South Somalia and Adjacent Areas” respectively, and are reproduced at **Figures 1-30** and **1-31** below.²¹⁸ As indicated by the blue dash line in both maps, at its southern limit, the “Soma Oil & Gas Offshore Evaluation Area” follows the parallel of latitude. Both

Option Agreement in Mogadishu on August 6, 2013”). See Seismic Option Agreement between the Federal Republic of Somalia and Soma Oil & Gas Exploration Limited, 6 August 2013, available at <http://mof.gov.so/en/wp-content/uploads/2016/08/SOMA-Seismic-Option-Agreement-August-2013.pdf>

²¹⁴ The UN Monitoring Group's mandate is to, *inter alia*, monitor and investigate the implementation of the measures imposed on Somalia and Eritrea (arms embargoes, travel bans, asset freezes, and Somali charcoal ban); assess actions taken by Somali authorities, as well as Member States, in particular, those in the region, fully to implement the arms embargo regime; investigate, in coordination with relevant international agencies, all activities, including in the financial, maritime and other sectors, which generate revenues used to commit violations of the Somalia and Eritrea arms embargoes; investigate any seaport operations in Somalia that may generate revenue for Al-Shabaab. <https://www.un.org/sc/suborg/en/sanctions/751/work-and-mandate>

²¹⁵ Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, 13 October 2014, Annex 5.1: Illustrative overview of contracts, pp. 192–7, Annex 99, at p. 192 (para. 2. See further paras. 3–5).

²¹⁶ On 3 February 2014, the company announced it had signed a seismic contract with Seabird Exploration to cover 20,000 [square] kilometres of [2D] seismic data off the coast of Somalia (Soma Oil & Gas: Unlocking Somalia's Potential, Eastern African Oil, Gas — LNG Energy Conference, Nairobi, Kenya, 29–30 April 2014, Annex 112, p. 14). In June 2014, the company announced it had completed 20,500 square kilometres of seismic data acquisition and that processing of the data would run until late 2014, see Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2111 (2013), S/2014/726, 13 October 2014, Annex 5.1: Illustrative overview of contracts, pp. 192–7, Annex 99, at p. 192, para. 4.

²¹⁷ Soma Oil & Gas: Unlocking Somalia's Potential, Eastern African Oil, Gas — LNG Energy Conference, Nairobi, Kenya, 29–30 April 2014, Annex 112.

²¹⁸ *Ibid.*, Annex 112, pp. 10–1.

maps also indicate the Kenyan Blocks L13, L5 and L21 issued from 2000 onwards at the same line.

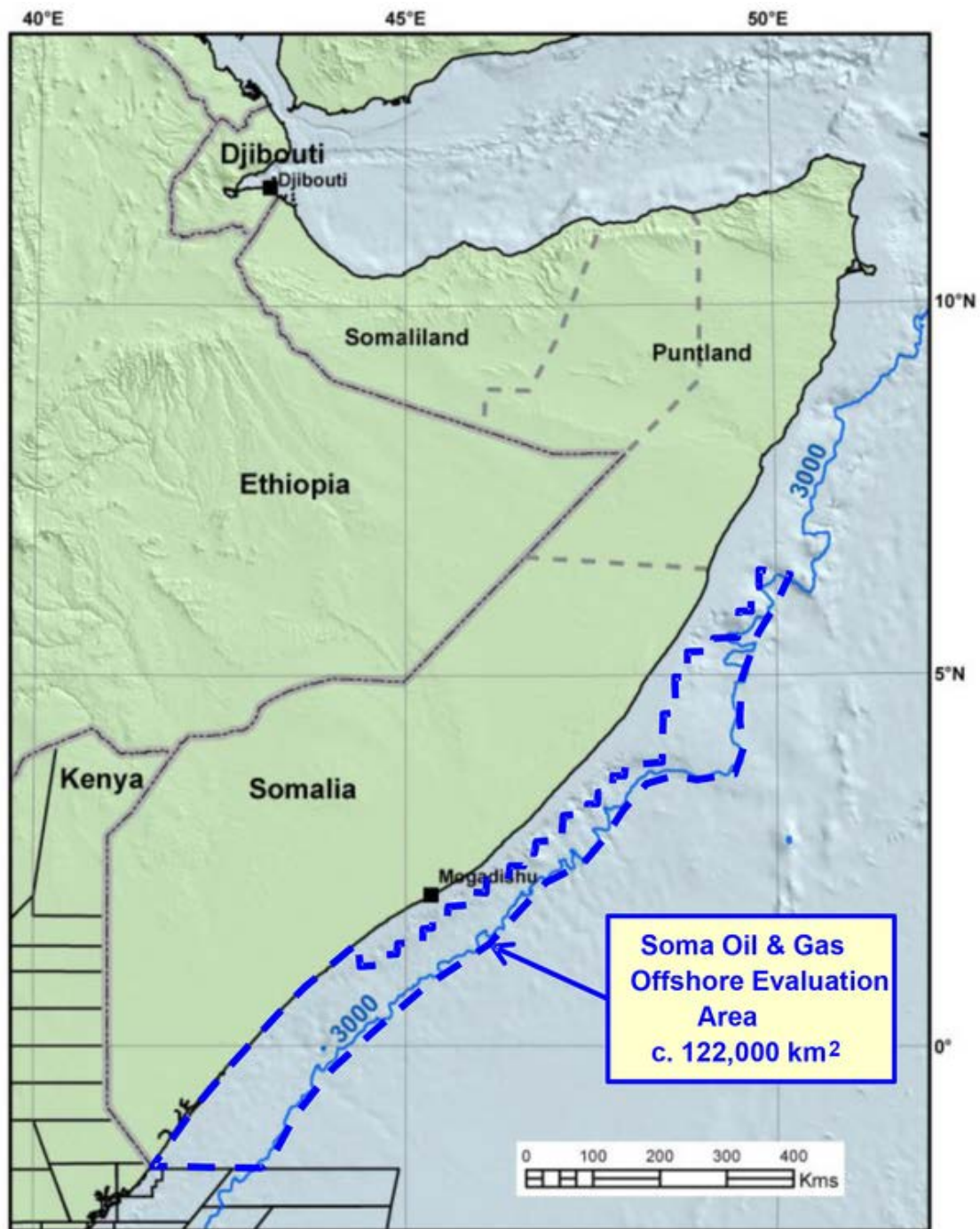


Figure 1-30: Soma Oil and Gas Offshore Evaluation Area. (Source: Soma Oil. Unlocking Somalia's Potential Eastern African Oil, Gas — LNG Energy Conference, Nairobi, Kenya, 29–30 April 2014, Nairobi, Kenya, p. 10)

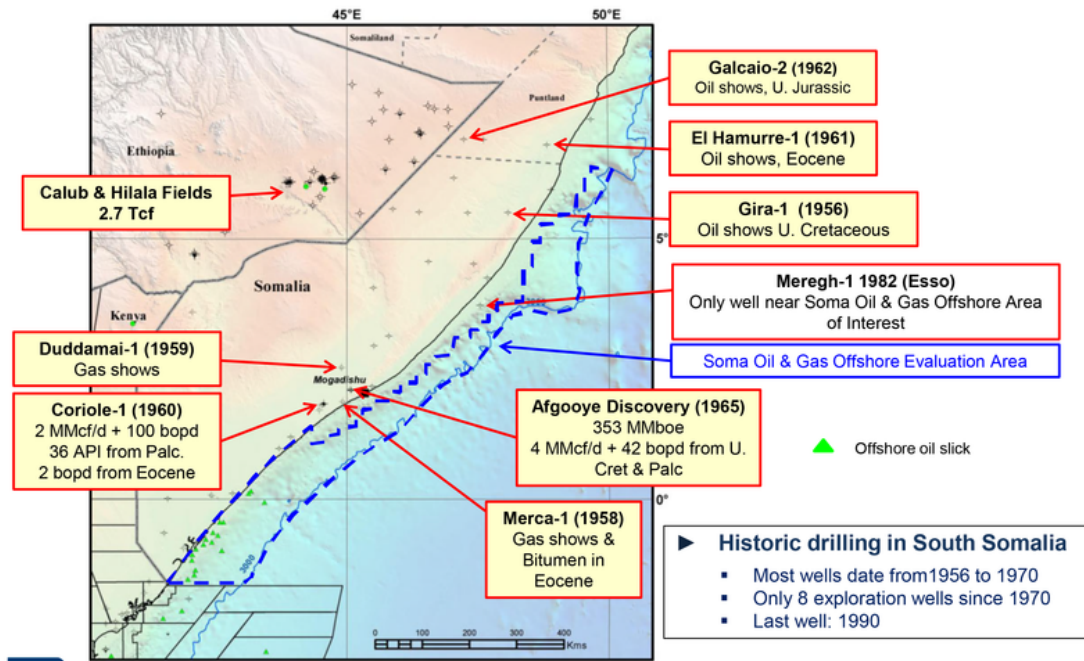


Figure 1-31: Hydrocarbons in South Somalia and Adjacent Areas. (Source: Soma Oil. Unlocking Somalia’s Potential Eastern African Oil, Gas — LNG Energy Conference, Nairobi, Kenya, 29–30 April 2014, p. 11)

162. The southern limit of Soma Oil’s Offshore Evaluation Area at the parallel is also confirmed in a 2016 report by the Somali Ministry of Petroleum and Mineral Resources entitled “Preparing for Hydrocarbon Exploration Somalia 2016”.²¹⁹ It was prepared with the “intention to hold Somalia’s first ever offshore Oil and Gas Licensing Round, set to open in the first half 2017”.²²⁰ At p. 8 there is a graphic entitled “Multi-client seismic coverage offshore Somalia, offered by Spectrum Geo Ltd” which is reproduced at **Figure 1-32** below. The map demonstrates that the southern limit of Soma Oil’s seismic testing was at the parallel of latitude.²²¹

²¹⁹ *Preparing for Hydrocarbon Exploration Somalia*, Federal Ministry of Petroleum and Mineral Resources, Federal Republic of Somalia, 2016, Annex 51.

²²⁰ *Ibid.*, Annex 51, p. 2.

²²¹ Somalia’s Memorial contains a passing reference in footnote 95 (MS, Vol. I, para. 3.21.) to “an offshore block the limits of which track the equidistance line”. This was a 2001 twelve-month Technical Evaluation Agreement (“TEA”) between the newly established TNG and the French oil company TotalFinaElf. The assertion that it tracked an equidistance line is inconsistent with the other depictions of the same “Jorre” TEA at the parallel of latitude, including the 2013 Soma Oil SOA. Furthermore, the 2001 preliminary contract was “to explore blocks off the southern coast between Merca and Kismaayo for possible crude petroleum reserves” well to the north of the maritime boundary with Kenya (U.S. Trade and Investment with Sub-Saharan Africa, United States International Trade Commission, Third Annual Report, Investigation No. 332-415, USITC Publication 3552, December 2002, Annex 56, p. 248). In fact, the TEA was quickly abandoned after thousands of demonstrators took to the streets of Baidoa in south-central Somalia to protest the deal, accusing Total of indirectly fuelling civil war (Demonstrators Protest Exploration Deal in Somalia, *World Oil*, March 2001, Annex 106). In any event, pursuant to the Somali 2008 Petroleum Law, the abandoned TEA would constitute an invalid “post-1990 Grant”.

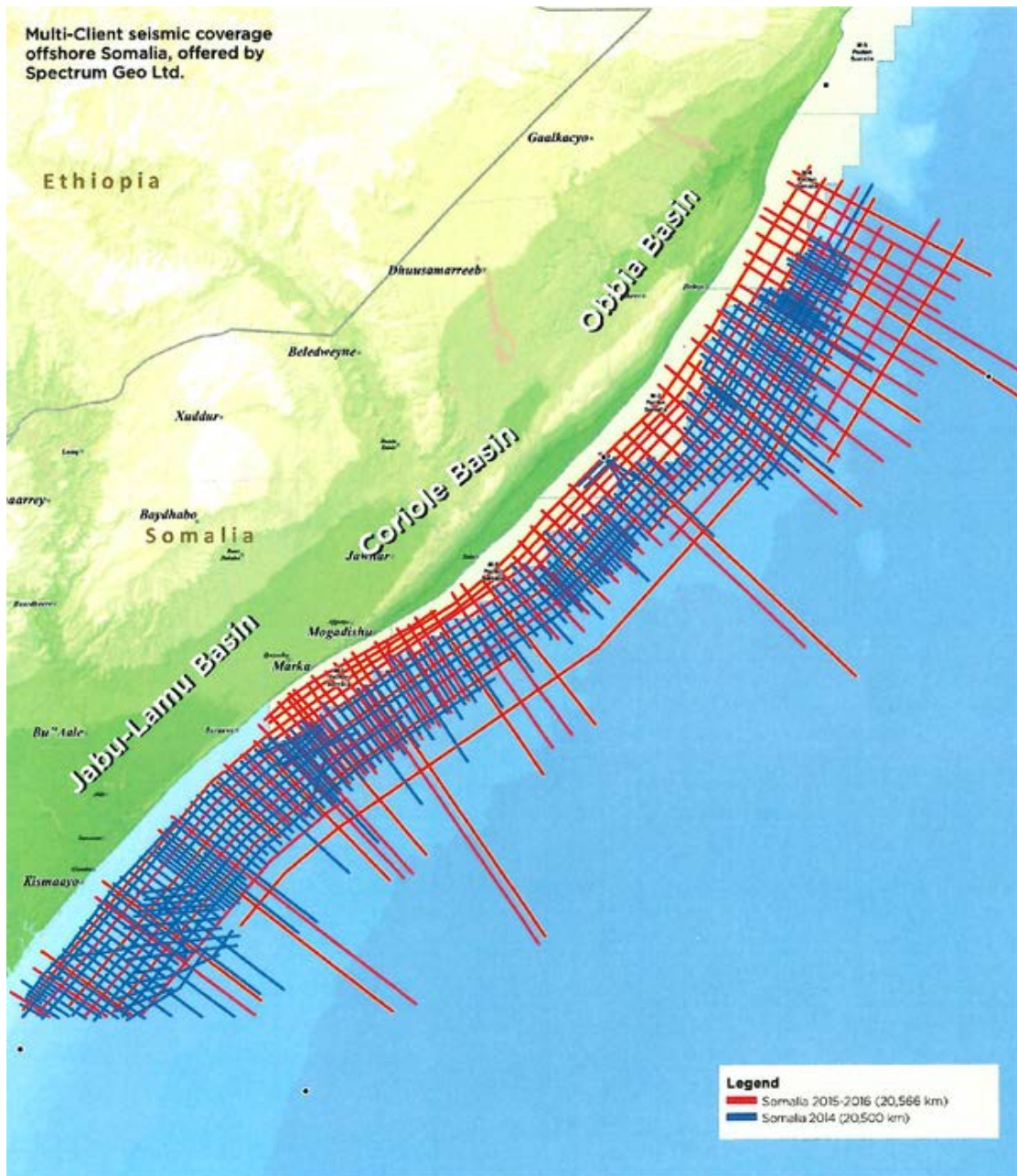


Figure 1-32: Multi-client seismic coverage offshore Somalia, offered by Spectrum Geo Ltd. Source: Somalia’s Ministry of Petroleum and Mineral Resources, *Preparing for Hydrocarbon Exploration Somalia 2016*, p. 8

163. **Figure 1-32** is also consistent with the Kenyan Ministry of Energy’s Seismic Coverage Map of 2011 (see **Figure 1-26** above) showing that all seismic testing up to the parallel line was under exploration licenses issued by Kenya.
164. In summary, the Parties’ oil concession practice from 2000 to 2013 is consistent with the maritime boundary at the parallel of latitude. It was only in 2014, just before commencing proceedings before the Court, that Somalia departed from this practice

and claimed an equidistance line, and extended Soma Oil's Evaluation Area south of the parallel of latitude, as addressed in the following section.

G. 2014: Somalia's First Official Claim to an Equidistance Line

165. This section addresses the events of 2014, notably Somalia's first protest against Kenya's maritime boundary at the parallel of latitude (in the context of its objection to Kenya's CLCS submission contrary to the 2009 MOU), and Somalia's first claim of an equidistance line.
166. As discussed below, in January 2014, Kenya made another official notification of its claim to the parallel of latitude as the maritime boundary (section 1). In February 2014, in connection with its rejection of the MOU, Somalia made its first formal objection to the consideration of Kenya's submission by the CLCS and protested the maritime boundary along a parallel of latitude in disregard of the Parties' consistent conduct for 35 years (section 2). That protest coincided with the extension by Somalia in May 2014 of Soma Oil's Offshore Evaluation Area south of the parallel of latitude in controversial circumstances (section 3). Following Somalia's EEZ Proclamation and CLCS Submission claiming an equidistance line in June–July 2014 (section 4), in August 2014 Somalia initiated the present proceedings before the Court (section 5).

1. January 2014: Fourth notification by Kenya

167. On 9 January 2014, Kenya transmitted a *Note Verbale* to the UN Secretary-General “to convey general information on Kenya's terrestrial and maritime boundaries.” Attached to the letter was the “official terrestrial map of Kenya” in regard to the land boundary.²²² In regard to maritime boundaries, the letter noted that:

... in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Kenya proclaimed her Exclusive Economic Zone (EEZ) through a Presidential Proclamation of June 9, 2005. The charts and coordinates of the Proclamation were deposited with the Secretary-General of the United Nations, pursuant to Article 16, Paragraph 2, and Article 75, Paragraph 2 of UNCLOS, and were subsequently published under Law of the Sea Bulletin No. 16 of 2006. The Territorial Sea/Economic Zone map of Kenya is also herewith attached.

²²² MS, Vol. III, Annex 40.

168. That map depicted the maritime boundary at the parallel of latitude in the 2005 EEZ Proclamation.²²³ Kenya requested the UN Secretary-General:

... to bring this general information to all States and urge them to bring the same to all interested entities wishing to undertake activities within the confines of Kenya's EEZ. The charts and coordinates are attached to this document for reference and can also be found on the United Nations website. Kenya therefore, wishes to inform that any activity within the proclaimed area must be with express authority of the Government of Kenya.

169. The letter further confirmed that: "Kenya, in accordance with the Convention has exercised and will continue to exercise sovereignty and jurisdiction over the said area." Somalia did not protest this fourth notice by Kenya.

170. Instead, a month later, by letter dated 4 February 2014 from the Minister of Foreign Affairs of Somalia to the UN Secretary-General, Somalia issued its first formal protest against the maritime boundary at the parallel of latitude in connection with Kenya's CLCS submission.²²⁴ By that letter, Somalia repudiated the MOU and objected to consideration of Kenya's submission. Unlike Somalia's earlier letter, transmitted to the UN Secretary-General by letter dated 2 March 2010, requesting that the MOU be treated as "non-actionable", the 2014 letter asserted for the first time that, in addition to a purported requirement of the MOU's ratification by the Somali Parliament, Somalia objected to Kenya's maritime boundary claim. The letter stated that Somalia had "expressly rejected Kenya's claim" and that:

Based on the exaggerated nature of Kenya's claim, its lack of legal foundation and its severe prejudice to Somalia both within and beyond 200 M, Somalia formally objects to consideration of Kenya's submission by the Commission on the Limits of the Continental Shelf. In view of the Commission's consistent practice and in conformity with its regulations, of refraining from considering or making recommendations in regard to submissions when a dispute exists and one of the parties to the dispute submits an objection, Somalia expects that, faced with its objection, the Commission will decline to consider or make recommendations with regard to Kenya's submission.²²⁵

²²³ MS, Vol. III, Annex 40.

²²⁴ *Judgment on Preliminary Objections, I.C.J. Rep 2017*, paras. 19, 38 and 46.

²²⁵ MS, Vol. III, Annex 48, para. 4.

171. Two aspects of this letter are significant. First, there is no mention of an equidistant maritime boundary. Second, there is no indication in the letter (or in the Memorial) as to when Somalia purportedly “expressly rejected Kenya’s claim” prior to 2014.²²⁶
172. There is no evidence that Somalia “expressly rejected” Kenya’s maritime boundary claim before 2014. As noted above, in a letter dated 8 November 2017, the UN Office of Legal Affairs stated that its own “extensive research” in its archives uncovered no protest or other communication concerning the 1979 and 2005 EEZ Proclamations.²²⁷
173. Furthermore, the Cabinet Secretary in charge of the Ministry of Foreign Affairs of Kenya has solemnly declared as follows:

I can confirm based on the diligent search conducted at the Ministry of Foreign Affairs archives, that in the period 1979 to early 2014, there was no official protest by the Somalia Government addressed to the Republic of Kenya against the Maritime Boundary proclaimed in the Presidential Proclamation of 28th February 1979 or the Presidential Proclamation of 9th June 2005.²²⁸

2. March 2014: Somalia’s first claim to an equidistance line

174. In view of Somalia’s sudden objection to Kenya’s CLCS submission on 4 February 2014, the Parties held their first bilateral meeting on 26–27 March 2014 in Nairobi, at Kenya’s initiative.²²⁹ A Joint Report contained a detailed record of the discussions which was signed by the Head of Delegation of each State.²³⁰ It was “agreed that these minutes provide an accurate reflection of the discussions which took place in this meeting”. The Joint Report indicates that from the outset: “The Somali delegation objected to the proposed discussion of the purported Memorandum of Understanding

²²⁶ Somalia’s assertion in this regard should be considered in light of other incorrect assertions made in that same letter, including the statement that the Somali Minister signing the MOU in 2009 did not have full powers and that he orally communicated the requirement of prior ratification by the Somali Parliament as a precondition for the MOU’s entry into force: KPO, paras. 95–6; *Judgment on Preliminary Objections, I.C.J. Rep 2017*, paras. 43–7.

²²⁷ See paras. 65–7.

²²⁸ Witness Statement of the Cabinet Secretary, Ministry of Foreign Affairs, Republic of Kenya, Amb. (Dr.) Amina C. Mohamed, EGH, CAV, 18 October 2017, Annex 49. Somalia’s Memorial does not point to any prior protests. In fact, the Judgment on Preliminary Objections notes that Somalia abandoned claims made in its February 2014 letter, such as the assertion that the Minister signing the MOU did not possess “full powers” (*I.C.J. Rep 2017*, paras. 43, 46–9).

²²⁹ See MS, Vol. III, Annex 31; Federal Republic of Somalia, Report on the Meeting between The Federal Republic of Somalia and The Republic of Kenya On Maritime Boundary Dispute, Nairobi, Kenya, 26–27 Mar. 2014 (1 Apr. 2014) which records that the meeting was convened “At the request of the Kenyan Government” (MS, Vol. III, Annex 24).

²³⁰ MS, Vol. III, Annex 31.

and requested its removal from the proposed agenda.”²³¹ The Somali delegation then immediately: “requested an explanation as to why Kenya had departed from the ‘equidistance’ methodology adopted by the Kenyan Government in the 1972 Territorial Waters Act [as revised in 1977] and the 1989 Maritime Zones Act to the 2005 Presidential Proclamation.”

175. The Joint Report records Kenya’s response to Somalia, which confirms its prolonged and principled claim to a maritime boundary at the parallel of latitude:²³²

The Kenyan delegation informed Somali [*sic*] that in 1967 Kenya made her first Proclamation on her territorial sea in accordance with UNCLOS II [i.e. the 1958 Convention on the Territorial Sea] which then provided that territorial sea extended up to 3 Nautical miles and the method for determining the territorial sea then was the equidistance line up to 3 nautical miles. The revision of UNCLOS II to UNCLOS III [i.e. the 1982 Convention] expanded available maritime zones for coastal States by extending the territorial sea from 3 nautical miles to 12 nautical miles and creating the Exclusive Economic zones among others.

The 1979 Proclamation therefore was in the spirit of the discussions and negotiations which were underway on UNCLOS III and State practice where States were making Proclamations on the Exclusive Economic Zone. The Territorial waters Act was subsequently repealed in 1989 and replaced by the Maritime Zones Act which domesticated the UNCLOS III.

The 1979 Proclamation adopted a parallel of latitude as the boundary line and at no time did Kenya in her Proclamation either in 1979 and 2005 adopt the equidistance methodology to determine the maritime boundary. The review of the 1979 Proclamation was essentially to review the base points and the baseline and to review the coordinates of the final base point bordering Somali[a] [*sic*].

176. Kenya added that in adopting the parallel of latitude:

The criteria that was considered by Kenya was the provisions in UNCLOS relating to special circumstances and equitable solution as well as the established jurisprudence and State practice regarding determination of maritime boundaries.²³³

177. Somalia’s response (consistent with its Memorial) was to simply ignore the 1979 EEZ Proclamation and to also ignore the distinction between “territorial waters” and the EEZ in Kenya’s 1989 Act:

²³¹ MS, Vol. III, Annex 31, p. 1.

²³² MS, Vol. III, Annex 31, pp. 2–3.

²³³ MS, Vol. III, Annex 31, p. 5.

The Somali delegation was not satisfied with the explanation provided by the Kenyan delegation on its departure in the 2005 Proclamation from the “equidistance” methodology ... in the Maritime Zones Act of 1989 ...²³⁴

178. Furthermore, “Somali’s [*sic*] position was that a unilateral declaration of maritime boundary by a country is invalid under international law.”²³⁵ Somalia simply ignored its prolonged acquiescence from 1979 to 2014 (again, consistent with its Memorial), and asserted instead that Kenya’s maritime claim “produces a grossly disproportionate division of the disputed area” and is “perceived as an African country taking advantage of a sisterly country that has been ravaged by a civil war”.²³⁶

179. In response to Somalia’s assertions:

The Kenyan delegation informed that the Government of Kenya established her maritime zones in accordance with UNCLOS and taking the initiative by the two countries to initiate discussion on the same and finalizing on an agreed maritime boundary. At no time has the Kenyan Government taken advantage of the unfortunate situation in Somali. Further, and to show the good faith the MoU that had been entered into by the two countries expressly recognized that there is a possibility of an overlapping claim between the two countries and indicated that consideration of either country’s outer limits of the continental shelf was not going to jeopardize future discussions on the maritime boundary. The sentiments expressed by Somali in rejecting the MoU were never brought to the attention of Kenya and Kenya only learnt about the objections through the information submitted to the United Nations. Kenya as a country has never had any intention of encroaching into the territory of Somali and what was done is well within international law.

180. Kenya’s record of its presentation at the meeting states that: “Previously, Kenya has reliably picked hints that Somalia prefers median lines.”²³⁷ This demonstrates that as at 2014, Kenya had not received anything more than “hints” of a Somali intention to depart from the parallel of latitude as the maritime boundary.

3. Kenya’s security concerns regarding its boundary with Somalia

181. The sudden rejection of the maritime boundary at the parallel of latitude was also connected to Somalia’s historical irredentist claims to Kenyan territory, dating back to the 1960s Shifta War. Somalia’s own report of the March 2014 meeting indicates that

²³⁴ MS, Vol. III, Annex 31, p. 3.

²³⁵ MS, Vol. III, Annex 31, p. 5.

²³⁶ MS, Vol. III, Annex 31, p. 5.

²³⁷ MS, Vol. III, Annex 31 (Power Point presentation at p. 2, slide 10).

during the negotiations, Somalia cast doubt on the 1924-33 Anglo-Italian Agreement establishing the land boundary:

The Somali delegation stated that its agreement to BP29 as the LBT should not imply any explicit or implicit position of the Somali Government in regards to the Anglo-Italian Treaty of 1933.²³⁸

182. The Joint Report of the meeting further confirms that Somalia was reserving its position on the 1924–33 Agreement and agreed to BP29 “solely” as the starting point for a maritime boundary.²³⁹
183. Somalia’s ambiguity on the land boundary, together with the absence of Somalia’s maritime enforcement capacity, constitutes an existential security threat to Kenya. As set out in the Preliminary Objections, Kenya is facing fundamental threats from Al Shabaab. That terrorist group that has been linked to piracy, human trafficking, the proliferation of small arms, and launched numerous lethal attacks from Somalia, both from land and sea, killing hundreds of Kenyan civilians, especially in the Kenyan land territories bordering Somalia. The terrorist threat is heightened by Somalia’s manifest inability to control her land and maritime territory. In particular, towns liberated by AMISOM and handed over to the Somali National Army have reverted to Al Shabaab²⁴⁰ thereby creating lawlessness and insecurity on Kenya’s border, resulting in serious threats both at land and at sea. These complex concerns have been the subject of on-going bilateral discussions, and help explain Kenya’s long-standing policy of a negotiated solution to boundary issues with Somalia.
184. Al-Shabaab’s strategy bears resemblance to historical irredentist claims to a “Greater Somalia”. It has a long-term strategic objective of creating a Caliphate of the Wahhabi Islamic Sect in the Horn of Africa region that is inhabited by people of Somali origin.²⁴¹ This would constitute an Islamic State of ethnic Somali in Somalia, Kenya, Ethiopia and Djibouti. Selective attacks in Kenya on key security installations and

²³⁸ MS, Vol. III, Annex 24, p. 2.

²³⁹ MS, Vol. III, Annex 31, pp. 3–4: “The delegations discussed and agreed to rely on Pillar BP29 as reflected in the 1924 Anglo-Italian Treaty to constitute the starting point solely for the purposes of establishing a maritime boundary pending confirmation of the coordinates.” (Emphasis added.)

²⁴⁰ Exit Strategy Challenges for the AU Mission in Somalia, *The Heritage Institute for Policy Studies*, February 2016, Annex 113 and available at www.heritageinstitute.org/.../Exit-Strategy-Challenges-for-the-AU-Mission-in-Somalia

²⁴¹ Operations Linda Nchi, Kenya’s Military Experience in Somalia, Ministry of Defence — Kenya Defence Forces, Kenya Literature Bureau, Nairobi, Kenya, 2014, Annex 43, p. 22.

personnel along the border (Lacta Belt and Lamu) as well as churches and civilians are intended to create anarchy and animosity among the Kenyan population.²⁴²

185. It was in this context that Al Shabaab circulated inflammatory rumours that by concluding the 2009 MOU Somalia was “selling the sea” to Kenya. Given such propaganda directed against the Somali government (that Kenya was actively supporting, both directly and through AMISOM), the Somali delegation at the March 2014 meeting refused to discuss the MOU, and further refused to recognise the 1924–33 Anglo-Italian Agreement on the land boundary, or its prolonged acquiescence since 1979 in the maritime boundary at the parallel of latitude.

3. May 2014: Somalia’s extension of Soma Oil’s Offshore Evaluation Area south of the parallel of latitude

186. Somalia’s new claim to an equidistant maritime boundary coincided with a sudden change in its oil concession practice. In particular, shortly after the March 2014 technical meeting in Nairobi, Somalia proposed an Offshore Evaluation Area Extension to Soma Oil, extending its Seismic Option Agreement (“SOA”) south of the parallel of latitude for the first time. As noted in the 2015 Report of the UN Monitoring Group on Somalia and Eritrea to the Security Council (“2015 UN Report”):²⁴³

On 8 May 2014, the Minister [of Petroleum] signed a letter extending the offshore area available to Soma to survey (Evaluation Area Extension). “In light of [Soma’s] progress, it is the desire of the Ministry that the Evaluation Area ... as agreed between the Ministry and Soma be expanded to include a larger area. The Ministry hereby requests that Soma include within its exploration Program (as defined in the SOA) a 2D seismic survey that extends to the JORA block as outlined in the attached map.” The letter ends: “Also, the JORA Block will become part of the area in respect of which Soma may serve a Notice of Application for a Production Sharing Agreement pursuant to Article 2.2 of the SOA.”

187. The 2015 UN Report specifically noted that: “Ownership of the JORA block is currently subject to a maritime border dispute between the governments of Kenya and

²⁴² See Terrorist Attacks, Concentration and Intensity Map, Global Terrorism Database, 2015, Annex M5, available at

https://www.start.umd.edu/gtd/images/START_GlobalTerrorismDatabase_2015TerroristAttacksConcentrationIntensityMap.jpg See also map depicting security threat (2017), Annex M6.

²⁴³ Letter from the Coordinator of the Somalia and Eritrea Monitoring Group mandated pursuant to paragraph 46 of Security Council resolution 2182 (2014) to the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, reporting the initial findings of the Monitoring Group’s investigation into the operations of Soma Oil & Gas Holdings Limited (Soma), S/AC.29/2015/SEMG/OC.31, 28 July 2015, Annex 101, p. 21 (footnotes omitted).

Somalia.”²⁴⁴ The 8 May 2014 letter extending the offshore area under Soma Oil’s SOA was in fact the first time Somalia attempted to extend its oil concessions south of the parallel of latitude.

188. The UN Monitoring Group further observed the controversial circumstances surrounding this expansion of Soma Oil’s SOA beyond Kenya’s maritime boundary claim:

The timing of the signing of the Evaluation Area Extension suggests that it may have represented a *quid pro quo* between the Ministry and Soma. The Minister signed the Evaluation Area Extension on 8 May 2014, fewer than two weeks after agreeing the terms of the Soma Capacity Building Agreement. A week later, on 15 May 2014, Soma countersigned the Capacity Building Agreement.²⁴⁵

189. In this regard, the UN Monitoring Group observed that: “Instead of being an assistance package to facilitate hiring a limited number of technical experts, Soma’s Capacity Building Agreement amounted in many cases to extra ‘salaries’ paid to top ministerial officials who had already been on the FGS [Federal Government of Somalia] payroll prior to the programme’s launch.”²⁴⁶ The UN Monitoring Group stated in particular that it “has obtained evidence suggesting that requests for ‘capacity building’ may form part of a pattern of corruption within the Ministry.”²⁴⁷ The Report also pointed to Soma Oil’s payment of the Somali Government’s legal expenses despite an apparent conflict of interest.²⁴⁸

190. The UN Monitoring Group concluded that these circumstances:

... constitute both misappropriation, and facilitation of misappropriation of public resources by officials of the FGS and by Soma in violation of paragraph 2 of resolution 2002 (2011) and paragraph 2(c) of resolution 2060 (2012). The Monitoring Group has had indications that the Ministry intends to sign a revised PSA [Production Sharing Agreement] with Soma as early as August 2015, which influenced the Group’s decision to submit the following recommendations to the Committee prior to the submission of its final report in October.²⁴⁹

²⁴⁴ *Ibid.*, Annex 101, p. 21, fn. 54.

²⁴⁵ *Ibid.*, Annex 101, p. 21.

²⁴⁶ *Ibid.*, Annex 101, p. 20.

²⁴⁷ *Ibid.*, Annex 101, p. 23.

²⁴⁸ *Ibid.*, Annex 101, pp. 25–6.

²⁴⁹ *Ibid.*, Annex 101, p. 27. The recommendations were duplicated in the final report, Report of The Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2182 (2014), S/2015/801, 19 October 2015.

191. The UN Monitoring Group concluded that in light of its findings:

... and against the background of the Security Council’s call to the FGS [Federal Government of Somalia] “to mitigate properly against the petroleum sector in Somalia becoming a source of increased tension in Somalia,” the Monitoring Group recommends that the Committee consider the Group’s longstanding recommendation of a moratorium on oil and gas agreements in Somalia until a federal resource-sharing framework is in place, and viable federal and regional institutions are established to govern the extractives sector effectively.²⁵⁰

4. June–July 2014: Somalia’s EEZ Proclamation and CLCS submission claiming an equidistance line

192. Shortly after the exchange of letters between the Somali Minister of Petroleum and Soma Oil, on 30 June 2014 the President of Somalia claimed the EEZ for the first time in a Proclamation.²⁵¹ The coordinates of the Outer Limit of the EEZ of the Federal Republic of Somalia were submitted to the UN Secretary-General pursuant to UNCLOS.²⁵²

193. The Memorial of Somalia provides no explanation for the more than 25-year gap before giving effect to Article 7(7) of the 1989 Maritime Law by which the Ministry of Fisheries and Sea Transport is required to “draw up detailed charts and lists of geographical coordinates” on the EEZ and which requires that those “charts or lists ... shall be made public and a copy sent to the Secretary General of the United Nations.” Despite the obligation in UNCLOS Article 75(2) to give due publicity to the charts/lists, they were only submitted to the UN in 2014 (immediately prior to commencement of proceedings before the Court).²⁵³

194. Thus, 35 years after Kenya’s 1979 EEZ Proclamation, in June 2014, Somalia made its own EEZ Proclamation and claimed an equidistance line as the maritime boundary. On 13 August 2014, the Kenyan Ministry of Foreign Affairs wrote to the Ministry of

²⁵⁰ *Ibid.*, Annex 101, p. 28.

²⁵¹ MS, Vol. III, Annex 14, para. 1, extending “from the baselines from which the breadth of the territorial waters of the Somali Republic is measured”.

²⁵² MS, Vol. III, Annex 15 Federal Republic of Somalia, Outer Limit of the Exclusive Economic Zone of Somalia (30 June 2014)) and Annex 68 United Nations, Division for Ocean Affairs and the Law of the Sea, Deposit by the Federal Republic of Somalia of a list of geographical coordinates of points, pursuant to article 16, paragraph 2 and article 75, paragraph 2 of the Convention, U.N. Doc. M.Z.N. 106.2014.LOS (3 July 2014)).

²⁵³ Kenya submitted this information on 11 April 2006.

Foreign Affairs of the Federal Republic of Somalia expressing its concern regarding Somalia's EEZ Proclamation and CLCS submission.²⁵⁴

195. On 21 July 2014, Somalia made its submission to the CLCS, in accordance with UNCLOS Article 76(8), of information on the limits of the continental shelf beyond 200M from the baselines from which the breadth of its territorial sea is measured. In contrast with its preliminary information submission in 2009 which merely referred to “[u]nresolved questions” on bilateral delimitation with Kenya and other neighbouring States,²⁵⁵ Somalia's 2014 submission clearly indicated the existence of a dispute with Kenya concerning the maritime boundary, and claimed an equidistance line.²⁵⁶
196. During the same month, on 28–29 July 2014, Kenya and Somalia held a second technical level meeting to discuss the MOU and maritime boundary. After intense discussions, the Parties agreed to adjourn and reconvene for a third meeting 25–26 August 2014. Before that meeting took place however, Somalia initiated proceedings before the Court.

5. August 2014: Somalia's Application to the Court and the Parties' subsequent conduct

197. On 28 August 2014, more than 35 years after Kenya's 1979 EEZ Proclamation, Somalia filed its Application with the Court, claiming a maritime boundary at the equidistance line, and asserting that by exercising jurisdiction at the parallel of latitude, Kenya had acted unlawfully.
198. Shortly after filing its Application, on 16 September 2014, the Attorney-General of Somalia addressed several letters to oil companies operating under Kenyan exploration licenses south of the parallel of latitude, threatening them with legal action. The letters backdated penalties to 1 July 2014, confirming that Somalia's EEZ boundary claim only became effective from that date. The Memorial indicates that

²⁵⁴ *Note Verbale* from the Kenyan Ministry of Foreign Affairs to the Somali Ministry of Foreign Affairs (MFA.TCA 12/34 VOL.XI (110)), 13 August 2014, forwarded to the Somali Embassy in Nairobi to be transmitted to the Somali Ministry of Foreign Affairs, (MFA.TCA 12/34 Vol.XI (109)), 13 August 2014, Annex 58.

²⁵⁵ MS, Vol. III, Annex 66, p. 7. See para. 106 above.

²⁵⁶ MS, Vol. IV, Annex 70, p. 7: “The delimitation of the continental shelf between the Federal Republic of Somalia and the Republic of Kenya has not yet been resolved. On the basis of the jurisprudence of the International Court of Justice on maritime delimitation, Somalia's continental shelf claim may extend south at least up to a line of equidistance drawn from S608/K1 (Figure 3)”.

this was Somalia's first such protest against what it considers "illegal exploration in maritime areas it claims as its own."²⁵⁷

199. Although the activities of its licensees were limited to transitory seismic testing in a maritime area that had previously not been in dispute, Kenya suspended further exploration in furtherance of cooperation and neighbourly relations. On 18 May 2016, Kenya invited Somalia to enter into "provisional arrangements of a practical nature" pursuant to UNCLOS Articles 83(3) and 74(3) for the maritime areas now in dispute, pending a final settlement of the maritime boundary.²⁵⁸ Somalia refused on the ground that the dispute was before the Court.²⁵⁹

H. Conclusion

200. It is not in dispute that Kenya first proclaimed and gave notice of its maritime boundary at the parallel of latitude in the 1979 EEZ Proclamation, that it reaffirmed its claim in the 2005 EEZ Proclamation, and that it claimed the extension of that line beyond 200M in the outer continental shelf in its 2009 CLCS submission. It is also not in dispute that Somalia did not either protest that line or claim a contrary equidistance line as its maritime boundary until 2014. Diligent searches of the archives of the UN Office of Legal Affairs and of the Kenyan Ministry of Foreign Affairs have not revealed any evidence of a protest. During this 35 year period furthermore, the Parties' conduct in regard to fisheries, marine scientific research, oil concessions, and maritime patrols and enforcement, was consistent with a maritime boundary at the parallel of latitude.
201. Kenya first adopted the parallel of latitude in 1975 as an equitable delimitation consistent with international law, taking into consideration both the geographical context and regional practice of African States on the coast of the Indian Ocean. Kenya and Somalia concurred during UNCLOS III that equitable principles, and not equidistance, was applicable to maritime delimitation in the EEZ and continental shelf.

²⁵⁷ MS, Vol. I, para. 8.27 and fn. 368; one letter to ENI was sent in April 2014.

²⁵⁸ Letter from the Kenyan Ministry of Foreign Affairs to the Somali Ministry of Foreign Affairs dated 18 May 2016 sent to the Somali Embassy in Nairobi by *note verbale* (MFA.INT.8/15A) dated 25 May 2016, Annex 61.

²⁵⁹ Letter from the Somali Ministry of Foreign Affairs to the Kenyan Ministry of Foreign Affairs (MFA/SFR/OM2378/2016), 18 June 2016, Annex 64.

202. In brief, between 1979 and 2014, Kenya claimed and exercised jurisdiction, and Somalia acquiesced and consented to, a maritime boundary at the parallel of latitude as an equitable delimitation.

CHAPTER II. SOMALIA'S ACQUIESCENCE IN THE PARALLEL OF LATITUDE AS THE MARITIME BOUNDARY

203. This Chapter addresses the binding legal effect of Somalia's prolonged and undisputed acquiescence in the maritime boundary at the parallel of latitude.
204. Somalia's claim before the Court is based on the incorrect premise that in the period before 2014 nothing happened between Somalia and Kenya as regards their maritime boundary. According to Somalia, the present case is "straightforward": the Court needs to simply follow an abstract geometric approach, based on the equidistance–special circumstances methodology. Somalia would have the Court completely ignore the official claims and the conduct of the Parties over a 35 year period, as if a principle of *tabula rasa* applied to the present dispute.²⁶⁰ In particular, Somalia assumes that its prolonged acquiescence in Kenya's "unilateral" conduct is without any legal effect.
205. This approach is manifestly wrong, for two reasons.
206. First, in 1979 and again in 2005, Kenya officially notified other States, including Somalia, that the single line of maritime delimitation with Somalia up to the 200M limit of the EEZ followed the parallel of latitude. In 2009, that line was extended to the outer limits of the continental shelf. These official notifications called for a reaction in the event that Somalia did not agree with Kenya's claim. In fact, having received the first notice in 1979, Somalia reiterated in 1980 that equitable principles, and not equidistance, should apply to maritime delimitation. Until 2014, Somalia did not either protest the parallel of latitude or claim a contrary equidistant line. It must thus be held, under international law, to have acquiesced to the maritime boundary officially and consistently claimed by Kenya since 1979 (section A).
207. Second, in addition to Kenya's formal claim and successive notifications, Somalia admits that Kenya's conduct in granting oil concessions has followed the parallel of latitude as the maritime boundary. Again, Somalia made no protest against this practice until 2014, when it claimed an equidistant line for the first time. Furthermore, Somalia's Memorial ignores its own practice in oil concessions, as well as fisheries and marine scientific research, that was also consistent with the parallel of latitude.

²⁶⁰ See especially MS, Vol. I, paras. 1.17–1.21.

Beyond Kenya's successive notifications and Somalia's lack of protest therefore, the other conduct of the Parties further indicates that they both consented to the parallel of latitude as their maritime boundary (section B).

A. The Absence of Protest by Somalia following Kenya's 1979 and 2005 EEZ Proclamations and the 2009 CLCS Submission until 2014

208. According to Somalia, there is in the present case no agreement, "written or otherwise", on its maritime delimitation with Kenya.²⁶¹ This statement stands in marked contrast with Somalia's prolonged conduct between 1979 and 2014. As the record shows, Kenya officially proclaimed and gave notice, in 1979, and again in 2005, its position as regards delimitation with Somalia, and provided a detailed description of the maritime boundary, with precise coordinates as well as maps. The UN Secretary-General circulated the 1979 EEZ Proclamation to UN Member States, published it in a 1986 official UN publication, and circulated the 2005 EEZ Proclamation to UN Member States as well as UNCLOS States Parties, and published it in the *Law of the Sea Bulletin*, while also publishing both Proclamations on the website of DOALOS.²⁶² There was thus no ambiguity or lack of notice regarding the maritime boundary that Kenya claimed at the parallel of latitude and which it considered to be an "equitable" delimitation under UNCLOS. As Somalia admits in its Memorial:

... in 1979 and then again in 2005 the President of Kenya made unilateral Proclamations laying claim to a parallel boundary in both the territorial sea and the EEZ. Consistent with these Presidential Proclamations, Kenya has offered a number of petroleum blocks for deep-water exploration and drilling in areas across the equidistance line that extend up to the claimed parallel boundary.²⁶³

209. Since 1979, Somalia has been in a position to react to Kenya's official proclamations and notifications of its maritime boundary claim; and if it considered Kenya's claim inequitable or otherwise unacceptable, it was under an obligation to protest within a reasonable time (see section 1 below). Somalia, however, did not either protest or claim a contrary equidistance line until 2014. This prolonged conduct must be deemed to express Somalia's consent to Kenya's maritime boundary claim at the parallel of latitude (see section 2 below). International law confirms that the absence of protest

²⁶¹ MS, Vol. I, para. 1.18.

²⁶² See paras. 65–6 and 92–3 above.

²⁶³ MS, Vol. I, para. 1.28.

under circumstances (such as Kenya's 1979 and 2005 EEZ Proclamations) where a reaction is called for constitutes acquiescence (see section 3 below).

1. Under international law the absence of protest when a reaction is called for constitutes acquiescence

210. There is no doubt that under international law the absence of protest when a reaction is called for constitutes acquiescence. As the Court pointed out in 2008 in the *Pedra Branca* case, an agreement, including one transferring sovereignty over territory, may take the form of a treaty or “instead be tacit and arise from the conduct of the Parties”, since international law “does not, in this matter, impose any particular form” but rather “places its emphasis on the parties’ intentions ...”.²⁶⁴ According to the Court:

[t]he absence of reaction may well amount to acquiescence. The concept of acquiescence ‘is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent ...’ ... That is to say, silence may also speak, but only if the conduct of the other State calls for a response.²⁶⁵

211. Similarly, in the *Temple of Preah Vihear* case, the Court observed that:

it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced.²⁶⁶

212. Consistent with this principle, the Arbitral Tribunal in the case concerning *Honduras Borders (Guatemala/Honduras)* held that “public, formal acts” that “show clearly the understanding of [a State] that this [is its] territory” invite “opposition (...) if they were believed to be unwarranted.”²⁶⁷

213. According to Sir Gerald Fitzmaurice:

[t]here must of course be knowledge, actual or presumptive, of the events or circumstances calling for a protest ... Subject to that, it might be said generally that a protest is called for whenever failure to make it will, in the circumstances, justify the inference that the party concerned is indifferent to

²⁶⁴ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, para. 120.

²⁶⁵ *Ibid.*, para. 121; quoting *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, para. 130 (“acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...”).

²⁶⁶ *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 23.

²⁶⁷ *Honduras Borders (Guatemala/Honduras)*, UNRIAA, 23 July 1933, Vol. II, 1307, at p. 1327.

the question of title, or does not wish to assert title, or is unwilling to contest the claim of the other party;²⁶⁸

...a *failure* to protest, where a protest is called for, must have a detrimental effect on the position of the party concerned and may afford evidence of non-existence of title.²⁶⁹

214. In the same vein, Sir Hersch Lauterpacht considered that:

the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability — a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents States from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a State from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States.²⁷⁰

The duty to protest, and the relevance of the failure to protest, are especially conspicuous in the international sphere²⁷¹

215. The International Law Commission (“ILC”) reached the same conclusion in the context of its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties. It pointed out consistent with the jurisprudence that: “Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.”²⁷² In the commentary on the relevant draft conclusion, the ILC observed that:

The International Court of Justice has also recognized the possibility of expressing agreement regarding interpretation by silence or inaction by stating, in the case concerning the *Temple of Preah Vihear*, that ‘where it is clear that the circumstances were such as called for some reaction, within a reasonable period’, the State confronted with a certain subsequent conduct by another party ‘must be held to have acquiesced’. This general proposition of the Court regarding the role of silence for the purpose of establishing agreement regarding the interpretation of a treaty by subsequent practice has been confirmed by later decisions, and supported generally by writers.²⁷³

216. The rule has been applied by the Court even in the absence of any notification by the State making a claim, as illustrated by the *Anglo–Iranian Oil* case. In that case, the

²⁶⁸ G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951–4: Points of Substantive Law. Part II” (1955–6) 32 B.Y.I.L. p. 59, fn. 3.

²⁶⁹ *Ibid.*, p. 59.

²⁷⁰ H. Lauterpacht, “Sovereignty over Submarine Areas” (1950) 27 B.Y.I.L. p. 395–6.

²⁷¹ *Ibid.*, p. 396.

²⁷² ILC, Draft Conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted on first reading in 2016, A/71/10, p. 122, Conclusion 10(2).

²⁷³ *Ibid.*, p. 198, para. 15 of the Commentary (fn. omitted).

terms of certain Iranian laws were at issue and the legislation, drafted in Persian, had not been communicated to the United Kingdom. The Court decided that it “is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years.”²⁷⁴ Similarly, in response to the argument of the United Kingdom in the *Anglo–Norwegian Fisheries* case that “the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential” to be opposable to it,²⁷⁵ the Court held that it “is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 ...”.²⁷⁶ The Arbitral Tribunal in the *Eritrea–Yemen Territorial Dispute* also relied on constructive knowledge in holding that “Ethiopia may be argued to have had notice, at any rate, constructive notice, of its existence and provisions”.²⁷⁷ It is significant further, that although the Tribunal recognized that the “agreement was made at a time [1985] when the Ethiopian civil war was still raging”,²⁷⁸ the lack of protest was nonetheless opposable to Ethiopia.²⁷⁹

217. The rule applies *a fortiori* where there has been an *express, official, public* notification through formal UN procedures — and all the more so when there has been a reiteration of the notification 26 years later. Notification plainly calls for reaction in case of a disagreement with its content, especially when it concerns maritime delimitation and the sovereign rights of adjacent coastal States.
218. In regard to notification, Anzilotti observed that “*son effet propre est celui de porter légalement les faits qui en sont l’objet à la connaissance de l’Etat à qui elle est adressée, de sorte que cet Etat ne pourra plus en alléguer l’ignorance et devra éventuellement se comporter de la manière qui, dans les circonstances données, lui*

²⁷⁴ *Anglo–Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952, *I.C.J. Reports* 1952, p. 107.

²⁷⁵ *Fisheries case*, Judgment of December 18th, 1951, *I.C.J. Reports* 1951, p. 138–9.

²⁷⁶ *Ibid.*, p. 139.

²⁷⁷ *Eritrea v Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 I.L.R. p. 102, para. 400.

²⁷⁸ *Ibid.*, p. 136, para. 520.

²⁷⁹ *Ibid.*, p. 102, para. 400.

est imposée par le droit international.”²⁸⁰ The same view was expressed by de Visscher that it is impossible for a State which has been officially notified of a claim to plead ignorance. Notification he noted, is a “*communication qui met le destinataire dans l'impossibilité d'alléguer désormais son ignorance*”; “*en effet les conséquences qu'elle peut entraîner dépendent de prises de position ultérieures du destinataire, prises de position que la notification a précisément pour but de provoquer et de rendre publiques.*”²⁸¹

219. In this regard, it is important to distinguish the finding of the Court in *Continental Shelf (Tunisia/Libya)* that a “*modus vivendi*, resting only on the silence and lack of protest on the side of the French authorities responsible for the external relations of Tunisia, falls short of proving the existence of a recognized maritime boundary between the two Parties”.²⁸² The situation is fundamentally different in the present case where there has been an *explicit, official, public claim* by one Party, not least through formal UN notification procedures, as to the exact location of the maritime boundary, the other Party having made no protest nor any reservation whatsoever for a prolonged period. In such circumstances, silence must be seen as consent. The facts in the present case therefore, go far beyond a mere *modus vivendi*.

2. The legal effect of Somalia’s acquiescence

220. In light of the above, the following elements are particularly decisive in the present case.

221. First, Kenya’s Proclamations in both 1979 and 2005 were clear and precise, leaving no room for ambiguity as regards Kenya’s intention and claim to a maritime boundary at the parallel of latitude. According to the first Proclamation:

(...) the Exclusive Economic Zone of Kenya shall: (...) (b) in respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38’ South

and, according to the second Proclamation:

(...) the Exclusive Economic Zone of Kenya shall: (...) b. In respect of its northern territorial waters boundary with Somali Republic be on

²⁸⁰ D. Anzilotti, *Cours de droit international* (Sirey 1929) p. 347, Annex 116.

²⁸¹ C. de Visscher, *Problèmes d’interprétation judiciaire en droit international public* (Pedone 1963) p. 183–4, Annex 118.

²⁸² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, para. 95.

eastern latitude South of Diua Damascian Island being latitude 1°39'34" degrees south.²⁸³

222. Both Proclamations referred expressly to the maritime “boundary with [the] Somali Republic” in the EEZ, which is defined as a line on the “latitude”, with precise coordinates. The maps attached to the Proclamations further depict the maritime boundary from the coasts of the Parties up to 200M along the parallel of latitude.
223. As such, the present case is fundamentally different from cases where international courts and tribunals held that it was not possible to declare the existence of a consensual maritime boundary based on declarations or conduct of the parties on the ground that they did not “make express reference to the delimitation of maritime boundaries of the zones generated by the continental coasts” or lacked “such information which might be expected in an agreement determining maritime boundaries, namely, specific co-ordinates or cartographic material”,²⁸⁴ or because they consisted only of domestic legislation or practice not directly related (or not referring expressly) to the maritime boundary as such.²⁸⁵ The contrast with the present case is obvious: there are two official Proclamations, from 1979 and 2005, made by Kenya’s Head of State, in a written form, expressly relating to delimitation of the maritime boundary, defined by precise co-ordinates, “to a distance of two hundred nautical miles”, as regards both “the water-column” and “the seabed, and the subsoil thereof”, “as indicated in the Map annexed to this Proclamation”.
224. In the 1979 EEZ Proclamation, Kenya stated that “All States shall, subject to the applicable laws and regulations of Kenya, enjoy in the EEZ the freedom of navigation and overflight and the laying of sub-marine cables and pipelines and other internationally lawful recognized uses of the sea related to navigation and communication.” The Proclamation was thus both declarative and prescriptive, and entailed rights and obligations for other States. The Proclamation also indicated that the “scope and regime” of the EEZ “shall be as defined in the Schedule attached to this Proclamation.” That Schedule contained a number of provisions setting forth the “sovereign rights” of Kenya for the purpose of “exploring, exploiting, conserving and

²⁸³ See para. 91 above.

²⁸⁴ *Maritime Dispute (Peru v Chile)*, Judgment, I.C.J. Reports 2014, paras. 58–9.

²⁸⁵ See *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, paras. 149, 163, 215, 217, and 226.

managing the natural resources ... of the water column, the sea-bed, and the sub-soil thereof.” It also laid down the regime applicable to maritime activities in the said zone. Similar provisions were included in the 2005 EEZ Proclamation. The fact that Somalia did not protest provisions which would have encroached on its maritime areas had it not accepted the maritime boundary at the parallel of latitude shows that Somalia consented to that maritime boundary.

225. Second, both Proclamations were circulated by the UN Secretary-General at Kenya’s request to give formal notification to the Permanent Missions of UN Member States in 1979 and to UN Member States as well as UNCLOS States Parties in 2005.²⁸⁶ On both occasions therefore, Somalia was fully informed and notified of Kenya’s official claim. The 1979 EEZ Proclamation was also published in a 1986 official UN publication on the EEZ,²⁸⁷ the 2005 EEZ Proclamation was also published in the *Law of the Sea Bulletin* No. 61, and both Proclamations were published on the UN DOALOS website. Somalia cannot plead ignorance.
226. Third, the said Proclamations reiterated the same claim 26 years apart and remained in force throughout. Kenya has been consistent in its claim that the maritime boundary is at the parallel of latitude. It means that Somalia was officially put on notice in 2005 that Kenya’s maritime boundary claim remained the same (i.e. at the parallel of latitude) as the one proclaimed in 1979, subject only to an adjustment of the coordinates. The absence of any protest by Somalia, whether after 1979 or after 2005, shows that Somalia, too, has been consistent as regards its acquiescence in this delimitation.
227. Fourth, the first Proclamation, made in 1979, was published in a very specific context, of which Somalia was fully aware. In 1972, Kenya became the first State to officially propose the creation of the EEZ as a new maritime area under international law²⁸⁸ and was among the first to take steps to proclaim and delimit the EEZ beginning as early as 1975. The proposed EEZ was immediately and enthusiastically endorsed by African States, including Somalia, at UNCLOS III.²⁸⁹ In fact, the State practice was

²⁸⁶ See Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

²⁸⁷ See para. 66 above.

²⁸⁸ See para. 41 above.

²⁸⁹ See Kenya and other African States, Draft Articles on Exclusive Economic Zone, U.N. Doc. A/AC.138/SC.II/L.40, reproduced in Official Records, UN General Assembly: Twenty-Eighth Session, Suppl.

such, that by the time UNCLOS was adopted in 1982, the Court already considered the EEZ to have become part of customary international law.²⁹⁰ In that context, given the prominence that States attached to the EEZ, the legal effect of Kenya's 1979 EEZ Proclamation and notification that the delimitation of its maritime boundary up to 200M follows a parallel of latitude, could not have been ignored or misunderstood by Somalia.

228. Fifth, nothing prevented Somalia from protesting the Proclamations on the ground that it disagreed with the maritime boundary claimed by Kenya. In the Memorial, Somalia claims that “[i]ts post-independence history has been dominated by instability, poverty and a civil war that led to the collapse of effective central government”.²⁹¹ But this is only partially true and in any case has no bearing whatsoever on the operation of the principle of acquiescence, both as a matter of law and fact, as explained below.

229. *As a matter of law*, the jurisprudence of international courts and tribunals is clear that the standard by which a State is held in this regard cannot be lowered when the State is “a poor country locked in civil war”.²⁹² The principle set out in the *Anglo-Norwegian Fisheries*²⁹³ case was applied in the *Territorial Dispute (Eritrea v Yemen)* case, where the Tribunal rejected Eritrea's contention that as a poor country ravaged by the civil war, Ethiopia (of which Eritrea was a part at the time) could not be held to have had notice of various agreements between Yemen and certain oil companies in the 1970s and 80s.²⁹⁴ Similarly, in *Guinea-Bissau v Senegal*, Guinea-Bissau argued that the reason the country had failed to take notice of an agreement was “*la situation où il se trouvait lors de la déclaration d'indépendance. Il venait de sortir d'une longue guerre de libération qui avait épuisé son peuple et l'avait enfoncé encore davantage dans la pauvreté. En outre, la population était en grande partie*

21(A/9021), 1973, Vol. 3, p. 87 (bottom of page), Annex 68.

²⁹⁰ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 100; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, para. 34.

²⁹¹ MS, Vol. I, para. 1.11.

²⁹² *Eritrea v Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 I.L.R. p. 102, para. 400.

²⁹³ *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 139 (“As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government”).

²⁹⁴ *Eritrea v Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 I.L.R. p. 102, para. 400 and p. 136–7, paras. 520–4.

analphabète et son niveau culturel était bas ...”.²⁹⁵ The Tribunal refused even to take this argument into consideration, making no mention of it.

230. Similarly, in *Nicaragua v Honduras*, it was also argued unsuccessfully on behalf of Nicaragua, which indisputably had knowledge of the fact at issue, that:

the distinction between *knowledge* of a fact and *awareness* of its legal consequences may be particularly useful. Developing countries very often lack adequate diplomatic, technical and administrative infrastructures; their institutional framework is weak; they exist in situations of great instability. Consequently, simple negligence must be ruled out as a cause of possible *oversights* or *omissions of conduct*, as the latter should not be interpreted as *acquiescence*, especially when territorial interests are at stake. Even if *knowledge* of the facts can be shown — more or less — *awareness* of their legal consequences can often elude their real capabilities.²⁹⁶

Neither the Court in its judgment nor any of the separate opinions accepted this argument.²⁹⁷

231. In any event, *as a matter of fact*, at the critical date (in particular in 1979 and during the years that followed), Somalia was a functioning State with international recognition. In the Memorial, Somalia admits that it had effective government at least between 1979 and 1991, that is, more than *ten years* after the 1979 EEZ Proclamation.²⁹⁸ This is corroborated by relevant documents²⁹⁹ which show that Somalia participated actively in the UNCLOS III negotiations and possessed the relevant expertise, in particular as regards the definition of the principles applicable to maritime delimitation. In addition, in 1988–9 (ten years after Kenya’s 1979 EEZ Proclamation), Somalia adopted its own maritime laws. Furthermore, between 1991 and 1999, Somalia was represented at the UN, and from 2000, the TNG, and from 2004 to 2012, the TFG, enjoyed international recognition and acted on behalf of Somalia, making numerous official statements at the UN and concluding many agreements, including with Kenya (see para. 95 above).³⁰⁰ Therefore, both in 1979

²⁹⁵ *Case Concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal* (1989) 20 R.I.A.A. p. 147, para. 69.

²⁹⁶ CR 2007/4: original p. 33, para 73; translation, p. 25, para. 73. Translation cited here, emphasis as in original.

²⁹⁷ See also R. Kolb, *Good Faith in International Law* (Hart 2017) p. 95, Annex 125.

²⁹⁸ See MS, Vol. I, para. 1.11: Somalia’s “post-independence history has been dominated by instability, poverty and a civil war that led to the collapse of effective central government for two decades. Since 1991, a number of external actors seized upon the absence of effective government to exploit Somalia’s territory and resources for their own ends” (emphasis added).

²⁹⁹ See paras. 95–7 above.

³⁰⁰ *Ibid.*

and 2005, Somalia was in a position to understand the nature of Kenya's claim and to protest if it disagreed with the maritime boundary at the parallel of latitude.

232. Sixth, if Somalia had been in disagreement with the 1979 and 2005 EEZ Proclamations and Kenya's maritime boundary claim, it should have protested, and it should have done so rapidly, or at least within a reasonable time. Instead, it did nothing between 1979 and 2014. As the Court of Arbitration put it in *Dubai–Sharjah*:

the State whose rights are threatened by the actions of another State does not necessarily have to make its protest as soon as it learns about the action giving rise to the complaint, but it must be made as soon as the State realises that these actions may be prejudicial to its rights. ... Sharjah could not have failed to realise very quickly that the exercise of authority by the Emirate of Dubai was contrary to Mr Tripp's delimitation; it should therefore have reacted very rapidly which it did not do.³⁰¹

233. Similarly, in the *Costa Rican–Nicaraguan Boundary* case, Nicaragua had argued that a treaty of 1858 which defined the frontier was not binding owing to the fact that a third State, San Salvador, had not ratified it in its capacity of guarantor. The Tribunal rejected this contention on the basis that Nicaragua had through its silence acquiesced in the validity of the treaty for a period of 10–12 years:

the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. ... [N]either may now be heard to allege, as reasons for rescinding this completed Treaty[,] any facts which existed and were known at the time of its consummation.³⁰²

234. The *Costa Rican–Nicaraguan Boundary* case is, as Sir Robert Jennings has observed, an "apt illustration" of how:

acquiescence can operate as a preclusion ... in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect.³⁰³

235. According to international courts and tribunals, circumstances such as proximity and formal notice may call for an immediate response. In the *Anglo–Norwegian Fisheries*

³⁰¹ *Dubai–Sharjah Border Arbitration* (1981) 91 I.L.R. p. 624–5.

³⁰² *Costa Rican–Nicaraguan Boundary* ("Cleveland Award") (1888) 2 J.B. Moore, History and Digest of the Arbitrations to which the US has been a Party 1945, p. 1961, Annex 127.

³⁰³ R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) p. 45, Annex 119, citing Judge Fitzmaurice in *Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 62.

case, the Court pointed to “Great Britain’s position in the North Sea”³⁰⁴ as one of the reasons why Norway’s system was opposable to Britain given its lack of protest. This applies especially when the two States concerned are neighbours, as in the present case: the *Grisbadarna* case is a classic example of how the proximity of States as neighbours is an important factor in determining what constitutes a reasonable time for protest.³⁰⁵ “[T]he intensity of the relationship between the parties” is important; “the closer it is and the more quickly a protest may be necessary: e.g. neighbourly relations”.³⁰⁶

236. In addition, when, as in the instant proceeding, there is “effective knowledge of the facts rather than constructive knowledge of the fact”, that will be a factor “calling for a quicker reaction, e.g. when a State has been put on notice by a diplomatic note”.³⁰⁷ The circulation and publication of both the 1979 and 2005 EEZ Proclamations by the UN Secretary-General constitutes direct and formal notice.
237. State practice clearly demonstrates that objections should be made promptly — i.e. within no more than a few weeks or months — to any maritime or territorial claim by another State that they disagree with, in order to protect their rights and prevent acquiescence. The following are a few examples, among many others, all concerning claims to maritime or territorial boundaries:
- a. The Norwegian system of drawing baselines at issue in the *Anglo–Norwegian Fisheries* case was based in part on an 1869 Decree relating to the delimitation of Sunnmøre. The Norwegian Government promulgated the Decree on 16 October 1869, prompting the French Government to ask Norway for an explanation of this enactment on 21 December of the same year, only two months later; France did so basing itself upon “the principles of international law”. In a second Note, dated 30 November of the same year, France pointed out that the distance between the base-points was greater than 10 sea miles, and that the line joining up these points should have been a broken line following the configuration of the coast.³⁰⁸ In its Judgment in the *Anglo–Norwegian Fisheries* case, the International Court stressed the fact of the French reaction when it assessed whether the Norwegian

³⁰⁴ *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 139.

³⁰⁵ *Affaire de Grisbadarna (Norvège/Suède)* (1909) 11 R.I.A.A. p. 147.

³⁰⁶ R. Kolb, *Good Faith in International Law* (Hart 2017) p. 92, Annex 125.

³⁰⁷ *Ibid.*, p. 93.

³⁰⁸ *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 135–6.

system was opposable to the United Kingdom: “As a coastal State on the North Sea, greatly interested in the fisheries in this areas, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government”;³⁰⁹

- b. When Denmark, in two notes of 19 December 1921, communicated its views as to the question of sovereignty over Greenland, Norway reacted on 16 October 1922; the reason, observed Norway, that the Norwegian reaction had been slow (meaning 10 months in that case) was that, by reason of the extreme importance of the question at issue, it had been necessary to look into it in special detail and to present the question to Parliament;³¹⁰
- c. In 1967–69 Nicaragua granted an oil exploration concession in the area of Quitasueño; this led to a Note of protest being sent by Colombia to Nicaragua on 4 June 1969, in which, for the first time after the ratification of a 1928 Treaty between Colombia and Nicaragua, Colombia claimed that the 82nd meridian was a maritime boundary between the two countries. Nicaragua responded within a matter of days, on 12 June 1969, denying the Colombian claim;³¹¹
- d. On 15 May 1975, the United States notified Canada of its plans to issue a Call for Nominations (the first step towards granting of oil and gas leases) in respect of areas on Georges Bank; already by a Note dated 3 June 1975, Canada took the position that it could not acquiesce in acts by the United States intended to constitute an exercise of jurisdiction in respect of any part of the continental shelf under Canadian jurisdiction. When, in 1976, 206 tracts of sea-bed on Georges Bank were selected for “intensive study” in the process of preparing the draft environmental impact statement before leasing would begin, 28 of the tracts were on the north eastern part of Georges Bank, in the area Canada claimed as its continental shelf. Canada thus protested on 2 February 1976;³¹²

³⁰⁹ *Ibid.*, p. 139 (emphasis added).

³¹⁰ E. Brüel, “La protestation en droit international” (1932) 3 *Nordisk tidsskrift for international ret* (Nordic Journal of International Law) p. 84–5, Annex 117.

³¹¹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, *I.C.J. Reports* 2012, para. 69.

³¹² *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*,

- e. On 21 December 1979 Malaysia published a map entitled “Territorial Waters and Continental Shelf Boundaries of Malaysia”, published by the Director of National Mapping, Malaysia, showing the outer limits and co-ordinates of the territorial sea and continental shelf claimed by Malaysia. The map depicted the island of Pedra Branca/Puta Batu Puteh as lying within Malaysia’s territorial waters. Singapore protested by a Diplomatic Note dated 14 February 1980, which rejected Malaysia’s claim and requested that the 1979 map be corrected;³¹³
- f. In a declaration of 12 November 1982, Vietnam claimed a system of ten straight baseline segments several of which exceeded the norms of international practice.³¹⁴ Several States protested, including China on 28 November 1982;³¹⁵
- g. In 1994 Honduras published an official map which included, as insular possessions of Honduras in the Caribbean Sea, a series of cays, “located in the rise geographically and historically known as ‘Nicaraguan Rise’ in areas which, according to Nicaragua, are ‘under the complete sovereignty and jurisdiction of Nicaragua’. For this publication, Nicaragua expressed ‘its total disagreement and protests’.”³¹⁶ The Nicaraguan protest was issued on 9 June 1995, setting out Nicaragua’s protest in relation to the 1994 Honduran map and asserting that Nicaragua possessed insular and maritime rights in the area north of the 15th parallel;³¹⁷
- h. In relation to the Zubayr and Jabal al-Tahyr islands, the Tribunal in *Eritrea–Yemen Territorial Dispute* observed that, although neither Ethiopia nor Eritrea had made any petroleum agreements encompassing these islands, “Eritrea did, however, make agreements in 1995 and 1997 with the Anadarko Oil Company, which extended in the direction of these islands and towards what appears to be an approximate median line between coasts. *Yemen protested this line on 4*

Judgment, I.C.J. Reports 1984, para. 67.

³¹³ *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, para. 30.

³¹⁴ United States Department of State, Bureau of Intelligence and Research, *Limits in the Seas, Straight Baselines: Vietnam*, Report No. 99, 12 December 1983, pp. 3–7, Annex 53.

³¹⁵ “Statement by China” (1983) *Law of the Sea Bulletin* No.1, p. 76, Annex 75.

³¹⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), I.C.J. Reports 2007*, para. 212.

³¹⁷ *Ibid.*, para. 71.

January 1997 as a ‘blatant’ violation of the territorial waters of both groups and of her economic rights ‘in the region’”,³¹⁸

- i. In 2004, Turkey reacted to the recent publication in the *Law of the Sea Bulletin* of the 2003 agreement between Egypt and Cyprus and made clear that it “does not recognize the said agreement and reserves all its legal rights related to the delimitation of the maritime areas” concerned;³¹⁹
 - j. On 7 May 2009, China sent two Notes Verbales to the UN Secretary-General in response to Malaysia and Viet Nam’s Joint Submission of the preceding day to the CLCS. In its Notes, China claimed that it “has indisputable sovereignty over the islands in the South China Sea and the adjacent waters”; as the Arbitral Tribunal pointed out in the *South China Sea Arbitration*, “China’s notes prompted immediate objections from Viet Nam and Malaysia, as well as subsequent objections from Indonesia and the Philippines”;³²⁰
 - k. Similarly, when Saudi Arabia in March 2010 deposited geographical coordinates of maritime spaces which it claimed, several States objected promptly, within a few weeks or months;³²¹ and
 - l. The same is true concerning the reaction of Slovenia and Italy to the 2005 notification by Croatia of its EEZ claim.³²²
238. The fact that circumstances called for a prompt reaction in the present case, especially in 1979 and again in 2005, is confirmed by Somalia’s Memorial. In particular, Somalia considered that:

³¹⁸ *Eritrea v Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 I.L.R. p. 136, para. 521 and p. 29, para. 85, fn. 4 (which dates the Yemeni protest as at “4 January 1996” rather than “4 January 1997”).

³¹⁹ “Information note by Turkey, concerning its objection to the Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone” (2004) *Law of the Sea Bulletin* No. 54 p. 127, Annex 89. See other examples of prompt reactions at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/TUR.htm> (“Additional relevant materials”).

³²⁰ *South China Sea Arbitration (Republic of the Philippines v People’s Republic of China) (Award on the Merits)* (2016) 170 I.L.R. p. 267–9, paras. 182–4 (emphasis added).

³²¹ See the communications on Saudi Arabia DOALOS Page, Additional Relevant Material, updated 16 February 2017, available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SAU.htm>.

³²² See the communications on Croatia DOALOS Page, Additional Relevant Material, updated 22 June 2015, available at: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/HRV.htm>.

Kenya's unprecedented and unjustifiable claim violates Somalia's territorial integrity, and its sovereign rights and jurisdiction. Kenya has, moreover, purported to grant commercial oil concessions in the areas located between its parallel boundary claim and the equidistance line claimed by Somalia. In so doing, Kenya has sought to dispossess Somalia not only of significant areas of maritime space, but also of substantial living and non-living resources.³²³

239. Had Somalia considered, in 1979, between 1979 and 2005, and in 2005, that the effect of Kenya's Proclamations was to "dispossess" Somalia of "significant areas of maritime space", it would have been expected to promptly express at that time its strong disagreement with the Proclamations in light of their legal effects, which Somalia today describes in dramatic terms as constituting a violation of "Somalia's territorial integrity, and its sovereign rights and jurisdiction". The fact that Somalia remained silent for 35 years on an issue of such importance clearly shows that, at that time, it did not disagree with the maritime boundary claimed by Kenya.
240. This is especially true since, as Somalia again emphasizes in the Memorial, Somalia has a specific interest in maritime resources. By Somalia's own admission, "[m]arine fisheries have long been important to Somalia's economy and culture".³²⁴ It has, and it had, therefore, a particular interest in the question of the maritime boundary between itself and its neighbour. Lauterpacht emphasized that a "duty to protest is especially incumbent upon States directly interested".³²⁵ Similarly, in the *Anglo-Norwegian Fisheries* case, the Court laid stress on the fact that Great Britain was "greatly interested in the fisheries in [the] area" as one of the elements that would warrant Norway's enforcement of her system against the United Kingdom.³²⁶
241. Moreover, since 1972, Somalia claimed a 200M territorial sea. According to Article I of the Law No. 37 of 10 September 1972, confirmed by Somalia in 2013,³²⁷ "The Somali Territorial Sea includes the portion of the Sea to the extent of 200 nautical miles" and is "under the sovereignty of the Somalia Democratic Republic".³²⁸ It

³²³ MS, Vol. I, para. 1.8.

³²⁴ MS, Vol. I, para. 2.11 (emphasis added).

³²⁵ H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 B.Y.I.L. p. 397.

³²⁶ *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 139.

³²⁷ See KPO, Annex 33.

³²⁸ 1972 Law at MS, Vol. III, Annex 9. From 1972 to 2011, Somalia has consistently been considered by the UN as claiming a 200M territorial sea (see (1993) *Law of the Sea Bulletin* No. 23, p. 75; (1994) *Law of the Sea Bulletin* No. 25, p. 112; (1996) *Law of the Sea Bulletin* No. 30, p. 76; (1997) *Law of the Sea Bulletin* No. 34, p. 49; (1999) *Law of the Sea Bulletin* No. 39, p. 46; (2001) *Law of the Sea Bulletin* No. 45, p. 126; (2004) *Law of the Sea Bulletin* No. 54, p. 144; (2007) *Law of the Sea Bulletin* No. 63, p. 91; (2010) *Law of the Sea Bulletin* No.

means that from 1972 to 2014, from Somalia's point of view, Kenya's EEZ and continental shelf have been adjacent to its territorial sea out to 200M. In these circumstances, had Somalia not been in agreement with Kenya's maritime delimitation in 1979 and 2005, it should have strongly and immediately objected to it because, according to Somalia, its sovereignty in its claimed 200M territorial sea was at stake. The fact that Somalia elected not to react is, in these circumstances, particularly significant. It clearly shows that Somalia was of the view that the maritime boundary proclaimed by Kenya was not inconsistent with Somalia's sovereignty.

242. Although the circumstances clearly called for a protest if Somalia disagreed with the maritime boundary proclaimed by Kenya, Somalia made no protest whatsoever. There was no protest at all after the 1979 EEZ Proclamation, either when it was adopted and circulated to UN Member States or when it was published by the UN in 1986 and again on the DOALOS website in 2001. Again there was no protest at all against the 2005 EEZ Proclamation, either when it was adopted in 2005 and circulated to UN Member States and UNCLOS States parties in 2006 or after its publication in the same year in the *Law of the Sea Bulletin* (No. 61, p. 96).³²⁹ The UN Office of Legal Affairs has confirmed that it received "no communications" concerning the Proclamations.³³⁰
243. In addition, in April 2006, Kenya officially deposited with the UN Secretary-General two lists of geographical coordinates of points defining its straight baselines and the limits of its territorial sea and EEZ, both of which are based on the 2005 EEZ Proclamation.³³¹ The map attached by Kenya clearly depicted a maritime boundary with Somalia along the parallel of latitude. This deposit was made, as expressly indicated by the official communication of the UN Secretary-General,³³² in accordance with Articles 16(2) and 75(2) of UNCLOS which obligates States parties to deposit a copy of each chart or list of coordinates of the outer limits of the

73, p. 68, see Somalia's consistent assertion of a 200-nautical mile territorial sea before the United Nations, *Law of the Sea Bulletins*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 1993–2010, Annex 80. See also DOALOS Table of National Claims to Maritime Jurisdiction, p. 16 (as at 15 July 2011), Annex 96.

³²⁹ Annex 92.

³³⁰ Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

³³¹ See MS, Vol. III, Annex 56.

³³² *Ibid.* See also DOALOS Kenya page, updated 14 October 2014, Annex 100.

territorial sea and the EEZ and the lines of delimitation drawn in accordance with Articles 12, 15 and 74. Once again, Somalia made no protest.

244. In April 2009, Kenya reaffirmed yet again in its Submission to the CLCS that:

The maritime space over which Kenya exercises sovereignty, sovereign rights and jurisdiction has been determined on the basis of the provisions of the Convention, as implemented by the following legislation and Proclamations: the *Territorial Waters Act*, 1972; the *Maritime Zones Act*, 1989, Cap. 371; and, the Presidential Proclamation of 9 June 2005 published in the Kenya Gazette Notice No. 55 of 22 July 2005 in respect of Kenya's territorial sea and exclusive economic zone (Legal Notice No. 82 (Legislative Supplement No. 34)). This Proclamation, which was deposited with the United Nations and reproduced in *Law of the Sea Bulletin No. 61*, contains an illustrative map number SK 90 (edition 4) and two lists of geographical coordinates of points, specifying the straight baselines from which the breadth of the territorial sea is measured and the outer limits of the Exclusive Economic Zone (EEZ).³³³

245. Kenya's submission also extended its claim to a maritime boundary at the parallel of latitude beyond 200M to the outer limits of the continental shelf, subject to the recommendations of the CLCS.³³⁴

246. In a letter sent in August 2009 to the UN Secretary-General, Somalia noted that absent a formal agreement "[t]he delimitation of the continental shelf between the Somali Republic and the Republic of Kenya has not yet been settled" and observed that "an equidistance line normally constitutes the point of departure for the delimitation of the continental shelf between two States with adjacent coasts."³³⁵ Somalia however, did not claim or even suggest in that letter that it was protesting Kenya's maritime boundary claim or that it was claiming an equidistant maritime boundary (which it only claimed in 2014). It did not suggest either that it had previously protested either the 1979 or 2005 Kenyan Proclamations, or that it had protested Kenya's activities in the relevant maritime area since 1979. In fact, as discussed above, until 2014 Somalia's oil concession practice was consistent with the parallel of latitude.³³⁶ At best, Somalia's 2009 letter was a first indication of Somalia's preference for an

³³³ MS, Vol. III, Annex 59, p. 3, para. 1.3 (emphasis in original).

³³⁴ See Chapter I, section E above.

³³⁵ MS, Vol. III, Annex 37, Letter from H.E. Omar Abdirashid Ali Sharmarke, Prime Minister of the Transitional Federal Government of the Somali Republic, to H.E. Ban Ki-Moon, Secretary-General of the UN, No. XRW/00506/08/09 (19 August 2009).

³³⁶ See Chapter I, section F4 above.

equidistance line, in disregard of its acquiescence in Kenya's maritime boundary claim over a period (at that point in time) of 30 years.

247. Similarly, even in the 2014 Proclamation of the President proclaiming Somalia's EEZ and formally claiming an equidistance line for the first time,³³⁷ there is no mention whatsoever of Kenya's 1979 or 2005 EEZ Proclamations, nor any prior Somali protests against the parallel line. In fact, Somalia's first recorded objection to Kenya's maritime boundary claim was in the letter dated 4 February 2014 to the UN Secretary-General,³³⁸ that is, 35 years after the 1979 EEZ Proclamation.

3. The context of Somalia's acquiescence in Kenya's 1979 EEZ Proclamation

248. The context in which the 1979 Kenyan EEZ Proclamation and the absence of protest by Somalia took place — i.e. in the words of the Court, “the context of the history surrounding”³³⁹ the facts relevant to assessing a State's intention — further confirms Somalia's acquiescence in the parallel of latitude as the maritime boundary.

249. In the Memorial, Somalia observes that:

Having set “an equitable solution” as the standard for the delimitation of the continental shelf and EEZ, the Convention ‘is silent as to the method to be followed to achieve it’; “[t]o endow this standard with specific content” was “left to States themselves, or to the courts”.³⁴⁰

250. As Somalia rightly puts it, the method to be followed in a particular maritime boundary delimitation depends primarily on the views, common understanding, or agreement between the parties as to what constitutes an equitable solution. As the Court said in *Tunisia/Libya*, “it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such”,³⁴¹ *a fortiori* when there is a “tacit agreement” between them. Similarly, in *Peru/Chile*, the Court considered that it must have regard to any “shared understanding of the Parties concerning maritime delimitation”.³⁴²

³³⁷ MS, Vol. III, Annex 14.

³³⁸ See para. 170 above.

³³⁹ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, para. 98.

³⁴⁰ MS, Vol. I, para. 6.11.

³⁴¹ See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 84, para. 118; see similarly *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para. 25.

³⁴² *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, para. 43 and para. 69; see also para. 91.

251. In the present case, the context surrounding the adoption of the 1979 EEZ Proclamation, and Somalia's absence of protest and acquiescence in the maritime boundary proclaimed by Kenya, confirms that the delimitation at the parallel of latitude crystallised, to paraphrase the Court in *Peru/Chile*, "an evolving understanding between the Parties concerning their maritime boundary."³⁴³
252. So far as the maritime boundary between Kenya and Somalia is concerned, the sequence of events that surrounded the 1979 EEZ Proclamation is particularly relevant. First, in 1972, Somalia adopted Law No. 37 on the Somali Territorial Sea and Ports, Article 1 of which claimed a 200M territorial sea, "under the sovereignty of the Somali Democratic Republic." Two years later, in 1974, during UNCLOS III, Kenya made clear that "application of equidistant rule of delimitation of the economic zone with both Tanzania and Somalia would lead to severe distortion".³⁴⁴ In 1975, Kenya adopted the parallel of latitude for its EEZ as an equitable delimitation in light of geographic context and regional practice. In 1979, the EEZ Proclamation formally established Kenya's maritime boundary and gave notice to all UN Member States.
253. Coinciding with this period, at the Eleventh Session of UNCLOS III in Montego Bay 6–10 December 1982, Somalia was one of a few delegations to offer its interpretation of Articles 74 and 83 of the draft UNCLOS, seizing the opportunity during its final statement to the Conference to reassert its insistence on equitable delimitation rather than equidistance. On 9 December 1982, at the 192nd meeting, Somalia stated that:
- With regard to the important question, contained in articles 74 and 83, of delimitation of maritime boundaries, Somalia's understanding of these key provisions is that the goal or objective in all adjudications relating to delimitation shall be to secure an equitable solution. It follows that equity can never be achieved in such situations without having due regard to all relevant circumstances.³⁴⁵
254. This is an interpretative declaration of the kind which, according to the ILC, "indicate[s] the spirit in which [a State] agree[s] to be bound",³⁴⁶ and which, according to the Court, has "considerable probative value".³⁴⁷ It was based on earlier statements made by Somalia in 1980 during UNCLOS III, according to which

³⁴³ *Ibid.*, para. 91.

³⁴⁴ See para. 70 above.

³⁴⁵ See para. 75 above.

³⁴⁶ Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011), A/66/10/Add.1, p. 63.

³⁴⁷ *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 135–6.

maritime delimitation should be based on equitable principles rather than equidistance. In particular, it is recorded that Somalia declared on 26 August 1980 (just one year after the 1979 EEZ Proclamation) that the delimitation of the EEZ and the continental shelf:

should be determined on the basis of the principle of equity. It was convinced that a serious analysis of customary international law, as articulated in the 1969 North Sea cases and the 1977 arbitral decision on the Channel case between France and the United Kingdom, would prove that equity and equitable principles rather than the purely geometric methods of the median or equidistance line had become consecrated as the general rule in international law in delimitation matters.³⁴⁸

255. This expression of the applicable law is consistent with the final text of UNCLOS, which does not refer to equidistance in the context of the delimitation of the EEZ and the continental shelf. It is also in conformity with the approach to maritime delimitation adopted by international courts and tribunals in the 1970s and 1980s, that is to say when the parallel of latitude crystallised as the maritime boundary between Kenya and Somalia, as reflected in the 1979 EEZ Proclamation and the subsequent absence of protest by Somalia. The same principle of equity, rather than equidistance, had also been recognised before the 1979 EEZ Proclamation in the Kenya–Tanzania Boundary agreement concluded in 1975-76.³⁴⁹
256. Somalia’s decision not to protest in 1979 or in the years that followed has to be assessed in light of Somalia’s contemporaneous official position as regards the international law applicable to maritime delimitation — i.e. equity and equitable principles “rather than the purely geometric methods of the median or equidistance line”.³⁵⁰ It is a well-established principle that “a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled”.³⁵¹ In particular, according to the

³⁴⁸ See para. 74 above.

³⁴⁹ See Chapter I, section B3 above.

³⁵⁰ See paras. 74 and 254 above.

³⁵¹ *Island of Palmas (Netherlands/United States)* (1928) 2 R.I.A.A. p. 845; see also G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law” (1953) 30 B.Y.I.L. p. 5; *Grisbadarna (Suède c Norvège)* (1909) 11 R.I.A.A. p. 159; R. Kolb, *Case Law on Equitable Maritime Delimitation: Digest and Commentaries* (Martinus Nijhoff 2003) p. 13, Annex 121; or *Cape Horn Pigeon (United States v Russia)* (1902) 9 R.I.A.A. p. 64; *James Hamilton Lewis (United States v Russia)* (1902) 9 R.I.A.A. p. 67; *CH White (United States v Russia)* (1902) 9 R.I.A.A. p. 72; *Kate & Anna (United States v Russia)* (1902) 9 R.I.A.A. p. 77; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 189; *The Minquiers and Ecrehos case, Judgment of November 17th, 1953, I.C.J. Reports 1953*, p. 56; *Right of Passage, I.C.J. Reports 1960*, p. 37;

Court, “[c]ontemporaneous developments in the law of the sea”, “at the time of the acknowledgment by the Parties of the existence of the maritime boundary”, are relevant elements to be taken into account to establish consensual maritime delimitations.³⁵² In the present case, it is legally significant that Somalia’s absence of protest against the parallel of latitude as the maritime boundary from 1979 onwards was consistent with existing practice and the applicable law of maritime delimitation as expressed by Somalia when the 1979 EEZ Proclamation was adopted, and consistent with the contemporaneous jurisprudence of international courts and tribunals.

257. In the same vein it is to be noted that, during the course of negotiations between 1978 and 1980 at UNCLOS III, Kenya and Somalia, along with other delegations, submitted proposals pertaining to the draft articles on maritime boundary delimitation which laid stress on equitable principles rather than equidistance, and protested strongly against initiatives aiming at modifying the informal composite negotiating text on issues of maritime delimitation.³⁵³ It is relevant that Kenya gave notice of the 1979 EEZ Proclamation during the very same period. Under these circumstances, which constitute “the background against which”³⁵⁴ the 1979 EEZ Proclamation was adopted, Somalia was necessarily in a position to perfectly understand the legal meaning and consequences of Kenya’s Proclamation. The fact that it did not protest against Kenya’s maritime boundary claim (while on the other hand it did act to denounce the Conference proposals which referred to the principle of equidistance, with which it strongly disagreed) is a compelling indication that it was content to accept the parallel of latitude as an equitable delimitation.

258. It is also significant to consider Somalia’s abandonment during this period of its irredentist claims to a “Greater Somalia” and repudiation of the 1924-33 Anglo-Italian Agreement that gave rise to the 1960s Shifita War. Somalia had initiated a rapprochement with Kenya beginning in 1978 (coinciding with Somalia’s military defeat in the Ogaden war against Ethiopia) leading to a declaration by the Somali Head of State in 1981 that Somalia was seeking “accommodation” with Kenya, and

Western Sahara, Advisory Opinion, I.C.J. Reports 1975, paras. 76–7.

³⁵² *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, p. 45, paras. 112 *et seq.*

³⁵³ See Chapter I, section C2 above.

³⁵⁴ *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, para. 115.

that “Somalia is not seeking any territorial gain from Kenya”.³⁵⁵ Facing diplomatic isolation, Somalia’s *volte face* on its boundary claims against Kenya (including its offer to cooperate on “marine exploitation”³⁵⁶) reinforced its acquiescence in Kenya’s maritime boundary claim at the parallel of latitude under the 1979 EEZ Proclamation. Given the history of the Shifta War and the acute controversy between the Parties over boundaries, Somalia’s silence and policy of “accommodation” in the face of Kenya’s 1979 claim assumes even greater significance.

259. In the same vein, Somalia did not protest the 1979 EEZ Proclamation while it was adopting legal instruments related to the law of the sea which, no doubt, were carefully assessed and prepared. In particular, during the ten year period that followed the 1979 EEZ Proclamation, Somalia: (i) signed UNCLOS on 10 December 1982; (ii) adopted the Somali Maritime Law of 1988; (iii) adopted Law No. 11 and Decree No. 14 dated 9 February 1989 relating to the ratification of UNCLOS; (iv) and ratified UNCLOS on 24 July 1989.³⁵⁷ At no point in time during this crucial period for the law of the sea did Somalia protest the 1979 EEZ Proclamation. As demonstrated above, there is also no evidence that Kenya’s maritime boundary claim was met with any protest in the following years, or that Somalia protested the 2005 EEZ Proclamation (and its publication in 2006 in the *Law of the Sea Bulletin* No.61) when it was adopted and notified under applicable rules to UNCLOS States Parties.
260. The same considerations apply to the extension of the parallel of latitude to the outer limits of the continental shelf in Kenya’s 2009 CLCS submission. Somalia’s mere observation in the August 2009 letter to the UN Secretary-General that equidistance is “normally” the point of departure for delimitation — the first occasion on record where Somalia even raised the matter — was neither a protest nor a claim to a contrary maritime boundary. Having claimed and exercised uncontested jurisdiction at the parallel of latitude for 30 years, Kenya could not be left speculating as to Somalia’s exact position in 2009, and to suddenly relinquish its long-established claim to the maritime boundary. In fact, Somalia only clarified its exact position and claim to an equidistance line for the first time at the March 2014 technical meeting

³⁵⁵ See para. 68 above.

³⁵⁶ *Ibid.*

³⁵⁷ See MS, Vol. I, paras. 3.2–3.4.

between the Parties, followed soon thereafter by Somalia's EEZ Proclamation in June 2014, and its CLCS submission in July 2014.

B. The Other Conduct of the Parties between 1979 and 2014 is Consistent with Acquiescence in the Parallel of Latitude as the Maritime Boundary

261. Somalia's acquiescence is further confirmed by the other conduct of the Parties since 1979. This includes the practice of Kenya and Somalia in regard to maritime patrols and enforcement, fisheries, marine scientific research, and oil concessions, which are all consistent with the maritime boundary at the parallel of latitude.
262. In its Memorial, Somalia seeks to dismiss the relevance of the Parties' practice by arguing that as a matter of international law, "circumstances created by the conduct of the parties do not constitute relevant circumstances for the purposes of maritime delimitation."³⁵⁸ The Court's jurisprudence demonstrates however that this assertion is incorrect.
263. First, contrary to Somalia's assertion, the Court has not ruled out that "conduct might need to be taken into account as a relevant circumstance in an appropriate case."³⁵⁹ This aspect is considered in Chapter III in regard to evidence of what the Parties considered to be an equitable delimitation, irrespective of whether there has been prolonged acquiescence. Second, and in regard to acquiescence in the present Chapter, the Court has clearly held that the conduct of the Parties can "in certain circumstances correspond to the existence of an agreed legal boundary",³⁶⁰ express a "tacit agreement (...) of a nature to establish a legally binding maritime boundary",³⁶¹ or otherwise assist in determining the extent of the maritime boundary accepted by the Parties.³⁶² Third, the other conduct of the Parties is relevant in the present case because it is consistent with and *confirms* acquiescence in the line proclaimed by Kenya since 1979. Unlike other precedents, there is in the present case a formal claim and notice by one party, followed by prolonged lack of protest by the other party. This is emphatically not an instance where the Court has to base itself merely on the Parties' practice on fisheries or oil concessions. In the present case, the practice of

³⁵⁸ MS, Vol. I, para. 6.46.

³⁵⁹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, I.C.J. Reports 2012, para. 220.

³⁶⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, I.C.J. Reports 2007, para. 253.

³⁶¹ *Ibid.*, para. 258.

³⁶² *Maritime Dispute (Peru v Chile)*, Judgment, I.C.J. Reports 2014, para. 103.

Kenya and Somalia merely *confirms* their consent (already established by other evidence of formal notice and prolonged silence) to a maritime boundary at the parallel of latitude.

264. As demonstrated above, Kenya's consistent conduct since 1979 has been based on a parallel of latitude as the maritime boundary with Somalia.³⁶³ Somalia does not argue, or even suggest, that either party adopted or otherwise evidenced support for an equidistance line after the 1979 EEZ Proclamation. The only exception is the territorial sea, and the reference in Kenya's 1972 Law and 1989 Act to a median line as a provisional principle. This is consistent with Article 12 of the 1958 Convention on the Territorial Sea in regard to the 1972 Law, and Article 15 of UNCLOS in regard to the 1989 Act. Thus, the reference to a median line in the territorial sea absent a formal agreement with Somalia on the maritime boundary is not in contradiction with claiming the parallel of latitude in the 1979 and 2005 EEZ Proclamations. Somalia's own 1988-89 Law furthermore, referred to a "straight line" and clearly not to a "median line" which only applied to Yemen. It is therefore not in dispute that Kenya claimed the parallel of latitude beginning in 1979, and that Somalia only claimed an equidistance line beginning in 2014. This has been the basis for the conduct of the parties during this 35 year period.

265. Somalia's Application and Memorial make it perfectly clear that:

Despite these provisions, in 1979 and then again in 2005 the President of Kenya made unilateral Proclamations laying claim to a parallel boundary in both the territorial sea and the EEZ. Consistent with these Presidential Proclamations, Kenya has offered a number of petroleum blocks for deep-water exploration and drilling in areas across the equidistance line that extend up to the claimed parallel boundary;³⁶⁴

As Somalia underscored in its Application, 'Kenya has acted unilaterally ... to exploit both the living and the non-living resources' of the disputed area. It has awarded several exploration blocks, and undertaken or authorised various companies to undertake exploration studies.³⁶⁵

266. Chapter I establishes that in addition to the undisputed conduct of Kenya in granting oil concessions, Somalia's Memorial has ignored its own conduct in following the parallel of latitude in offshore oil exploration blocks beginning in 1986 until the

³⁶³ See Chapter I, sections C-F above.

³⁶⁴ MS, Vol. I, para. 1.28.

³⁶⁵ MS, Vol. I, para. 8.1.

extension of Soma Oil's Offshore Evaluation Area south of the parallel of latitude in May 2014. In fact, in 1979, Somalia abandoned a concession block that followed an equidistance line, and did not offer a similar exploration license until the May 2014 Soma Oil extension. Somalia's Memorial has also ignored the Kenyan Navy's maritime patrols and enforcement, as well as Somalia's own fisheries and marine scientific research, indicating that from 1979 onwards, the Parties' practice was consistent with the parallel of latitude. This other conduct reinforces Somalia's acquiescence (already established through the lack of protest against Kenya's repeated formal notifications) and leaves no doubt that it consented to Kenya's maritime boundary claim.

267. In addition to the 1979 and 2005 EEZ Proclamations as well as the 2009 CLCS submission, this other conduct would have also called for reaction if Somalia had disagreed with Kenya's claim or considered that it encroached on Somalia's own maritime areas. This would have been especially necessary because since 1972, Somalia claimed sovereignty in a territorial sea up to 200M rather than an EEZ with more limited sovereign rights.³⁶⁶ In *Dubai-Sharjah*, the Court of Arbitration concluded that:

“a State must react, although using peaceful means, when it considers that one of its rights is threatened by the action of another State. Such a rule is perfectly logical as lack of action in a situation like this can only mean two things: either the State does not believe it really possesses the disputed right, or for its own private reasons, it decides not to maintain it.”³⁶⁷

268. In the *Anglo-Norwegian Fisheries* case, the Court similarly placed stress upon the effect of absence of protest against the Norwegian claims:

Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognised although it constitutes a derogation from the rules in force.”³⁶⁸ According to Sir Derek Bowett, when, “as in the *Anglo-Norwegian Fisheries* case, the State proceeds with full knowledge of another State's conflicting right or interest, the inaction or silence of the latter may afford a basis for the acquisition of a title by prescription.”³⁶⁹

³⁶⁶ See para. 241 above.

³⁶⁷ *Dubai-Sharjah Border Arbitration* (1981) 91 I.L.R. p. 623.

³⁶⁸ *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 130.

³⁶⁹ D. Bowett, “Estoppel before International Tribunals and Its Relation to Acquiescence” (1957) 33 B.Y.I.L.

269. Somalia admits in the Memorial that it was under a duty to act in order to protect its sovereign rights. It emphasizes that, in August 2014, it:

was compelled to bring these proceedings as a result of Kenya's unilateral claim to a maritime boundary extending due east into the Indian Ocean along a parallel of latitude from the terminal point of the Parties' land boundary. The boundary claimed by Kenya represents an attempt a significant effort [*sic*] to expand Kenya's maritime jurisdiction, as well as a serious encroachment into Somalia's maritime spaces.³⁷⁰

270. But if Somalia's intention was to protest against the 1979 and 2005 EEZ Proclamations and the consistent conduct of Kenya, it should have done so *at that time*, not 35 years later. Even after Kenya's 2009 CLCS submission, Somalia did not protest or claim an equidistance line. To the contrary, as recently as 2013, Somalia issued a license for oil exploration at the parallel of latitude. The fact that Somalia did not react for such a prolonged period evidences an intention throughout that period to consent to Kenya's maritime boundary claim as an equitable delimitation, in accordance with the positions it expressed during UNCLOS III.

271. Nothing prevented Somalia from submitting an Application to the Court in 1979 or thereafter, both Parties' having deposited Article 36 Declarations with the UN Secretary-General several years before (1963 in respect of Somalia and 1965 in respect of Kenya). In any event, Somalia would have been able to at least lodge an official protest if it considered, at that time, that the maritime boundary claimed by Kenya was not equitable or otherwise unacceptable.

272. Despite this total lack of evidence, Somalia argues in the Application that it "has repeatedly protested Kenya's excessive and unjustifiable maritime claims".³⁷¹ This is simply not true. There is no evidence whatsoever of *any* protest prior to 2014, let alone "repeated protests". It is however an admission by Somalia that it was under a duty to protest. In fact, Somalia's Application quotes only a single Diplomatic Note (objecting to Kenya's CLCS submission) dated 4 February 2014,³⁷² that is, 35 years after the 1979 EEZ Proclamation, and it does not even claim an equidistance line. The Memorial confirms that there was no claim to an equidistance maritime boundary until the first technical meeting in March 2014, and that Somalia's new claim was

p. 200–1.

³⁷⁰ MS, Vol. I, para. 1.6.

³⁷¹ Application Instituting Proceedings (28 August 2014), para. 27.

³⁷² Application Instituting Proceedings (28 August 2014), para. 27.

only formalized with its EEZ Proclamation in June 2014. Somalia's own evidence thus indicates that despite its duty to protest, throughout this period, it did not protest or express any reservation against Kenya's formal claim or conduct based on the 1979 and 2005 EEZ Proclamations. There is no record in Kenya's Foreign Affairs archives of a protest by Somalia against the 1979 or 2005 EEZ Proclamations³⁷³ and the UN also confirms that it has never received a communication in this regard.³⁷⁴ By failing to protest during this prolonged period, Somalia confirmed that it acquiesced in a parallel of latitude as the maritime boundary between itself and Kenya.

C. Conclusion: Somalia has Consented to the Maritime Boundary at the Parallel of Latitude

273. In conclusion, given the historical context and undisputed facts in the present case, there can be no doubt that Somalia's lack of protest for some 35 years, whether in regard to Kenya's successive official claims and formal notices in 1979, 2005, and 2009, or the other conduct of the Parties in regard to the exercise of maritime jurisdiction (including in regard to navy patrols, fisheries, marine scientific research, and oil concessions), constitutes prolonged acquiescence and consent to the parallel of latitude that Kenya expressly, publicly, and officially proclaimed as the maritime boundary in the territorial sea and EEZ in 1979 and again in 2005, and which was extended beyond 200M to the outer limits of the continental shelf in 2009. It is not in dispute that Somalia only protested and claimed an equidistant maritime boundary in 2014.
274. In brief, under international law, Somalia's prolonged acquiescence in the maritime boundary at the parallel of latitude that Kenya proclaimed as an equitable delimitation and implemented in good faith from 1979 to 2014 without any protest whatsoever, is binding on Somalia.

³⁷³ Witness Statement of the Cabinet Secretary, Ministry of Foreign Affairs, Republic of Kenya, Amb. (Dr.) Amina C. Mohamed, EGH, CAV, 18 October 2017, Annex 49.

³⁷⁴ Letter from the Office of Legal Affairs of the United Nations to the Permanent Mission of the Republic of Kenya to the United Nations, 8 November 2017, Annex 65.

**CHAPTER III. EQUITABLE DELIMITATION OF THE MARITIME BOUNDARY
BASED ON THE PARALLEL OF LATITUDE**

275. It was explained in Chapter II that based on conduct extending from 1979 to 2014, Somalia consented to the parallel of latitude as the maritime boundary with Kenya, following Tanzania's agreement in 1975-6 to the use of the parallel as Kenya's southern maritime boundary. Kenya submits that Somalia's prolonged acquiescence settles the question before the Court. This Chapter demonstrates that even if there had been no common acceptance of and consent to the parallel of latitude as the maritime boundary, application of the principle of equitable delimitation under international law would lead to the same result.
276. Kenya and Somalia are bound by UNCLOS, which stipulates in Articles 74 and 83 that the maritime boundary delimitation between them must achieve an equitable solution. UNCLOS does not require the use of any particular methodology in order to achieve this mandatory result. Customary international law is similar, as the Court has firmly established in its decisions over many years. While the three-stage "equidistance/relevant circumstances" methodology has been commonly applied in order to achieve an equitable result, there is no suggestion that it is mandatory or that it is appropriate in all circumstances. In the particular circumstances and the regional context of the present case, the "three-stage" approach is not appropriate. Furthermore, international law provides that where the parties have indicated what they regard as an equitable solution, this must be respected in effecting maritime delimitation.
277. In the present case, the Parties have so indicated: there was a common understanding between them that the parallel of latitude is an equitable solution. When Kenya first decided to adopt that line in 1975, it did so expressly on the grounds that it was an equitable delimitation within the geographical context of the maritime area to be delimited. Both immediately before and after the 1979 EEZ Proclamation and notice thereof, during the UNCLOS III negotiations Somalia insisted that instead of equidistance, maritime delimitation in the EEZ and continental shelf should be based on equitable principles. Consistent with this shared understanding, Somalia did not protest Kenya's maritime boundary claim following either the 1979 or 2005 EEZ Proclamations, or following the 2009 CLCS submission. Somali's new claim in 2014,

that equidistance is the only equitable solution, is manifestly inconsistent with its position for the 35 year period preceding the initiation of proceedings before the Court. Irrespective of the binding legal effect of prolonged acquiescence as set out in Chapter II therefore, in effecting a maritime delimitation, the Court cannot disregard Somalia's historical position as to what constitutes an equitable solution.

278. In this regard, this Chapter addresses the following five points:
- a. The objective in maritime boundary delimitation is to achieve an equitable solution (section A);
 - b. No particular methodology is mandatory for the achievement of that objective (section B);
 - c. Where the parties have indicated what they regard as an equitable solution, this must be respected (section C);
 - d. In the present case, the Parties have indicated that they regard the parallel of latitude as an equitable solution (section D); and
 - e. The parallel of latitude is in any event objectively an equitable solution, taking into account all the relevant circumstances in this maritime delimitation (section E).

A. The Objective of Maritime Boundary Delimitation

1. Equitable solution

279. The Court is asked to determine the complete course of a single maritime boundary between Somalia and Kenya in the Indian Ocean in the territorial sea, the EEZ and the continental shelf, including the outer limits of the continental shelf beyond 200M.³⁷⁵
280. In making its determination of this maritime boundary, the Court must ensure that this is, overall, an equitable solution.³⁷⁶ As stated by the Somali delegate (Mr. Robleh) in his final statement to UNCLOS III:

³⁷⁵ Application Instituting Proceedings (28 August 2014), para. 2; MS, Vol. I, para. 1.1; MS, Vol. I, p. 147, Submissions at para. 1. See further MS, Figures 3.3 and 6.1. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Merits, Judgment, I.C.J. Reports 2001*, para. 173: “the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and ... finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various — partially coincident — zones of maritime jurisdiction appertaining to them”.

With regard to the important question, contained in articles 74 and 83, of delimitation of maritime boundaries, Somalia's understanding of these key provisions is that the goal or objective in all adjudications relating to delimitation shall be to secure an equitable solution. It follows that equity can never be achieved in such situations without having due regard to all relevant circumstances.³⁷⁷

Kenya agrees.

281. The relevant provisions of UNCLOS in regard to the EEZ and continental shelf are Articles 74(1) and 83(1) respectively, which reflect customary international law.³⁷⁸ The texts of these provisions are identical, the only difference being that Article 74 refers to the EEZ and Article 83 to the continental shelf. They read as follows:

The delimitation of the exclusive economic zone [or continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.³⁷⁹

282. Article 15 does not expressly refer to the need to achieve an equitable solution. However, as observed by President Guillaume, in a speech to the UN Sixth Committee in October 2001:

Whether it be for the territorial sea, the continental shelf or the fishing zone, it is an equitable result that must be achieved.³⁸⁰

283. The Court has consistently emphasized the obligatory nature of that objective; namely, that the result of the delimitation must be equitable:

What general international law prescribes in every maritime delimitation between neighbouring States could therefore be defined as follows: ... delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the

³⁷⁶ See UNCLOS Articles 74(1) and 83(1) set out below at paras. 281.

³⁷⁷ 192nd Plenary meeting, 9 December 1982, A/CONF.62/SR.192, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XVII, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion, para. 159, p. 127, Annex 73. In its Memorial, Somalia's submissions are advanced on the assumption that the objective in determining the single maritime boundary is to achieve an equitable solution (see MS, Vol. I, paras. 1.21 (referring to the "equitable result") and 6.3 (referring to "the equitable solution that the law requires"))).

³⁷⁸ *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, para. 179.

³⁷⁹ Emphasis added. Somalia in its Memorial accepts that "an equitable solution" is the prescribed objective for the delimitation of the continental shelf and EEZ (MS, Vol. I, para. 6.11).

³⁸⁰ Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of The General Assembly of The United Nations, 31 October 2001, p. 9, Annex 120. See also *Land and Maritime Boundary (Cameroon v Nigeria)*, Judgment, *I.C.J. Reports 2002*, para. 288; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, paras. 178–84; *Croatia/Slovenia Arbitration Final Award*, PCA 2017, para. 1000.

geographic configuration of the area and other relevant circumstances, an equitable result.³⁸¹

The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS).³⁸²

284. In summary, it is clear that (i) the objective of any maritime boundary delimitation is to achieve an equitable solution; and (ii) that an equitable solution is mandatory. A State is entitled to an equitable delimitation of its maritime areas, whether by agreement or by decision of the Court. In the present case, as set out in sections D and E below, there was a common understanding of the Parties as to what constitutes an equitable solution, namely the parallel of latitude (and not an equidistant or adjusted equidistant line); and the parallel of latitude would in any event be an objectively equitable solution even if the Parties had not already acquiesced in that position for 35 years.

2. Relevant equitable principles

285. An equitable solution is achieved by applying certain well-established principles that constitute the foundations of the law on maritime delimitation.³⁸³ The following principles are of particular relevance in the present case.

286. First, is the principle of not inequitably cutting off either State's maritime entitlements and of non-encroachment.

287. For example, in *Nicaragua/Colombia* the Court confirmed that:

³⁸¹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, para. 112.

³⁸² *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009*, para. 120. See also *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, para. 179; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment, I.C.J. Reports 2007*, para. 270; *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, para. 183. See further *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, paras. 85 and 92; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para. 45; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, para. 70.

³⁸³ See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para. 46: "The normative character of equitable principles applied as a part of general international law is important because these principles govern not only delimitation by adjudication or arbitration, but also, and indeed primarily, the duty of Parties to seek first a delimitation by agreement, which is also to seek an equitable result. That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples ... principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstance". At the time that Kenya expressly and publicly asserted its claim to the parallel of latitude (by Presidential Proclamation dated 1979), equitable principles were clearly expounded as the basis for maritime delimitation both by the Court and the drafters of UNCLOS. In more recent cases the Court refers to the need to accommodate "relevant circumstances", but consideration of "relevant circumstances" serves the same function as the application of equitable principles.

the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*), Judgment, I.C.J. Reports 2009, p. 127, para. 201).³⁸⁴

288. The Court concluded that:

the cut-off effect is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result ... An equitable solution requires that each State enjoy reasonable entitlements in the areas into which its coasts project. In the present case, that means that the action which the Court takes in adjusting or shifting the provisional median line should avoid completely cutting off either Party from the areas into which its coasts project.³⁸⁵

289. In *Guinea/Guinea-Bissau*, the Arbitral Tribunal stated that:

[w]hen in fact ... there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits.³⁸⁶

290. As observed by Judge Lachs in *Guinea/Guinea Bissau*:

As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its rights to development or put its security at risk.³⁸⁷

291. Second, is the principle that marked disproportions between coastal length and the area of maritime zones should be avoided.

³⁸⁴ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012, para. 215.

³⁸⁵ *Ibid.*, paras. 215–16. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, para. 46.

³⁸⁶ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award (14 Feb. 1985), reprinted in R.I.A.A., Vol. XIX, at p. 149 and I.L.R., Vol. 77, p. 635, at p. 682, para. 104.

³⁸⁷ See further *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, I.C.J. Reports 2009, para. 204 “legitimate security considerations of the parties may play a role in determining the final delimitation line”; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, para. 222 “However, the Court has recognized that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State and the Court will bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted”; *Eritrea v Yemen (Phase Two: Maritime Delimitation)* (1999) 119 I.L.R. p. 463, para. 157: “If any further were needed to reject the Yemen suggestion of enclaving the Eritrean islands in this area beyond a limit of 12 miles from the high-water line of the mainland coast, it may be found in the principle of non-encroachment which was described by Judge Lachs in the *Guinea/Guinea-Bissau Award* in the following terms: As stated in the award, our principal concern has been to avoid, by one means or another, one of the Parties finding itself faced with the exercise of rights, opposite to and in the immediate vicinity of its coast, which might interfere with its rights to development or put its security at risk”.

292. While Kenya does not suggest that “proportionality”, which has its proper role as a ‘stage three’ check on the proposed boundary under the three-stage approach,³⁸⁸ is a legal principle applicable to create an equitable line, it is a helpful analytical tool for the identification and illustration of the degree of cut-off with a view to achieving an equitable delimitation. In principle, two coastlines of equal length (or coastal frontage) facing the open ocean would be expected to generate equal maritime areas; and a coastline twice the length of another would be expected to generate twice the area; and so on. If something approaching those proportions does not occur, it is because a concave coastline produces some degree of cut-off (and/or because a convex coastline produces a ‘bonus’ for a State).
293. The principle that marked disproportions between coastal length and the area of maritime zones should be avoided has been repeatedly referred to by the Court.³⁸⁹ For example, in *Nicaragua v Colombia* the Court noted that:

the boundary should be such that the portion of the relevant area accorded to each State takes account of the disparity between the lengths of their relevant coasts. A boundary which followed the course of the provisional median line would leave Colombia in possession of a markedly larger portion of the relevant area than that accorded to Nicaragua, notwithstanding the fact that Nicaragua has a far longer relevant coast.³⁹⁰

294. In *Peru v Chile*, the Court referred to a disproportionality test in which it:

...assesses whether the effect of the line, as adjusted, is such that the Parties’ respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, pp. 101-103, paras. 115-122; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, pp. 695-696, paras. 190-193).³⁹¹

³⁸⁸ For the reasons set out in this chapter, the three-stage approach relied upon by Somalia does not apply in the present case.

³⁸⁹ This principle is also referred to by ITLOS. Recently, in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, ITLOS verified whether there would be an inequitable result owing to a marked disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime area (encompassing the entire area under dispute, including an approximation of the outer limits of the continental shelf beyond 200M) (see at paras. 533–5).

³⁹⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, para. 229.

³⁹¹ *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, para. 180.

B. No Mandatory Methodology

295. Somalia attempts to present equidistance as a rule that “must” be applied from the outset,³⁹² apparently treating the “three-step analytical framework known as the ‘equidistance/relevant circumstances method’” as a mandatory methodology,³⁹³ and asserting that the use of the parallel of latitude as a maritime boundary has no legal basis.³⁹⁴
296. An equidistance line, however, (including the equidistance/relevant circumstances approach) is only one method among others that may be deployed to achieve the overriding objective of an equitable solution.³⁹⁵ Non-equidistance methods, such as use of a parallel of latitude, are also admitted by international law as possible approaches for the achievement of an ‘equitable result’.
297. This is clear from:
- a. The relevant provisions of UNCLOS (see section 1 below);
 - b. State practice (see section 2 below); and
 - c. The relevant jurisprudence (see section 3 below).

1. UNCLOS

298. The relevant provisions of UNCLOS have been set out at para. 281 above. They do not prescribe any mandatory methodology to achieve an equitable solution. As was noted by Somalia, “the Convention ‘is silent as to the method to be followed to achieve it’”.³⁹⁶
299. This reflects the fact that during the negotiation of UNCLOS, a large group of States opposed any reference to equidistance in Articles 74 and 83. Both Kenya and Somalia

³⁹² MS, Vol. I, para. 1.20 (emphasis added) “Equidistance is “the general rule” and “[t]he usual methodology” applicable to maritime delimitation disputes. Accordingly, the Court’s case law establishes that the delimitation exercise must begin with the drawing of a provisional equidistance line unless there exist “compelling reasons” to make this “unfeasible.” MS, Vol. I, para. 3.37 “For Somalia, the applicable principles are the ones consistently applied by the Court.”

³⁹³ MS, Vol. I, para. 6.12.

³⁹⁴ MS, Vol. I, para. 5.29 “The parallel boundary claimed by Kenya has no historical or legal basis”.

³⁹⁵ See particularly on this point M. Kamto, “Considérations actuelles sur la méthode de délimitation maritime devant la Cour internationale de Justice. De charybde en scylla ?”, in *Mélanges Momtaz* (Brill Nijhoff 2017) pp. 411–16 and 419–20, Annex 126.

³⁹⁶ MS, Vol. I, para. 6.11 citing *Continental Shelf (Libyan Arab Jamahiriya/Malta), Merits, Judgment, I.C.J. Reports 1985*, para. 28. Kenya’s submission that there is no mandatory methodology also applies to the territorial sea.

were members of that group. The clear position adopted by Kenya and Somalia (and indeed by many other African States³⁹⁷) during UNCLOS III was that maritime delimitation must be based *not* on equidistance, but on the principle of ‘equitable result’.

300. This is demonstrated by the contemporaneous statements of both Parties. For example:

- a. On 3 April 1980, the Somali representative, Mr. Yusuf, confirmed that “Such delimitation should be effected in accordance with equitable principles and all the relevant circumstances. The practice of States and judicial and arbitral precedents provided clear evidence of the widespread use of those criteria by the international community”;³⁹⁸
- b. The second report of the Kenyan delegation to the Ninth Session (1980) negotiations with respect to the delimitation of maritime boundaries recorded that “Kenya has been a supporter of the equitable principles group and continues to do so. The current international law would tend to support our view that delimitation of the areas in question should be effected through the employment of equitable principles rather than the median or equidistance criterion employed under the 1958 Law of the Sea Conventions. The cases oft[en] cited in this respect relate to the *North Sea Continental Shelf* and the *Anglo-French Arbitral Award* with respect to the English Channel”;³⁹⁹
- c. On 22 May 1980, Mr. Mulwa, in his report to the Kenya National Assembly regarding the Ninth Session of UNCLOS III (1980) negotiations concerning the

³⁹⁷ As set out in Chapter I at para. 70, NG7 was divided into two unofficial sub-groups, the “equidistance group” and the “equity group”. In addition to Kenya and Somalia, the “equity group” included Algeria, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syria, Turkey, Venezuela, and Vietnam (see list set out in the Dissenting Opinion of Judge Oda in *Continental Shelf (Tunisia/Libya) Judgment*, *I.C.J. Reports 1982*, para. 135(ii)).

³⁹⁸ 128th Plenary meeting, 3 April 1980, A/CONF.62/SR.128, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume XIII, Ninth Session, para. 43, p. 35 (Somalia) and para. 168, p. 44 (Kenya), Annex 71.

³⁹⁹ Second Report of the Ninth Session of 3rd UNCLOS (New York from 3 March to 4 April 1980) from the Kenya Permanent Mission to the United Nations to the Ministry of Foreign Affairs, *Delimitation of Maritime [sic] Boundaries*, 14 March 1980, Annex 23, p. 2.

delimitation of maritime boundaries, confirmed that with respect to Somalia “we are using what we call equitable principles”,⁴⁰⁰

- d. Again in 1980, during negotiations the Somali delegate (Mr. Robleh) stated that “equity and equitable principles, rather than the purely geometric methods of the median or equidistance line, had been consecrated as the general rule in international law in delimitation matters”,⁴⁰¹
- e. As noted above, at the concluding UNCLOS III session held in Montego Bay on 6–10 December 1982, the Somali delegate (Mr. Robleh) stated “With regard to the important question, contained in articles 74 and 83, of delimitation of maritime boundaries, Somalia’s understanding of these key provisions is that the goal or objective in all adjudications relating to delimitation shall be to secure an equitable solution. It follows that equity can never be achieved in such situations without having due regard to all relevant circumstances”.⁴⁰²

301. These statements of the official positions of Kenya and Somalia as to the meaning to be ascribed to the relevant provisions of UNCLOS are important elements in the present case since they reflect the common understanding of Kenya and Somalia as regards the applicable law on maritime delimitation. Critically, these statements were made by Kenya and Somalia at the very time that their own maritime boundary was under consideration; they are contemporaneous with the 1979 EEZ Proclamation, by which Kenya expressly and publicly asserted a parallel of latitude as an equitable delimitation of the maritime boundary, and notified Somalia which made no protest.⁴⁰³

2. State practice

302. State practice demonstrates that States use a range of methods in order to achieve an equitable solution in maritime delimitation.

⁴⁰⁰ Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December, 1979, Second Session, Tuesday, 4th December, 1979 to Wednesday, 18th June, 1980, Records of 22 May 1980, col. 1225–1226 and 27 May 1980, col. 1281–1282, at col. 1225, Annex 5.

⁴⁰¹ 138th Plenary meeting, 26 August 1980, A/CONF.62/SR.138, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV, Resumed Ninth Session, para. 73, p. 56, Annex 72.

⁴⁰² 192nd Plenary meeting, 9 December 1982, A/CONF.62/SR.192, Official Records of the Third United Nations Conference on the Law of the Sea, Volume XVII, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion, p. 127, para. 159, Annex 73.

⁴⁰³ See Chapter I, section C above.

303. This has to be taken into account for the purpose of identifying the rules and methodology applicable to maritime delimitation.⁴⁰⁴ State practice is a constituent element of customary international law, and is also relevant to the interpretation of UNCLOS as “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.⁴⁰⁵ In the present case, the fact that in many circumstances States have not considered it relevant or appropriate to have recourse to equidistance, but have instead favoured other methods of delimitation, is highly significant.
304. State practice shows that in a number of instances, States have adopted a non-equidistance method, demonstrating that in some circumstances the equidistance line (including an adjusted equidistance line) is considered inappropriate even for agreed boundaries.⁴⁰⁶ Listed below are examples of delimitations where a parallel of latitude or meridian of longitude was used, for all or part of the boundary, as the agreed equitable solution:
- a. The 1952 Ecuador–Peru Agreement (parallel of latitude);⁴⁰⁷
 - b. The 1954 Chile–Peru Agreement (parallel of latitude);⁴⁰⁸
 - c. The 1975 Gambia–Senegal Agreement (parallel of latitude);⁴⁰⁹
 - d. The 1976 Mauritania–Morocco Agreement (parallel of latitude);⁴¹⁰
 - e. 1975 Colombia–Ecuador Delimitation (parallel of latitude);⁴¹¹

⁴⁰⁴ See I.C.J. Statute, Art. 38. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, para. 44 “The Court for its part has no doubt about the importance of State practice in this matter.” In that case the Court observed that that the practice cited demonstrated that no rule prescribing the use of equidistance, or indeed of any method, was obligatory. See further para. 49 and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 129.

⁴⁰⁵ Article 31(3)(b) provides that in interpreting a treaty “there shall be taken into account, together with the context: ... (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

⁴⁰⁶ In Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Judgment of 23 September 2017, ITLOS Reports 2017, ITLOS noted that delimitation agreements may have been influenced by extra-legal considerations (para. 288). However, such agreements are to be presumed to achieve an equitable solution under the applicable rules of international law. As such, they constitute relevant State practice for the purpose of establishing the applicable methodology to maritime delimitation.

⁴⁰⁷ 1006 U.N.T.S. 325, Annex 128.

⁴⁰⁸ 2274 U.N.T.S. 527, Annex 129.

⁴⁰⁹ JI Charney & LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 854, Annex 132.

⁴¹⁰ 1035 U.N.T.S. 120, Annex 134.

⁴¹¹ 996 U.N.T.S. 239, Annex 133.

- f. The 1976 Kenya–Tanzania Agreement (in part, parallel of latitude);⁴¹²
- g. The 1976 Colombia–Panama Agreement (in part, parallels of latitude and meridians of longitude);⁴¹³
- h. The 1977 Colombia–Costa Rica Treaty (line consisted of two elements: a defined line along the parallel and an open-ended meridian);⁴¹⁴
- i. The 1980 France (Guadeloupe and Martinique)–Venezuela Delimitation Treaty (meridian of longitude);⁴¹⁵
- j. The 1984 Argentina–Chile Agreement (combination of meridians of longitude and parallels of latitude);⁴¹⁶
- k. The 1988 Tanzania–Mozambique Agreement (combination of equidistance initially and then a parallel of latitude);⁴¹⁷
- l. The 1988 Ireland–United Kingdom Agreement (stepped line of parallels of latitude and meridians of longitude);⁴¹⁸
- m. The 1990 United States–Soviet Union Agreement (meridian of longitude in part);⁴¹⁹
- n. The 2001 Honduras–United Kingdom (Cayman Islands) Treaty (in part, parallel of latitude);⁴²⁰
- o. The 2002 Angola–Namibia Treaty (parallel of latitude);⁴²¹
- p. 2009 Kenya–Tanzania Agreement (parallel of latitude);⁴²²

⁴¹² JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 881, Annex 136.

⁴¹³ 1074 U.N.T.S. 221, Annex 137.

⁴¹⁴ JI Charney & LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 474, Annex 138. This states: “No reference to the method employed is stated and it is definitely not equidistance. One straight line A–B (47 n.m. long) was drawn along a determined parallel starting on the (dotted) final line prescribed in the Colombia–Panama 1976 agreement (Colombia–Panama (1976) No. 2-5). From Point B, another open-ended (dotted) line runs along a given meridian to at least 11° N lat. where a delimitation with a third party (Nicaragua) enters under consideration” (see p. 464).

⁴¹⁵ 1319 U.N.T.S. 215, Annex 139.

⁴¹⁶ 1399 U.N.T.S. 102, Annex 141.

⁴¹⁷ JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 898, Annex 143.

⁴¹⁸ (1989) *Law of the Sea Bulletin* No. 13, Annex 142.

⁴¹⁹ (1991) *Law of the Sea Bulletin* No. 17, Annex 145.

⁴²⁰ (2002) *Law of the Sea Bulletin* No. 49, Annex 147.

⁴²¹ JI Charney & LM Alexander (eds), *International Maritime Boundaries V* (Nijhoff 2005) p. 3719, Annex 148.

- q. 2011 Mozambique–Tanzania Agreement (not yet in force) (in part, parallel of latitude);⁴²³
 - r. 2012 Colombia–Ecuador Delimitation (parallel of latitude).⁴²⁴
305. In addition, there are many examples of delimitations where other non-equidistant methods were used as the agreed equitable solution:
- a. The 1957 Norway–Soviet Union Agreement (pragmatic solution acceptable to both parties in the circumstances; not equidistance);⁴²⁵
 - b. The 1960 Senegal–Guinea-Bissau Agreement (France–Portugal) (straight line);⁴²⁶
 - c. The 1984 France–Monaco Agreement (parallel lines, i.e. corridor);⁴²⁷
 - d. The 1990 Trinidad and Tobago–Venezuela Agreement (in part, straight line);⁴²⁸
 - e. The 2000 China–Vietnam Agreement (in the spirit of ‘mutual understanding and mutual accommodation, friendly consultation for an equitable and rational solution’);⁴²⁹
 - f. The 2008 Qatar–Saudi Arabia Joint Minutes on the Land and Maritime Boundaries Agreement of 4 December 1965 (the co-ordinates of the boundary line lie 3M to the north and parallel with the Qatar–United Emirates (Abu Dhabi) boundary);⁴³⁰
 - g. 2010 Norway–Russian Federation (equitable solution based on the progress achieved in the course of negotiations, as well as the marked disparities in the respective coastal lengths);⁴³¹

⁴²² MS, Vol. III, Annex 7. The 1976 and 2009 Kenya–Tanzania Agreements are considered in further detail at paras. 326–31 below.

⁴²³ CG Lathorp (ed), *International Maritime Boundaries VII* (Brill Nijhoff 2016), p. 4800, Annex 155. The 1988 and 2011 Mozambique–Tanzania Agreements are considered in further detail at para. 332 below.

⁴²⁴ CG Lathorp (ed), *International Maritime Boundaries VII* (Brill Nijhoff 2016) p. 4765, Annex 156. This 2012 Delimitation confirmed the previous 1975 Delimitation (cited above).

⁴²⁵ JI Charney & LM Alexander (eds), *International Maritime Boundaries II* (Nijhoff 1993) p. 1786, Annex 130

⁴²⁶ JI Charney & LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993) p. 873, Annex 131.

⁴²⁷ 1411 U.N.T.S. 289, Annex 140.

⁴²⁸ 1654 U.N.T.S. 293, Annex 144.

⁴²⁹ 2336 U.N.T.S. 179, Annex 146.

⁴³⁰ (2009) *Law of the Sea Bulletin* No.70, Annex 152.

⁴³¹ 2791 U.N.T.S. 3, Annex 154.

- h. 2013 Denmark (Greenland)–Iceland Agreed Minutes on Delimitation (provisional equidistance line did not impact negotiations as it would in the circumstances have been unsuitable).⁴³²

306. In an analysis of 120 maritime boundary delimitation agreements concluded between 1942 and 1992, in geographical configurations of adjacent coasts, non-equidistant methods prevail over equidistant methods. Specifically, a non-equidistant method was used in over two thirds (68%) of agreements between States with adjacent coasts.⁴³³ Commenting on these statistics,⁴³⁴ Professor T. Cottier observes that:

“non-equidistant methods clearly prevail over equidistance in geographical configurations of adjacent coasts... Non-equidistant methods prevailed in 68 per cent of all adjacent cases and showed a considerable presence in mixed configurations (34.3 per cent). Taken together, these results suggest that delimitation with adjacent or mixed coastal constellations often requires particular solutions that cannot rely upon the mathematics of equidistance”.⁴³⁵

3. Jurisprudence

307. The jurisprudence of the Court demonstrates that:

- a. The three-stage approach is a common but not mandatory methodology; and that
- b. Other methods may be and are used, including delimitation using the parallel of latitude.

⁴³² CG Lathorp (ed), *International Maritime Boundaries VII* (Brill Nijhoff 2016) p. 5269, Annex 157. See at p. 5265: “The parties agreed not to formulate particular legal reasoning for the outcome. However, it is evident that a provisional equidistance line did not impact the negotiations because it would be located beyond the area of overlapping entitlement and consequently unsuitable as a starting point for the delimitation. The only circumstance that affected the delimitation, to some extent, is the disparity in overall coastal lengths between Greenland and Iceland.”

⁴³³ See T. Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015) pp. 242–49, Annex 124. This analysis covers the period during which Somalia and Kenya were participating in the UNCLOS negotiations and also when Kenya issued the 1979 EEZ Proclamation asserting the parallel of latitude.

⁴³⁴ It is recognized, as the Court observed in *Gulf of Maine* (para. 159), that “statistical considerations afford no indication either of the greater or lesser degree of appropriateness of any particular method, or of any trend in favour thereof discernible in international customary law”. Statistics are cited in the present case simply to demonstrate that a range of methods is deployed by states to achieve the objective of an equitable solution in maritime delimitation.

⁴³⁵ T. Cottier, *Equitable Principles of Maritime Boundary Delimitation* (CUP 2015) p. 245, Annex 124. Cottier found that when compared to other studies on the subject, the conclusions were consistent in this regard (p. 249). The practice after 1992 demonstrates that the majority of maritime delimitation agreements between States with adjacent coasts continue to use non-equidistant methods: bringing the statistics up to date, in the period from 1942 up to 2015, a non-equidistant approach was deployed in 59% of such agreements. The analysis of post 1992 practice is based on all the delimitations reported in *International Maritime Boundaries*, from and including the year 1992 up until and including 2015. Delimitations where a part of the line was drawn relying upon equidistance but another part or other parts of the line were drawn on the basis of a non-equidistant method, are classified as non-equidistant for the purposes of that analysis. See Annex 135.

308. Somalia has focused on the fact that in many cases the Court has used the three-stage methodology.⁴³⁶ The critical points, however, are that:
- a. It is not a mandatory method to be automatically applied in all cases.⁴³⁷ The 1979 Kenyan Proclamation was issued at a time when the three-stage methodology was not prevalent in the Court's jurisprudence; equitable principles were clearly expounded as the basis for maritime delimitation both by the Court and the drafters of UNCLOS. In any event, regard is to be had to what is appropriate in each case; and in the present case application of the 'three-stage' methodology is not appropriate because the Parties have already indicated what is an equitable solution, namely the parallel of latitude.
 - b. The non-mandatory nature of 'equidistance' as an approach to maritime delimitation has been the consistent position of the Court, as demonstrated both by the statements of the Court⁴³⁸ and the outcomes of the relevant cases.⁴³⁹
 - c. That position of the Court reflects:
 - (i) Firm adherence to the mandatory *objective* of an equitable solution, coupled with recognition that reliance solely on equidistance (including an adjusted equidistant line) cannot ensure an equitable solution in every case of maritime delimitation;⁴⁴⁰
 - (ii) State practice, which deploys a range of methods (including non-equidistant methods) to achieve the objective of an equitable solution.⁴⁴¹ State practice must inform the approach of the Court when framing the rules and methodology applicable to maritime delimitation and in its determination of what is equitable (as noted at para. 303 above); and

⁴³⁶ MS, Vol. I, para. 6.12.

⁴³⁷ Further and in any event, any agreement or acquiescence between the parties would prevail (see Chapter II).

⁴³⁸ See paras. 309–12 below.

⁴³⁹ See para. 313 below.

⁴⁴⁰ As observed in *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, para. 228.

⁴⁴¹ See paras. 302–6 above.

(iii) A mechanical application of equidistance, including the ‘three-stage’ methodology, would be contrary to the relevant provisions of UNCLOS and inconsistent with State practice.

309. As early as the *North Sea Continental Shelf* cases, the Court asserted that equidistance was not a mandatory legal principle or a method having some privileged status in relation to other methods.⁴⁴² The Court’s position in this respect has remained consistent.⁴⁴³ Thus, in *Nicaragua/Honduras*,⁴⁴⁴ whilst acknowledging certain advantages of the equidistance method in certain situations, the Court reiterated that “the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate”; and in its 2012 Judgment in *Nicaragua/Colombia*, the Court again rejected the application “in a mechanical fashion” of the three-stage process, recognising that regard must be had to what is appropriate in each case.⁴⁴⁵

310. Other tribunals have taken the same view. In its Judgment in the *Bangladesh/Myanmar* case, ITLOS stated:

... the issue of which method should be followed in drawing the maritime delimitation line should be considered in light of the circumstances of each case. The goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection. Therefore the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result.⁴⁴⁶

⁴⁴² *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, paras. 83 and 92.

⁴⁴³ Cf. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, para. 110; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, paras. 106–7, 156–7, 159, 162, 174, 191; *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award (14 Feb. 1985), reprinted in R.I.A.A., Vol. XIX, at p. 149 and I.L.R., Vol. 77, p. 635, para. 102; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, paras. 43 and 63; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, para. 293.

⁴⁴⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, para. 272.

⁴⁴⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, para. 194.

⁴⁴⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, para. 235. See further *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, Vol XXVII pp. 147–251, para. 244 “Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever,

311. That passage was cited with approval in the Award in the *Bangladesh/India* case, where the UNCLOS Annex VII Tribunal observed that:

Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method — if the States concerned cannot agree — is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved. In this connection, the Tribunal recalls the principles stated by the International Tribunal for the Law of the Sea in its judgment in *Bangladesh/Myanmar* (*Judgment of 14 March 2012*, paragraph 235). This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process.⁴⁴⁷

312. The reference to “transparency” and “predictability” is noteworthy. Those values are undermined if two States, engaged in the delimitation of a maritime boundary between them, settle upon an equitable boundary, and then one State, perhaps because of a change of government policy or changed view of where the balance of advantage lies, repudiates that boundary and makes a novel claim based on a different methodology.⁴⁴⁸ One particular aspect of that transparency and predictability was highlighted in the *Guinea/Guinea Bissau* case, where the Tribunal referred to the need to effect an equitable delimitation which had to be “integrated into the present or future delimitations of the region as a whole”.⁴⁴⁹ It is not only the two neighbouring

be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.”

⁴⁴⁷ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award dated 7 July 2014, para. 339.

⁴⁴⁸ In *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, ITLOS took the view that it would be “in contradiction of the principle of transparency and predictability...to deviate, in this case, from a delimitation methodology which has been practised overwhelmingly by international courts and tribunals in recent decades” (para. 289, emphasis added). In the present case, the demands of transparency and predictability must be considered in light of the common understanding of the Parties over past decades and Somalia’s acquiescence in a parallel of latitude boundary.

⁴⁴⁹ *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985 (1985) 19 RIAA 149, 189, para. 108; (1985) 77 I.L.R. 636, 683–4, para. 108, relied on and summarized in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, I.C.J. Reports 2007, para. 288. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 81 “The ‘relevant circumstances which characterize the area’ are not limited to the facts of geography or geomorphology, either as a matter of interpretation of the Special Agreement or in application of the equitable principle requiring all relevant circumstances to be taken into account. Apart from the circumstance of the existence and interests of other States in the area, and the existing or potential delimitations between each of the Parties and such States, there is also the position of the land frontier, or more precisely the position of its intersection with the coastline, to be taken into account”; Diss.

States which have a particular interest in a stable and equitable maritime boundary. As the Court held in the *North Sea Continental Shelf* cases, maritime boundaries have to be seen in their regional setting.⁴⁵⁰

313. Reflecting the flexible approach set out above, the methods adopted by international courts and tribunals to achieve an equitable solution are various, and include many instances where the equidistance/relevant circumstances approach has not been applied. For example:

- a. In *Tunisia/Libya*, the method adopted was a *de facto* line and ‘bisector’, the latter giving half-effect to the Kerkennah Islands;⁴⁵¹
- b. In *Gulf of Maine* the Chamber of the Court adopted a bisector in the first part, rejecting equidistance in relation to this part,⁴⁵² but used a perpendicular in the third part;⁴⁵³
- c. In *Guinea/Guinea-Bissau* the Tribunal drew *grosso modo* a perpendicular (the bisector of a 180° angle) to a line drawn from Almadies Point in Senegal to Cape Shilling in Sierra Leone in order to approximate the general direction of the coast of “the whole of West Africa”, extending “to the outer limit of the maritime territories of each States as recognized under general international law”;⁴⁵⁴
- d. In *St Pierre & Miquelon* the Court of Arbitration rejected equidistance and instead constructed a ‘corridor’ for the maritime entitlement of the islands;⁴⁵⁵

Op. Judge Jennings, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, Italy permission to intervene, para. 21: “In determining any continental shelf boundary it is necessary to draw attention to all the relevant circumstances, and it is difficult to imagine a more relevant circumstance than the legal rights of a geographically immediate neighbour”.

⁴⁵⁰ *North Sea Continental Shelf*, I.C.J. Reports 1969, para. 101(D)(3): “in the course of the negotiations, the factors to be taken into account are to include the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its Coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region”.

⁴⁵¹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, paras. 117–21, and paras. 128–9.

⁴⁵² *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, paras. 209–11.

⁴⁵³ *Ibid.*, paras. 224–8.

⁴⁵⁴ *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985 (1985) 19 RIAA 149, 189, para. 108; (1985) 77 I.L.R. 636, 683–4, para. 108, relied on and summarized in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, I.C.J. Reports 2007, para. 288.

⁴⁵⁵ *Case concerning delimitation of maritime areas between Canada and the French Republic (St Pierre and*

- e. In *Nicaragua/Honduras*, the method adopted was a bisector and (semi-) enclaving;⁴⁵⁶
- f. In *Nicaragua/Colombia*, the method adopted was a mixture of equidistance–relevant circumstances, enclaving, and parallels of latitude;⁴⁵⁷
- g. In *Peru v Chile*, the Court found that there was a tacitly-agreed boundary along a parallel of latitude, up to 80M from the coast.⁴⁵⁸

C. Where the Parties have Indicated what they regard as an Equitable Solution, this must be Respected

314. Where the parties have indicated what they regard as an equitable solution, this must be respected by the Court. As stated by the Court in *Tunisia v Libya*:

The aspect now under consideration of the dispute which the Parties have referred to the Court, as an alternative to settling it by agreement between themselves, is what method of delimitation would ensure an equitable result; and it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves may have considered equitable or acted upon as such — if only as an interim solution affecting part only of the area to be delimited.⁴⁵⁹

315. Two aspects of this pronouncement are striking. First, the Court used the language of obligation (“must take into account”). Second, the Court articulated the scope of the obligation in broad terms, extending the obligation to “take into account” so as to encompass “whatever indicia” are available, including the line which the parties “acted upon”, in order to determine what is an equitable line.

316. In that case, both Tunisia and Libya acknowledged that buffer zones established by the Italian colonial authorities had constituted “a *de facto* compromise or provisional

Miquelon) (1992) 95 I.L.R. 645, 670–3, paras. 66–74.

⁴⁵⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, I.C.J. Reports 2007, paras. 283–98 and paras. 299–305.

⁴⁵⁷ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012, paras. 190–5, para. 237, and para. 238. See Separate Opinion of Judge Abraham at para. 21: “In short, my opinion is that, although the Court states that it is following the traditional method, as described in particular in its Judgment in the case between *Romania and Ukraine (Maritime Delimitation in the Black Sea (Romania v Ukraine))*, Judgment, I.C.J. Reports 2009, p. 61, in reality it diverges very considerably from it and actually it cannot do otherwise, since it is clear that the said method is inappropriate in the present case.”

⁴⁵⁸ *Maritime Dispute (Peru v Chile)*, Judgment, I.C.J. Reports 2014, paras. 151 and 196.

⁴⁵⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 118.

solution”, respected for a long time without protest.⁴⁶⁰ Libya did not claim that the line was a recognized maritime boundary.⁴⁶¹ The Court noted, however, that:

in view of the absence of agreed and clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of the method for the delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.⁴⁶²

317. The Court held that it:

could not fail to note the existence of a *de facto* line from Ras Ajdir at an angle of some 26° east of north, which was the result of the manner in which both Parties initially granted concessions for offshore exploration and exploitation of oil and gas. This line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds furthermore to the line perpendicular to the Coast at the frontier point which had in the past been observed as a *de facto* maritime limit, does appear to the Court to constitute a circumstance of great relevance for the delimitation.⁴⁶³

318. The Court subsequently observed that:

A further relevant circumstance is that the 26° line thus adopted was neither arbitrary nor without precedent in the relations between the two States.⁴⁶⁴

319. The Court confirmed this approach in *Libya v Malta*. It expressly referred to its “duty” in this regard, reiterating the scope of that duty in broad terms, namely to “take into

⁴⁶⁰ *Ibid.*, para. 94.

⁴⁶¹ *Ibid.*, para. 95.

⁴⁶² *Ibid.*, para. 95.

⁴⁶³ *Ibid.*, para. 96. See further para. 117 referring to “the history of the enactment of petroleum licensing legislation by each Party, and the grant of successive petroleum concessions” and noting that “[t]he result was the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference, or (until 1976) protests, by the other.”

⁴⁶⁴ *Ibid.*, para. 119. The “26” line” referred to the first segment of the line which started from the outer limit of the Parties’ territorial sea, at the intersection of that limit with a straight line constructed from the frontier point of Ras Ajdir at a bearing approximately 26° east of north. In noting that that 26° line was “neither arbitrary nor without precedent” the Court referred to the methods of delimitation of the territorial sea examined by the Committee of Experts for the International Law Commission in 1953 and “how, in the relations between France and Italy during the period when these States were responsible for the external relations of present-day Tunisia and Libya, there came into existence a *modus vivendi* concerning the lateral delimitation of fisheries jurisdiction expressed in *de facto* respect for a line drawn from the land frontier at approximately 26° to the meridian ... which was proposed on the basis that it was perpendicular to the coast” (para. 119).

account whatever indicia are available of the [delimitation] line or lines which the Parties themselves may have considered equitable or acted upon as such”.⁴⁶⁵

320. This approach has been referred to by the Court in other cases.⁴⁶⁶ In its 2014 Judgment in *Peru v Chile*, the Court had regard to a “shared” and “evolved” understanding between the parties. It considered whether the Proclamations made unilaterally by each of the two States in 1947 could be interpreted as “reflecting a shared understanding of the Parties concerning maritime delimitation”.⁴⁶⁷ It observed in particular that:

various factors mentioned in the preceding paragraphs, such as the original Chilean proposal and the use of the parallel as the limit of the maritime zone of an island of one State party located less than 200 nautical miles from the general maritime zone of another State party, suggest that there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundaries.⁴⁶⁸

D. The Parties’ Indication of an Equitable Solution

321. Both Kenya and Somalia have stated their position that equitable principles (rather than equidistance) are applicable to maritime delimitations; and there are clear indications available of the course of a maritime boundary which they have considered equitable and acted upon, namely the parallel of latitude. This reflects a shared understanding between the Parties in that regard.

322. The “three-stage test” is neither necessary nor appropriate in circumstances where the parties have already indicated what they consider to be an equitable delimitation. To the contrary, the shared understanding of the parties as to the maritime boundary prevails under international law. Departure from that understanding would undermine stability and transparency. In the present case, it is a non-equidistant method that is applicable (the parallel of latitude) because that is what the Parties had accepted as an equitable solution.

⁴⁶⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para. 25.

⁴⁶⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, paras. 149–52. Although the Court found the facts did not support the submission, it accepted the principle that the Parties conduct may be relevant as demonstrating a *modus vivendi* or the use of a given line as an equitable culmination of the delimitation process, stating that: “Each Party has adopted a clear position on what it would consider a just or equitable balance between their respective interests, and the Chamber cannot but take note of this”.

⁴⁶⁷ *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, para. 43.

⁴⁶⁸ *Ibid.*, para. 69. See also para. 91: “the Court has already mentioned that certain elements of the 1947 Proclamations and the 1952 Santiago Declaration suggested an evolving understanding between the Parties concerning their maritime boundary”.

323. As set out at para. 304 above, there are several other instances where parallels of latitude have been adopted as an equitable solution, notably in Africa. Significantly, the African coast of the Indian Ocean, in which the present cases arises,⁴⁶⁹ is characterized by a set of delimitations between littoral States that are based upon use of the parallel of latitude. Before turning to the common understanding between Kenya and Somalia that the parallel of latitude is an equitable solution (section 2 below), this regional context is first considered, with reference to the successive delimitation agreements between Kenya-Tanzania (1975–6 and 2009) and Mozambique-Tanzania (1988) (section 1 below).
324. To clarify, it is not Kenya’s position that the Court should treat the agreements between Kenya and Tanzania, and between Mozambique and Tanzania, as opposable to Somalia. It is not disputed that the aforementioned agreements are *res inter alios acta* as regards third parties.⁴⁷⁰ Furthermore, this is not an argument of “compensation” for Kenya for the agreements it has made with third parties.⁴⁷¹ Rather, its relevance is that: (i) it indicates what the parties to those agreements regard as an equitable solution; (ii) it is a further example of how State practice adopts non-equidistant methods for maritime delimitation; (iii) it establishes the regional context in which the Kenya-Somalia boundary is situated; and (iv) it provides relevant context as to why between 1979 and 2014, Kenya claimed, and Somalia did not protest, the maritime boundary at the parallel of latitude.
325. In *Guinea/Guinea Bissau* the Arbitral Tribunal accepted the relevance of a regional context and sought a solution that “would take overall account of the shape of [the West African] coastline”,⁴⁷² and produce a delimitation that would “be suitable for equitable integration into the existing delimitations of the West African region, as well as future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions”.⁴⁷³ In the

⁴⁶⁹ Cf. examples from other regions of Africa: the 1975 Gambia–Senegal Agreement and the 2002 Angola–Namibia Treaty (cited at para. 304 above).

⁴⁷⁰ Cf. MS, Vol. I, para. 1.23 “In regards to Somalia, the Kenya–Tanzania agreements are *res inter alios acta* and they cannot be invoked against Somalia to “compensate” Kenya for the consequences of the bargain in made hundreds of miles to the south.” See also MS, Vol. I, para. 6.53.

⁴⁷¹ Cf. MS, Vol. I, para. 1.23.

⁴⁷² *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award (14 Feb. 1985), reprinted in R.I.A.A., Vol. XIX, at p. 149 and I.L.R., Vol. 77, p. 635, para. 108.

⁴⁷³ *Ibid.*, para. 109. (In order to do so, “it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline, and what deductions should be drawn from this in relation

Malta/Libya case, the Court similarly considered the regional context, stating that it “has to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected”.⁴⁷⁴ It is precisely Kenya’s point in the present case that the parallel of latitude has all along been considered a solution that would “be suitable for equitable integration into the existing delimitations of the [East] African region”. At the meeting between the Parties held in March 2014, Kenya explained “how and why Kenya arrived at a latitudinal boundary” noting that “inequities that would be occasioned by median lines have been realized and mitigated in at least two other cases along the same coast line by use of latitudinal boundaries thereby establishing a regional practice”.⁴⁷⁵

1. Regional context

Kenya–Tanzania (1975–6)

326. Pursuant to the Exchange of Notes in 1975–6, Kenya and Tanzania established the “delimitation of the territorial waters boundary between our two countries” in accordance with equitable principles following a parallel of latitude.⁴⁷⁶

327. Specifically, paragraph 2(d) of the Kenyan Note of 1975 indicated that:

The eastward boundary from point C, which is the Northern Intersection of arcs from Ras Kigomasha lighthouse and Mpunguti ya Juu lighthouse as described under paragraph 2 (b)^[477] above, shall be the latitude extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States.

to the precise area concerned in the present delimitation.”)

⁴⁷⁴ *Ibid.*, para. 69.

⁴⁷⁵ MS, Vol. III, Annex 31, Power Point presentation, slides 1 and 10). See also MFA Internal Memo from A.S. Legal to Dr Adede on the Consultative Interministerial Meeting of the Law of the Sea Group held at Harambee House on 12 August 1975 (MFA. 273/430/001A/66), 26 August 1975, Annex 12, pp. 3–4; Mr. Mulwa report to the Kenya National Assembly regarding the Ninth Session negotiations with respect to the delimitation of maritime boundaries dated 22 May 1980, col. 1225 (Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol. LII), Annex 5; Exchange of Notes between the United Republic of Tanzania and Kenya Concerning the Delimitation of the Territorial Waters Boundary between the Two States, 9 July 1976, JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 879, Annex 136.

⁴⁷⁶ MS, Vol. III, Annex 5. See also MS, Vol. I, para. 3.17.

⁴⁷⁷ Para. 2(b) states “On the East. The median line derived by the Intersection of two arcs each being 12 nautical miles drawn from Mpunguti ya Juu lighthouse and Ras Kigomasha lighthouse respectively, hereinafter referred to as point “B”, located at 4° 53' 31" Sand 39° 28' 40" E and point C, located at 4° 40' 52" Sand 39° 36' 18" E.” The 2009 agreement (see para. 331 below) refers to Point C as follows “This Agreement shall define the maritime boundary from the limits of the Territorial Waters as defined in the 1976 Maritime Boundary Agreement starting at Point C (4° 40' 52"S, 39 36' 18" E) which is the Northern intersection of arcs from Ras Kigomasha lighthouse and Mpunguti ya Juu as described under paragraph 2(b) of the 1976 Agreement” (Art. 1.2).

328. This is illustrated on the map at **Figure 1-4**. That this was considered to be an equitable solution is reflected in the terms of the 2009 Agreement confirming the agreement contained in the Exchange of Notes in 1975–6 which, as cited below, referred to “an amicable and equitable agreement”.⁴⁷⁸

329. As noted in Chapter I above, the “Limits of the Seas” series, issued by the United States Department of State, assessed the Kenya–Tanzania maritime boundary as follows:

The course of the final boundary combines numerous delimitation methodologies. The first boundary segment is equidistant between the two claimed straight baselines. Segment A-B has been developed by drawing an arc from point X, an artificially established point. Segment B-C is equidistant between selected coastal points one from each country. The seaward extension of the boundary from point C is based on a parallel of latitude. Thus, the boundary represents an agreement which has been established in accordance with equitable principles and which is satisfactory to both countries.⁴⁷⁹

330. That the Parties’ objective was to achieve an overall equitable solution is also reflected in the report of Mr. Mulwa to the Kenya National Assembly regarding the Ninth Session UNCLOS III negotiations with respect to the delimitation of maritime boundaries. He confirmed that:

As regards our problem with Somalia, there is no question about it because we are using what we call equitable principles to see how we can put a boundary between the two States without affecting the existing structures. For instance, with regard to our boundary with Tanzania, we had to take into account the presence of Pemba. Likewise, with regard to our boundary with Somalia, we had to take into account that if we did put the boundary as it was, we would have completely diminished our economic zone. So, we had to take into account the equitable principle of putting a parallel line which gives us a sizeable economic zone.⁴⁸⁰

⁴⁷⁸ MS, Vol. III, Annex 7. See further the characterization of the 1976 agreement by the US State Department as “an agreement which has been established in accordance with equitable principles” and by Mr. Mulwa as reflecting “equitable principles”, as set out in the following paragraphs.

⁴⁷⁹ United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, *Limits in the Sea, Kenya–Tanzania Maritime Boundary*, Report No. 92, 23 June 1981, p. 5, Annex 52, also available at <https://www.state.gov/documents/organization/58819.pdf>

⁴⁸⁰ Republic of Kenya, the National Assembly Official Report, Fourth Parliament Inaugurated, Vol. LII, 4th December 1979, First Session, Tuesday, 4th December, 1979, Second Session, Tuesday, 4th December, 1979 to Wednesday, 18th June, 1980, Records of 22 May 1980, col. 1225–1226 and 27 May 1980, col. 1281–1282, Annex 5, col. 1225.

Kenya–Tanzania (2009)

331. A further agreement between Kenya and Tanzania dated 2009 confirmed the position with respect to the delimitation of their maritime boundary, namely the parallel of latitude, and extended it beyond 200M to the outer limits of the continental shelf.⁴⁸¹ It stated as follows:

Desirous of reaching an amicable and equitable agreement pertaining to the maritime boundary between the Parties ...

The Parties reaffirm the Agreement that entered into force on 9th July, 1976 between them which determines the Maritime Boundary up to 12 nautical miles (the Territorial Waters) ...

The Parties confirm that the basis of maritime boundary delimitation shall be the parallel of latitude as established in the 1976 Maritime Boundary Agreement ...

The boundary line of the Exclusive Economic Zone and the Continental Shelf between the Parties is hereby delimited along the parallel of latitude from Point T-C eastwards to a point that it intersects the outermost limits of the Continental Shelf.

Mozambique–Tanzania (1988)

332. Similarly, with respect to the 1988 Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, whose preamble asserts that it was “inspired by the principles of the 1982 United Nations Convention on the Law of the Sea”, the parallel of latitude was used as an “application of the principle of equity” to delimit the EEZ:⁴⁸²

The delimitation of the Exclusive Economic Zone between the two countries is delimited in conformity with the equidistance method by prolonging the median straight line used for the delimitation of the territorial sea from point "C" to a point 25.5 nautical miles, located at latitude 10° 05' 29" S and longitude 41° 02' 01" E, hereinafter referred to as point "D". From this point, the Exclusive Economic Zone is delimited by application of the principle of equity, by a line running due east along the parallel of point

⁴⁸¹ MS, Vol. I, para. 3.18. MS, Vol. III, Annex 7.

⁴⁸² See Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Art. 4, at MS, Vol. III, Annex 7. See further the commentary at JI Charney and LM Alexander (eds), *International Maritime Boundaries I* (Nijhoff 1993), p. 896 as follows: “This is another boundary delimitation negotiated by the two parties (Tanzania and Mozambique) with full recognition of the implications for a future delimitation in the area involving another neighbouring party. The boundary therefore fully takes into account the potential delimitation which would otherwise be necessary for the Islamic Federal Republic of Comoros to undertake with its neighbours. It is another example of a delimitation exercise conducted in the spirit of good neighbourliness and aimed at achieving equitable results” (Annex 143).

"D". The point to termination of this line will be established through exchange of notes between the United Republic of Tanzania and the People's Republic of Mozambique at a future date.

2. Kenya–Somalia

333. Since the 1970s, both Kenya and Somalia have stated that they consider that equitable principles, in contrast to the equidistance methodology, are applicable and have demonstrated that they consider the parallel of latitude as an equitable solution.
334. The relevant facts have been set out in Chapter I above, and considered at Chapter II in regard to Somalia's acquiescence. For present purposes, the following key aspects are highlighted.
335. First, in 1979 and again in 2005, Kenya issued Presidential Proclamations stating that the maritime delimitation follows a parallel of latitude. The 1979 EEZ Proclamation begins with the words "notwithstanding any rule of law or any practice which may hitherto have been observed in relation to Kenya or the waters beyond or adjacent to the territorial Sea of Kenya."⁴⁸³ While this reference was broad enough to encompass the colonial practice in relation to Kenya's maritime claims, and the adherence to the 3M territorial sea limit maintained by the United Kingdom, it is also an indication of the awareness of Kenya and other States in the vanguard of the move towards acknowledgment of the new wave of 200M claims, that a new chapter was opening in the law of the sea, and that the old rules and practices which had applied in the era of the three-mile territorial sea could not simply be transposed to the new regime. The same point was made in the 2005 EEZ Proclamation.⁴⁸⁴
336. Regarding each of the two Proclamations:
- a. It was a clear and precise statement by Kenya as to what was an equitable delimitation, expressly identifying the parallel of latitude.
 - b. Somalia was formally notified of each of the two Proclamations. As noted above, the 1979 EEZ Proclamation was transmitted by the UN Secretary-General to UN Member States, and the 2005 EEZ Proclamation transmitted to UN Member States and UNCLOS States Parties.⁴⁸⁵ There is no indication that Somalia made

⁴⁸³ MS, Vol. III, Annex 19.

⁴⁸⁴ MS, Vol. III, Annex 21.

⁴⁸⁵ Chapter I, paras. 64 and 92–3.

any protest or that it reserved its position.⁴⁸⁶ Somalia's prolonged lack of protest reflected the common understanding of the Parties that this delimitation was an equitable solution in accordance with international law.

- c. The statements made by the Parties at the time of the 1979 EEZ Proclamation indicated that this was their common understanding. Immediately following Kenya's maritime boundary claim and notification thereof, at UNCLOS III both Parties rejected proposals for a reference to equidistance in the text of the delimitation provisions which became Articles 74 and 83 of UNCLOS. Somalia and Kenya both considered that maritime delimitation should be based on an "equitable solution".⁴⁸⁷
- d. As recorded in the "Joint Report on the Kenya–Somali Maritime Boundary Meeting" (March 2014), Kenya explained that "[t]he 1979 Proclamation therefore was in the spirit of the discussions and negotiations which were underway on UNCLOS III and State practice where States were making Proclamations on the Exclusive Economic Zone. ... The 1979 Proclamation adopted a parallel of latitude as the boundary line and at no time did Kenya in her Proclamation either in 1979 and 2005 adopt the equidistance methodology to determine the maritime boundary."⁴⁸⁸

337. Second, in 2009 Somalia was specifically put on notice for a third time since 1979 that Kenya claimed the parallel of latitude as the maritime boundary. As set out in Chapter I, section E, Kenya's Executive Summary of its CLCS submission dated 6 May 2009, which was circulated by the UN Secretary-General to UNCLOS States parties (including Somalia), extended the parallel of latitude beyond 200M to the outer limits of the continental shelf. In other words, this was an extension throughout the Parties' maritime boundary of what was deemed to be an equitable solution.

338. Third, subsequent to the issuing of Kenya's 1979 EEZ Proclamation, the conduct of both Kenya and Somalia has been consistent with their shared understanding that the parallel of latitude is an equitable solution. This is evident from the facts set out in Chapter I, sections C–F. This is also reflected in Kenya's position at the March 2014

⁴⁸⁶ Somalia's Memorial does not refer to any protest in this regard.

⁴⁸⁷ See Chapter I, section C2.

⁴⁸⁸ MS, Vol. III, Annex 31, p. 3.

meeting. In particular, Kenya stated that “UNCLOS provides for settlement of maritime boundaries by agreement on the basis of [e]quitable solution”⁴⁸⁹ and explained that “the rationale for adopting the parallel of latitude” was “the provisions in UNCLOS relating to special circumstances and equitable solution based on the established jurisprudence and State practice regarding determination of maritime boundaries”.⁴⁹⁰ Kenya’s clear position has been that “the application of the principle of equity and fairness would yield the ‘parallel of latitude’ line that has been adopted by Kenya in determining its maritime boundary with Somalia”.⁴⁹¹

E. The Parallel of Latitude is an Equitable Solution

339. The parallel of latitude delimitation line adopted by the Parties is in any event objectively an equitable solution, taking into account all the relevant circumstances.

340. In considering what circumstances are relevant to identifying an equitable solution, the Court has observed that:

there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case. In balancing the factors in question it would appear that various aspects must be taken into account....⁴⁹²

341. As noted above, this approach has been followed by ITLOS:

The goal of achieving an equitable result must be the paramount consideration guiding the action of the Tribunal in this connection. Therefore the method to be followed should be one that, under the prevailing geographic realities and the particular circumstances of each case, can lead to an equitable result.⁴⁹³

⁴⁸⁹ MS, Vol. III, Annex 31, Power Point presentation, slide 3.

⁴⁹⁰ MS, Vol. III, Annex 31, p. 5.

⁴⁹¹ MS, Vol. III, Annex 24, p. 2.

⁴⁹² *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, paras. 93–4. As noted at para. 290 above, this may include security considerations. The importance of ensuring access of traditional fishermen to areas where they undertake their fishing activities has also been recognized by the Court. See *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, para. 75, where the Court was concerned to “ensure equitable access to the capelin fishery resources for the vulnerable fishing communities concerned”. See also *Eritrea v Yemen (Phase Two: Maritime Delimitation)* (1999) 119 I.L.R. e.g. p. 440, para. 63 and p. 450, para. 101.

⁴⁹³ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, para. 235.

342. In the present case, the assessment of an equitable solution should include consideration of the regional context in circumstances where various delimitation agreements in this region of Africa have adopted the same “parallel of latitude” delimitation methodology as an equitable solution,⁴⁹⁴ and the geographical realities of the regional coast have a significant impact on the equity of any proposed solution.⁴⁹⁵
343. The Parties’ use of a parallel of latitude as an equitable solution until 2014 is a consequence of the geographical circumstances in the region. As noted by Kenya as early as 1975,⁴⁹⁶ application of an equidistance line produces a cut-off effect with respect to the maritime areas of Kenya. Specifically, it substantially narrows Kenya’s coastal projection into its EEZ, from a coastal length (measured as a straight line) of 424km to only 180km measured at the 200M limit, i.e. a reduction of 58%.⁴⁹⁷ The need to avoid exacerbating the disadvantage of a State’s particular coastal configuration was recently recognized by the Arbitral Tribunal in *Croatia/Slovenia* as a basis for departure from the equidistance line.⁴⁹⁸
344. The cut-off effect in the present case is even more pronounced beyond 200M. In that sector of the boundary, the application of the equidistance principle would prevent Kenya from having any entitlement out to the edge of the continental shelf in accordance with UNCLOS Article 76. It would be as if the outer continental shelf in this area is generated by the coastal projections of Somalia and Tanzania alone, and Kenya simply does not exist. The point is illustrated on the map at **Figure 3-1**.

⁴⁹⁴ As set out at paras. 326–32 above.

⁴⁹⁵ As articulated in the Rejoinder of the Cote D’Ivoire in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, at para. 2.42: “Just as the jurisprudence ensures that no State is enclaved by reason of its geographical situation and thus attenuates the effects of a very unfavourable configuration, the law must attenuate the effects of a geographical configuration which, although very favourable to one State, automatically produces an inequitable result for its neighbours”.

⁴⁹⁶ See para. 52 above.

⁴⁹⁷ See **Figure 3-1** below.

⁴⁹⁸ *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, paras. 1011–14.

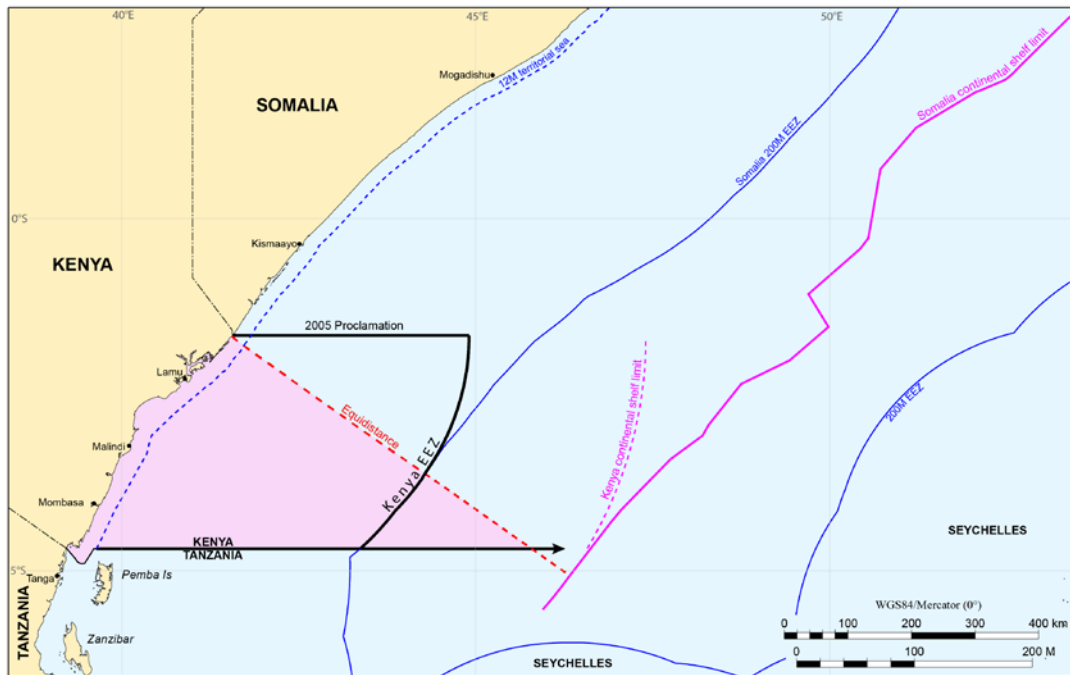


Figure 3-1: Cut-off Effect due to Equidistance

345. As noted above, the Court stated in *Libya/Malta* that non-encroachment (the term by which it referred to what is also called the cut-off principle) is one among the “equitable principles ... expressed in terms of general application”.⁴⁹⁹ It referred in particular to:

... the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances ...⁵⁰⁰

346. The effect of the cut-off in the present case is precisely to prevent Kenya enjoying sovereign rights over the continental shelf off its coasts to the full extent authorized by international law. Kenya is a State whose coastline undoubtedly has a ‘projection’ out into the open waters of the Indian Ocean; but if the equidistance principle were applied the result would be that Kenya, unlike Somalia and Tanzania, will not be recognized as having a maritime entitlement extending to the outer limits of the continental shelf as defined in UNCLOS Article 76.

⁴⁹⁹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, para. 46. See also the *Newfoundland/Nova Scotia case* (2002) 128 I.L.R. p. 574, para. 5.15.

⁵⁰⁰ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, para. 46. See also the *Newfoundland/Nova Scotia case* (2002) 128 I.L.R. p. 574, para. 5.15.

347. The cut-off effect flows in part from the maritime boundary between Kenya and Tanzania, referred to above,⁵⁰¹ but this does not change the position. The delimitation agreed by Kenya and Tanzania was itself an equitable solution and a necessary departure from the equidistance/relevant circumstances approach,⁵⁰² which ameliorated to some extent the effect of the concavity resulting from the change in direction of the Tanzanian coast south of Kenya and the presence of the major islands of Pemba and Zanzibar. The geographical reality in this region is that to impose an equidistance line between Somalia and Kenya in the present case would not “allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way”, to use the words of the Court.⁵⁰³
348. Somalia now argues that the parallel of latitude would cut off Somalia’s entitlements.⁵⁰⁴ However, following the Kenyan 1979 EEZ Proclamation, Somalia adopted a quite different position. At that time, the Parties had a common understanding that the parallel of latitude was indeed an equitable solution. Only recently has Somalia performed a *volte face*.
349. Use of the parallel of latitude rather than the equidistance line has only a modest effect on Somalia’s maritime entitlement (see **Figure 3-2** below). Using Somalia’s equidistance line, Somalia’s total maritime entitlement would be 833,000km² measured out to the 200M limit of its EEZ, and 1,300,000km² measured out to the approximate limit of its outer continental shelf beyond 200M. Using the parallel of latitude, Somalia’s entitlements would be 783,000km² measured out to the 200M limit of its EEZ, and 1,177,000km² including the limit of its outer continental shelf beyond 200M. The difference in maritime area for Somalia would be only 6% for the EEZ, and 9% for the continental shelf.
350. By contrast, the equivalent figures for Kenya are 111,000km² and 128,000km² using equidistance and 161,000km² and 254,000km² using the parallel of latitude — a difference in maritime area of 45% for the EEZ and 98% for the continental shelf beyond 200M. Thus, use of the parallel of latitude has only a slight effect for Somalia,

⁵⁰¹ MS, Vol. I, para. 7.48 (figure 7.7).

⁵⁰² See paras. 328–30 above.

⁵⁰³ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012, para. 215. Somalia does acknowledge that “the cut-off effect appreciated within the general geographical context” is a relevant geographic circumstance (MS, Vol. I, para. 6.47).

⁵⁰⁴ MS, Vol. I, para. 7.45 (figure 7.6).

but an overwhelming effect in ameliorating the cut-off suffered by Kenya. Kenya submits that delimitation based on the parallel of latitude is equitable, and that the consequent reduction in Somalia's entitlement is on a scale that is appropriate in achieving an equitable delimitation where cut-off effects are addressed in "a reasonable and mutually balanced way".⁵⁰⁵

351. The delimitation that would result from use of Somalia's claimed equidistance line, in contrast, would create a very significant cut-off. It would entrap Kenya and give it the same kind of inequitable share of the continental shelf projecting from its coast that led to the *North Sea Continental Shelf* cases.
352. As noted above, while Kenya does not suggest that 'proportionality', which has its proper role as a 'stage three' check on the proposed boundary under the three-stage approach,⁵⁰⁶ is a legal principle applicable to determination of an equitable line, it is a helpful analytical tool by which to identify and illustrate the degree of a cut-off. Considering only Somalia's southeast-facing coastline, if an equidistance line were adopted, and if Somalia's coastal length in its entirety (1890km measured as straight lines as far as the Horn of Africa), and Somalia's territorial sea and EEZ (702,900km²) are considered, and compared to Kenya's coast (420km as a straight line) and territorial sea and EEZ (110,900km²), there would be a marked discrepancy. Somalia has far more maritime area per kilometre of coast than does Kenya (a ratio of 371 compared to 262).⁵⁰⁷ Indeed, Kenya has the least maritime area per kilometre of coast of any of the four East African States on the Indian Ocean — the two "outer" States around the concavity being the States with the greatest benefit.⁵⁰⁸

⁵⁰⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, para. 201.

⁵⁰⁶ As noted above, it is inappropriate to apply the three-stage approach relied upon by Somalia in the present case, and in any event Somalia's analysis in that regard is flawed. Somalia presents the equidistance line within 200M as resulting in an approximate equal division of maritime areas between Kenya and Somalia, and it presents that division as equitable (MS, Vol. I, paras. 6.54–6.58 and Figure 6.12. See further, MS, Vol. III, Annex 31, p. 6 recording Somalia's proposal in the March 2014 meeting of an "almost equal division of the disputed area"). In fact, the parallel of latitude produces the "almost equal division" of maritime areas between Kenya and Somalia that Somalia has recognised as equitable.

⁵⁰⁷ This discrepancy is even more marked if the full extent of the continental shelf is considered — Somalia has a total area of 1,172,200km² and Kenya has 128,000km², giving area/length ratios of respectively 620 and 305.

⁵⁰⁸ Mozambique has a coast of 2060km, and an area of 564300km², giving it a ratio of 275. Tanzania has a coast of 660km, and an area of 241300km², giving it a ratio of 367.

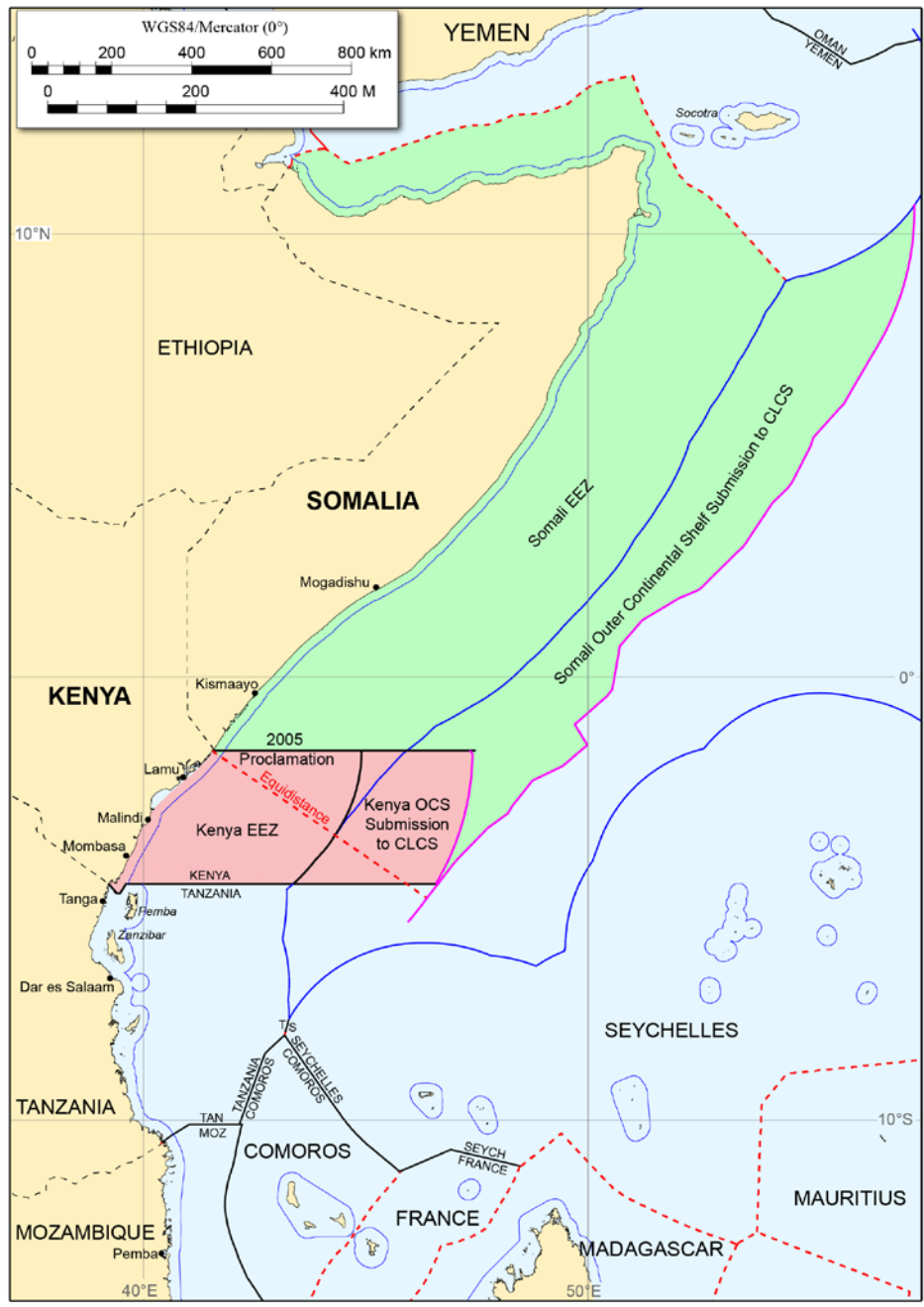


Figure 3-2: Division of Maritime Areas based on a Parallel of Latitude

F. Conclusion

353. Somalia and Kenya bound themselves, as parties to UNCLOS, to establish a maritime boundary that achieves an equitable solution, and publicly took the position that this is what international law requires. Between 1979 and 2014, Somalia and Kenya acted consistently with the position, expressed in Kenya’s 1979 and 2005 EEZ Proclamations, that the maritime boundary follows the parallel of latitude. That consensus, even if it is not treated as a formal agreement, establishes what Somalia and Kenya considered to be an equitable solution; and the Parties’ position must be

taken into account by the Court. Plainly, there are other methods of delimitation, commonly applied. But the very essence of equity in its legal connotation — the context in which it appears in UNCLOS Articles 74 and 83 — is that it focuses upon the justice of a particular situation and may require a solution different from that required by a strict application of the rules of law. In the present case, the Parties have accepted the parallel of latitude as an equitable solution for 35 years. Moreover, as is apparent from the study of the regional geography, the parallel of latitude is objectively an equitable solution.

354. In brief, irrespective of the binding character of Kenya's maritime boundary claim at the parallel of latitude based on Somalia's prolonged acquiescence (as set out in Chapter II), the Parties' common understanding that the parallel of latitude constitutes an equitable delimitation should be respected by the Court.

CHAPTER IV. REBUTTAL OF ALLEGATIONS OF ILLEGAL ACTIVITIES IN THE DISPUTED AREA

355. This Chapter addresses Somalia’s assertion that by engaging in unilateral exploration activities at the parallel of latitude, Kenya has acted in violation of international law. It is Kenya’s position that this assertion is wrong both as a matter of fact and of law. As set out in Chapters I and II, between 1979 and 2014, Somalia acquiesced to the maritime boundary claimed by Kenya. Throughout this period, the conduct of both Parties has been consistent with the parallel of latitude. There was no specific “dispute” until 2014 when for the first time Somalia claimed an equidistance line, shortly before filing its Application with the Court. In asserting that Kenya has acted unlawfully, Somalia has completely ignored this historical conduct.

356. Until 2014, the maritime area that Somalia now claims as the “disputed area” in which the exploration activities took place was not in dispute. In particular, since 1979, Kenya had claimed and exercised uncontested jurisdiction in what it had proclaimed as its EEZ without any protest by Somalia. As such, Kenya had a right to freely engage in activities consistent with its sovereign rights to explore, exploit, conserve and manage the natural resources in this maritime area. Such activities therefore, cannot be said to be unlawful. In fact, this would also apply even if the EEZ had been in dispute. As the Special Chamber of ITLOS held in *Ghana/Côte d’Ivoire*:

maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.⁵⁰⁹

357. Accordingly, even if some of Kenya’s activities took place in maritime areas later attributed in a Judgment to Somalia, this would not constitute a violation of the sovereign rights of Somalia.⁵¹⁰

358. This Chapter consists of three parts each addressing the following points: First, because there was no “disputed area” until 2014, the relevant time period for determining whether unlawful activities occurred begins in 2014. Second, irrespective

⁵⁰⁹ *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 592.

⁵¹⁰ *Ibid.*, para. 594.

of this narrow time period, Somalia applies the incorrect legal test by failing to recognize that transitory activities such as seismic testing are lawful in disputed areas. Third, Somalia has in fact not established any activities that would fall either within the relevant time period or the type of non-transitory activities that could potentially be unlawful. Its assertion of unlawful activities therefore, is wholly without merit.

A. There was no “Disputed Area” until 2014

359. As set out above, on Somalia’s own account of the facts, the first time that it made a protest against the maritime boundary at the parallel of latitude was in 2014.⁵¹¹ Accordingly, there was no dispute between the Parties before 2014. Given the absence of a formal agreement on delimitation, the 2009 MOU did refer (for the first time) to “an area under dispute” in regard to the continental shelf. In the absence of a specific claim by Somalia however, there was no specific area under dispute that could be identified. Somalia did not formally assert an equidistance maritime boundary until 2014.⁵¹²
360. Somalia’s Memorial admits that it was not until April 2014 that Somalia made a protest against offshore exploration south of the parallel of latitude, and even then, it was directed to the Chief Executive Officer of a private company, Eni S.p.A., not to the Kenyan Government.⁵¹³ The letter was not even copied to any Kenyan official.⁵¹⁴ In a follow-up letter of 16 September 2014⁵¹⁵ (i.e. after the case was already before the Court), Somalia’s Attorney-General sought to bolster Somalia’s maritime boundary claim by referring to the EEZ Proclamation by the President of Somalia dated 30 June 2014⁵¹⁶ and the Application filed before the Court on 28 August 2014. It is notable that the “penalty fine” the Attorney-General purports to impose on Eni S.p.A. is backdated to 1 July 2014 because this was “the day following the Somali Government’s Proclamation of its Exclusive Economic Zone”. Once again, this confirms Kenya’s position that there was no “disputed area” until 2014 when Somalia protested and claimed a maritime boundary based on equidistance.

⁵¹¹ MS, Vol. I, para. 3.32 and MS, Vol. III, Annex 41. Somalia declared its EEZ for the first time in June 2014 (MS, Vol. III, Annex 14).

⁵¹² See Chapter I, section G above.

⁵¹³ MS, Vol. I, para. 8.24, fn. 357.

⁵¹⁴ MS, Vol. IV, Annex 74.

⁵¹⁵ MS, Vol. IV, Annex 76.

⁵¹⁶ MS, Vol. III, Annex 14.

361. Somalia's second protest letter was sent on 20 September 2014 to the Chief Executive Officer of Midway Resources International,⁵¹⁷ not to the Kenyan Government. An identical letter was sent on the same day to the Chief Executive Officer of Total.⁵¹⁸ Once again, the Somali Attorney-General referred to the 30 June 2014 Proclamation of the President of Somalia and backdated the "penalty fine" to 1 July 2014.
362. Accordingly, by Somalia's own admission, there was no maritime area in dispute between Kenya and Somalia prior to 2014.⁵¹⁹

B. The Correct Legal Test for the Lawfulness of Activities in the "Disputed Area"

363. Somalia does not set out the legal framework in UNCLOS for activities in a disputed maritime area. Instead, it asserts without any basis that the "principle of exclusivity" of sovereignty in the territorial sea applies to the EEZ and continental shelf in an area disputed by two or more States.⁵²⁰ This wrongly conflates the sovereignty that the coastal State enjoys in the territorial sea with the more limited "sovereign rights" in the EEZ and continental shelf.
364. The correct legal test for activities in a disputed area is set out in the identical paragraph 3 of Articles 74 and 83 of UNCLOS

Pending agreement [on a boundary] as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.

365. The Special Chamber in *Ghana/Côte d'Ivoire* has confirmed that this provision contains "two interlinked obligations": to make every effort to enter into provisional arrangements and not to jeopardize or hamper the reaching of the final agreement.⁵²¹ Kenya has fulfilled both obligations.

⁵¹⁷ MS, Vol. IV, Annex 77.

⁵¹⁸ MS, Vol. IV, Annex 78.

⁵¹⁹ Somalia refers in a footnote to two news articles from April and July 2012 (MS, Vol. I, para. 8.27, fn. 367 and MS, Vol. IV, Annexes 104 and 107) quoting Somalia's Minister of Foreign Affairs, Mr. Abdullahi Haji, stating, "The issue between Somalia and Kenya is not a dispute; it is a territorial argument that came after oil and gas companies became interested in the region" (MS, Vol. IV, Annex 104). This confirms that Somalia had previously acquiesced in Kenya's 1979 maritime boundary claim and only became interested in claiming a different line shortly before 2014 because of increased exploration activity by oil companies operating under Kenyan licenses.

⁵²⁰ MS, Vol. I, paras. 8.10–8.11.

⁵²¹ *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 626.

366. First, as set out below,⁵²² Kenya made a good faith effort to enter into provisional arrangements, but its offer was rejected by Somalia.

367. This is an “obligation of conduct”.⁵²³ The Arbitral Tribunal in *Guyana v Suriname* emphasized that this obligation to make every effort to enter into provisional arrangements acknowledges the importance of avoiding the suspension of economic development in a disputed area, as long as such activities do not affect the reaching of a final agreement.⁵²⁴ It held that:⁵²⁵

international courts and tribunals should also be careful not to stifle the parties’ ability to pursue economic development in a disputed area during a boundary dispute, as the resolution of such disputes will typically be a time-consuming process.

368. As regards the second obligation “during this transitional period, not to jeopardize or hamper the reaching of the final agreement”, Kenya has also fulfilled this in good faith. According to the Special Chamber in *Ghana/Côte d’Ivoire*, the transitional period is “the period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved”.⁵²⁶ In this case, that “transitional period” only begins in 2014.

369. As regards the activities that may “jeopardize or hamper the reaching of the final agreement”, Somalia appears to claim that any economic activities conducted in the disputed area would constitute a violation of international law.⁵²⁷ This exorbitant interpretation is not justified either by the ordinary meaning of those terms, or by the *travaux préparatoires*. The Report of the Chairman of Negotiating Group 7 at UNCLOS III concluded that, “The position seemed to be generally recognized that mutual restraint should be exercised pending final agreement or settlement in order not to impede the completion of the final delimitation.”⁵²⁸ The drafters of UNCLOS

⁵²² See para. 378 below.

⁵²³ *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 627.

⁵²⁴ *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, U.N. R.I.A.A., Vol. XXX, p. 1, para. 460.

⁵²⁵ *Ibid.*, para. 470.

⁵²⁶ *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 630.

⁵²⁷ MS, Vol. I, para. 8.12.

⁵²⁸ Report by the Chairman of the Negotiating Group 7 on the work of the Group at its 17th–27th meetings, NG7/24, 14 September 1978, U.N. Doc. A/CONF.62/RCNG/2, UNCLOS III, Official Records Vol. X, p.171, Annex 70.

did not intend to completely exclude all activities in disputed areas and there was a lack of support for a provision requiring a general moratorium.⁵²⁹

370. The jurisprudence on activities in disputed maritime areas has, consistent with the intention of the drafters of UNCLOS, taken a pragmatic approach of allowing transitory activities to continue, subject to the exercise of restraint and the prohibition of activities causing permanent physical change. The *Guyana v Suriname* Tribunal observed that:

The second obligation imposed by Articles 74(3) and 83(3) of the Convention, the duty to make every effort ... not to jeopardise or hamper the reaching of the final agreement”, is an important aspect of the [Law of the Sea] Convention’s objective of strengthening peace and friendly relations between nations and of settling disputes peacefully. However, it is important to note that this obligation was not intended to preclude all activities in a disputed maritime area.⁵³⁰

371. The *Guyana v Suriname* Tribunal considered that unilateral acts “which do not cause a physical change to the marine environment” would generally not breach the obligation in Articles 74(3) and 83(3).⁵³¹ Seismic exploration therefore “should be permissible”.⁵³² Acts that “lead to a permanent physical change”, on the other hand, were likely to breach the obligation.⁵³³ For that reason, drilling was impermissible.
372. The *Guyana v Suriname* Tribunal relied in part on the Court’s Provisional Measures Order in the *Aegean Sea Continental Shelf* case. Somalia cites this Order but glosses over the fact⁵³⁴ that the Court did not order the requested provisional measures in respect of Turkey’s seismic testing because even if that maritime area turned out to be part of Greece’s continental shelf and would have infringed Greece’s exclusive right to exploration, such a breach could be remedied by compensation.⁵³⁵ The Court noted that the seismic exploration conducted by Turkey was of a “transitory character” and did not involve either the establishment of installations on or above the seabed of the

⁵²⁹ *Ibid.*

⁵³⁰ *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, U.N. RIAA, Vol. XXX, p. 1, para. 465.

⁵³¹ *Ibid.*, para. 467

⁵³² *Ibid.*, paras. 467, 481.

⁵³³ *Ibid.*, para. 467.

⁵³⁴ MS, Vol. I, para. 8.14.

⁵³⁵ *Aegean Continental Shelf Case (Greece v Turkey)*, Order on Provisional Measures of 11 September 1976, I.C.J. Reports 1976, paras. 22–33.

continental shelf, or operations involving actual appropriation or other use of the natural resources.⁵³⁶

373. It is notable that even the prohibition on activities causing permanent physical change does not apply to activities commenced prior to a dispute. In its Order on Provisional Measures in *Ghana/Côte d'Ivoire*, the ITLOS Special Chamber permitted Ghana to continue hydrocarbon exploration and exploitation activities, but ordered that it “take all the necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area”.⁵³⁷ The Special Chamber refused Côte d'Ivoire's request that Ghana suspend all oil exploration and exploitation activities and refrain from granting any new permits. In fact, during the period between the Order and the final Judgment, Ghana carried out drilling activities on wells already drilled and even drilled a new well in the TEN field. The Special Chamber held that these were “ongoing activities ... for which drilling has already been carried out” and which did not violate the Order on Provisional Measures.⁵³⁸
374. Somalia also relies on the Order in *Ghana/Côte d'Ivoire* for the assertion that the acquisition and use of information about, and the exploitation of, the resources of the disputed area would create a risk of irreparable prejudice to the rights of the State that is later found to have sovereign rights in the disputed area.⁵³⁹ This reliance on that case is misplaced. First, the test of the “risk of irreparable prejudice” is only applicable to the provisional measures phase and not to the merits of the case. Second, in any event, the Special Chamber held that risk of irreparable prejudice only applies to acts that result “in a modification of the physical characteristics” of the continental shelf.⁵⁴⁰ When the Special Chamber came to consider the merits, it found no violation by Ghana.
375. In summary, the test under UNCLOS for the lawfulness of activities in the disputed maritime area has the following elements:
- a. There is no obligation to cease all activities;

⁵³⁶ *Ibid.*, para. 30.

⁵³⁷ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, para. 102 (emphasis added).

⁵³⁸ *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, paras. 651–2.

⁵³⁹ MS, Vol. I, paras. 8.15–8.17.

⁵⁴⁰ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, paras. 88–90.

- b. Transitory activities are permitted;
- c. Activities that lead to permanent physical change are not permitted.

C. The Transitory Nature of Kenya’s Activities and Somalia’s Rejection of Provisional Arrangements

376. Almost all of the alleged “unlawful activities” that Somalia attributes to Kenya predate the emergence of the “disputed area” in 2014 and are transitory in nature. These can be addressed briefly in turn:

- a. Block L13: Somalia refers to the “acquisition, processing and interpretation of 6,262 line kms of gravity-magnetic data across the original area of its operated Blocks L4 and L13” in 2013.⁵⁴¹ This activity predates 2014. Furthermore, merely gathering data does not modify the physical characteristics of the area. Additionally, it is not even clear that this activity crossed into the disputed area because only a small area of L13 crosses the equidistance line;
- b. Block L5: Somalia cites 2D and 3D seismic studies in 2001; acquiring seismic data in 2003; and drilling of a well in 2006.⁵⁴² These activities all predate 2014;
- c. Somalia refers to Total S.A. announcing exploratory drilling scheduled in 2015 “although the publicly available information does not indicate where exactly this drilling will take place”.⁵⁴³ On Somalia’s own account, there is no evidence that the drilling site was in the disputed area. In fact, the proposed drilling in 2015 never took place;
- d. Block L22: Somalia alleges that in 2013 2D seismic survey and sea core drilling operations were conducted and that in 2014 there were seabed core drilling operations and a 3D seismic survey.⁵⁴⁴ Again, most of these activities are prior to 2014 and Somalia does not establish that the 2014 activities took place in the disputed area;

⁵⁴¹ MS, Vol. I, para. 8.20.

⁵⁴² MS, Vol. I, para. 8.21.

⁵⁴³ MS, Vol. I, para. 8.22.

⁵⁴⁴ MS, Vol. I, para. 8.23.

- e. Blocks L21, 23, 24: Somalia only mentions the award of these blocks in 2012, but does not substantiate any activities therein;⁵⁴⁵
 - f. Block L26: Somalia only refers to the award of this block, not to any activities therein. Furthermore, Somalia notes that the block is currently unlicensed;⁵⁴⁶
 - g. Seismic activities by companies that are not operators: Somalia claims that seismic data was acquired in 2008 in relation to Block L22 and in 2013-14 in relation to Blocks L21, 22, 23, 24 and 26:⁵⁴⁷ Much of this activity predates 2014. Furthermore, it relates to seismic data, which does not cause physical change. It does not establish that it was carried out in the disputed area — only blocks L21 and 23 are entirely within the “disputed area”.
377. Somalia therefore, has failed to establish that Kenya authorized any unlawful activities in the disputed maritime area.
378. Although Kenya acted lawfully, and despite Somalia’s baseless accusations that Kenya was taking advantage of its neighbour, Kenya still offered to enter into provisional arrangements with Somalia in 2016 consistent with the Parties’ obligations under UNCLOS Articles 74(3) and 83(3) on the EEZ and continental shelf respectively. In a letter dated 27 May 2016, the Attorney-General of Kenya went so far as to state that, “Notwithstanding that exploration activities of a transitory character would not cause any irreparable prejudice to Somalia, Kenya has temporarily suspended all activities in the disputed EEZ”.⁵⁴⁸ He attached a letter dated 5 May 2016 from the Kenya Minister of Energy and Petroleum confirming that there is at present no exploration activity in the disputed EEZ area. Both letters were sent (by copy) to the Deputy Agent and the Somali Minister for Foreign Affairs and Investment Promotion.
379. The Somali Minister for Foreign Affairs and Investment Promotion expressly acknowledged the suspension of unilateral activities in his letter dated 18 June 2016.

⁵⁴⁵ MS, Vol. I, para. 8.24.

⁵⁴⁶ MS, Vol. I, para. 8.25.

⁵⁴⁷ MS, Vol. I, para. 8.26.

⁵⁴⁸ Letter from the Kenyan Office of the Attorney-General and Department of Justice to the Registrar of the International Court of Justice, (AG/CONF/19/153/2 VOL. III), 27 May 2016, para. 10, Annex 62; Letter from the Ministry of Energy & Petroleum, State Department for Petroleum to the Office of the Attorney General & Department of Justice, Attorney-General Muigai (ME/CONF/3/2/1), *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya): Activities in the Disputed Area*, 5 May 2016, Annex 45.

He stated that, “Somalia is pleased to be informed by the 27 May 2016 correspondence by the Honourable Attorney General of Kenya to the Court that, ‘Kenya has temporarily suspended all activities in the disputed EEZ.’” It rejected, however, Kenya’s attempt to agree on provisional arrangements, preferring instead to prevent all further activity in the disputed maritime area. In its response: “Somalia considers that by mutually refraining from exploratory activities in any disputed area pending the final judgment of the Court, all obligations under the Convention, including Articles 83(3) and 74(3) of UNCLOS, are fulfilled”.

380. Somalia’s refusal to negotiate has effectively terminated Kenya’s development of its offshore resources and prejudiced investment in offshore oil exploration. Somalia has thus rejected its obligations under Articles 83(3) and 74(3) of UNCLOS.
381. In conclusion, Somalia has failed to establish a single instance of unlawful activities by Kenya in the maritime area in dispute since 2014. Furthermore, it has refused to enter into provisional arrangements of a practical nature as required by UNCLOS Articles 83(3) and 74(3). Through its conduct, Somalia has effectively put an end to the development of Kenya’s offshore oil resources within the EEZ at the parallel of latitude that Kenya has claimed and exercised jurisdiction in with Somalia’s acquiescence from 1979 until 2014. Somalia’s claim in this regard therefore, is wholly without merit.

SUBMISSIONS

On the basis of the facts and law set forth in this Counter-Memorial, Kenya respectfully requests the Court to:

1. Dismiss the requests in paragraphs 2 and 3 of the Submissions at pages 147 and 148 of Somalia's Memorial dated 13 July 2015.
2. Adjudge and declare that the maritime boundary between Somalia and Kenya in the Indian Ocean shall follow the parallel of latitude at $1^{\circ} 39' 43.2''\text{S}$, extending from Primary Beacon 29 ($1^{\circ} 39' 43.2''\text{S}$) to the outer limit of the continental shelf.