INTERNATIONAL COURT OF JUSTICE

Maritime Delimitation in the Indian Ocean
(Somalia v Kenya)

REJOINDER OF THE REPUBLIC OF KENYA

VOLUME I

18 DECEMBER 2018

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INTRODUCTION

1. By its Order dated 2 February 2018, the Court fixed 18 December 2018 as the time-limit for the filing of Kenya's Rejoinder. This Rejoinder is submitted pursuant to that Order.

2. As provided in Article 49(3) of the Rules of Court, this Rejoinder is directed to bringing out the issues that still divide the Parties. Somalia's Reply dated 18 June 2018 does not dispute the decisive facts set out in Kenya's Counter-Memorial, namely that: (1) Kenya formally proclaimed its maritime boundary in the territorial sea and Exclusive Economic Zone ("EEZ") with Somalia at the parallel of latitude in 1979 (and again in 2005) consistent with the principle of equitable delimitation; (2) Kenya extended that line to the outer limits of the continental shelf in 2009; and (3) despite repeated formal notifications by Kenya, including through the UN Secretary-General, Somalia did not either protest or claim a contrary maritime boundary based on equidistance for some 30 years. The central issue that divides the Parties is whether on these facts international law called for a reaction by Somalia against Kenya's claim in order to prevent acquiescence. Kenya's case is that Somalia had a duty to react if it opposed Kenya's claim, and Somalia's prolonged silence therefore constitutes consent to maritime delimitation based on the parallel line.

3. As such, Kenya maintains in full its previous position, as set out in its Counter-Memorial. None of the contentions advanced in Somalia's Reply have caused Kenya to change its approach to this case in any way.

4. This Introduction sets out Kenya's principal pleadings in respect of the issues in dispute. It then outlines the structure of the Rejoinder.

A. Issues in dispute between the Parties

5. 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 maintains that there is no agreement between the Parties, and in

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

particular that despite its failure to protest Kenya's claim between 1979 and 2014, it has not acquiesced in the parallel line. It maintains therefore, that equidistance is the applicable method for delimitation of the maritime boundary, and that there are no special circumstances requiring its adjustment. Kenya contends 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.

6. Kenya broadly agrees with the "three principal areas of dispute between the Parties" identified by Somalia in its Reply,[2] which are addressed in turn below.

> *"First, whether it is legally possible to establish a maritime boundary through acquiescence and whether Somalia did in fact acquiesce in Kenya's unilateral parallel boundary claim"*

7. Somalia's key objection is that "maritime boundaries cannot be established by a unilateral act".[3] Kenya's case however, is not that the maritime boundary was established simply by its unilateral acts. Rather, Kenya's case is based on acquiescence, consistent with the jurisprudence of the Court that silence where a reaction is called for amounts to tacit consent. Kenya's case rests on Somalia's prolonged absence of protest against Kenya's maritime boundary claim, despite repeated formal notifications, including through the UN Secretary-General.[4] Annex 65 to Kenya's Counter-Memorial contains a letter dated 8 November 2017 from the UN Office of Legal Affairs confirming that despite formal notifications and publication of the 1979 and 2005 EEZ Proclamations (including in 1979, 1986, 2001, and 2006) there was no reaction from Somalia.

8. On the absence of protest, Somalia's claim is confused and contradictory. Somalia claims that under international law, it was not under a duty to protest but at the same time admits that there is a duty to react to prevent acquiescence.[5] Somalia further claims on the one hand that it protested against Kenya's claim prior to 2014 and on the other hand that it was unable to do so because of the civil war that began in 1991 (i.e., more than a decade after

[2] Reply of Somalia ("SR"), para. 1.9.
[3] SR, paras. 1.11, 2.4, 2.7-2.8.
[4] Counter-Memorial of Kenya ("KCM"), paras. 7, 15, 22 and 273.
[5] SR, para. 2.12.

the 1979 Proclamation).[6] Despite a second round of written pleadings, Somalia has failed to point to *any* protest against Kenya's maritime boundary claim until 2014, shortly before the initiation of this proceeding before the Court.

9. On these facts, Somalia must be deemed to have acquiesced in Kenya's maritime boundary at the parallel of latitude.

> *"Second, whether there is any reason to depart from the standard three-step delimitation method to determine the Parties' maritime boundary and, assuming not, what is the equitable solution it produces."*

10. Kenya rejects the assumptions underlying Somalia's characterisation of the second area of dispute. The three-step delimitation method is not "standard" in the sense of being the mandatory starting point for delimitation, and the question is not whether there is "any reason to depart" from that method. Rather, the question is what is the appropriate methodology to achieve an equitable solution on the particular facts of this case. Kenya contends that, in light of the applicable law, the regional geographical context and practice, the conduct of the Parties, as well as Somalia's own proportionality test when applied to the relevant maritime area, the parallel of latitude is the appropriate methodology to achieve an equitable solution on the facts of this case.

> *"Third, whether Kenya violated Somalia's sovereign rights and jurisdiction by engaging in seismic and drilling activities in the disputed area."*

11. As to the third area of dispute, Kenya contends that there was no "disputed area" until Somalia first protested the parallel line and claimed a contrary equidistant line in 2014. Somalia has failed to prove that any drilling authorised by Kenya occurred in the disputed area after 2014, disregards the lawfulness of transitory activities in disputed areas such as seismic testing, and further ignores its own rejection of Kenya's proposals to agree to practical arrangements of a provisional nature consistent with UNCLOS Articles 74(3) and 83(3).

[6] SR, paras. 2.89 cf. 2.107–2.113.

B. Structure of the Rejoinder

12. This Rejoinder consists of a Volume I divided into three chapters with annexes in the accompanying Volume.

13. **Chapter I** addresses Somalia's acquiescence to the parallel of latitude as the maritime boundary. It shows that Somalia does not contest the decisive facts that establish acquiescence; that contrary to Somalia's assertions, there was an obligation to protest Kenya's repeated formal claims and notifications; and that application of the international law on acquiescence leads to the unavoidable conclusion that Somalia consented for a prolonged period to a maritime boundary at the parallel of latitude.

14. **Chapter II** explains that irrespective of Somalia's dispositive acquiescence, the three-stage methodology is not mandatory for achieving the objective of an equitable solution. In the present case, it is the parallel of latitude that achieves an equitable solution in view of the applicable law in 1979, the regional geographical context and practice, the conduct of the Parties, and the resulting equitable division of maritime areas. Whilst Kenya maintains its position that the three-stage methodology has no application in the present case, it explains why, even on the application of Somalia's own proportionality test to the relevant maritime area, the delimitation advanced by Kenya achieves an equitable result.

15. **Chapter III** rebuts Somalia's claim that Kenya has conducted unlawful acts in the "disputed area". It shows that contrary to Somalia's assertion, there was no disputed area until 2014; that in any event Somalia uses an incorrect legal test; and that the only activities of Kenya either predate the existence of the disputed area or have been of a transitory character.

16. The Rejoinder concludes with Kenya's submissions to the Court.

CHAPTER I:
SOMALIA'S ACQUIESCENCE TO THE PARALLEL OF LATITUDE AS THE MARITIME BOUNDARY

17. In its Counter-Memorial, Kenya demonstrated that between 1979 and 2014, Kenya proclaimed, and Somalia acquiesced in, a maritime boundary at the parallel of latitude, and consequently that the prolonged consent of the Parties to this maritime delimitation is binding under international law.[7] As this Chapter demonstrates, Somalia's Reply essentially confirms Kenya's case on acquiescence.

18. First, Somalia does not dispute the core factual elements of Kenya's case; namely, that Kenya proclaimed its maritime boundary in the territorial sea and EEZ in 1979 and 2005, and its boundary in the outer continental shelf in 2009, and gave formal notification on each occasion through the UN Secretary-General, without any formal protest or contrary claim being made by Somalia until 2014 (see Section A below). Second, Somalia largely agrees with Kenya on the international law applicable to acquiescence; namely that where a response is called for, silence is to be interpreted as consent. Somalia's main contention is that maritime boundaries cannot be established by a unilateral act, and that it was under no obligation to protest Kenya's repeated and consistent notifications of its maritime boundary claim. As Kenya will show, neither contention is correct (see Section B below).

19. There is also no merit to Somalia's assertion that the Memorandum of Understanding signed on 7 April 2009 ("the MOU") (regarding "no-objection" to submissions to the Commission on the Limits of the Continental Shelf ("CLCS") in respect of delineation of the outer continental shelf) or the negotiations held between the Parties in 2014 (when Somalia first claimed an equidistant maritime boundary) are somehow inconsistent with Somalia's prior acquiescence since 1979 (see Section C below). Furthermore, Somalia has failed to refute Kenya's case that between 1979 and 2014, the other conduct of the Parties – including practice in regard to fisheries, marine scientific research, oil concessions, and naval patrols – was consistent with a maritime boundary at the parallel of latitude (see Section D below).

[7] See KCM, paras. 2ff.

A. Somalia does not contest the decisive facts that prove acquiescence

20. In its pleadings, Somalia alleged that in 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",[8] and that Kenya advanced a "novel claim" to that maritime boundary.[9] In fact, Kenya's Counter-Memorial showed that Somalia had been formally notified of Kenya's claim through the UN Secretary-General not in 2014, but *35 years earlier*, and that it *never* protested Kenya's 1979 and 2005 proclamations until 2014. As the United Nations Office of Legal Affairs noted in a letter to Kenya dated 8 November 2017, there have been no communications whatsoever from Somalia concerning Kenya's proclamations of 1979 and 2005.[10] Kenya's position is thus not "novel" at all. The only novelty is Somalia's abrupt change of position in 2014.

21. The following core facts and points of law, which are decisive in the present case in relation to Somalia's acquiescence, are in fact not disputed in Somalia's Reply.[11]

22. First, Somalia does not deny that, as a matter of international law, mere constructive knowledge is sufficient for acquiescence[12] and that, *a fortiori*, it applies in respect of a claim that is expressed publicly.[13] Somalia does not deny either that Kenya repeatedly declared its position in forms and in fora that are the appropriate means of communicating such claims between States. In particular:

    a. As early as 1974, Kenya stated before the Third UN Conference on the Law of the Sea ("UNCLOS III") that "application of equidistant rule of delimitation of the economic zone with both Tanzania and Somalia would lead to severe distortion".[14]

[8] Memorial of Somalia ("MS"), para. 1.6 (emphasis added).
[9] Written Statement of Somalia concerning the Preliminary Objections of Kenya, 5 February 2016, para. 1.26, as well at para. 1.5.
[10] KCM, paras. 92-94.
[11] In the Counter-Memorial, Kenya already noted that the core facts of the present case are not in dispute (see KCM, para. 200).
[12] See in particular J. Barale, "L'acquiescement dans la jurisprudence internationale", *Annuaire français de droit international*, 1965, pp. 401–402. See also the case-law cited at KCM para. 216.
[13] KCM, paras. 216–217.
[14] 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, KCM 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 200Miles point. This should never be allowed and this is

Figure KR1-1 below depicts how Kenya's conclusion in 1974 was clearly reasonable.

b. In 1976, following the decision of the 1975 Kenyan Consultative Inter-Ministerial Meeting of the Law of the Sea Group in respect of equitable delimitation in the EEZ, the Survey of Kenya issued a map indicating the parallel of latitude as the maritime boundary in the EEZ up to 200M.[15]

c. On 28 February 1979, Kenya issued a Presidential Proclamation, establishing the maritime boundary in the EEZ up to 200M at the parallel of latitude.[16]

d. In 1983, the Survey of Kenya published a map corresponding to the 1979 Proclamation, establishing the maritime boundary in the EEZ up to 200M at the parallel of latitude.[17] For convenience, this map is reproduced below as **Figure KR1-2**.

e. In 1986, the 1979 Proclamation was published in a UN publication on *National Legislation on the EEZ*.[18]

f. In 2001, the 1979 Proclamation was published on the UN Division for Ocean Affairs and the Law of the Sea ("DOALOS") website when it was first launched in 2001.[19]

g. On 9 June 2005, a Presidential Proclamation was issued and published in the *Kenya Gazette*, confirming the maritime boundary in the EEZ up to 200M at the parallel of latitude.[20]

h. In 2006, the 2005 Proclamation was published on the DOALOS website.

i. In 2006, the 2005 Proclamation was also published in the *Law of the Sea Bulletin*.[21]

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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."

[15] KCM, paras. 52, 57 and KCM Annex 12. The context for the production of this map is addressed at KCM paras. 51 – 57.

[16] KCM, paras. 58–59.

[17] KCM, para. 62. KCM para. 116 explains that following technical input from Canada, the 1976 map was re-printed in 1983 with a more accurate depiction of the outer limits of the EEZ.

[18] KCM, para. 66.

[19] KCM, paras 65–66.

[20] KCM, paras. 87-92.

[21] See KCM, Annex 92. See also KCM, paras. 93 and 242.

j. In its 2009 submission to the CLCS, Kenya confirmed its maritime boundary at the parallel of latitude up to 200M, and extended it beyond 200M to the outer limits of the continental shelf.[22]

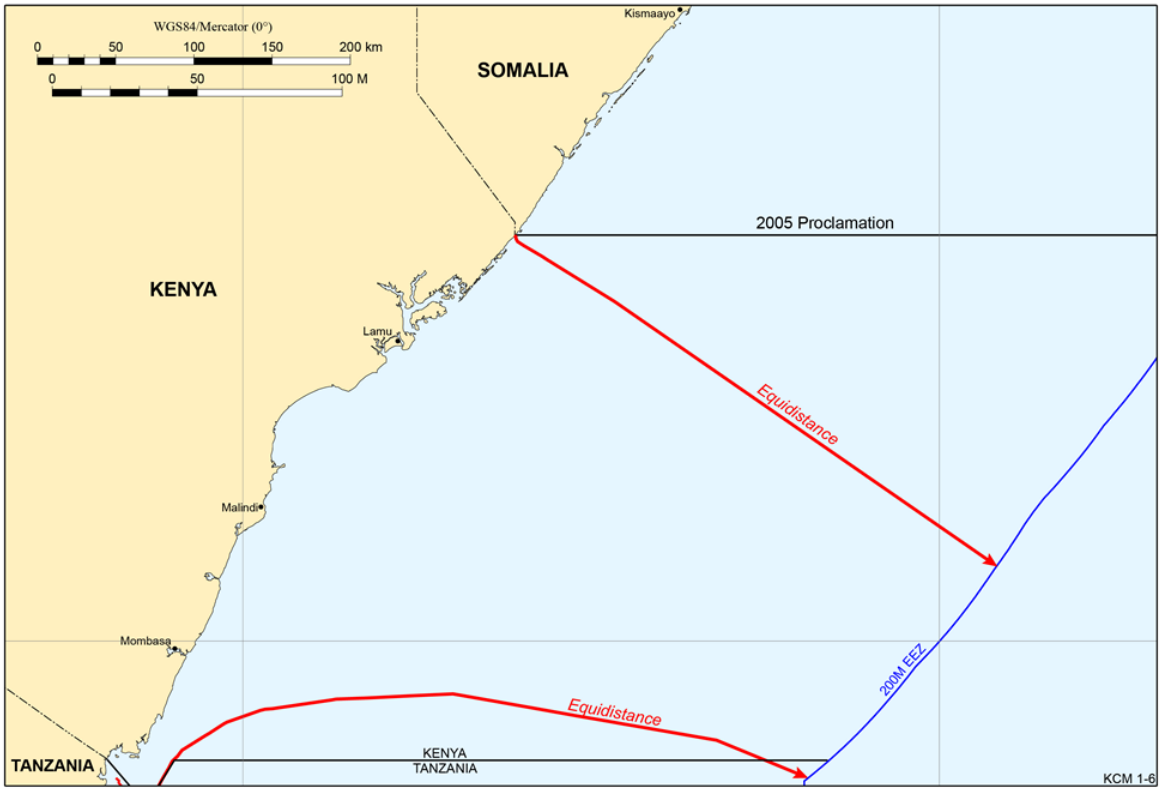

Figure KR1-1: Delimitation of the EEZ contrasting the use of equidistance and parallels of latitude

[22] KCM, paras. 98–99.

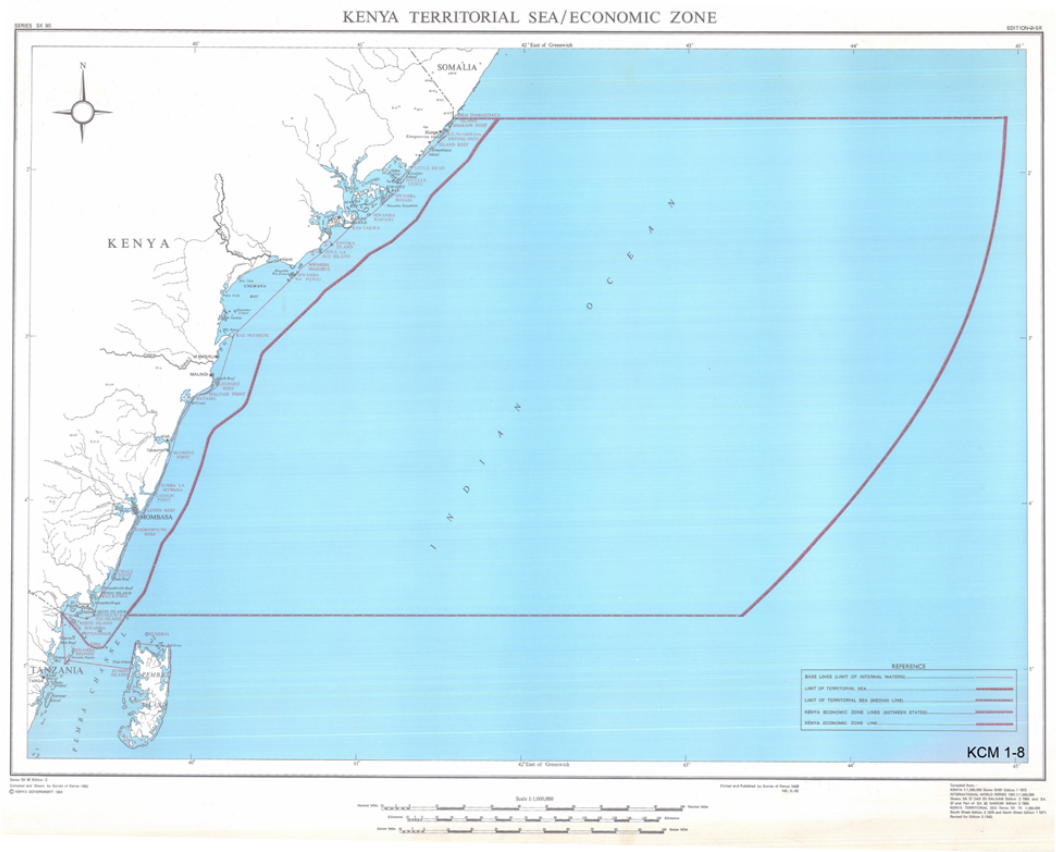

Figure KR1-2: Kenya Territorial Sea and Economic Zone, Survey of Kenya, SK-90 Edition 2, 1983

23. Second, Somalia does not deny that Kenya's position was not only made public but also *officially circulated and directly notified* to Somalia and other States through the UN Secretary-General, on at least four occasions, spanning 35 years.[23] Within a week of the 1979 Proclamation, Kenya requested its circulation to all UN Member States, and that circulation was duly effected by the UN Secretary-General.[24] Similarly, the 2005 Proclamation was circulated by the UN Secretary-General to all UN Member States and to all UNCLOS States Parties in 2006.[25] The 2009 Executive Summary to the CLCS was also circulated by the UN Secretary-General to all UNCLOS States Parties.[26] Finally, in

[23] KCM, para. 225. It has to be recalled that notification guarantees the notoriety of facts in international relations, in particular in the law of the sea, notification being "*l'acte par lequel est porté officiellement à la connaissance des tiers un fait, une situation ou un acte juridique"*: see L. Lucchini & M. Vœckel, *Droit de la mer. Tome I*, Pedone, 1990, p. 53; Lauterpacht defined notification as 'the technical term for the communication to other States of certain facts and events of legal importance': H Lauterpacht (ed), *Oppenheim's International Law,* 8th ed., Longman's, 1955, p. 874.
[24] KCM, paras. 64–65.
[25] KCM, para. 92.
[26] KCM, para. 105.

January 2014, Kenya transmitted a Note Verbale on its "terrestrial and maritime boundaries" that was circulated by the UN Secretary-General to all UN Member States.[27]

24. These were not simply routine publications of official statements. Somalia does not deny that these were specific and formal notifications made specially and in the context of UN fora, including the fora concerned with the law of the sea. Notifications play a crucial role in the law of the sea because "[*l*]*a mer étant un espace de liaison, de communication, les tiers concernés par les actes ou les faits dont elle est l'objet sont particulièrement nombreux, d'où l'importance de la notification ou, plus généralement, de la publicité donnée à ces actes ou à ces faits*".[28] In particular, a proclamation has a constitutive character in transforming the high seas into an EEZ.[29] The 1979 and 2005 Proclamations, therefore, could not be ignored by other States – especially by Somalia – because it limited the regime applicable to the high seas by putting relevant maritime areas under the jurisdiction of Kenya. As such, these were not mere claims, but rather acts performed by Kenya *à titre de souverain*.[30]

25. The significance of such proclamations, and the fact that such unilateral declarations cannot simply be ignored by other States, is reflected in the seventh report of the International Law Commission ("ILC") Special Rapporteur on Unilateral Acts of States. When considering "protests to prevent the consolidation of the legal situation in a given territory" in the context of maritime claims, it states as follows:

> *"A very large category of protests relates to unilateral declarations by States of various forms of domestic legislation (laws, decrees, declarations, etc.) the intention of which is to extend unilaterally the maritime area over which they exercise sovereign rights or, at least, are in a position to exercise some control (for the purposes of marine conservation, customs*

[27] KCM, para. 167.
[28] L. Lucchini & M. Vœckel, *Droit de la mer Tome I*, Pedone, 1990, pp. 53–54 (emphasis added). A register of notifications in the field of maritime delimitation is managed by DOALOS: See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm.
[29] See for instance *Arbitration between the Republic of Croatia and the Republic of Slovenia,* PCA No. 2012-4, Final Award, 29 June 2017, para. 1065, pointing out that since Croatia has not yet established an EEZ, "There is currently lying beyond and adjacent to Croatia's territorial sea an area which has the status of high seas." See also ITLOS, *Norstar (Panama v Italy)*, Preliminary Objections, Judgment, 4 November 2016, at para. 116.
[30] See for instance *Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment, I.C.J. Reports 2012*, p. 655, para. 80 and p. 675, para. 84.

controls or operations for the conservation of resources on the continental shelf and its subsoil)".[31]

26. In addition, notifications through the UN Secretary-General possess a special nature in practice. They constitute the highest level of publicity in expressing the official position of States.[32] Moreover, while the 1979 Proclamation was made prior to the adoption of UNCLOS in 1982, following the 2005 Proclamation, in 2006 Kenya deposited lists of geographical coordinates pursuant to Articles 16(2) and 75(2) of UNCLOS,[33] that is to say under treaty provisions that expressly govern "due publicity" in respect of "the lines of delimitation drawn in accordance with Articles 12, 15 and 74".[34] Thus, Kenya's notifications to Somalia were formal and direct.

27. Third, Somalia does not deny that since 1976 Kenya's maritime boundary claim has been expressed in a *precise and unequivocal way*.[35] In particular, Kenya's 1979 and 2005 Proclamations *expressly concerned maritime delimitation,* and contained specific coordinates and an official map.[36] As Somalia's Written Statement on Preliminary Objection noted, the Proclamations of 1979 and 2005, and the 2009 Executive Summary to the CLCS, indicated Kenya's view that "the boundary is settled along the line claimed by Kenya".[37]

28. Fourth, Somalia does not deny that the 1979 Proclamation was consistent with Somalia's position at that time that maritime delimitation in the EEZ should be based on equitable principles rather than equidistance.[38] In fact, in 1980, immediately following Somalia's express statements at the Ninth Session of UNCLOS III opposing any reference to equidistance in the provisions concerning delimitation of the EEZ or continental shelf, the

[31] ILC, Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, Yearbook of the ILC, 2004, Vol. II (Part Two) at para. 148.
[32] The particular importance attaching to United Nations notifications and publications is evident (*mutatis mutandis*) from *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility), I.C.J. Reports 1984*, pp. 410–413.
[33] See KCM, para. 92.
[34] KCM, para. 243.
[35] KCM, paras. 116, 221–223. See *supra*, para. 22(b) referring to the 1976 Survey reproduced at KCM **Figure 1-7**.
[36] Ibid.
[37] Written Statement of Somalia on Preliminary Objections, para. 2.85 *in fine*.
[38] See KCM para. 24, as well as para. 23, para. 41, paras. 69 *et seq*, especially para. 74; para. 227; paras. 248ff.

representative of Kenya stated before the Kenya National Assembly that there was "no question" with Somalia in respect of delimitation at the parallel of latitude.[39]

29. Fifth, Somalia does not refute Kenya's contention that between 1979 and 2014, Somalia *never protested* or made a contrary claim against Kenya's maritime boundary at the parallel of latitude.[40]

30. The assertion in Somalia's Reply that it "has repeatedly and unequivocally protested against Kenya's assertion of a parallel maritime boundary"[41] and that it "has consistently and emphatically asserted that the maritime boundary should follow an equidistance line"[42] finds no basis whatsoever in the facts. First, Somalia points to a statement from 1974 in which Kenya merely indicated that it *seems* that Somalia may have claimed a median line *for the territorial sea*;[43] this observation was made 5 years before the 1979 Proclamation and is clearly not a protest by Somalia against the parallel line. Second, as explained in the Counter-Memorial, the August 2009 Somali letter to the UN Secretary-General repudiating the MOU merely observed that an equidistance line "normally constitutes the point of departure for the delimitation of the continental shelf between two States with adjacent coasts", noting Somalia "bases itself on the latter view" (i.e., the equidistance line), in disregard of its acquiescence in Kenya's maritime boundary claim (at that point in time) for a period of 30 years.[44]

31. In this regard, the contrast between Kenya's and Somalia's submissions to the CLCS in 2009 is telling. Kenya's submission of April 2009 stated that "the maritime space over which Kenya exercises sovereignty, sovereign rights and jurisdiction" is the area delimited by the 2005 Proclamation along the parallel of latitude, which "has been determined on the basis of the provisions of the Convention" and deposited with and published by the UN, with an illustrative map.[45] By contrast, Somalia's Preliminary Information submission of April 2009 contains no indication that it previously claimed a contrary maritime boundary.

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[39] See KCM, para. 72.
[40] KCM, paras. 242–247 and para. 108.
[41] SR, para. 2.87. See also para. 1.12 c), para. 2.2, para. 2.100 and para. 2.106.
[42] SR, para. 2.2. See also para. 2.87: "Somalia has always had a different claim, based on equidistance. Somalia has consistently asserted that claim and acted in accordance with it."
[43] SR, para. 2.30.
[44] KCM para. 246 addressing MS, Vol. III, Annex 37.
[45] MS, Annex 59, para. 1.3.

It stated only that "[a]ll information and maps contained in this submission are without prejudice to issues of maritime delimitation" and that there remain "unresolved questions (…) in relation to bilateral delimitation of the continental shelf with neighbouring States." There was no map, no geographical coordinates, no claim, and no indication of any protest against either Kenya's 1979 or 2005 Proclamations.[46]

32. What Somalia's Reply refers to as "formal protests by the Somali Government" in 2012 (i.e. 33 years after the 1979 Proclamation) are merely press reports without any supporting evidence.[47] The two other documents cited (dated 2012 and 2013 respectively) are third party reports, and not protests by Somalia.[48] In fact, the *only* documents annexed to Somalia's Memorial that evidence the existence of a protest after the 1979 Proclamation are dated 2014.[49] It is not in dispute that the first time that Somalia deposited with the UN details of what it now claims as the maritime boundary of its territorial sea and EEZ under Articles 16(2) and 75(2) of UNCLOS, was in on 30 June 2014, that is to say: (1) 35 years after Kenya's 1979 Proclamation; (2) after – and not before – the first round of discussions on maritime delimitation in March 2014; and (3) immediately before Somalia's Application to the International Court in August 2014.[50]

33. In summary, it is uncontested that since at least 1979: (1) Kenya has publicly and expressly claimed a maritime boundary at the parallel of latitude as an equitable delimitation; (2) Kenya has formally and directly notified Somalia of that claim on multiple occasions including through the UN Secretary-General, UNCLOS procedures, DOALOS and official UN publications; (3) Kenya's claim has been precise and unequivocal, including specific coordinates and maps; (4) Kenya's claim in 1979 was consistent with Somalia's position at UNCLOS III in 1980 that equitable delimitation rather than equidistance was the applicable principle, leading Kenya to conclude that there was "no problem" with Somalia

[46] MS, Annex 66, Section 6. See also KCM, para. 106.
[47] SR, para. 2.80 citing MS, para. 8.27, which in turn cites Kelly Gilblom, "Kenya, Somalia border row threatens oil exploration", Reuters (20 Apr. 2012). MS, Vol. IV, Annex 104; and Kelly Gilblom, "Somalia challenges Kenya over oil blocks", Reuters (6 July 2012). MS, Vol. IV, Annex 107
[48] SR paras. 2.93 and 2.94 referring to a 2012 report issued by a US research center and a 2013 UN report.
[49] See MS, Annex 48; MS, Annex 31, p. 5; KCM, paras. 177- 178.
[50] See MS, Annex 68, and KCM, paras. 192–196. During the first round of discussion between the Parties on the maritime dispute in March 2014, Kenya's record of its presentation at that meeting indicates that it had not received anything more concrete than "hints" that Somalia "prefer[red] median lines" (see MS, Vol. III, Annex 31, Power Point presentation at p. 2, slide 10).

in this respect; and (5) between 1979 and 2014,[51] Somalia *never* protested or claimed a maritime boundary contradicting Kenya's claim. As set out below, on these undisputed facts, the legal consequence of Somalia's prolonged acquiescence is clear: Somalia must be deemed to have consented to the maritime boundary at the parallel of latitude.

B. The international law applicable to acquiescence

1. Acquiescence as tacit consent to maritime boundary delimitation

34. Somalia's central objection in its Reply is that "maritime boundaries cannot be established by a unilateral act".[52] But Kenya's case is manifestly not that the maritime boundary was established by its own unilateral acts. Rather, Kenya's case is based on the *consent of Somalia* resulting from *its prolonged absence of protest against Kenya's claim*.[53]

35. It is clearly established that in international law, acquiescence is a form of consent. As observed by one commentator:

> *"In international law, the term 'acquiescence' (...) denotes consent. It concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another state would be called for. Acquiescence is thus consent inferred from a juridically relevant silence or inaction."*[54]

36. A detailed study further concluded:

> *"Il est certain que l'acquiescement est trop étroitement lié, quant à sa formation, aux actes ou aux prétentions de l'autre partie, que la situation juridique née de l'acquiescement est trop directement créée par la partie*

[51] For the reasons set out above, Kenya's position is that the only documents annexed to Somalia's Memorial that evidence the existence of a protest are dated 2014.

[52] SR, para. 1.11. See also para. 2.4: "Kenya chooses to (…) invent an entirely novel approach: delimitation by acquiescence in a unilateral claim"; para. 2.7: "there can be no presumption that a unilateral act of a State can ever create a boundary under international law"; para. 2.8: "Yet Kenya considers that its common maritime border with Somalia was somehow established simply by virtue of a unilateral act".

[53] See KCM, para. 7, para. 15, para. 22, 219 and para. 273. See International Law Commission, Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, *Yearbook of the ILC,* 2004, Vol. II (Part Two), p. 248, paras. 188–189: "Strictly speaking and delineated in precise terms, silence cannot be considered a unilateral act (…) In one way or another, this silence, along with other aspects that may well reveal the will of the State in question, may make a retraction impossible if the conduct continues. Silence as such usually has legal consequences if it is related to a prior act on the part of another subject; (…) the Special Rapporteur therefore inclines towards the position (…) whereby silence, since it cannot produce legal effects independently and requires another act in order to do so, does not come under the definition of unilateral engagement (...)."

[54] N.S. Marques Antunes, "Acquiescence", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012, Vol. I, p. 53.

> *adverse pour que l'acquiescement puisse être dans la majorité des cas regardé comme un simple acte unilatéral. D'ailleurs dans la jurisprudence qui fait application de l'acquiescement on trouve parfois une référence à l'accord des parties (...). D'une manière générale, la Cour parle de consentement ou d'acceptation, ce qui implique un accord de volontés."*[55]

37. Acquiescence thus constitutes "*un acte juridique conventionnel*",[56] i.e. a form of agreement, not a unilateral act as Somalia contends.

38. The definition of acquiescence as a form of tacit consent has been consistently confirmed in the Court's jurisprudence.[57] In *Pedra Branca/Pulau Batu Puteh* in 2008, the Court declared in very clear terms that in respect of displays of sovereignty, absence of reaction may be interpreted as consent:

> *"Any passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty (...). The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather it places its emphasis on the parties' intentions (...). Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct à titre de souverain of the other State (...). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The 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 . . .' (...)."*[58]

39. The Court has made clear that in international law "the question of form is not decisive".[59] Thus, the precise legal category by which consent – that is to say, agreement – is

[55] J. Barale, "L'acquiescement dans la jurisprudence internationale", *Annuaire français de droit international,* 1965, p. 418.
[56] Ibid., p. 418.
[57] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 305, para. 130 "the Court decided that "(…) acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent."; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile*), I.C.J. Reports 2018, para. 152; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992,* p. 577, para. 364, the Court similarly considered that acquiescence constitutes a "form of tacit consent". Judge Ago characterised acquiescence as "consent evinced by inaction" (*Continental Shelf (Tunisia/Libya),* Separate Opinion of Judge Ago, *I.C.J. Reports 1982,* p. 97, para. 4).
[58] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008,* pp. 50–51, paras. 120–121.
[59] *Nuclear Tests Cases (Australia v France), Judgment, I.C.J. Reports 1974,* pp. 267-268, para. 45: "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. (…) The question of form is not decisive."

manifested is irrelevant. As Judges Simma and Abraham opined in *Pedra Branca/ Pulau Batu Puteh*:

> *"In fact, it is not of great importance that, as basis for the solution it adopts, the Court should use this or that legal category or characterization, as those categories, it must be acknowledged, are often not hermetically separated from one another. Thus, whether one says that a State can acquire sovereignty over a territory by tacit agreement with the previous sovereign, or by supposed acquiescence, or that the acquisition should be regarded as having taken place through prescription, the essential question is in what conditions a tacit agreement having such an effect can be regarded as reached (…)."*[60]

40. As the arbitral tribunal in *Air Transport Services Agreement* observed:

> *"This identity of effects eliminates the practical consequences of the doctrinal divergence between the partisans of the theory according to which acquiescence is equivalent to tacit consent (e.g. FITZMAURICE, The Law and Procedure of the International Court of Justice, 1951–4 : General Principles and Sources of Law, "British Yearbook of International Law", XXX, 1953, pp. 27 et seq.; and even more clearly MacGIBBON, The Scope of Acquiescence in International Law, ibid., XXXI, 1954, pp. 143 et seq.; and Customary International Law and Acquiescence, ibid., XXXIII, 1957, pp. 144 et seq.) and those for whom acquiescence, while it is a phenomenon that is equivalent in its effects to tacit consent, should in theory be distinguished from it (for example, SPERDUTI, Prescrizione, consuetudine et acquiescenza, "Rivista di diritto internazionale", 1961, pp. 7 et seq.)".*[61]

41. Contrary to Somalia's assertions, the formation of consent through absence of protest and acquiescence is well-established in regard to maritime boundary delimitations. In fact, "[*l*]*es problèmes de souveraineté territoriale constituent l'essentiel du champ d'application de l'acquiescement*" and "[*l*]*e domaine de l'acquiescement s'entend au sens large puisque les décisions intervenues en matière intéressent la souveraineté de l'Etat sur terre mais aussi sur les étendues maritimes et même sur l'espace aérien*".[62] As set out in an ILC

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[60] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Joint Dissenting Opinion of Judges Simma and Abraham, *I.C.J. Reports 2008,* p. 121, para. 16.

[61] *Case concerning the Interpretation of the Air Transport Services Agreement between the United States of America and France, signed at Paris on 27 March 1946,* Decision of the Arbitration Tribunal established pursuant to the Arbitration Agreement signed at Paris on 22 January 1963 between the United States of America and France, given at Geneva on 22 December 1963, *RIAA,* Vol. XVI, p. 63, fn. 2.

[62] J. Barale, "L'acquiescement dans la jurisprudence internationale", *Annuaire français de droit international,* 1965, pp. 409–410. See also, expressing the same view, N.S. Marques Antunes, "Acquiescence", in *Max Planck Encyclopedia of Public International Law,* Oxford University Press, 2012, Vol. I, p. 54, para. 11 and p. 55, para. 13. See also, outside the context of

report on unilateral acts of States cited above, there is a plethora of examples where States have protested in response to another State's unilateral maritime claim, in order to "prevent the consolidation of the legal situation" in a given maritime area.[63]

42. Thus, Somalia's position in paragraph 2.1 of its Reply in respect of Kenya's "main argument … that its maritime boundary was effected (…) *by a unilateral act* of Kenya (…) to which Somalia's alleged failure to protest constituted acquiescence" is fundamentally flawed. It rests on a false premise that somehow consent to Kenya's unilateral act (i.e. the 1979 Proclamation) cannot be expressed by silence or inaction. In fact, Somalia's Reply contradicts its own position following the initiation of this proceeding in 2014. In a letter addressed to the UN Secretary-General on 7 July 2015, the Foreign Minister of Somalia asserted that "Kenya's unilateral declaration of such a maritime boundary with Somalia, which has not been agreed to *(or recognised)* by Somalia, has no validity under international law".[64] The qualification ("agreed to *(or recognised)* by") plainly reflects Somalia's own admission that under international law, a maritime boundary may be established based either on express or tacit consent.[65]

2. The requirements of acquiescence are satisfied by the facts

43. Despite Somalia's misplaced emphasis on "unilateral acts", its Reply demonstrates that the Parties are largely in agreement in respect of the law applicable to acquiescence. At paragraph 2.6 of its Reply, Somalia identifies "three requirements, common to tacit agreement, preclusion, estoppel and acquiescence", relying on the Eritrea/Ethiopia Boundary Commission. As set out below, each of these three requirements is clearly

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delimitation: "Admittedly, Nicaragua itself, according to the information furnished to the Court, did not at any moment explicitly recognise that it was bound by its recognition of the Court's compulsory jurisdiction, but neither did it deny the existence of this undertaking. The Court notes that Nicaragua, even if its conduct in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* was not unambiguous, did not at any time declare that it was not bound by its 1929 Declaration. Having regard to the public and unchanging nature of the officia1 statements concerning Nicaragua's commitment under the Optional-Clause system, the silence of its Government can only be interpreted as an acceptance of the classification thus assigned to it. It cannot be supposed that that Government could have believed that its silence could be tantamount to anything other than acquiescence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 410, para. 39).

[63] ILC, Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, Yearbook of the ILC, 2004, Vol. II (Part Two) at paras. 148 – 167, section entitled "Protests to prevent the consolidation of the legal situation in a given territory".

[64] MS, Annex 52, p. 1 (emphasis added).

[65] See in particular KCM, para. 211, quoting *Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962,* p. 23.

satisfied in the present case; by Somalia's own view of the applicable standard, it must therefore be considered to have acquiesced in the maritime boundary at the parallel of latitude. Any other conclusion would seriously undermine the requirement of predictability and legal security, which, according to both Kenya[66] and Somalia is essential to maritime delimitation.[67]

> ***"(1) an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule"***[68]

44. Kenya has demonstrated in its Counter-Memorial, and Somalia has not disputed in its Reply, that since at least 1979, Kenya has formally proclaimed and established, under the relevant rules of international law, its maritime boundary at the parallel of latitude as an equitable delimitation under international law. Thus, beyond the contemporaneous view of both Kenya and Somalia at UNCLOS III that equitable principles (not equidistance) applied in respect of EEZ delimitation, from at least 1979 Kenya expressed that general legal rule in the specific form of a maritime boundary at the parallel of latitude.

> ***"(2) the knowledge (actual or reasonably to be inferred) of the other party of such conduct or omission…"***[69]

45. Kenya has demonstrated in its Counter-Memorial, and Somalia has not disputed in its Reply, that since at least 1979, Kenya's maritime boundary claim was publicly and expressly proclaimed, and that Somalia received formal, direct, and repeated notifications. There can be no doubt as to the knowledge of Somalia, whether actual or constructive.

> ***"(3) a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first…"***[70]

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[66] See KCM, paras. 311-312, and *infra*, paras 158-161.

[67] According to Somalia (SR, para. 3.18), "The Court's jurisprudence, and that of other international tribunals, has brought structure and predictability to the delimitation process in the 36 years since the signing of the Convention." During the same period of time of more than 30 years (while the case-law of the Court was under development), Kenya's position, which was in conformity with both Kenya's and Somalia's approach to delimitation during the negotiations of the UNCLOS, was repeatedly and consistently reaffirmed, made public and notified, and Somalia never protested. Predictability thus requires the Court to adjudge and declare that the maritime boundary is established at the parallel of latitude. In *Grisbadarna* the arbitral tribunal similarly stated, also against the background of thirty years of acquiescence, that '*dans le droit des gens, c'est un principe bien établi, qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait depuis longtemps*' (*Grisbadarna* (*Norvège, Suède*) (1909) 11 RIAA 147, 161).

[68] SR, para. 2.6.

[69] Ibid.

46. Kenya has demonstrated that between 1979 and 2014, Somalia *never* protested or made a claim contrary to Kenya's maritime boundary claim.[71]

47. In fact, Somalia's defence in this regard is confused and contradictory. At one point in its Reply, Somalia claims that there is no obligation to protest under international law, but at the same time it refers to the third requirement cited above and acknowledges that there is a duty to react to prevent acquiescence.[72] Somalia also claims on the one hand that it protested against Kenya's position[73] and on the other hand that it was unable to protest because of the outbreak of civil war in 1991 (i.e. after 12 years of acquiescence in the 1979 Proclamation).[74]

48. In this regard, Somalia's protests in 2014 are irrelevant because they constitute the crystallization of the dispute after 35 years of acquiescence (see Subsection a below). In fact, those protests confirm Kenya's case. What matters is Somalia's absence of reaction to Kenya's claim between 1979 and 2014, before the critical date when Somalia first claimed an equidistant maritime boundary. Kenya's claim of sovereignty and sovereign rights in relation to maritime areas called for a reaction, and consequently, Somalia's failure to react constitutes acquiescence (see Subsection b below).

a. Critical date

49. Under international law, the fact that, after at least 30 years of silence, Somalia protested is irrelevant for determining whether, under international law, Somalia had already acquiesced in Kenya's position. Obviously, a protest that gives rise to a dispute cannot erase pre-existing acquiescence. Otherwise, acquiescence would become meaningless as a legal category. A State cannot neutralise the legal effect of prolonged consent by protesting against what it had *already* consented to. What matters is whether acquiescence existed on the critical date *when the dispute arose*.

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[70] Ibid.
[71] See *supra*, Section A.
[72] See *infra*, Subsection b.
[73] See *supra,* Subsection b.
[74] See *infra,* para. 61.

50. The Court's jurisprudence is clear on this point. In *Anglo–Norwegian Fisheries*, the Court held that although the United Kingdom had challenged the validity of Norway's claim pursuant to its legislation, which gave rise to the dispute, the United Kingdom had already acquiesced in that claim. What mattered, the Court emphasized, was the absence of protest "until the time when the dispute arose".[75] Similarly, in *Pedra Branca*, the fact that a dispute crystallized in 1979–1980[76] did not prevent the Court from deciding in 2008 (almost 30 years later) that silence and inaction prior to 1979–1980 constituted acquiescence.[77] The Court reaffirmed its well-established jurisprudence according to which acts taking "place after the date on which the dispute between the Parties crystallised" are irrelevant and cannot be taken into consideration, except if they confirm a pre-existing situation.[78]

51. What is relevant in the present case is that, before the crystallization of the dispute in 2014, Somalia was obliged to react to Kenya's position if it disputed what Kenya claimed as the maritime boundary, and that in fact it did not protest for a prolonged period.

b. Somalia was under an obligation to react to prevent acquiescence

The circumstances called for a reaction from Somalia to prevent acquiescence

52. In its Counter-Memorial, Kenya relied on a number of authorities – examples of State practice as well as judicial and arbitral decisions – in support of the well-established rule that silence constitutes acceptance when the circumstances call for some reaction.[79] In particular, there is no question that a State opposed to the claims of another State, especially when it affects its sovereignty and sovereign rights, must protest if it wants to prevent acquiescence.[80] Kenya also established that, in the present case, the circumstances

[75] *I.C.J. Reports 1951*, p. 138. In *Grisbadarna* (*Norvège, Suède*), the Arbitral Tribunal similarly noted that Sweden acted "*la première et une trentaine d'années avant le commencement de toute contestation*": (1909) 11 RIAA 147, 162.
[76] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 27, para. 30 and 33 - 34.
[77] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, pp. 50 - 96, paras. 118 - 277.
[78] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, pp. 27–28, para. 32.
[79] See KCM, paras. 210-219.
[80] KCM, paras. 210–219 and paras. 232–237.

plainly called for a prompt reaction, in particular following Kenya's formal notifications of the 1979 and 2005 Proclamations, as well as its 2009 CLCS submission.[81]

53. Kenya notes that in its Judgment on Preliminary Objections, the Court held that Somalia had acquiesced in the validity of the MOU because it "did not begin to express its doubts until some time later, in March 2010 … and that Somalia has never directly notified Kenya of any alleged defect in its consent to be bound by the MOU".[82] In regard to Kenya's maritime boundary claim, there is no record of Somalia even expressing "doubts" in regard to the 1979 and 2005 Proclamations prior to its August 2009 letter repudiating the MOU,[83] and it did not directly notify Kenya of its protest until 2014.

54. In fact, Somalia's Reply conceded that "protest may be called for when one of the two States has adopted for a long time a consistent conduct that indicates its views on the location of a maritime boundary"[84] and that, through the 1979 and 2005 Proclamations, Kenya "has purported to" establish a maritime boundary.[85]

55. More specifically, on the facts of the present case, Somalia's Reply makes a conclusive admission that protest against Kenya's 1979 and 2005 Proclamations was required. In particular, Somalia stresses that the purported extension by Kenya after 2009 of oil concessions to the parallel of latitude "prompted vigorous formal protests by the Somali Government"[86] (although it has not offered credible evidence in support of this assertion that any such protests were in fact made) and that it protested very recently that Kenya's activities in 2014 in Somalia's claimed EEZ constitute "gross violations of Somalia's sovereignty and territorial integrity and of applicable Somali laws, including Somali Maritime Law of 1988".[87] These assertions confirm *a contrario* that Kenya's maritime boundary claim since 1979 had called for reaction if Somalia opposed delimitation at the parallel of latitude. Somalia does not provide any plausible explanation for the contrast

[81] KCM, paras. 238–241.
[82] *Judgment on Preliminary Objections, I.C.J. Reports 2017*, paras. 49-50.
[83] MS, Vol. III, Annex 37.
[84] SR, para. 2.12.
[85] Written Statement of Somalia concerning the Preliminary Objections of Kenya, 5 February 2016, para. 2.47.
[86] SR, para. 2.80.
[87] MS, Annex 77. See also MS Annexes 74 and 78.

between its strong protests (purportedly after 2009, but on the evidence, only in 2014) and its conspicuous silence in the face of Kenya's formal notifications since 1979.[88]

State practice confirms that a reaction is called for to prevent acquiescence

56. In its Reply, Somalia excuses its prolonged silence by asserting that "there is no generalised practice in relation to protests", which means that "no inference can be drawn from the absence of an official protest to claims and proclamations, and none should be."[89] This is plainly wrong. In its Counter-Memorial, Kenya provided numerous examples of State practice where States felt obliged to protest to prevent acquiescence.[90] Consistent with this State practice, it has been observed in the ILC that "[t]he enormous number of protests that occur in international practice is, in the view of the Special Rapporteur, an important indicator that silence may have significant effects; therefore, each time there is a risk that a given situation with which a State disagrees might become more acute, the affected State or States will protest forcefully."[91] This applies especially to maritime boundary claims – and the corresponding assertions of sovereignty and sovereign rights – that are formally proclaimed and formally notified, as in the present case.

57. Somalia's Reply ignored the numerous examples provided by Kenya in its Counter-Memorial. Similarly, Somalia did not deny that the jurisprudence of international courts and tribunals has consistently held that failure to protest when circumstances call for reaction results in acquiescence, or that this applies especially to boundary claims with their attendant assertions of sovereignty and sovereign rights.[92] As, for instance, the Arbitral Tribunal held in *Honduras Border*:

> *"While no State can acquire jurisdiction over territory in another State by mere declarations on its own behalf, it is equally true that these assertions of authority by Guatemala (and other acts on her part disclosed by the evidence), shortly after independence, with respect to the territory to the north and west of the Motagua river, embracing the Amatique coast region, were public, formal acts and show clearly the understanding of Guatemala*

[88] See also KCM, paras. 238–239.
[89] SR, para. 2.11.
[90] KCM, para. 237 (pp. 102–105).
[91] ILC, Seventh report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, *Yearbook of the ILC*, 2004, Vol. II (Part Two), p. 248, fn. 329.
[92] See KCM, paras. 210 ff.

that this was her territory. These assertions invited opposition on the part of Honduras if they were believed to be unwarranted."[93]

58. In this regard, Somalia's *only* defence is its theory of African exceptionalism. It asserts that "[o]n the African continent (…) protests to claims, far from being systematic, are rather sporadic."[94] To suggest that the African continent is somehow exempt from the international law applicable to acquiescence (which, moreover, reflect plain common sense and routine diplomatic practice) is plainly wrong. Furthermore, as illustrated by the plethora of examples cited below, African State practice points to numerous instances of protest by interested States against the unilateral claims of other States. In fact, consistent with diplomatic protests more generally,[95] the practice is to make repeated protests in order to prevent acquiescence. In fact, Somalia's own practice shows that it found it necessary to make repeated formal protests in respect of violations of its territorial sovereignty.[96]

59. The following examples leave no doubt that Somalia's theory of African exceptionalism is inconsistent with African State practice:

    a. "In 1977 and 1978, and in each year from 1982 to 1987, Chad protested to the General Assembly about the encroachment which it alleged that Libya had made into its territory".[97]

    b. On 8 November 1984, Ethiopia protested Yemen's "claims of sovereignty over unspecified islands in the Red Sea and the Indian Ocean", observing that Yemen's declaration upon signature of UNCLOS "cannot in any way affect Ethiopia's sovereignty over all the islands in the Red Sea forming part of its national territory".[98]

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[93] *Honduras Borders (Guatemala, Honduras),* Award, 23 January 1933, *RIAA,* Vol. II, 1307, at 1327.
[94] SR, para. 2.11.
[95] "*Il ne faut d'ailleurs pas croire qu'une protestation, si claire et prompte soit-elle, suffise toujours à elle seule à sauvegarder les droits d'un État. Il devra souvent renouveler sa protestation de temps en temps, ou l'opposer chaque fois aux actes de l'autre État qui méconnaissent son droit, pour empêcher que son silence après la première protestation soit interprété comme un abandon de sa volonté de protester, comme l'acceptation du fait contesté d'abord.*": A Cavaglieri, "Règles générales du droit de la paix" (1929) 26 *Collected Courses,* p. 517.
[96] See *infra,* para. 65.
[97] *Territorial Dispute (Libya/Chad), Judgment, I.C.J. Reports. 1994*, p. 6, 36, para. 70.
[98] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE4.pdf, p. 22.

c. In *Guinea-Bissau v. Senegal*, Guinea-Bissau had lodged protests in relation to the authorization by Senegal of the construction of certain oil platforms in the maritime area disputed by the parties, and Senegal had lodged a protest with the Secretary-General of the United Nations in relation to the passage by Guinea-Bissau of legislation concerning its system for base lines.[99]

d. In *Eritrea/Yemen*,[100] "[i]n a letter dated 4 January 1996, Yemen formally protested an Eritrean oil concession [given] to the Anadarko Company which, according to Yemen, constituted 'a blatant violation of Yemeni sovereignty over its territorial waters in so far as it extends to the exclusive territorial waters of the Yemeni Jabal al-Tayr and al-Zubayr islands, in addition to the violation of the rights of the Republic of Yemen in the Exclusive Economic Zone'."

e. On 23 July 1996, Yemen protested against the publication by Eritrea of a map showing oil exploitation zones in the Red Sea that included areas that Yemen considered to be subject to Yemeni sovereignty.[101]

f. On 17 May 2001, Mauritius protested a declaration made by France in respect of the deposit by Mauritius on 20 June 2008 with the Secretary-General of a chart entitled "Tromelin: Basepoints", taking the view that France's declaration had "no legal basis in as much as Tromelin Island forms an integral part of the territory of the Republic of Mauritius and no other State is entitled to claim the maritime zones appurtenant to Tromelin Island".[102]

g. In *Chagos Marine Protected Area*, Mauritius had registered with the Secretary-General on 14 April 2004 its wish "to protest strongly" against the deposit by the United Kingdom of a list of geographical coordinates of points pursuant to Article

[99] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, 31 July 1989, R.I.A.A., Vol. XX, para. 25. Senegal's protest lodged with the Secretary-General was cast in the following terms: "The Government of the Republic of Senegal raises a formal protest against Act No. 2 of 17 May 1985 of the Republic of Guinea-Bissau, articles 1 and 2 of which are manifestly contrary to international law. The Permanent Mission of the Republic of Senegal requests the Secretariat to see to it that this protest is circulated among all Member States and takes this opportunity to convey to the Secretariat the renewed assurances of its highest consideration" (http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE8.pdf p. 24).
[100] *Eritrea/Yemen,* 9 October 1998, R.I.A.A., Vol. XXII, para. 85, fn 4.
[101] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE32.pdf, p. 92.
[102] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin76e.pdf, p. 35.

75(2) UNCLOS "inasmuch as it considers that, by depositing the list of geographical coordinates of points defining the outer limits of the so-called Environment (Protection and Preservation) Zone with the Secretary-General of the United Nations pursuant to article 75, paragraph 2, of the Convention, the United Kingdom of Great Britain and Northern Ireland is purporting to exercise over that zone rights which only a coastal state may have over its exclusive economic zone."[103]

h. On 31 July 2009, Angola took note of the Democratic Republic of the Congo's intention to establish the outer limits of its continental shelf beyond 200 nautical miles, which was submitted to the CLCS on 11 May 2009, and which Angola rejected.[104]

i. On 14 June 2010, the Democratic Republic of the Congo "noted with regret that the plan submitted by the Republic of Angola to the Commission on 4 May 2009 delimits the continental shelf of that country without reference to the rights of the Democratic Republic of the Congo as a coastal State", taking the view that this contravened international law.[105]

j. On 7 June 2012, Angola protested certain aspects of Gabon's submission to the CLCS dated 10 April 2012.[106]

k. On 25 July 2014 Yemen wrote to the United Nations Legal Affairs Division for Ocean Affairs and the Law of the Sea that "the Government of the Republic of Yemen objects to the list of geographical coordinates of points which, inter alia, define the limits of the Exclusive Economic Zone deposited by the Federal Republic of Somalia, because it violates Yemen's territorial waters and Exclusive Economic Zone."[107] On 10 December 2014, Yemen wrote again to "maintain its objection to

[103] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, 18 March 2015, R.I.A.A., Vol. XXXI, para. 124. See also http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf, p. 128. See also Mauritius' protest in the Note Verbale of 9 June 2009: http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin70e.pdf, p. 59

[104] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin71e.pdf, p. 45.

[105] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin73e.pdf, p. 47.

[106] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin79e.pdf, p. 61.

[107] http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/yen_re_som_2014eez.pdf.

the list of geographical coordinates which, inter alia, define the limits of the Exclusive Economic Zone deposited by the Federal Republic of Somalia".[108]

l. On 31 January 2017, Djibouti addressed to the Secretariat of the United Nations a Note Verbale stating that it "does not recognise the geographical coordinates used as baselines for measuring the exclusive economic zone of the Federal Republic of Somalia. The exclusive economic zone, as defined in the list of geographical coordinates, extends over waters that are under the sovereignty and jurisdiction of the Republic of Djibouti."[109]

m. On 3 March 2017 the Sudan affirmed its rejection and non-recognition of the Decree of the President of the Arab Republic of Egypt No. 27 of 9 January 1990 in respect of the maritime boundary noting that it "has written to the Security Council regarding this matter every year since 1958, and it did so again on 5 January 2017 in order to reaffirm its rejection of the Egyptian military occupation of the Sudanese Hala'ib Triangle and its maritime borders, and any actions taken by the Egyptian Government on the basis of the current situation that are prejudicial to the sovereignty of the Sudan over the Hala'ib Triangle and its maritime borders."[110]

n. On 5 December 2017, the Sudan declared its "objection and rejection to what is known as the Agreement on the demarcation of maritime boundaries between the Kingdom of Saudi Arabia and the Arab Republic of Egypt signed on April 8th 2016, and which was deposited at the UN records (Treaty Section volume 5477)".[111]

60. This confirms – consistent with Kenya's Counter-Memorial – that when they are opposed to the claims or actions of another State, the practice of African States (like all other States) is to protest, in particular when it concerns their territorial or maritime boundaries.

Somalia was in a position to protest

[108] http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/yemen.pdf, p. 1.
[109] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/LOS_93_WEB.pdf, p. 22.
[110] http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/LOS_94_WEB.pdf, p. 20.
[111] http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_15_12_2017_en.pdf, p. 1.

61. Somalia argues in its Reply that it was "unrealistic" to expect it to protest since beginning in 1991, it was "ravaged by a civil war and with no functioning government to lodge formal diplomatic protests (…)."[112]

62. Kenya makes three observations in this regard.

63. First, by relying on the "civil war" that commenced in 1991, Somalia concedes that it was able to protest at least until 1991. In particular, Somalia could have protested – if not the publication of Kenya's 1976 map – the formal notification of the 1979 Proclamation by the UN Secretary-General, or the publication of Kenya's 1983 map, or the 1986 UN publication of the 1979 Proclamation in *National Legislation on the EEZ*.[113]

64. It is notable in this regard that Somalia's Reply disregarded the fact that, Somalia expressly opposed proposals referring to equidistance during UNCLOS III while also failing to protest in any way Kenya's contemporaneous maritime boundary claim at the parallel of latitude based on equitable delimitation.[114] Nor did it protest in 1989 – a decade after the 1979 Proclamation – when it ratified UNCLOS.[115]

65. During this same period, Somalia protested the violation of its sovereign rights in respect of its other neighbouring States. For instance, on 8 October 1982, Somalia protested what it described as Ethiopia's "violation of the sovereignty and territorial integrity of Somalia"[116] and further protested on 28 September 1984 that "Ethiopian forces are still occupying two portions of Somalia's territory… ."[117] By contrast, Somalia did not protest at all against Kenya's 1979 Proclamation.

66. Second, and in any event, Somalia does not challenge the numerous judicial and arbitral decisions invoked in Kenya's Counter-Memorial which show that failure to protest creates acquiescence even the circumstances of a civil war.[118] It quotes certain extracts from the

[112] SR, para. 2.113. See also paras. 2.107–2.112.
[113] See KCM, para. 231.
[114] Ibid., para. 257.
[115] Ibid., para. 259.
[116] UN General Assembly, Thirty-Seventh Session, Verbatim Record of the 24th Meeting, UN Doc. A/37/PV.24, p. 454.
[117] UN General Assembly, Thirty-Ninth Session, Verbatim Record of the 13th Meeting, UN Doc. A/39/PV.13, p. 255.
[118] KCM, paras. 229–230. See SR, para. 2.108

arbitral award in *Eritrea v Yemen*[119] but fails to point out that the tribunal in that case held that Ethiopia "failed to protest" and that, "though it should be remembered that the Hunt agreement was made at a time when the Ethiopian civil war was still raging", in light of "all relevant historical, factual and legal considerations", including Ethiopia's failure to protest, the relevant islands in dispute were considered as being "subject to the territorial sovereignty of Yemen".[120] This is the reason why *Eritrea/Yemen* is seen as confirming the rule that failure to protest when reaction is called for amounts to acquiescence, even when the State concerned faces a civil war or is underdeveloped.[121] State practice offers further confirmation that States protest to preserve their rights even in situations of civil war.[122]

67. Third, Somalia's allegation that it could not protest during the civil war is in any event not established as a matter of fact. Somalia alleges that during the oral pleadings on Preliminary Objections, Kenya "recognized Somalia's practical inability to acquiesce in any maritime boundary during the civil war that engulfed the country".[123] That is plainly wrong. Kenya merely noted in respect of the need for negotiations that because Somalia had "begun to emerge from a long period of instability caused by civil war, humanitarian disaster and widespread terrorism", it "has no maritime enforcement capacity"[124] thus posing "an existential threat to Kenya".[125] These statements say nothing about Somalia's ability to simply react if it disagreed with Kenya's claim.[126] In fact, Kenya established in

[119] Ibid.
[120] *Eritrea/Yemen,* 9 October 1998, *RIAA*, Vol. XXII, paras. 520–524.
[121] See R. Kolb, *Good Faith in International Law* (Oxford 2017), at 95: "This precedent [*Eritrea v Yemen*] tends to show that tribunals will be slow to lower the applicable standard, so much as there is a need for a certain international stability. (…) Ultimately, the arbitral tribunal in the Territorial Dispute case accepted constructive knowledge with regard to a published Petroleum Agreement between Yemen and Shell, since 'with a sufficient diligence it could have been known to Ethiopia', which however failed to issue a protest. The argument that Ethiopia was a poor country ridden by civil war did not alter this finding. This precedent thus perfectly fits the *Norwegian Fisheries* jurisprudence". This conclusion *a fortiori* applies when the initial claim has been duly notified, as in the present case. In such a case, ignorance cannot be pleaded.
[122] For instance, in the period 1983–2005, during the Second Sudanese Civil War, Sudan wrote to the Security Council in relation to the Hala'ib Triangle every year between 1995 (the year Egypt began its military occupation) and 2005 (the year the Second Civil War came to an end), in spite of the ongoing civil war (see http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/LOS_94_WEB.pdf, p. 20). Similarly, during the 1974–1991 Ethiopian Civil War, the Provisional Military Government of Socialist Ethiopia on 8 November 1984 protested Yemeni "claims of sovereignty over unspecified islands in the Red Sea and the Indian Ocean", observing that paragraph 3 of the declaration by the Yemen Arab Republic upon signature of UNCLOS "cannot in any way affect Ethiopia's sovereignty over all the islands in the Red Sea forming part of its national territory" (http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE4.pdf, p. 22).
[123] SR, para. 2.109.
[124] Ibid.
[125] CR 2016/10, pp. 25-26, para. 25 (Akhavan).
[126] SR, paras. 2.110–2.112.

its Counter-Memorial that, even during the civil war in the 1990s until the establishment of the Transitional National Government in 2000,[127] Somalia was in a position to play, and in fact did play, an active role in diplomatic relations, such as co-sponsoring and drafting numerous UN resolutions, as well as the negotiation and adoption of international agreements, notably with Kenya.[128] Thus, nothing prevented Somalia from protesting Kenya's maritime boundary claim, if it was opposed to it.

North Sea Continental Shelf Case

68. In attempting to refute Kenya's position, Somalia has also invoked paragraphs 28 and 30 of the Court's *North Sea Continental Shelf* Judgment, to argue that acquiescence requires "a very definite, very consistent course of conduct" by Somalia, that is to say "a real intention to manifest acceptance or recognition of Kenya's claim",[129] or a "clear and consistent acceptance".[130] That Judgment however, does not help Somalia.

69. First, the facts of the present case may be readily distinguished. In *North Sea Continental Shelf*, the question was whether, having signed but not ratified the 1958 Convention on the Continental Shelf, Germany had consented to be bound by the default equidistance rule set out in Article 6 of that Convention in respect of maritime delimitation. The Court emphasised in paragraph 28 of its Judgment that "if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime – then it must be asked why it was that the Federal Republic [of Germany] did not take the obvious step of giving expression to this readiness by simply ratifying the Convention."[131] Thus, it was in the specific context of treaty ratification, that the Court adopted a strict standard of tacit consent. Second, paragraph 30 of the Judgment is in apposite because it concerned "the conditions for invoking the doctrine of estoppel", not acquiescence.[132] Third, and most significant, *North Sea Continental Shelf* concerned alleged consent to a general method of maritime delimitation (i.e. equidistance), not prolonged acquiescence in a

[127] KCM, para. 95.
[128] KCM, paras. 95–96.
[129] SR, para. 2.9.
[130] SR, para. 2.12.
[131] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, para. 28.
[132] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, para. 145 (citing *North Sea Continental Shelf*, para. 30).

specific maritime boundary. Silence or failure to protest is obviously far more significant when it concerns a specific boundary rather than a general method. Fourth, even if the *North Sea Continental Shelf* standard of tacit consent applied, it would clearly be satisfied by the facts of this case; namely, Somalia's lack of protest between 1979 and 2014 constitutes "clear and consistent acceptance" of Kenya's maritime boundary claim.

C. The 2009 MOU and the 2014 negotiations

70. Somalia maintains that (1) the reference to a "dispute" in the 2009 MOU and (2) the subsequent negotiations between the Parties on maritime delimitation in 2014, are inconsistent with Somalia's acquiescence in Kenya's maritime boundary claim at the parallel of latitude as notified for the first time in 1979. This is incorrect for the reasons set out below.

1. The 2009 MOU

a. The terms of the 2009 MOU

71. Somalia claims that the terms of the 2009 MOU "contradict Kenya's suggestion that the Parties had delimited their maritime boundary on the basis of Somalia's 'acquiescence' in a parallel of latitude".[133] Somalia refers in particular to the second paragraph of the MOU stating that delimitation of the continental shelf between Kenya and Somalia "has not yet been settled" and that this "unresolved delimitation issue between the two coastal States is to be considered as a 'maritime dispute'". This assertion is manifestly in contradiction with Somalia's own pleadings at the Preliminary Objections phase that the "exclusive object and purpose" of the 2009 MOU was the delineation of the outer continental shelf.[134] As the Court noted in its Judgment of 2 February 2017:

> *"Somalia contends that 'the MOU itself defines the maritime area in dispute strictly in terms of the continental shelf' and makes no reference to the territorial sea or the exclusive economic zone. It considers that the MOU is concerned only with the continental shelf beyond 200 nautical miles and*

[133] SR, paras. 2.22-2.25, 4.12.
[134] See Written Statement of Somalia concerning the Preliminary Objections of Kenya, 5 February 2016, paras. 1.11, 1.16, 1.18, 1.20, 1.21, 2.5, 2.22, etc.

observes that it contains no reference to the maritime boundary within 200 nautical miles."[135]

72. It is not in dispute that irrespective of acquiescence, when the MOU was concluded in 2009, the maritime boundary between Kenya and Somalia had "not yet been settled" in a formal written agreement. It is also not in dispute that during the 30-year period between 1979 and 2009, Somalia had not protested Kenya's maritime boundary at the parallel of latitude up to the 200M limit of the EEZ. It is not in dispute either that Kenya extended that line beyond 200M to the outer limits of the continental shelf (i.e. subject to delineation by the CLCS) for the first time in its 2009 CLCS submission immediately after conclusion of the MOU. Accordingly, at that point in time, Somalia had acquiesced in the parallel line at least up to the 200M limit of the EEZ, irrespective of the outer continental shelf.

73. The fact that in 2009 only delimitation of the continental shelf beyond 200M was at issue is confirmed by Kenya's CLCS submission, in which Kenya referred to "overlapping maritime claims with the adjacent coastal States of Somalia to the north and with the United Republic of Tanzania to the south."[136] The reference to Somalia and Tanzania in identical terms indicates that Kenya considered both maritime boundaries to have been settled up to the 200M limit of the EEZ at the parallel of latitude. In particular, Kenya had concluded a formal agreement with Tanzania in 1975-76,[137] but still referred to a maritime area of "overlap". Shortly after Kenya's CLCS submission, the remaining dispute with Tanzania was resolved by the conclusion of the 23 June 2009 agreement on delimitation of the continental shelf beyond 200M.

74. The Judgment of the Court on the Preliminary Objections in this case made clear that the references to maritime delimitation in the 2009 MOU "do nothing more than further the objective of securing no-objection by either Party to the consideration of the submission of the other Party by the CLCS" and confirm that the question of delimitation

[135] *Judgment on Preliminary Objections*, *I.C.J. Reports 2017*, para. 62.
[136] MS, Vol III, Annex 59, paras. 7-1 - 7-3.
[137] See KCM paras. 42 – 47. The agreement is at MS, Vol. III, Annex 5.

was "to be kept separate from the process leading to the delineation of the outer limits of the continental shelf".[138]

b. The 2007 and 2008 Notes Verbales confirming the parallel of latitude

75. The fact that Kenya considered the maritime boundary with Somalia to have been settled up to the 200M limit of the EEZ is confirmed by two Kenyan Notes Verbales, transmitted to Somalia in 2007 and 2008 respectively. It is recalled that the 2007-08 period is immediately following the 2005 Proclamation and its circulation by the UN Secretary-General in 2006, and immediately preceding the conclusion of the MOU on 7 April 2009 in light of the 13 May 2009 deadline for CLCS submissions.

76. In that specific context, on 26 September 2007, Kenya wrote to Somalia informing it that Kenya "has embarked on the delineation of the outer limits of her continental shelf by implementing the provisions of Article 76" of UNCLOS.[139] It observed further that the CLCS requires that maritime boundaries should be agreed upon between adjacent States. Kenya then stated its unequivocal position that: "The boundaries between our two countries however *have been drawn using parallel of latitudes*, in accordance with Articles 74, 83 of the UNCLOS. UNCLOS adopted the parallel of latitudes as proclaimed by the Government of the Republic of Kenya, in 2005".[140] Kenya then requested Somalia to "*confirm*" that it "agrees with the way the maritime boundaries between the two countries are drawn and as deposited with the United Nations by the Government of the Republic of Kenya".[141] Kenya attached to the Note Verbale a map of Kenya's maritime boundaries and the coordinates in the 2005 Proclamation that had already been circulated to Somalia in 2006 by the UN Secretary-General. It is recalled that the 2005 Proclamation simply adjusted the geographical coordinates of the parallel line in the 1979 Proclamation for greater accuracy.[142]

[138] *Judgment on Preliminary Objections*, *I.C.J. Reports 2017*, para. 77.
[139] Note Verbale from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, MFA.273/430/001 (26 September 2007) (Annex 9).
[140] Emphasis added.
[141] Emphasis added.
[142] KCM, para. 91.

77. On 30 October 2007, the Embassy of Somalia in Kenya confirmed that the Note Verbale of 26 September 2007 had been received and forwarded to the Somali Ministry of Foreign Affairs.[143] Consistent with Somalia's silence since 1979, Kenya has no record of any reaction or protest from Somalia.

78. On 4 July 2008, Kenya sent a second Note Verbale to Somalia referring to its earlier Note of 26 September 2007 and requesting confirmation of Somalia's agreement with the maritime boundaries between the two countries "as drawn and deposited with the United Nations".[144] Again, Kenya has no record of any reaction or protest from Somalia to this second Note Verbale. Thus, as at 2008, Kenya directly notified Somalia that it considered the maritime boundary to have been settled up to the 200M limit of the EEZ, and Somalia did not show any reaction.

79. Kenya sent a similar Note Verbale to Tanzania, indicating its position that its maritime boundary with Kenya had been settled at the parallel of latitude up to the 200M limit of the EEZ. This was irrespective of the fact that unlike the situation with Somalia, Kenya had concluded a maritime delimitation treaty with Tanzania in 1975-76. In particular, in its Note Verbale of 26 September 2007 to Tanzania, Kenya used language that was identical to the Note Verbale of the same date to Somalia, including its request to Tanzania to "confirm" that it "agrees with the way the maritime boundaries between the two countries are drawn".[145] In 2008, the Joint Technical Committee Meeting on the Tanzania/Kenya Maritime Boundary (discussing what was eventually to become the 2009 Boundary Agreement[146]) recorded that the meeting was "guided by the common State practice of adopting the parallel of latitude for mapping".[147]

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[143] Note Verbale from the Embassy of the Somali Republic in Kenya to the Embassy of Kenya to Somalia, ESR/4287/V/07 (30 October 2007) (Annex 11).
[144] Note Verbale from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, MFA.273/430/001A (4 July 2008) (Annex 12). The attachments to that Note Verbale that had been inadvertently omitted, were sent by Note Verbale from the Kenya Embassy to Somalia to the Embassy of the Transitional Federal Government of Somalia in Kenya, MFA.273/430/001A (16 July 2008) (Annex 13).
[145] Note Verbale from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the United Republic of Tanzania, MFA.273/430/001 (26 September 2007) (Annex 10).
[146] MS, Vol. III, Annex 7.
[147] Agreed Minutes of the Joint Technical Committee Meeting on the Tanzania/Kenya Maritime Boundary held in Dar es Salaam, Tanzania (30-31 October 2008), p. 5. (Annex 2).

80. The context and terms of the 2009 MOU and the Parties' respective submissions to the CLCS in 2009, as well as Kenya's preceding Notes Verbales of 2007 and 2008, are wholly consistent with the fact that Kenya considered Somalia to have acquiesced in the maritime boundary at the parallel of latitude up to the 200M limit of the EEZ. Thus, the only "dispute" potentially recognized in the MOU would have been in respect of maritime delimitation in the outer continental shelf beyond 200M, as Somalia insisted before the Court during the Preliminary Objections proceeding.

c. There was no maritime boundary "dispute" until 2014

81. Kenya notes that even in respect of delimitation of the outer continental shelf beyond 200M, there was no specific dispute with Somalia until 2014. Further to the discussion of the "critical date" above,[148] the Court's jurisprudence on this point is clear: the existence of a "dispute" requires the claim of one party to be "positively opposed" by the other party.[149] It is equally clear from the facts in this case, that Kenya's maritime boundary claim was not "positively opposed" by Somalia – whether in respect of the territorial sea, EEZ, or outer continental shelf – until 2014. Absent a claim by Somalia to an opposing equidistant line, Kenya could not have speculated in 2009 on the existence of a future dispute with Somalia. Accordingly, it is reasonable to conclude that the reference in the MOU to a maritime boundary dispute that had "not yet been settled" merely recognized that Kenya and Somalia had not yet negotiated a formal maritime boundary agreement.

2. The 2014 negotiations were consistent with Somalia's pre-existing acquiescence

82. Somalia's other argument is that Kenya's consent to negotiate on the conclusion of a maritime delimitation agreement in 2014 is inconsistent with Kenya's claim "that the Parties have already delimited their maritime boundary along a parallel of latitude."[150] In effect, Somalia asks the Court to penalize Kenya for agreeing to negotiate in good faith during 2014, when those negotiations were prompted by Somalia's own repudiation of the 2009 MOU. Somalia's approach is incorrect for the following reasons.

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[148] *Supra*, paras. 49-51.
[149] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73.
[150] SR, paras. 2.13–2.33 and paras. 2.39–2.44.

83. First, consistent with its Notes Verbales in 2007 and 2008 confirming the parallel line, Kenya's position on the facts was clear in 2014.[151] It may be recalled that in January 2014, Kenya had notified Somalia through the UN Secretary-General that in respect of the maritime boundary at the parallel of latitude, Kenya "has exercised and will continue to exercise sovereignty and jurisdiction over the said area".[152] The following month, in February 2014, Somalia repudiated the 2009 MOU, claiming for the first time that it has "expressly rejected Kenya's claim", but without claiming an equidistant maritime boundary. Somalia first claimed an equidistant maritime boundary during the March 2014 negotiations. In response, the Kenyan delegation explained that it was the "application of the principle of equity and fairness" that yielded the parallel of latitude "that has been adopted by Kenya in determining its maritime boundary with Somalia"[153] and in particular that Kenya had "arrived at latitudinal boundary" in the 1979 Proclamation consistent with "the spirit of the discussions and negotiations which were underway on UNCLOS III and State practice" in respect of the EEZ.[154] That is exactly the position that Kenya has adopted in this proceeding in respect of its decision to adopt the parallel line between 1974 and 1979 during UNCLOS III.

84. Second, as Kenya explained in its Counter-Memorial, Kenya's 1989 Maritime Zones Act requires the conclusion of a formal agreement on maritime delimitation.[155] In its Reply, Somalia states that it is "difficult to see how an informal agreement could be published in the *Gazette*" [156] which is the official record of Kenya's legislation. It is obvious that formal agreements are preferable for predictability and stability, especially when a neighbouring State may suddenly change its prolonged consent to a maritime boundary, as was the case

[151] KCM, paras. 174-180.
[152] MS, Annex 40, with a map attached.
[153] See MS, Annex 24, p. 2.
[154] See MS, Annex 31, pp. 2–3: "The revision of UNCLOS II to UNCLOS III 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 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;" Kenya's power point (attached to MS, Annex 31) also indicates "how and why Kenya arrived at latitudinal boundary", specifying that "Kenya was guided by fairness and international legal requirements in establishment of her maritime boundaries".
[155] See KCM, para. 79 and para. 101 noting that 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.
[156] SR, para. 2.38.

with Somalia in 2014. Irrespective of a situation of tacit agreement, acquiescence, or estoppel, certainty as to the exact location of the maritime boundary is essential, especially for the exploitation of offshore oil resources. It is clear however, that the desirability of a maritime boundary treaty has no bearing on the binding effect of acquiescence, which is applicable exactly where no such treaty has been concluded. In other words, despite the obvious preference for express consent in a formal agreement, acquiescence or tacit consent may equally give rise to obligations under international law. Somalia's position is tantamount to asserting that acquiescence is incompatible with the negotiation of an agreement formally recognizing a maritime boundary, which is incorrect.

85. Third, it is clear that the willingness of a State to negotiate does not mean that it abandons pre-existing rights or agreement on the matter in dispute. In *Peru v. Chile* for instance, the fact that Peru attempted, after the conclusion of UNCLOS in 1982, to find a negotiated solution to the dispute with Chile on the maritime delimitation[157] did not lead the Court to conclude that there was no prior tacit agreement that was still binding on the Parties.[158] The Court has also repeatedly recognised that States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification".[159] Each of them "should pay reasonable regard to the interests of the other".[160] Furthermore, as Somalia emphasised in its Reply: "Maritime delimitation agreements are frequently influenced by extra-legal considerations – political, historical, economic and so on."[161] In other words, negotiations must be distinguished from litigation, especially where two neighbouring States have a wide range of complex bilateral issues to resolve.

86. Fourth and finally, it is recalled that Kenya made clear at the Preliminary Objections phase that given the nature of bilateral relations between Kenya and Somalia, negotiation was and remains the appropriate means for settlement of this dispute.[162] In its Counter-Memorial, Kenya referred to its serious security concerns at both its land and sea

[157] See Memorial of Peru, 20 March 2009, paras. 20–25.
[158] *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, pp. 38–39, para. 91.
[159] *Continental Shelf Case, I.C.J. Reports 1969*, p. 47, para. 85.
[160] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011 (II),* p. 685, para. 132.
[161] SR, para. 3.24.
[162] See Kenya's Preliminary Objections at paras. 21 and 46.

boundaries with Somalia, arising from numerous lethal terrorist attacks by Al-Shabaab against Kenyan civilians.[163]

87. It was Somalia that, after 35 years of acquiescence, suddenly claimed an equidistant maritime boundary at the first bilateral meeting in March 2014, and it was Somalia that elected to abandon those negotiations in favour of litigation later that same year.[164] Somalia must therefore accept the consequences of that election, namely the full application of international law on acquiescence.

D. The other conduct of the Parties is consistent with acquiescence

88. As set out in Kenya's Counter-Memorial, the official claims and conduct of the Parties, namely Kenya's repeated notifications and Somalia's prolonged silence, are sufficient to establish acquiescence. Nonetheless, Kenya has provided additional evidence demonstrating that the Parties' further conduct was also consistent with acquiescence to a maritime boundary at the parallel of latitude.[165] This included official maps by the Survey of Kenya, fisheries and marine scientific research, oil concession practice, and maritime patrols and enforcement by the Kenyan Navy. In its Reply, Somalia has attempted to rebut that evidence by largely ignoring its own practice in adopting the parallel of latitude from the 1980s until 2014, and offering in evidence a few maps that have no probative value in indicating the official position of the Parties.[166]

1. Fisheries and Marine Scientific Research

89. Somalia concedes that **Figure 1-14** of Kenya's Counter-Memorial is an official fisheries map issued by the Somali Ministry of Fisheries and Marine Resources before 1987.[167] Its only response is that the map "does not show (nor does it purport to show) any maritime boundary with Kenya. Nor does it evidence any activities by Kenya".[168] First, Kenya adduces this map to show *Somalia's* reliance on the parallel of latitude, not Kenya's own activities. Second, maps issued by the Somali Ministry of Fisheries are highly significant

[163] KCM, paras. 181-185.
[164] KCM, paras. 196-197.
[165] KCM, Chapter II, pp. 47-79, paras. 119-164.
[166] SR paras. 2.98-2.105.
[167] SR, para. 2.69.
[168] SR, para. 2.69.

in terms of demonstrating Somalia's official position in the 1980s. Under Article 7(7) of the 1989 Maritime Law, it is this Ministry that is responsible for "draw[ing] up detailed charts and lists of geographical coordinates" on the EEZ which "charts or lists … shall be made public and a copy sent to the Secretary General of the United Nations."[169] In fact, this map was reproduced in a report of the UN Environment Program.[170] Third, it is significant that the Somali state-owned company, Somali Marine Products, had a cold storage complex in Kismaayo in close proximity to the Kenyan border.[171] It is unlikely therefore that the southern limit of this fisheries zone would have been inadvertently cut off at the parallel of latitude. Fourth, Somalia ignores the fact that the map at **Figure 1-14** may be contrasted with a similar but more recent map (**Figure 1-15**) also published by the Somali Ministry of Fishery and Marine Resources, and included in Somalia's 2015 National Biodiversity Strategy and Action Plan ("NBSAP")[172] (i.e., after the submission of the present case to the Court). Unlike **Figure 1-14**, the corresponding Fishery Development Zone 1 extends *south* of the parallel of latitude consistent with an equidistant line, indicating a shift from the previous position. Somalia is silent as to **Figure 1-15**.

90. Somalia also attempts to minimise the evidentiary value of the fishing licences issued by Kenya up to the parallel line, by making a generic claim that "vessels from many States have engaged in illegal fishing in Somalia's territorial waters and EEZ".[173] The extract provided from a 2015 UN Monitoring Group Report makes no reference to illegal fishing by Kenyan licensed boats.[174] In any event, Somalia's argument has no bearing on Kenya's practice and exercise of jurisdiction in the EEZ consistent with its 1979 and 2005 Proclamations.

91. As regards Kenya's evidence of the marine scientific research conducted by the 1975–84 surveys of the Dr. Fridtjof Nansen Program and the 1987 *Georgy Ushakov* survey consistent with the maritime at the parallel of latitude, Somalia's only response – which is inconsistent with the facts – is that the survey was not "authorized" by the coastal States,

[169] KCM, para. 193.
[170] KCM, para. 129.
[171] KCM, para. 129.
[172] National Biodiversity Strategy and Action Plan, Federal Republic of Somalia, FAO, Convention on Biological Diversity, GEF, December 2015 (Figure 8, p. 43).
[173] SR, para. 2.71.
[174] SR, Vol. II, Annex 23.

which is a precondition for it to constitute evidence as to the exercise of jurisdiction at the parallel of latitude.[175] As Kenya has set out in its Counter-Memorial,[176] the Somali Fisheries Ministry specifically authorized and participated in the survey of fisheries in its EEZ; a fact that Somalia's Reply simply ignores.

92. As regards the *Georgy Ushakov* survey, the Yearly Fisheries and Marine Transport Report 1987/1988 of Somalia's own Ministry of Fisheries and Marine transport indicates that: "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."[177]

93. Similarly, the 1975-1984 Nansen Survey exploring the fisheries potential of the EEZ on the African coast of the Indian Ocean was conducted with the consent and participation of the countries included in the programme.[178] The Appendix III of the report containing the "List of Participants from Cooperating Countries" lists "Abdi Ismail Abdi and Omar Haji Ahmed Dubad" as Somali officials participating in 1984.[179] A letter from a Kenyan Fisheries Officer (IDA) D. Opere Jr. to the "Ag. Assistant Director of Fisheries" dated 14 September 1982 similarly shows that Kenya also authorised the research.[180] **Figure 1-17** of the Counter-Memorial and the corresponding documents leave no doubt as to the location of the maritime boundary in the EEZ that those officials participating in the survey (both Kenyan and Somali) accepted and consented to.

94. It is true that Article 241 of UNCLOS provides that "[m]arine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources".[181] Kenya, however, does not rely on the surveys as the legal basis for its claim. Rather, it produces them as evidence that the conduct of *both* Parties was consistent with and demonstrated consent to the parallel of latitude as the maritime boundary. Article

[175] SR, para. 2.66.
[176] KCM, para. 131.
[177] KCM, para. 131 and KCM Annex 50, p. 8.
[178] KCM, para. 133.
[179] KCM, Annex 82, pp. 19 and 394.
[180] KCM, Annex 28.
[181] SR, para. 2.67.

241 clearly does not apply where a State's own practice indicates its view regarding the extent of its EEZ.

2. Oil Concession Practice

95. In its Counter-Memorial, Kenya provided substantial evidence that the Parties' oil concession practice was consistent with the maritime boundary at the parallel of latitude. In its Reply, Somalia has ignored the shift in its own oil concession practice from the equidistance line in 1979 to the parallel of latitude beginning in 1986,[182] as demonstrated in **Figures 1-21** and **1-22**. As further demonstrated in **Figures 1-27** to **1-32**, it continued this practice between at least 2007-2013 until the extension of Soma Oil's Offshore Evaluation Area in the "Jorre" block south of the parallel of latitude in May 2014, shortly before the commencement of proceedings before the Court. Thus, it is not in dispute that in 1979, Somalia abandoned a concession block that followed an equidistance line, and did not offer a similar exploration license again until the May 2014 Soma Oil extension.[183]

96. As for the seismic testing by Soma Oil in 2014 that extended only to the parallel of latitude, consistent with Kenya's EEZ Proclamation,[184] Somalia claims that the maps "simply reflect that, given the maritime boundary dispute, Somalia has complied with its obligations under Article 83(3) of UNCLOS by refraining from undertaking any measures in the disputed areas that might jeopardise or hamper the reaching of a final agreement on the Parties' maritime boundary".[185] This explanation is striking given that when Kenya invited Somalia to enter into "provisional arrangements of a practical nature" pursuant to UNCLOS Articles 83(3) and 74(3) of UNCLOS in May 2016,[186] Somalia refused on the ground that the dispute was before the Court.[187] Somalia did not refer to any previous practice supposedly undertaken pursuant to Article 83(3).

[182] KCM, paras. 140-142.
[183] KCM, para. 266.
[184] KCM, paras. 160-162 and **Figure 1-32**.
[185] SR, para. 2.105.
[186] 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, KCM Annex 61.
[187] Letter from the Somali Ministry of Foreign Affairs to the Kenyan Ministry of Foreign Affairs (MFA/SFR/OM2378/2016), 18 June 2016, KCM Annex 64.

97. Somalia refers again to a 2001 presentation by TotalFinaElf that showed the Jorre concession block extending to the equidistance line.[188] The map does not purport to show the official position of Somalia and, as Kenya explained in its Counter-Memorial, it is inconsistent with the other depictions of the same "Jorre" concession block (both before and after 2001) at the parallel of latitude.[189] Furthermore, pursuant to the Somali 2008 Petroleum Law – which is completely ignored in Somalia's Reply – the abandoned Technical Evaluation Area would constitute an invalid "post-1990 Grant" without any legal effect.[190] 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."

98. As for Kenya's oil concession practice, Kenya explained in its Counter-Memorial that while as early as 1984 the Survey of Kenya indicated prospective licensing blocks at the parallel of latitude (see **Figure 1-23**), for a brief period between 1994-1996 Kenya licensed blocks along a median line in part of the territorial sea (but never in the EEZ).[191] Kenya also pointed to a contemporaneous 1995 study on hydrocarbon potential by the National Oil Corporation Kenya ("NOCK")[192] that included maps depicting Block L5 and the EEZ with a dotted line indicating the parallel of latitude as the maritime boundary. Somalia refers to its Figure R2.5 as showing that the NOCK produced a map showing an "equidistant boundary in the territorial sea". This is incorrect. The solid line of the L5 block's northern limit extends a mere 6M and Somalia disregards the fact that from 6M to 12M in the territorial sea, and onwards in the EEZ, the dotted line proceeds along the parallel of latitude.

99. In any event, soon thereafter, beginning in 2000, Block L5 was extended eastwards along the parallel of latitude throughout the territorial sea and into the EEZ, and further offshore

[188] SR, para. 2.103 and Figure R2.10 and SR Annex 25; MS, fn. 95.
[189] KCM, para. 162 and fn 221.
[190] Based on text of Law available online: http://www.somalitalk.com/oil/Somalia_oil_Law.pdf.
[191] KCM, para. 144.
[192] Hydrocarbon Potential of the Coastal Onshore and Offshore Lamu Basin of South-East Kenya: Integrated Report, National Oil Corporation of Kenya, 1995, KCM Annex 38.

in subsequent licenses:[193] in September 2008, Block L13 was offered along the parallel of latitude[194] and in 2012, Block L21 was offered along the same maritime boundary up to the 200M limit of the EEZ. During this period, Kenya's oil concession practice coincided with Somalia's "Jorre" block which also followed the parallel of latitude.

3. Naval patrols

100. Somalia asserts that Kenya's **Figure 1-13** depicting naval patrols and interceptions in the territorial sea 1990-2014 provides no support for the claim to a parallel boundary because (1) "the transient presence of Kenyan vessels in the disputed maritime space …. cannot constitute evidence of *effectivités*"; and (2) "Just four interceptions allegedly occurred in the area between the equidistance line and the parallel during a period of nearly a quarter of a century" as depicted on Figure R2.2.[195] Both arguments misconstrue the evidence of naval patrols. First, it is not accepted in international law that transient activity cannot constitute evidence of *effectivités*. In this regard, a distinction should be drawn between land territory on the one hand and maritime areas on the other. With respect to the latter, with very few exceptions (e.g. drilling activities or oil platforms), displays of sovereignty or sovereign rights are inherently "transient". For this reason, the law of the sea gives weight to proclamations and notifications as acts performed by States *à titre de souverain*.[196] Second, interceptions are obviously much more infrequent than patrols within maritime areas. This does not justify disregarding such patrols, which are accepted as evidence of sovereign activity in the jurisprudence of the Court.[197] Third, Somalia does not deny that in fact interceptions did occur in the maritime area between the equidistance line and the parallel line in the 1990s, 2008 and 2011, which all preceded Somalia's official claim to an equidistance line.

[193] Cf. SR, para. 2.79 which says no date was given (see KCM para. 147).
[194] Production Sharing Contract between the Government of the Republic of Kenya and Sohi-Gas Dodori Ltd Relating to Block L13 (3 September 2008) (extract showing map) (Annex 1).
[195] SR, para. 2.59.
[196] See *supra*, para. 24.
[197] *Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment, I.C.J. Reports 2012*, p. 655, para. 80.

4. Irrelevance of maps produced by Somalia

101. Somalia asserts that Kenya's position is "contradicted by the fact that since 1979 Kenya has published various maps that depict the maritime boundary with Somalia along an equidistant line, rather than a parallel of latitude".[198] Upon examination however, it is apparent that *none* of these maps are relevant because they do not purport to show the official position of either Kenya or Somalia, and some are simply speculative or of unknown provenance. Some such as a soil map discussed below, do not even purport to show maritime areas. As such, Somalia's maps have no probative value and only reinforce its inability to find a single official map depicting an equidistant maritime boundary prior to 2014.

102. In regard to Figure R2.1 (AMISOM Maritime Zones of Intervention, 2012), Somalia claims that the maritime operations of the African Union Mission in Somalia ("AMISOM") "covers, in their southern district, an area running virtually along an equidistance line".[199] Somalia contends that "from 2012 onwards, Kenya was authorised to patrol Somalia's maritime space as part of a U.N.-approved multinational peacekeeping mission premised on full respect for Somalia's sovereignty over its maritime space".[200] The so-called "AMISOM map" however, in fact is not an official AMISOM map at all, and it is inconsistent with AMISOM's official position. As such, it does not constitute evidence of maritime boundaries, let alone "full respect for Somalia's sovereignty" in respect of an equidistance line:

    a. The map is *not* an official UN map. It is an illustrative map included in a UN Sanctions Committee Report. It is of unknown provenance and does not purport to depict maritime boundaries or to be of an official nature. Unlike official AMISOM maps, it is not issued by the UN Support Office of AMISOM ("UNSOA").[201]

[198] SR, para. 2.82.
[199] SR, para. 2.49.
[200] SR, para. 2.61.
[201] Following the adoption of Security Resolution 2245 of 9 Nov 2015, the United Nations Support Office in Somalia (UNSOS) replaced the United Nations Support Office for the African Union Mission in Somalia, UNSOA established in 2009 (see https://unsoa.unmissions.org).

b. Neither of the two official UNSOA maps of AMISOM reproduced below (**Figures KR 1-3a and KR 1-3b**)[202] depict any maritime zones whatsoever.

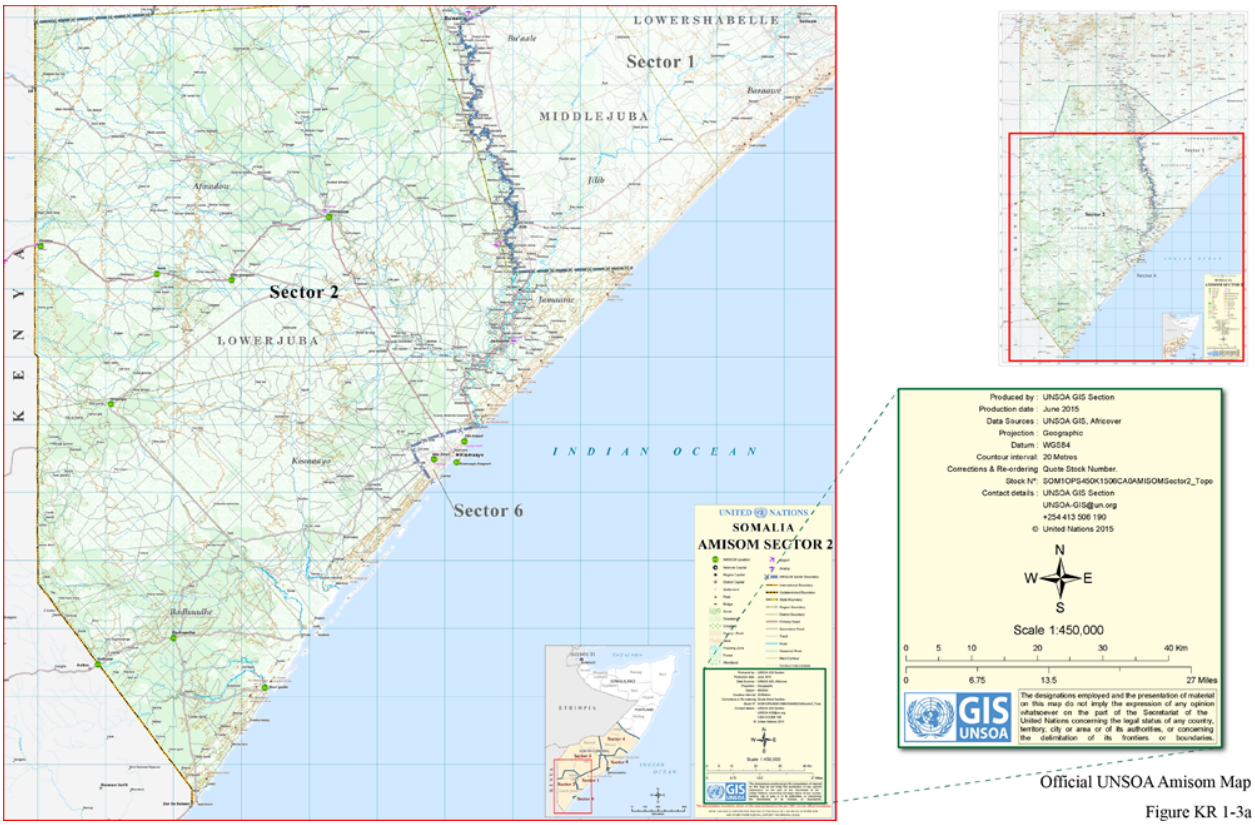
c. As explained by Lieutenant Colonel Muhia of the Kenyan Navy,[203] the official AMISOM maps do not depict maritime zones because the naval operations undertaken by Kenya were focused on activities around Somalia's Kismayu port, far from the maritime boundary:

> *"Kenya Navy operates two boats in Kismayu port in support of AMISOM operations. AMISOM troops are supplied through Kismayu port thus the boats provide security for the ships while they are entering harbor and while docking. Initially Kismayu was under Sector 2 manned by Kenya Defence Forces (see map of January 2015 of "Sector 2 – South Central Somalia" produced by UN Support Office for AMISOM (UNSOA) (before being expanded and named Sector 6 under Multi-National Forces comprising of Burundi, Ethiopia, Djibouti and Kenyan troops. (See map of "Somalia AMISOM Sector 2" of June 2015 and close up view of Sector 6, both produced by UNSOA Geospatial Information Section)."*

d. Lieutenant Colonel Muhia further clarifies that the Kenyan Navy relies on Kenya's 1980 chart (issued shortly after the 1979 Proclamation) to define its Northern Command Area within Kenya's EEZ. This map was included in Kenya's Counter-Memorial as **Figure 1-12** and depicts the boundary at the parallel of latitude.

e. In any event, Somalia's Figure R2.1 is dated 2012 so, taken at its highest, all that it shows is the potential relevance of Somalia's claim to an equidistance line more than 30 years after the 1979 Proclamation.

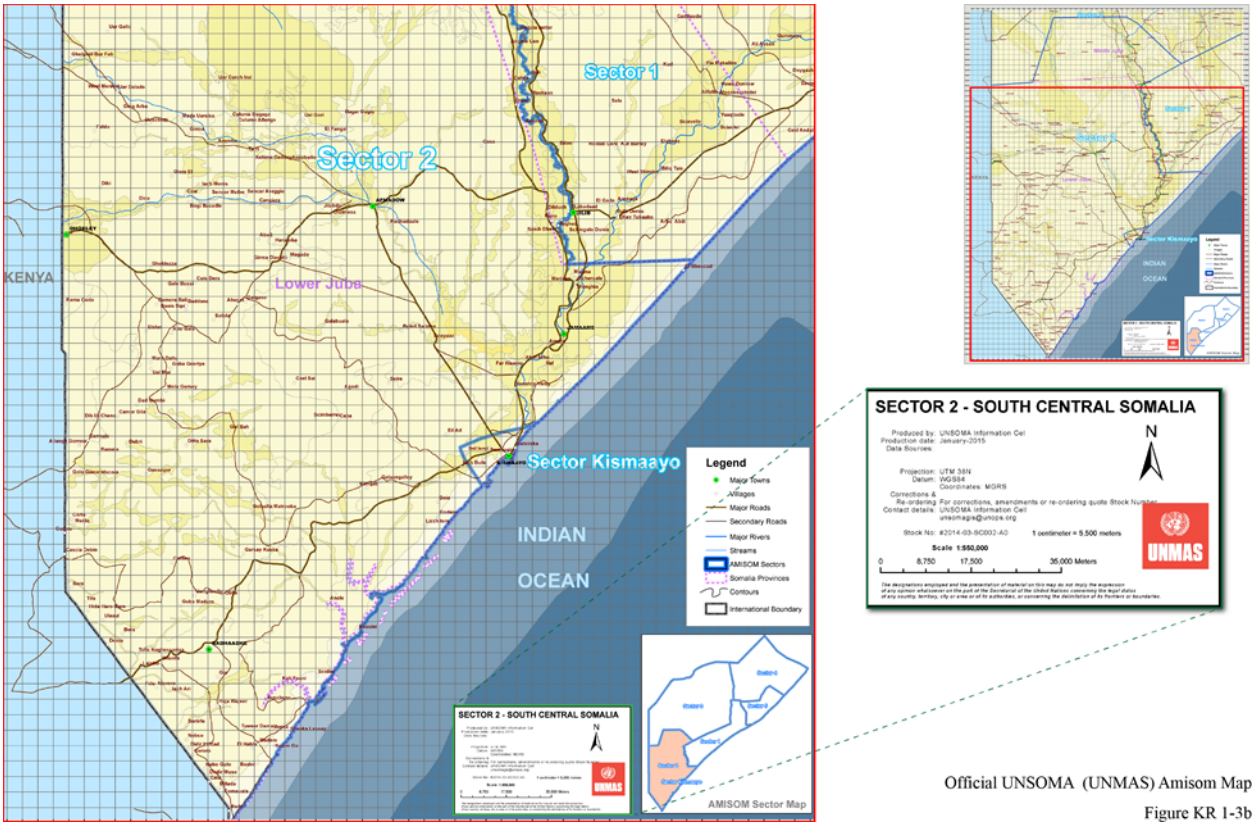
[202] **Figure KR 1-3b** is an official map produced by the UN Somalia Mine Action Programme ("UNSOMA") depicting AMISOM sectors (2015).
[203] Letter from Lieutenant Colonel Muhia of the Kenyan Navy to Juster Nkoroi, Head of Kenya International Boundaries Office (23 August 2018) (Annex 7).



Official UNSOA Amisom Map

Figure KR 1-3a

Figure KR 1-3a: Official UNSOA AMISOM Map showing no maritime zones



Official UNSOMA (UNMAS) Amisom Map

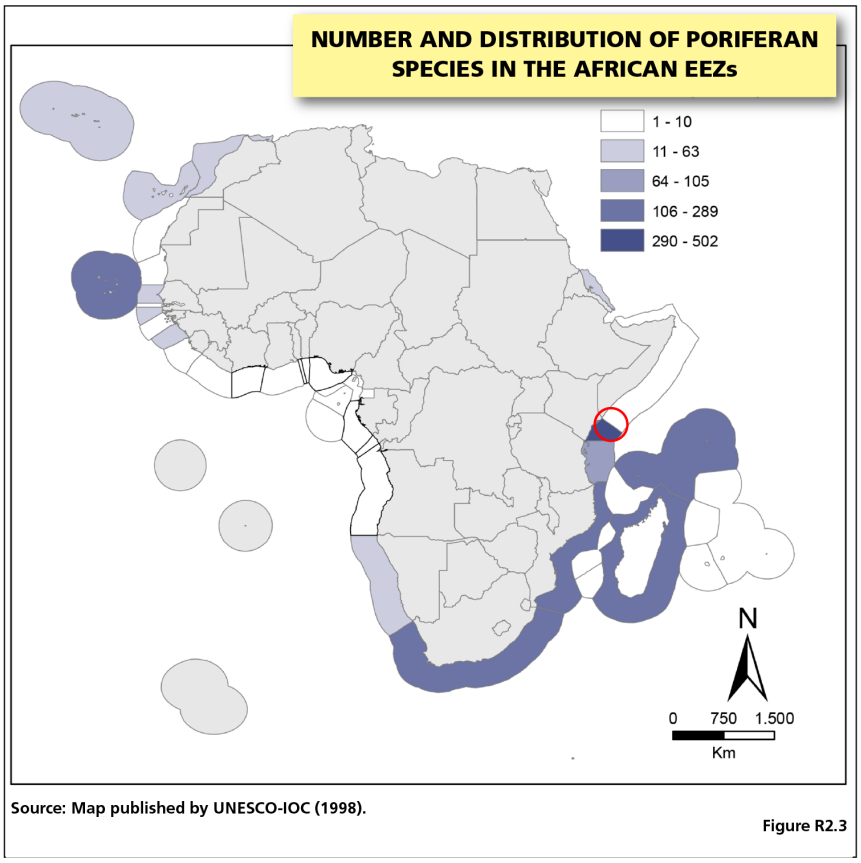
Figure KR 1-3b

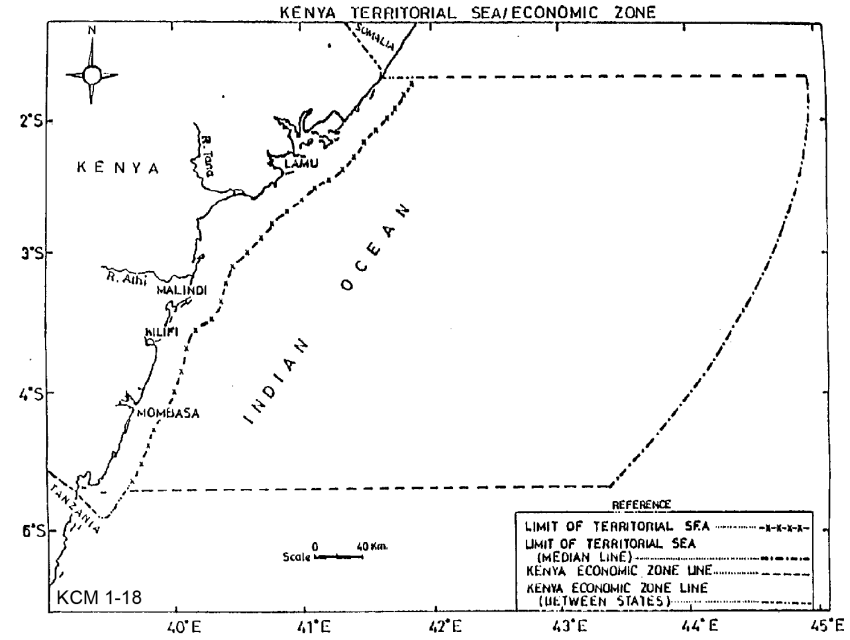
Figure KR 1-3b: Official UNSOMA (UNMAS) AMISOM Map showing no maritime zones

103. The other maps produced by Somalia are even less convincing. They either do not purport to show either maritime boundaries or the official position of the Parties, or they are speculative in nature:

a. Figure R2.3 (Number and Distribution of Poriferan Species in the African EEZs, UNESCO-IOC): In its Reply, Somalia refers to the map being published for a workshop on sponges held in Belgium in 2006,[204] but the relevant Annex indicates that it was in fact originally published in 1998. Beyond a vague map of the African continent, this illustrative workshop map does not purport to depict any maritime boundaries with accuracy. Furthermore, it is directly contradicted by other contemporaneous official IOC/UNESCO publications that specifically show the Kenya-Somalia maritime boundary. In particular, Kenya's Counter-Memorial produced a map (**Figure 1-18**) also published in 1998, in the IOC/UNESCO Marine Science Country Profile of Kenya. It is entitled "Kenya Territorial Sea /Exclusive Economic Zone" and is a detailed close-up of the maritime boundaries of Kenya with both Tanzania and Somalia at the parallels of latitude. By contrast, and as depicted in **Figure KR1-4** below, Somalia's Figure R2.3 is a general map showing a rough overview of the distribution of sponges across the entire African continent for a workshop.[205] Unlike Kenya's **Figure 1-18**, it does not have a legend indicating the "limit of the territorial sea" or "Kenya Economic Zone line". It may be further noted that a decade earlier, the 1987-88 *Georgy Ushakov* survey (under IOC/UNESCO auspices and with Somalia's participation) also followed the parallel of latitude in respect of Somalia's EEZ.[206] The sponge workshop map is thus contradicted by authoritative sources, and it is in any event wholly without probative value as to the position of either Kenya or Somalia.

[204] SR, para. 2.68(c), Annex 17.
[205] Training Course Report No. 89: ODINAFRICA: Marine Biodiversity Data Mobilisation Workshop on Sponges.
[206] *Supra*, paras. 91-92.





INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION &
WESTERN INDIAN OCEAN MARINE SCIENCE ASSOCIATION
Marine Science Country Profiles: Kenya (1998) Figure 1

Figure KR1-4: UNESCO-IOC Poriferan Species Distribution Map compared to the UNESCO-IOC Marine Science Country Profile Map

b. Figure R2.4 (Exploratory Soil Map of Kenya, 1980): This agricultural map relates to soil types on land. It has nothing to do with maritime areas. All that it shows is a short extension of the land boundary between Somalia and Kenya into the sea merely to indicate the division between land and sea. It clearly does not indicate a maritime boundary and is wholly irrelevant.

c. Figure R2.5 (New Exploration Blocks and Location of Wells in the Lamu Basic, 1995): This map, which actually shows a parallel of latitude from 6M onwards in the territorial sea and the EEZ, has already been addressed at paragraph 98 above.

d. Figure R2.6 (National Atlas, 2003): This map does not purport to show maritime boundaries. Its legend refers to the regional seismic profile and geologic cross section. The line that Somalia relies on is a short extension into the territorial sea, not an indication of the maritime boundary.

e. Figure R2.7 and R2.8 (On-line map of Kenyan Coral Reefs and On-line map of Kenyan Fish Landing Sites, Kenyan Marine & Fisheries Research Institute ("KMFRI") Website, 2018): As set out in the letter from the KMFRI date 18 July 2018,[207] the map is not produced by KMFRI and is not a depiction of Kenya's maritime boundary. It was linked to the KMFRI website through a system that relies on open source technologies. Users of the website can choose to use any background map found on the internet to view data on coral reefs, seagrasses, mangroves and fisheries. Figure R2.7 uses a background map from www.openstreetmap.com, which is a "free, editable map background of the whole world that is being built by volunteers" and does not necessarily represent official boundary positions. KMFRI makes clear that it uses the data and maps on its website "purely for research and illustrative purposes only".[208] When it does issue official maps, such as in its technical cruise reports for the Kenya Government, it has used official maps that

[207] Letter from the Kenyan Marine & Fisheries Research Institute to the Attorney-General (18 July 2018) (Annex 6).
[208] Letter from the Kenyan Marine & Fisheries Research Institute to the Attorney-General (18 July 2018), p. 2 (Annex 6).

show the maritime boundary at the parallel of latitude, consistent with the 1979 and 2005 Proclamations.[209]

f. Figure R2.9 (Maritime Jurisdictions in the Vicinity of the Arabian Peninsula and the Horn of Africa, 1992): This map, published in an academic book by a cartographer, is purely speculative. As the author explains in Annex 32, the map only depicts one maritime boundary agreement (Kenya-Tanzania) and describes all other boundaries as "potential boundaries to be negotiated in the region".[210] It has no probative value.

104. These maps therefore do not help Somalia's case. To the contrary, their irrelevance only reinforces the fact that Somalia has no evidence to refute Kenya's case on acquiescence. Most notably, while having apparently conducted an exhaustive search to discover *any* map showing an equidistance line, Somalia has not produced a *single* map published by Somalia itself (prior to 2014) depicting such a maritime boundary.

5. The "straight line" in the 1988 Somali Maritime Law in respect of the territorial sea boundary with Kenya is not a "median line"

105. Somalia has failed to produce the chart referred to in its own 1988 Maritime Law, depicting its maritime boundary (but only in respect of the territorial sea). As explained in the Counter-Memorial, Kenya has on two occasions requested that Somalia provide copies of the chart, but without success.[211] While Somalia has produced an original copy of the 1988 Law,[212] it says that it has been unable to locate the attached chart referred to in Article 4(6).[213] Nonetheless, Somalia persists in asserting that the words "straight line" in Article 4(6) in respect of the territorial sea boundary with Kenya were "intended to describe an equidistance line".[214] Somalia does not engage with Kenya's observation that in the translation provided by Somalia itself, the use of "straight line" to describe its boundary with Kenya, contrasts with the description of its boundary with Yemen as a

[209] Kenyan Marine & Fisheries Research Institute RV Mtafiti Report, Annex 1 (24 November – 18 December 2016), pp. pages 4, 9 and 11) and Kenyan Marine & Fisheries Research Institute RV Mtafiti Cruise Technical Report, Annex 2 (6-21 February 2017) (Annexes 4 and 5).
[210] SR, Annex 32.
[211] KCM, para. 85 and Annexes 59 and 63.
[212] MS, Annex 10.
[213] KCM Annex 60.
[214] SR, para. 2.99.

"median line".[215] A "straight line" is not the same as a "median line". The different meaning of the two terms in Somalia's own translation is confirmed by an independent translation of the relevant text, requested by Kenya.[216] As explained in the report accompanying that translation of Article 4(6), the Somali words translated as "straight line" are "xariiq toosan" and are distinct from the Somali words translated as "median line", namely "xariiq dhexe oo u dhaxeysa ballar isku mid ah".[217] That report confirms that "xariiq dhexe oo u dhaxeysa ballar isku mid ah" may be translated as "median line", "central line between them at an equal distance" or "equidistance line". Thus, by the express terms of Article 4(6) of Somalia's 1988 Maritime Law, whatever Somalia's missing map depicts is categorically *not* an equidistant line.

106. In fact, as demonstrated above, Somalia's fisheries maps, marine scientific research surveys, and offshore oil exploration blocks from the 1980s (i.e. contemporaneous with the 1988 Maritime Law), are all consistent with a maritime boundary at the parallel of latitude.[218] The most reasonable conclusion therefore, is that the "straight line" in Article 4(6) refers to the parallel of latitude.

E. Conclusion

107. The essential facts are not in dispute. Between 1979 and 2014, Kenya publicly, expressly, precisely, and repeatedly claimed a maritime boundary at the parallel of latitude as an equitable delimitation and specifically notified Somalia through the UN Secretary-General, official UN publications, and other means, including under the relevant provisions of the UNCLOS. Somalia never protested or claimed a contrary maritime boundary based on equidistance until 2014. The further conduct of the Parties in respect of maritime enforcement, fisheries, marine scientific research, and oil concessions, was also consistent with a maritime boundary at the parallel of latitude. Somalia's best case is that (notwithstanding the crystallization of the maritime boundary dispute only in 2014) the 2009 MOU in respect of CLCS submissions recognized a dispute in the continental shelf

[215] KCM, paras. 40 and 81.
[216] Translation from Absolute Translations (15 October 2018) (Annex 14).
[217] Report from Absolute Translations dated (26 October 2018) (Annex 15).
[218] See *supra* Section D, Subsections 1-4.

beyond 200M. By then however, Somalia had already acquiesced in Kenya's 1979 maritime boundary claim for 30 years.

108. The jurisprudence of international courts and tribunals is clear: failure to protest when reaction was called for constitutes acquiescence, namely tacit consent, and assertions of sovereignty and sovereign rights, are quintessentially a situation where a reaction is called for if a State opposes a particular claim.

109. If Somalia was opposed to Kenya's claim, its reaction was clearly called for, and its prolonged silence over 35 years constitutes consent to maritime delimitation at the parallel of latitude.

CHAPTER II:
EQUITABLE DELIMITATION OF THE MARITIME BOUNDARY BASED AT THE PARALLEL OF LATITUDE

110. As set out in Chapter 1, Somalia's prolonged acquiescence to Kenya's maritime boundary claim at the parallel of latitude results in a binding delimitation between the Parties. As this Chapter sets out, that maritime boundary also constitutes an equitable delimitation under the relevant provisions of UNCLOS.

111. Kenya and Somalia agree that the objective of a maritime boundary delimitation mandated by international law is to produce an equitable solution.[219] As succinctly put by Somalia immediately prior to the adoption of UNCLOS in 1982:

> *"…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".*[220]

112. The issue that divides the Parties is what achieving an equitable solution means in the specific context of this case. Somalia's Reply simply repeats the position set out in its Memorial that "the three-step method must be applied unless the construction of a provisional equidistance line is not feasible".[221] By contrast, Kenya's case is that:

a. The three-stage method is not a mandatory starting point (see Section A below).

b. In the present case, the parallel of latitude achieves an equitable solution (see Section B below).

c. The three-stage method has no application in the present case, but in any event, when the relevant maritime area is properly identified, the delimitation advanced by

[219] SR para. 3.9 referring to "the equitable result UNCLOS requires". See further KCM paras. 279–284, in particular fn 377 noting that Somalia's submissions in its Memorial 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")).
[220] 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, KCM Annex 73. Cited in KCM at para. 280.
[221] SR, para. 1.14.

Kenya is an equitable result even based on Somalia's own proportionality test (see Section C below).

A. The three-stage method is not mandatory

113. As explained in Chapter III (Section B) of the Counter-Memorial, no single methodology is mandatory for achieving an equitable solution in each and every case. Somalia's Reply mischaracterises Kenya's position as being that by "commonly" applying the three-stage method, the Court has "gotten" the law wrong.[222] This is not correct. Kenya does not deny that the three-stage approach may be appropriate to achieving an equitable solution in certain cases; the key point is that it is not *automatically* applicable in *all* cases.

114. In particular, two categories of cases are relevant to the present case.

115. First, the Court does not apply the three-stage method when there is an agreed maritime boundary between the Parties. This reflects Articles 15, 74 and 83 of UNCLOS, which provide that in the first instance delimitation shall be effected by way of agreement. Article 15 provides for delimitation of the territorial sea "failing agreement" and Articles 74 and 83 provide in identical terms (emphasis added):

> *"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".*

116. The primacy accorded to delimitation by agreement reflects customary international law.[223] Accordingly, in *Peru v. Chile* the Court stated "[i]n order to settle the dispute before it, the Court must *first* ascertain whether an agreed maritime boundary exists."[224]

117. For the reasons set out in Chapter 1, such an agreed maritime boundary exists in the present case because Somalia consented, by acquiescence, to the parallel of latitude proclaimed by Kenya.

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[222] SR paras. 1.8 and 3.34.
[223] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, para. 179. See further Fietta and Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, p. 30.
[224] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, para. 24 (emphasis added).

118. Second, even in the absence of an agreed maritime boundary, in certain cases the three-stage approach is inapposite, as is evidenced by State practice.[225]

119. Somalia in fact concedes that the three-stage method is not mandatory: it acknowledges that non-equidistant methods are admitted by international law,[226] and accepts that there are instances where the three-stage approach is not appropriate.[227]

120. In this regard, Somalia cites paragraph 195 of *Nicaragua v. Colombia*[228] in which the Court considered whether or not the construction of the equidistance line was "feasible" in that particular case. On this basis, Somalia leaps to the sweeping – and incorrect – conclusion that "the *only* time it will not be appropriate to start the delimitation process with an equidistance line is when 'the construction of [an equidistance line] is not feasible'".[229] What the Court in fact said in that paragraph however is inconsistent with Somalia's assertion:

> *"The question is not whether the construction of such a line is feasible but whether it is appropriate as a starting-point for the delimitation".*[230]

121. That is precisely Kenya's point: in some instances the equidistance line is not appropriate as a starting-point; and the present case is such an instance, for the reasons considered in further detail in Section B below.[231]

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[225] See KCM paras. 302 – 306 addressing the extensive state practice using a range of methods in order to achieve an equitable solution in maritime delimitation, showing that in some circumstances the equidistance line (including an adjusted equidistance line) is considered inappropriate even for agreed boundaries. For the avoidance of doubt, Kenya maintains its position that this practice demonstrates that there is no mandatory methodology (cf SR paras. 3.22–3.26).

[226] SR para. 3.10 "while there is truth to Kenya's assertion that '[n]on- equidistance methods ... are also admitted by international law', that cannot itself be a reason to abandon the three-step method".

[227] SR para. 3.10.

[228] *Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment, I.C.J. Reports 2012* cited in SR para. 3.10 fn 169.

[229] SR para. 3.10 (emphasis added).

[230] *Territorial and Maritime Dispute (Nicaragua v. Colombia) Judgment, I.C.J. Reports 2012*, para. 195. See further the Separate Opinion of Judge Abraham (*Nicaragua v Colombia*) at para. 21 focusing on the question of the appropriateness of the methodology: "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." See also *Nicaragua v. Honduras*, asking whether there are "factors which make the application of the equidistance method inappropriate" (*Judgment, I.C.J. Reports 2007*, p. 659 at p. 741, para. 272).

[231] In fact, Somalia is inconsistent with respect to the relevant question, advancing various formulations. The various formulations are as follows: (1) whether the equidistant line is "feasible" (SR para. 3.11) (2) whether there is a "practical or juridical impediment" (SR para. 3.13) (3) whether there is a "valid reason" to dispense with the three-stage method (SR para. 3.15) and (4) whether it is "reasonable, necessary or consistent with the law to reject the application of that method" (SR para. 3.21). The question is what methodology is appropriate in each particular case to achieve the objective of an equitable solution.

122. Indeed, contrary to Somalia's claim that "the Court has long made clear that, with only very limited exceptions, [an equidistance line] must be the starting point",[232] at paragraph 313 of its Counter-Memorial, Kenya listed many examples where an equidistance line was not considered by the Court to be the correct starting point.

123. Somalia draws on the speech of Judge Guillaume (cited by Kenya in its Counter-Memorial[233]) where he stated that "the legal rule is now clear".[234] Somalia disregards however:

    a. His recognition that "each case nonetheless remains an individual one, in which the different circumstances invoked by the parties must be weighed with care".[235]

    b. His reference to *Nicaragua v. Honduras* then before the Court, observing that "the international community may rest assured that those cases will be adjudicated in the same spirit".[236] Of course, in that case the Court rejected the three-stage method in favour of an alternative methodology noting 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".[237]

124. Somalia's repeated assertion that Kenya has "erroneously" equated the equidistance/relevant circumstances method with an equidistance line[238] is also misplaced.

125. First, this conceptual distinction (which was in fact acknowledged in the Counter-Memorial[239]) is not relevant to the critical point of disagreement in the present case,

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[232] SR para. 3.10.
[233] KCM para. 282.
[234] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations (31 Oct. 2001), p. 8. KCM, Vol. III, Annex 120 cited at SR para. 3.35 (and also at para. 3.18).
[235] P. 11.
[236] P.11 "The Court still has before it other cases of the same type, notably between Cameroon and Nigeria and between Honduras and Nicaragua. The international community may rest assured that those cases will be adjudicated in the same spirit."
[237] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment, I.C.J. Reports 2007*, para. 272. See further paras. 283–98 (cf delimitation of the islands at paras. 299–305). This case was cited in KCM paras. 309 and 313e.
[238] SR paras. 3.08, 3.10 and 3.19.
[239] KCM para. 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."), para. 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

namely the appropriate starting-point for achieving an equitable solution. For Somalia, it is the equidistance line.[240] For Kenya, it is not.[241]

126. Second, Somalia's own case is that there is no substantive distinction in the present case between an equidistance line and the equidistance/relevant circumstances method. While insisting that "applying the three-step method is not the same as insisting on equidistance",[242] Somalia also asserts that there are no relevant circumstances requiring adjustment of the equidistance line.[243] The result therefore is exactly the same.

127. Third, the fact that "[t]he equidistance/relevant circumstances method was developed by the Court precisely to ensure that the delimitation process achieves an equitable solution"[244] (1) does not entail the conclusion that the method will necessarily achieve such a result in every situation (as reflected in the practice of States party to UNCLOS,[245] as well as the various methods adopted by international courts and tribunals to achieve an equitable solution[246]); and (2) does not answer the question of what methodology is required *in this case* to achieve an equitable solution (which is addressed in the following Section).

B. The reason the parallel of latitude achieves an equitable solution

128. Somalia's claim that "Kenya offers no reason not to apply [the three-stage method] here"[247] disregards the arguments in the Counter-Memorial. Kenya set out several reasons

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boundaries")," para. 308(c) "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". See further in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment, I.C.J. Reports 2007* at paras. 271-272 where the Court refers interchangeably to the "equidistance/relevant circumstances method" and the "equidistance method".

[240] SR para. 3.10 "Whether or not an equidistance line is the proper end-point of the delimitation process, the Court has long made clear that, with only very limited exceptions, it must be the starting point (subject to later adjustment if warranted)."

[241] See further KCM paras. 295–296 "Somalia attempts to present equidistance as a rule that "must" be applied from the outset, apparently treating the "three-step analytical framework known as the 'equidistance/relevant circumstances method'" as a mandatory methodology ….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".

[242] SR para. 3.19

[243] SR, Chapter 3, Section II, Subsections B and C.

[244] SR para. 3.20 "Kenya appears to consider that there is some contradiction between equitable principles, on the one hand, and the equidistance/relevant circumstances method on the other. There is not. The equidistance/relevant circumstances method was developed by the Court precisely to ensure that the delimitation process achieves an equitable solution".

[245] As noted above, KCM paras. 302 – 306 addresses the examples of States using a range of methods in maritime delimitation in order to achieve an equitable solution in accordance with their obligation under UNCLOS.

[246] As noted above, KCM para. 313 identifies many instances where the equidistance/relevant circumstances approach has not been applied.

[247] SR para. 3.21.

why, even if Somalia had not tacitly consented to the maritime boundary at the parallel of latitude (*quod non*), the parallel of latitude (and not the three-stage method) is still the appropriate methodology for achieving an equitable solution.[248] These reasons are addressed further below, namely: (1) the applicable law at the critical time;[249] (2) the regional context;[250] (3) the practice of the Parties to date;[251] and (4) an equitable division.[252]

1. The 'applicable law' in 1979 (the date of the Kenyan Presidential Proclamation)

129. In Somalia's view, the fact that Articles 74 and 83 of UNCLOS do not prescribe any mandatory delimitation method is "irrelevant".[253] This argument cannot be sustained given that references to equidistance methodology in those provisions were expressly rejected (including by Kenya and Somalia) at UNCLOS III.[254] Pursuant to Articles 74 and 83, as finally adopted, the focus must be on identifying what methodology is appropriate in the circumstances to achieve the equitable solution mandated by UNCLOS.

130. In this regard, the situation[255] and the position adopted by Kenya and Somalia as to the appropriate methodology to achieve an equitable solution at the time when the maritime boundary crystallised between Kenya and Somalia from 1979 is highly relevant to determining what an equitable solution requires in the present context. The principle of intertemporal law requires that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[256] Thus, it is the law as it stood in 1979, and not in 2014 when the dispute crystallized, that is applicable.

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[248] KCM, Chapter III, Sections D and E.
[249] Section B (1) below.
[250] Section B (2) and (3) below.
[251] Section B (4) below.
[252] Section C below.
[253] SR para. 3.18 "The fact that Articles 73 and 84 do not prescribe any mandatory delimitation method may be correct, but it is also irrelevant". See also SR para. 3.16 referring to "irrelevant assertions concerning the text and negotiating history of UNCLOS". For a concise account of the debates over the formulation of Articles 74 and 83 see the *Virginia Commentary* vol II, pp. 796–816, 948–985 (1993).
[254] KCM, para. 70.
[255] As set out in Subsection 2 below, by 1976 Kenya and Tanzania had established the delimitation of their territorial waters boundary at the parallel of latitude, in accordance with international law as it then stood.
[256] *Island of Palmas* Case, United Nations, Reports of International Arbitral Awards (RIAA), Vol. II, p. 845. See further: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment,*

131. Kenya's 1979 Presidential Proclamation was issued while UNCLOS III was in the midst of its work. As explained in the Counter-Memorial,[257] at the UNCLOS III negotiations, there were two 'camps' proposing different approaches in the relevant provisions of UNCLOS addressing maritime delimitation in the EEZ and continental shelf: the equidistance camp, and the equity camp.[258] Somalia and Kenya (and indeed many other African States) were firmly in the equity camp, insisting that maritime delimitation must *not* be tied to the equidistance method. This stance reflected their common understanding of the applicable international law on maritime delimitation at the time the 1979 Proclamation was issued.[259]

132. Somalia seeks to downplay the significance of this common understanding by repeating its argument that "the three-stage process and equidistance are not the same"[260] and that the three-stage process is a means of achieving an equitable solution.[261] Kenya understands and accepts[262] both of those points. The key point, however, is that, contrary to Kenya and Somalia's unequivocal rejection of the equidistance method at the critical time, Somalia now seeks to impose an equidistance line as the first (and last) step in the process of maritime delimitation.

I.C.J. Reports 2002, p. 303 at para. 205 ("[e]ven if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today, in the present dispute"); *The Minquiers and Ecrehos case, Judgment of November 17th, 1953 I.C.J. Reports 1953,* at p.56 (where it held that feudal title could produce no legal effect, unless it had been replaced by another title, valid according to the law of the time of replacement); *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, at p.37 ("the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually").

[257] KCM paras. 69–76.

[258] KCM para. 70 explains that by 1978, the Negotiating Group 7 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 and which eventually prevailed. More than half of the delegations composing the "equity group" were from the African continent.

[259] See e.g. statement of the Somali representative, Mr. Yusuf, on 3 April 1980, cited at KCM para. 300(a): "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" (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), KCM Annex 71). See further the Somali delegate (Mr. Robleh) statement 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" (KCM para. 300(d) citing 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, KCM Annex 72).

[260] SR para. 3.19. Fn 175 cites KCM para. 298. It is assumed this is a typographical error and it was intended to refer to KCM para. 299.

[261] SR para. 3.20.

[262] See *supra,* paras. 125 - 127.

133. Furthermore, Somalia agrees with Kenya that, at the time of the 1979 Proclamation when the parallel of latitude was adopted as the maritime boundary, the approach of international courts and tribunals to maritime delimitation was clearly *not* the three-stage method. Somalia expressly acknowledges that the: "equidistance / relevant circumstances method had not crystallised into law 36 years ago".[263]

134. It is therefore undisputed that at the critical time:

a. Both Kenya and Somalia had rejected equidistance as the appropriate method to achieve an equitable solution;

b. Reference to the method of equidistance was deliberately rejected in the relevant provisions of UNCLOS;

c. Equitable principles, and not the three-stage methodology, were prevalent in the Court's jurisprudence (consistent with the position adopted by the drafters of UNCLOS).

In those circumstances, the retroactive and mechanical imposition in 2018 – some 40 years after the 1979 Proclamation – of the three-stage method with equidistance as the first step (and, on Somalia's case, the last step) would not reflect either the intention of the Parties, or the applicable rules of international law. As such, it would not be appropriate for achieving an equitable solution in the present case.

2. The regional context: the Kenya/Tanzania maritime boundary is at the parallel of latitude

a. Adoption of the parallel of latitude as an equitable solution

135. It was against the backdrop of this applicable law that in 1975-76, Kenya and Tanzania delimited their maritime boundary at the parallel of latitude by an Exchange of Notes.[264] This methodology was consistent with their common understanding – and the approach of the Court at the time – regarding maritime delimitation (as set out above). It was an

[263] SR para. 3.21. See also SR para. 3.18 referring to "the Court's jurisprudence….in the 36 years since the signing of the Convention". For the avoidance of doubt, Kenya does not accept that the application of the equidistance / relevant circumstances method is mandated by customary international law.
[264] KCM paras. 326–330. MS, Vol. III, Annex 5.

equitable solution; and it has always been accepted as such by Kenya and Tanzania and by all other States.

136. Kenya and Tanzania expressly confirmed that the parallel of latitude achieved an equitable solution:

a. On 26 September 2007, Kenya sent a Note Verbale to Tanzania regarding CLCS submissions, noting in respect of the 1975-76 agreement adopting the parallel of latitude that "the boundaries between our two countries have been drawn using the parallel of latitudes, in accordance with Articles 74, 83 of UNCLOS" (provisions which, as noted above, expressly refer to an equitable solution).[265]

b. As noted above, in 2008 the Joint Technical Committee Meeting on the Tanzania/Kenya Maritime Boundary (discussing what was eventually to become the 2009 Boundary Agreement) recorded that the meeting was "guided by the common State practice of adopting the parallel of latitude for mapping".[266]

c. Subsequently, Kenya and Tanzania concluded the 2009 Boundary Agreement which confirmed the 1975-76 agreement and extended the parallel of latitude beyond 200M to the outer limits of the continental shelf,[267] referring to it as an "equitable agreement".[268] As indicated in the Counter-Memorial, the 1975-6 maritime delimitation ameliorated to some extent the distorting 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.[269]

137. The common understanding that the 1975-76 Kenya-Tanzania agreement was an equitable solution informed Kenya's adoption of the parallel of latitude with respect to Somalia in 1975, leading to a formal Proclamation in 1979. Kenya recalls that:

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[265] Note Verbale from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the United Republic of Tanzania, MFA.273/430/001 (26 September 2007) (Annex 10).
[266] Agreed Minutes of the Joint Technical Committee Meeting on the Tanzania/Kenya Maritime Boundary held in Dar es Salaam, Tanzania (30-31 October 2008), p. 5) (Annex 2).
[267] MS, Vol. III, Annex 7. KCM paras. 328 and 331.
[268] 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 at KCM paras. 329–330.
[269] KCM para. 347.

a. In 1974, during UNCLOS III, Kenya made clear that:

> *"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".*[270]

b. The following year, in 1975, a Kenyan Consultative Inter-ministerial Meeting of the Law of the Sea Group was held. The Kenyan Ministry of Foreign Affairs Internal Memorandum of 26 August 1975 recorded that:

> *"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"*[271]

c. Kenya's 1979 Proclamation thus referred to both the maritime boundary with Tanzania and Somalia:[272]

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

[270] See KCM para. 70 citing the 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 KCM Annex 11, at para. 79 (emphasis added).

[271] MFA Internal Memo from A.S Legal to Dr Adede on the Consultative Inter-ministerial Meeting of the Law of the Sea Group held at Harambee House on 12 August 1975 (MFA. 273/430/001A/66), 26 August 1975, KCM Annex 12, cited in KCM para. 52 (emphasis added). 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 realised and mitigated in at least two other cases along the same coast line by use of latitudinal boundaries thereby establishing a regional practice" (MS, Vol. III, Annex 31, Power Point presentation, slides 1 and 10, cited at KCM para. 325).

[272] Article 1. Cited in KCM para. 60.

(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 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."

b. The cut-off effect

138. The reference in the 1975 Memorandum (cited above) to the deflection of the Kenyan boundary is significant. As explained in the Counter-Memorial, the application of an equidistance line to the Kenya–Somalia boundary would produce a significant cut-off effect with respect to the maritime areas of Kenya.[273] The parallel of latitude was considered in those circumstances as appropriate to achieve an equitable result.

139. Somalia accepts that an objective of maritime delimitation is to "allow the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way".[274] It maintains however that "any cut-off that may result from Kenya's boundary with Tanzania can be of no relevance for the purposes of the delimitation between Somalia and Kenya".[275] Somalia's position seems to be that if Kenya could now, under the Court's jurisprudence as it has developed over the past 40 years, insist upon a maritime boundary that is more unfavourable to Tanzania and more favourable to Kenya than that agreed as an equitable boundary in 1975-76, then Kenya must be treated as having 'given away'[276] part of its maritime entitlement.

140. Thus, Somalia's argument is that the significant cut-off effect on Kenya of an equidistant line can be attributed to a 'bad choice' made by Kenya back in 1975[277] and the evolution of the international law of maritime delimitation since then, such that Kenya's claim is merely

[273] See further KCM paras. 343–346.
[274] *Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, para. 201 cited with approval at SR para. 3.74 (and KCM para. 287) "The objective is, as the Court has stated, to share out the cut-off in a "reasonable and mutually balanced way"". 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).
[275] SR para. 3.75.
[276] SR para. 3.78 referring to a 'renunciation' by Kenya of "a part of its entitlement in the continental shelf".
[277] "Any cut-off Kenya may suffer as the result of its delimitation with Tanzania is due to its own actions" (SR para. 3.78).

seeking 'compensation' for that 'bad choice'.[278] Somalia's position reflects neither the facts nor the relevant applicable law. Kenya's submission is that equitable maritime delimitation cannot ignore equitable delimitations that were agreed in the past consistent with the applicable law. It is a matter of historical equity, and common sense, that boundaries lawfully and reasonably established in the past cannot be disregarded in the present. It is not Kenya that seeks "compensation", but rather Somalia that seeks to penalise Kenya for its 1975-76 maritime boundary agreement with Tanzania, despite the fact that it was consistent with the principle of equitable maritime delimitation as understood and implemented at that time.[279]

141. In its Counter-Memorial, Kenya elaborated on the cut-off effect of an equidistant boundary with Somalia following the equidistance line, noting that:

a. 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%[280] (or with the natural configuration used by Somalia, 511km to only 180km measured at the 200M limit, i.e. a reduction of 65%).[281]

b. Beyond 200M, the application of the equidistance principle would deprive Kenya of *any* entitlement at the outer limits of the continental shelf as provided for under 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.[282]

[278] "Somalia cannot be made to compensate Kenya for the consequences of its agreement with Tanzania" (SR para. 3.80).
[279] See *supra* para. 135. See further KCM para. 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. Furthermore, this is not an argument of "compensation" for Kenya for the agreements it has made with third parties. 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."
[280] KCM para. 343 (**Figure 3-1**).
[281] See *infra,* para. 165.
[282] KCM para. 344–346 (**Figure 3-1**).

c. Even if an equidistance line had been adopted in respect of both Tanzania and Somalia, Kenya's access to the outer continental shelf would have been severely cut off, while Somalia would have enjoyed a very wide access to it.

142. According to Somalia, "the case law makes clear" that these considerations do not justify either (1) not applying the three-stage method, or (2) an adjustment to the equidistance line.[283] Somalia relies upon two cases in that regard: *Bangladesh/Myanmar* (ITLOS)[284] and *Bangladesh v India* (arbitral tribunal).[285] However:

a. The position of both ITLOS and the arbitral tribunal in those cases is consistent with Kenya's position. Both recognised that the appropriate methodology depended on what would achieve an equitable result in the particular circumstances of each case:

> *"The Tribunal observes that 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"*[286]

> *"In addressing this question [the appropriate delimitation method], 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…. 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"*[287]

[283] SR para. 3.81 "the case law makes clear that these considerations do not justify an adjustment to the equidistance line, let alone an abandonment of the three-step process."
[284] *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, cited at SR paras. 3.82–3.83.
[285] *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award*, 2014, PCA Case No. 2010-16 cited at SR paras. 3.82–3.83.
[286] *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, cited in KCM para. 310.
[287] *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award*, 2014, PCA Case No. 2010-16, para. 339, cited in KCM para. 311.

b. Somalia also ignores *Guinea/Guinea-Bissau* which rejected the three-stage method as inappropriate precisely because of the cut-off effect,[288] including the concern that:

> *"Le pays situé au centre est enclavé par les deux autres et se trouve empêché de projeter son territoire maritime aussi loin vers le large que le lui permettrait le droit international"*.[289]

c. Furthermore, in regard to the equidistance line, in both *Bangladesh/Myanmar* and *Bangladesh v India* the provisional equidistance line was adjusted.[290] The extent of that adjustment, including the extent to which Bangladesh's seaward projection was extended, was a function of the tribunals' assessment of the specific circumstances of that case. As the ITLOS noted:

> *"There are various adjustments that could be made within the relevant legal constraints to produce an equitable result. As the Arbitral Tribunal observed in the Arbitration between Barbados and Trinidad and Tobago, '[t]here are no magic formulas' in this respect"*.[291]

c. Summary

143. The boundary agreement between Kenya and Tanzania cannot be simply dismissed as irrelevant to the determination of what constitutes an equitable solution in the present case. It is an established historical fact, and is a part of the geographical reality within which an equitable delimitation of the Kenya–Somalia maritime boundary must be achieved. It should be accommodated in particular because:

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[288] *Case concerning the Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985 (1985) 19 *RIAA* 149, 189, paras. 103–111.

[289] Para. 104. See also *North Sea Continental Shelf, Judgment, 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".

[290] *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. 297 "provisional equidistance line as drawn produces a cut-off effect on that coast requiring an adjustment of that line"; para. 324 "the concavity which results in a cut-off effect on the maritime projection of Bangladesh is a relevant circumstance, requiring an adjustment of the provisional equidistance line". *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award*, 2014, PCA Case No. 2010-16, para. 477 "The Tribunal should seek to ameliorate excessive negative consequences the provisional equidistance line would have for Bangladesh in the areas within and beyond 200 nm, but it must not do so in a way that unreasonably encroaches on the entitlement of India in that area". At para. 478, the Tribunal set out its adjusted line "To ameliorate the excessive negative impact the implementation of the provisional equidistance line would have on the entitlement of Bangladesh to the continental shelf/exclusive economic zone and the continental shelf beyond 200 nm and to achieve an equitable result".

[291] Para. 327.

a. It was adopted in good faith on the understanding that a maritime boundary at the parallel of latitude achieved an equitable solution in respect of Tanzania.

b. It informed Kenya's adoption of a similar parallel of latitude maritime boundary with Somalia, which delimitation Somalia acquiesced in for 35 years.

c. The consequence of disregarding the Kenya-Tanzania maritime boundary would be to produce a significant cut-off effect with respect to the maritime areas of Kenya, which would be inequitable.

d. It was consistent with regional practice in respect of maritime boundary delimitations.

3. The broader regional context: additional maritime boundary delimitations using the parallel of latitude

144. As set out in the Counter-Memorial, in addition to the 1975–76 Kenya-Tanzania agreement (which was confirmed and extended in 2009[292]), the 1988 Tanzania-Mozambique maritime boundary agreement also adopted the parallel of latitude as an "application of the principle of equity" to delimit the EEZ.[293]

145. The fact that the relevant African coast of the Indian Ocean is characterised by a set of delimitations between littoral States based upon use of the parallel of latitude should be taken into account in determining what is an equitable solution in the present case.

146. Somalia dismisses these agreements as "account[ing] for just a tiny number of the many potential maritime boundaries on the 'African coast of the Indian Ocean'."[294] In fact there are three relevant maritime boundaries on the eastern African coast of the Indian Ocean and the use of the parallel in relation to two of them (Mozambique–Tanzania and

[292] KCM, para. 110; MS, Vol. III, Annex 7.
[293] 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, KCM Annex 143. See further KCM paras. 50 and 332.
[294] SR para. 3.29.

Tanzania–Kenya) is agreed and undisputed, and its use in respect of the third (Kenya-Somalia) was not protested from 1979 until 2014.[295]

147. Somalia refers to *Costa Rica v. Nicaragua*,[296] where the Court stated that "a judgment rendered by the Court between one of the Parties and a third State or between two third States cannot *per se* affect the maritime boundary between the Parties. The same applies to treaties concluded between one of the Parties and a third State or between third States".[297] That reference is inapposite. It simply held that a treaty with a third State cannot "*per se*" affect the maritime boundary with another State (i.e., affect it *qua* treaty). Kenya's case is not that these other treaties affect the Kenya-Somalia maritime boundary *per se*. Rather, the point is that given the regional geographic context, prior to Somalia's novel equidistant claim in 2014, two of the three relevant maritime boundaries had been delimited by express agreement for 26 and 39 years respectively based on the position that the parallel of latitude was an equitable solution. This practice has reasonably informed Kenya's understanding from 1979 until the present that the parallel of latitude is an equitable solution also in respect of its maritime boundary with Somalia.[298]

148. Furthermore, the approach advanced by Kenya reflects that adopted by:

    a. The Arbitral Tribunal in *Guinea/Guinea Bissau,* which accepted the relevance of the regional context and sought a solution that "would take overall account of the shape of [the West African] coastline", and produce a delimitation that would "be suitable for equitable integration into the existing delimitations of the West African region, as

[295] An equidistant line has been considered by Mozambique and South Africa, but the delimitation has yet to be agreed: see South Africa's 2010 CLCS Submission at p.2 (which describes the "unresolved maritime boundary with Mozambique") http://www.un.org/depts/los/clcs_new/submissions_files/zaf31_09/zaf2009executive_summary.pdf and Mozambique's 2010 CLCS Submission at p3 (referring to "unresolved issues in relation to bilateral maritime delimitation with neighbouring States, specifically with the Republic of South Africa").
http://www.un.org/depts/los/clcs_new/submissions_files/moz52_10/moz_2010_es.pdf

[296] SR paras. 3.30–3.31.

[297] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), Merits, Judgment, I.C.J. Reports 2018*, para. 123 (emphasis added).

[298] As noted at KCM para. 325, 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 realised and mitigated in at least two other cases along the same coast line by use of latitudinal boundaries thereby establishing a regional practice" (MS, Vol. III, Annex 31, Power Point presentation, slides 1 and 10).

well as future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions".[299]

b. This Court in the *Libya/Malta* case, which 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".[300]

These authorities were cited in Kenya's Counter-Memorial[301] but ignored in Somalia's Reply.

4. The practice of the Parties to date indicating what they consider to be an equitable maritime boundary delimitation

149. Somalia states that it has "*never* done *anything ever* to indicate that it considers the parallel to be the equitable solution"[302] and that it has "*never indicated* it considered the parallel boundary to be equitable".[303] That claim is contradicted by the facts. In addition to their categorical rejection of equidistance in favour of equity as the fundamental principle governing maritime delimitation before UNCLOS III, both Kenya and Somalia have, since at least the 1979 Proclamation, accepted the parallel of latitude as an equitable solution. Notably, Somalia did not protest or claim a contrary maritime boundary until 2014.[304] Somalia's gloss on the historical record as showing the Parties "nominally recogniz[ing] the parallel of latitude as fair" does not reflect the significant evidence presented by Kenya.[305]

150. As Kenya explained in the Counter-Memorial, in effecting a maritime delimitation, the Court *must*, as a matter of law, take into account past statements and conduct indicating what the Parties consider to be an equitable solution.[306] As stated in *Tunisia/Libya*, in considering "what method of delimitation would ensure an equitable result" the Court

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[299] *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, paras. 108 and 109.
[300] *Continental Shelf (Libya/Malta), Judgment, I.C.J. Reports 1985*, para. 69.
[301] KCM, para. 325.
[302] SR para. 3.14 (emphasis added).
[303] SR para. 3.39 (emphasis added).
[304] See Chapter 1 above. See further KCM Chapter 3, Section D.
[305] SR para. 3.14 "In other words, Kenya says, since the Parties' have both nominally recognised the parallel of latitude as fair, the Court need not waste its time with the three-step method."
[306] KCM, Chapter 3, Section C.

"*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" (emphasis added).[307] Kenya cited two further cases confirming this approach: *Libya/Malta*[308] and *Peru v Chile*.[309]

151. Somalia's only response to the Court's jurisprudence is to cite a single decision, *Ghana v Côte d'Ivoire*, and to assert that the Court should follow the Special Chamber of ITLOS in applying the three-stage approach.[310] That decision however is inapposite for the following four reasons.

152. First, the proposition 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" is not disputed. The principle is not challenged either by Somalia or by the Special Chamber of ITLOS in *Ghana/Cote d'Ivoire*.

153. Second, the context in which the Parties' conduct was considered in *Ghana/Côte d'Ivoire* differs fundamentally from the present case. In that case, the Parties had *agreed* to the application of the three-stage method.[311] Their conduct was only considered in applying the second of the three stages, namely as a potential relevant circumstance that might require adjustment of the provisional equidistance line.[312] Unlike the present case, the ITLOS Chamber was not asked to consider the relevance of the conduct of the parties to determine – in the words of *Tunisia/Libya* – "what *method* of delimitation would ensure an equitable result".[313]

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[307] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* para. 118 cited at KCM para. 314.
[308] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, para. 25 cited at KCM para. 319 (emphasis added).
[309] *Maritime Dispute (Peru v Chile), Judgment, I.C.J. Reports 2014*, para. 43 cited at KCM para. 320.
[310] SR para. 3.40–3.43 citing *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.
[311] Para. 360 "The Special Chamber notes that the two Parties agree, in principle, on the three-stage approach as developed in international jurisprudence (*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 101, paras. 116 and 120, at p. 103, para. 122; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 4, at p. 67, para. 240) in applying the equidistance/relevant circumstances methodology in this case. The Special Chamber will follow this internationally established approach".
[312] *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. 468 "The Special Chamber has to consider whether the conduct of the Parties nonetheless could be considered a relevant circumstance requiring adjustment of the provisional equidistance line".
[313] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982,* para. 118 cited above (emphasis added).

154. In fact, *Ghana/Côte d'Ivoire* expressly recognised this distinction (at paragraph 470 of its decision) and noted that in *Tunisia/Libya* the Court was determining the "principles and rules of international law applicable to delimitation of the area of the continental shelf … taking account of equitable principles, and the relevant circumstances which characterise the area". It noted that by contrast, it was considering relevant circumstances in application of the three-stage method "with a view to assessing the equitableness of a provisional equidistance line drawn in the first stage". It specifically concluded that "the subject matter of, and the approach to, the delimitation in the *Continental Shelf case (Tunisia/Libyan Arab Jamahiriya)* are different from those in the present case".[314]

155. Third, in *Ghana/Côte d'Ivoire*, Ghana presented its *modus vivendi* claim primarily on the basis of oil concessions and practice.[315] In the present case, Kenya relies first and foremost upon formal proclamations and notifications that have a special significance in the international law of the sea.[316] The conduct of Kenya and Somalia in respect of oil concessions, as well as fisheries and marine scientific research, merely confirms and is consistent with a maritime boundary at the parallel of latitude.[317]

156. Fourth, Somalia's key argument is that in *Ghana/Côte d'Ivoire*, Ghana's attempt to rely on the parties' conduct in respect of oil exploration as a relevant circumstance requiring the adjustment of the provisional equidistance line was an "attempt to revive a tacit maritime boundary that was rejected by the Special Chamber" and "that accepting such argument would, in effect, undermine its earlier finding on the existence of a tacit agreement".[318]

157. This concern however cannot be transplanted to the present case. If the Court were to find that there is no acquiescence by Somalia in Kenya's 1979 maritime boundary claim (*quod non*), the Court must still, inevitably and as a dingistinct legal question, determine what methodology is appropriate to achieve an equitable solution. The jurisprudence is clear: in making that determination, including whether the three-stage approach is appropriate or

[314] 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, para. 470.
[315] See e.g. at paras. 112–113, 206, 227 and 465.
[316] See *supra* paras. 23-26.
[317] KCM Chapter 1 addressed the facts in Sections A–H. Oil concession practice was addressed in Section F, Subsection 4.
[318] Para. 478.

not, the Court *must* take into account whatever indicia are available of the line considered to be equitable by the Parties (see the case law cited at paragraph 150 above).

158. In the present case, there are clear indications as to the maritime boundary that both Parties have considered equitable and acted upon, namely the parallel of latitude.[319] Even if they did not constitute 'an agreement', those indicia cannot be disregarded. What is at issue is not "an attempt to revive a tacit maritime boundary" that has been rejected (as alleged by Somalia), but rather a preliminary and distinct legal question of delimitation methodology, to be answered in light of the objectives of predictability and transparency[320] that Somalia itself has recognised.[321]

159. In this respect, *Ghana/Côte d'Ivoire* emphasised 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".[322] In the present case, however, the demands of transparency and predictability point in a different direction, in light of two defining characteristics of the Kenya-Somalia maritime boundary.

160. The first characteristic is the prolonged conduct of the Parties since at least 1979 until 2014. As explained in the Counter-Memorial, the values of predictability and transparency are undermined if two States, engaged in the delimitation of a maritime boundary between them, settle upon an equitable solution, and then one State, perhaps because of a change of government policy or a changed view of where the balance of advantage lies, repudiates that boundary and makes a novel claim based on a different methodology. That is what Somalia has done in the present case.[323]

161. The second characteristic is the broader context of prolonged regional practice since 1975. Somalia says, in essence, that it does not matter if other delimitations in the region were

[319] Those indications are addressed in KCM Chapter III, Section D (referring to the regional context, the Proclamations of 1979 and 2005, Kenya's CLSC Submission and the other conduct of the Parties consistent with their shared understanding that the parallel of latitude is an equitable solution). See further Chapter 1 of this Rejoinder.
[320] "…transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process" (*Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, Award dated 7 July 2014, para. 339).
[321] SR, para. 3.18.
[322] Para. 289.
[323] KCM para. 312.

made, decades ago, in a manner that was consistent with international law as it then stood,[324] and that they achieved what was and is still regarded as an equitable result, and that this situation has since been stable and undisputed by any State. Now, Somalia says, the Court's jurisprudence on the methodology to achieve an equitable solution has evolved, and Somalia is entitled to take full benefit from that legal evolution even at the expense of inserting an incongruous boundary into the settled framework of maritime boundaries on the east African coast of the Indian Ocean, and one that would produce a severe cut-off for Kenya. It would be entirely inconsistent with the requirements of predictability and transparency to disregard established equitable solutions and effect a delimitation as if they did not exist, in particular in light of the contemporaneous position adopted by Somalia during the UNCLOS III negotiations.

C. The parallel of latitude achieves an equitable solution even by application of Somalia's own proportionality test

162. In addition to the foregoing circumstances regarding inter-temporal law, regional practice, and geographic context, a maritime boundary at the parallel of latitude is an equitable result even by application of Somalia's own proportionality test.

163. According to Somalia, "Kenya's Counter-Memorial makes no argument that applying the standard [three-stage] method yields the parallel of latitude that Kenya claims."[325] Kenya's position is, as clearly stated in its Counter-Memorial and repeated in this Rejoinder, that the three-stage method is not appropriate in the present case. Kenya's Counter-Memorial accordingly did not engage in a methodology that is, in its view, as a matter of law inapplicable to the present case.

164. It is wrong, however, to claim that Kenya does not "offer *any* criticism of the manner in which Somalia applied the method".[326] In its Counter-Memorial, Kenya did criticise the manner in which Somalia applied the three-stage method.[327] Specifically and as elaborated

[324] SR para. 3.21 "equidistance / relevant circumstances method had not crystallised into law 36 years ago". See also SR para. 3.18 referring to "the Court's jurisprudence….in the 36 years since the signing of the Convention".
[325] SR para. 3.45.
[326] SR para. 3.45 (emphasis added).
[327] See KCM para. 352, fn 506 "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

below, Kenya contends that if the correct approach to identifying the relevant maritime area is adopted, which is crucial to determining what constitutes an equitable result (Section 1 below), it is the parallel of latitude – and not the equidistant line – that achieves the "almost equal division of the disputed area"[328] that Somalia submits to be an equitable delimitation between the Parties (Section 2 below).

1. Relevant maritime area

165. A key component in the process of identifying the relevant maritime area is identification of the relevant coast. Kenya generally agrees with Somalia's approach as regards identification of the relevant coast,[329] with the notable exception that Somalia arbitrarily excludes a 30km section of coastline south of Chale Point on the Kenyan coast, which should be included. This is depicted in the figures below: Figure 6.6 is taken from Somalia's Memorial and shows Somalia's relevant coast; Figure 6.7 is also taken from Somalia's Memorial and shows Kenya's relevant coast, but with the additional 30km section of coastline that Kenya submits should also be included highlighted in red. That measurement yields coastal lengths of approximately 511km and 733km for Kenya and Somalia respectively, measured along their natural configuration. This corresponds to a Kenya:Somalia coastal length ratio of 1:1.4.

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".

[328] See *infra,* para. 174.

[329] SM paras. 6.27 – 6.30 and Figures 6.6 and 6.7.

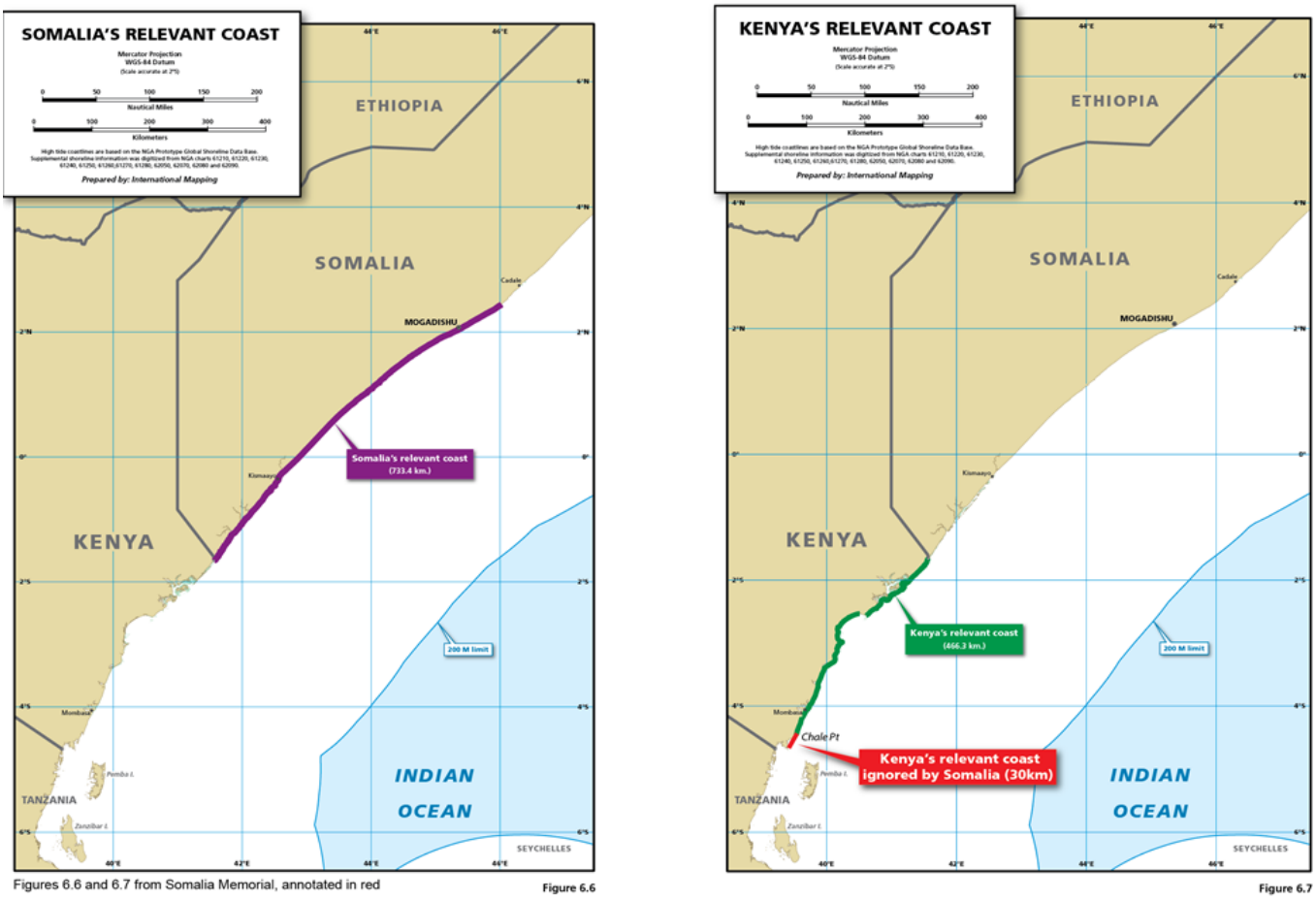


Figure KR 2-1: Somalia's depiction of the relevant coasts and its excluded section of Kenya's coast

166. It is noted that the land boundary terminus ("LBT") that Kenya considers to be correct as a matter of law is different from that relied upon by Somalia. Somalia uses an LBT starting at the low water line, 41 meters from BP29.[330] Kenya maintains that the LBT is located at Pillar BP 29 itself.[331] Kenya's position reflects the Parties' agreement (at the meeting held in March 2014) that the maritime boundary between Somalia and Kenya should extend from BP 29.[332] As to the location of BP 29, Somalia accepts the adoption of Kenya's proposed co-ordinates for BP 29,[333] which are based on actual surveyed data.[334]

[330] SR para. 3.61. 'BP29' refers to 'Boundary Pillar 29', also known as Primary Beacon No. 29 (see KCM para. 30).
[331] See KCM, submissions, para. 2 ("the maritime boundary between Somalia and Kenya in the Indian Ocean shall follow the parallel of latitude at 1° 39' 43.2"S, extending from Primary Beacon 29 (1° 39' 43.2"S) to the outer limit of the continental shelf").
[332] MS, Vol IIII, 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

167. Turning to the identification of the relevant area, in the following paragraphs Kenya (1) recalls Somalia's approach to identifying the relevant area, which is incorrect (see **Figure KR 2-2** below) (2) explains the correct approach to identifying the relevant area (3) identifies the relevant area according to that correct approach (see **Figure KR 2-4**) and (4) contrasts the correct identification of the relevant area with Somalia's identification of the relevant area, demonstrating the significant difference that results (see **Figure KR 2-5** below).

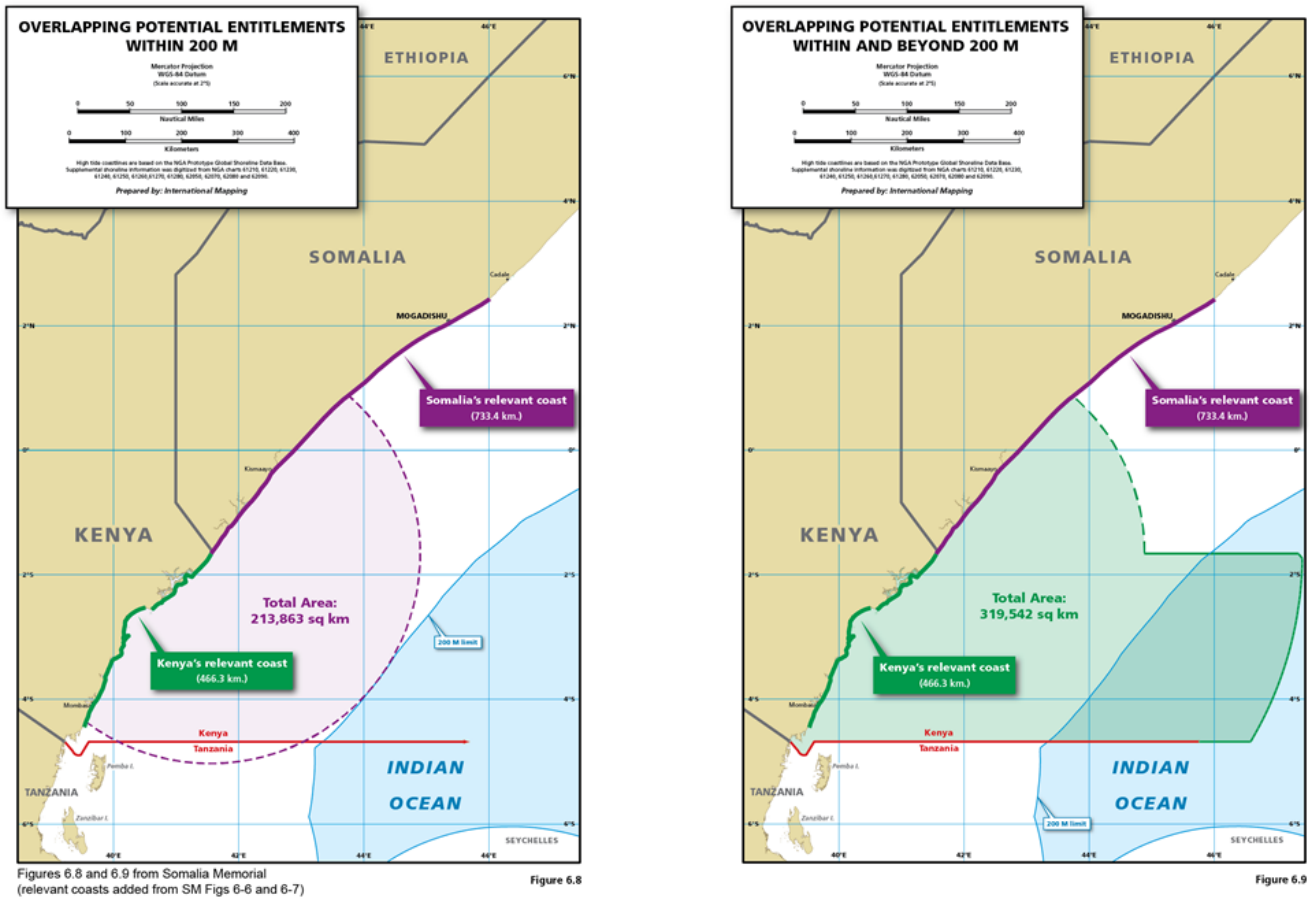
168. Kenya does not agree with Somalia's approach of identifying the areas of overlapping potential entitlements, while disregarding the northern part of the Somali coast that Somalia itself has identified as relevant.[335] Somalia's approach is depicted in Figures 6.8 and 6.9 of its Memorial. For convenience those two figures are reproduced below, with the relevant coast that Somalia had identified also shown.

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".

[333] SR para. 3.51.

[334] KCM para 30; KCM Annex 40. The difference between the co-ordinates advanced by the Parties in the first round of pleadings was de minimis; the reason for this was not "imprecision of geo-rectifying different satellite images" (SR 3.51); the location identified by Kenya was based on a directly surveyed position (see KCM fn 26).

[335] SM, Chapter 6, Section II(C) and Figures 6.8 and 6.9.



Figures 6.8 and 6.9 from Somalia Memorial
(relevant coasts added from SM Figs 6-6 and 6-7)

Figure KR 2-2: Somalia's depictions of the relevant area and the relevant coasts

169. Contrary to Somalia's depictions, the correct approach is to identify the maritime area resulting from the projections of the relevant coasts.[336] Somalia acknowledges that "there have been two decided cases that, like this one, involved the delimitation of the continental shelf beyond 200M: *Bangladesh/Myanmar* and *Bangladesh v. India*".[337] In both of those cases, the tribunal identified the area resulting from the projections of the relevant coast. In *Bangladesh/Myanmar*, ITLOS held that:

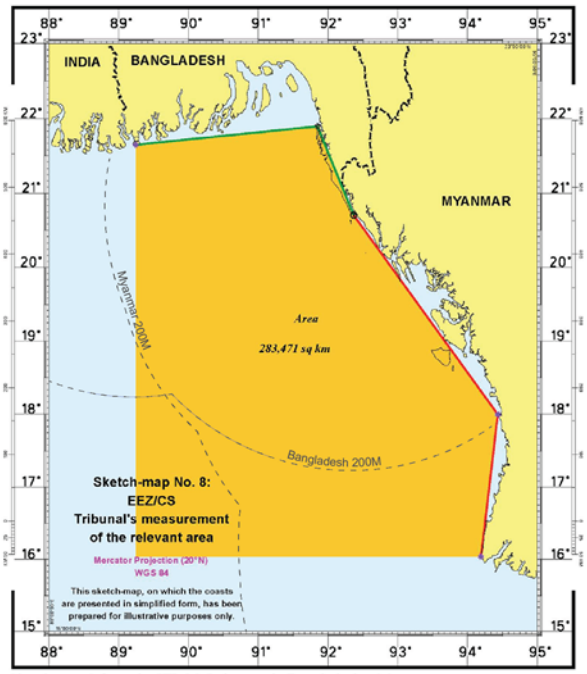
> *"the relevant maritime area for the purpose of the delimitation of the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is that resulting from the projections of the relevant coasts of the Parties"* (para. 489)

170. Similarly, in *Bangladesh v India*, the Annex VII Tribunal held that:

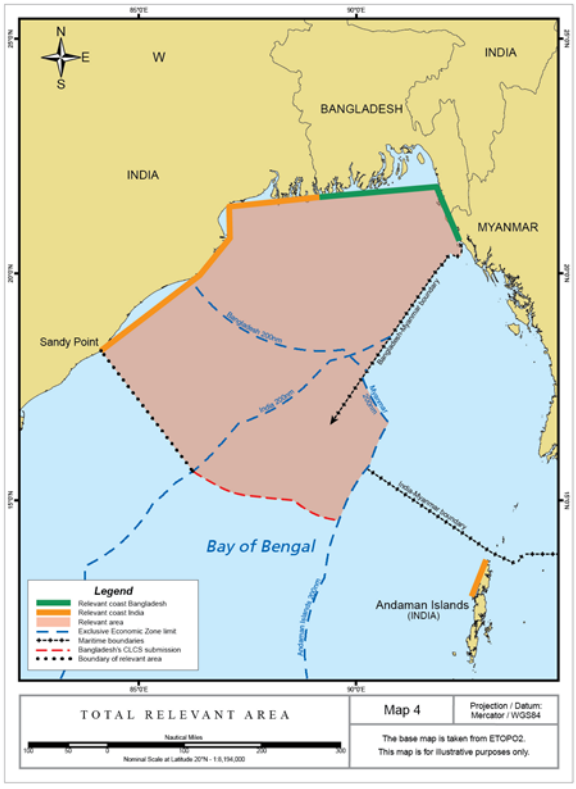
[336] See Fietta and Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, pp. 599-600 and 49-50.
[337] SM para. 6.35.

> *"[h]aving identified what it considers to be the relevant coasts of the Parties, it remains for the Tribunal only to identify the area resulting from the projections of those coasts"* (para. 306)

171. The figures immediately below reproduce the projections of the relevant coasts by the tribunals in *Bangadesh/Myanmar* and *Bangladesh v India* respectively.



Sketch map 8 from the ITLOS Judgment in Bangladesh v Myanmar. 200M lines and labels have been added for comparison purposes.



Map 4 from the Tribunal's Award in Bangladesh v India

Figure KR 2-3: The relevant areas in *Bangladesh/Myanmar* (L) and *Bangladesh v India* (R)

172. Applying the same approach to the present case, the relevant area is identified as follows (as depicted in **Figure KR 2-4** immediately below):

a. To the west, the relevant area is bounded by the coasts of Kenya and Somalia identified above from Kenyan Ras Wasin in the south, through the land boundary terminus to the Somali headland of Gees Warshikh in the north.

b. To the north, the end of the relevant coast at Gees Warshikh is connected to the continental shelf limit using a straight line perpendicular to the coast.

c. To the east, the relevant area is bounded by the continental shelf limits as submitted by Somalia to the Commission on the Limits of the Continental Shelf dated 21 July 2014.

d. To the south, the relevant area is bounded by the agreed boundary between Kenya and Tanzania.

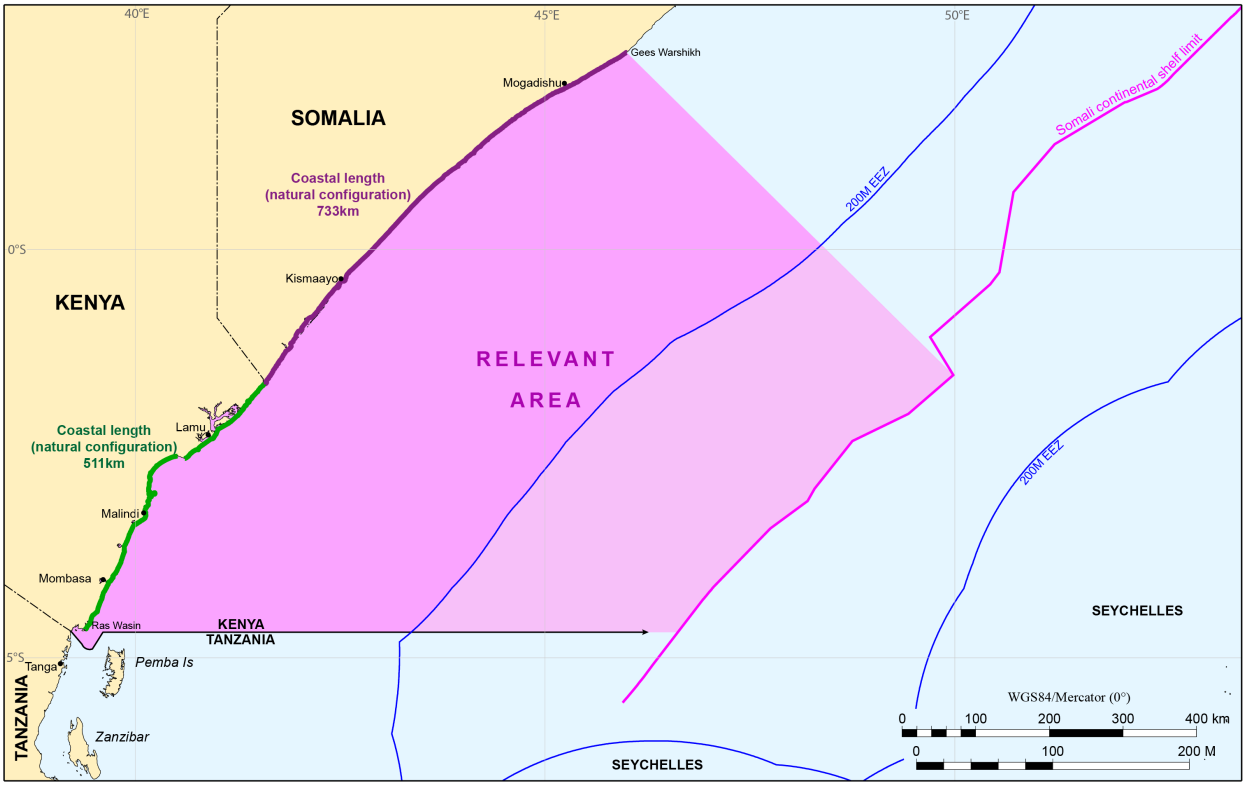


Figure KR 2-4: The correct identification of the relevant area

173. **Figure KR 2-5** below contrasts the correct identification of the relevant maritime area with Somalia's identification of the relevant maritime area, demonstrating the significant difference that results. It is clear that Somalia's approach maximises Kenya's relevant area, and minimises Somalia's relevant area.

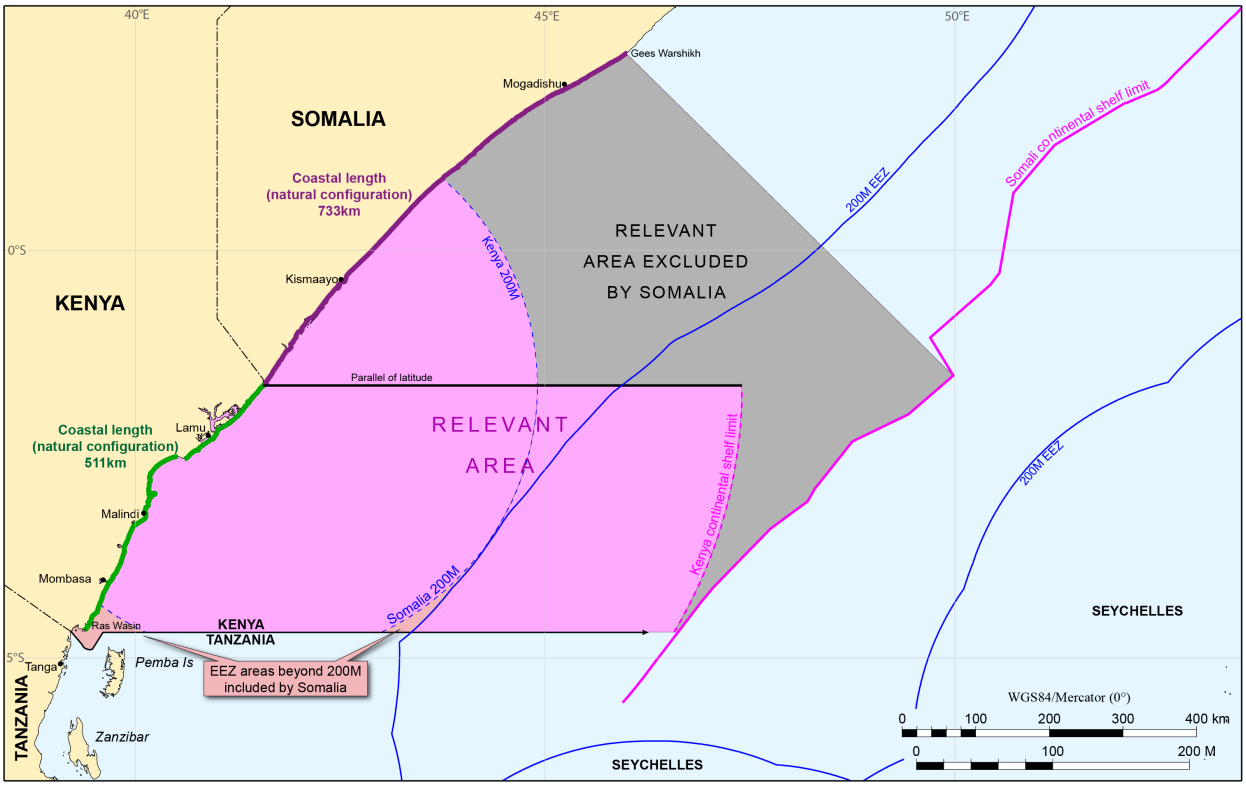


Figure KR 2-5: The relevant area excluded by Somalia

2. Somalia's proportionality test

174. As described in further detail below, Somalia's case is that *the equidistance line* results in an approximately equal division of maritime area between Kenya and Somalia, and that such a division is an equitable delimitation. That position, reflecting Somalia's proportionality test, echoes Somalia's delimitation proposal in the March 2014 meeting (i.e. shortly before the filing of its Application before the Court) that a bisector line "produced an almost equal division of the disputed area".[338] With the correct identification of the relevant maritime area however, Somalia's claim of "almost equal division" collapses. In fact, as explained below, it is *the parallel of latitude* (and not the equidistant line) that more closely approximates to the line producing an equal division of maritime areas between the Parties that Somalia has proposed as an equitable solution.

[338] MS, Vol. III, Annex 31, p. 6.

a. <u>Delimitation of the EEZ and Continental Shelf within 200M</u>

175. Addressing delimitation of the EEZ and continental shelf within 200M, the Memorial of Somalia states that:

> *"Dividing the area of overlapping entitlements within 200M by means of the provisional equidistance line results in an allocation of 103,627km2 (48.5%) to Somalia and 110,236km2 (51.5%) to Kenya; a ratio of 0.94:1 in favour of Kenya. This is depicted in Figure 6.12….Somalia respectfully submits that the maritime boundary between Somalia and Kenya in the EEZ and continental shelf within 200M should be defined by an equidistance line. Such a line produces the equitable solution the law requires".*[339]

176. Figure 6.12 is reproduced below for convenience. It shows that the division of the area identified by Somalia so as to give 48.5% to Somalia and 51.5% to Kenya flows from the relevant area being incorrectly identified as the area of overlapping entitlements.

[339] See MS, paras. 6.56 and 6.58 (emphasis added). These figures are repeated at SR para. 3.95.

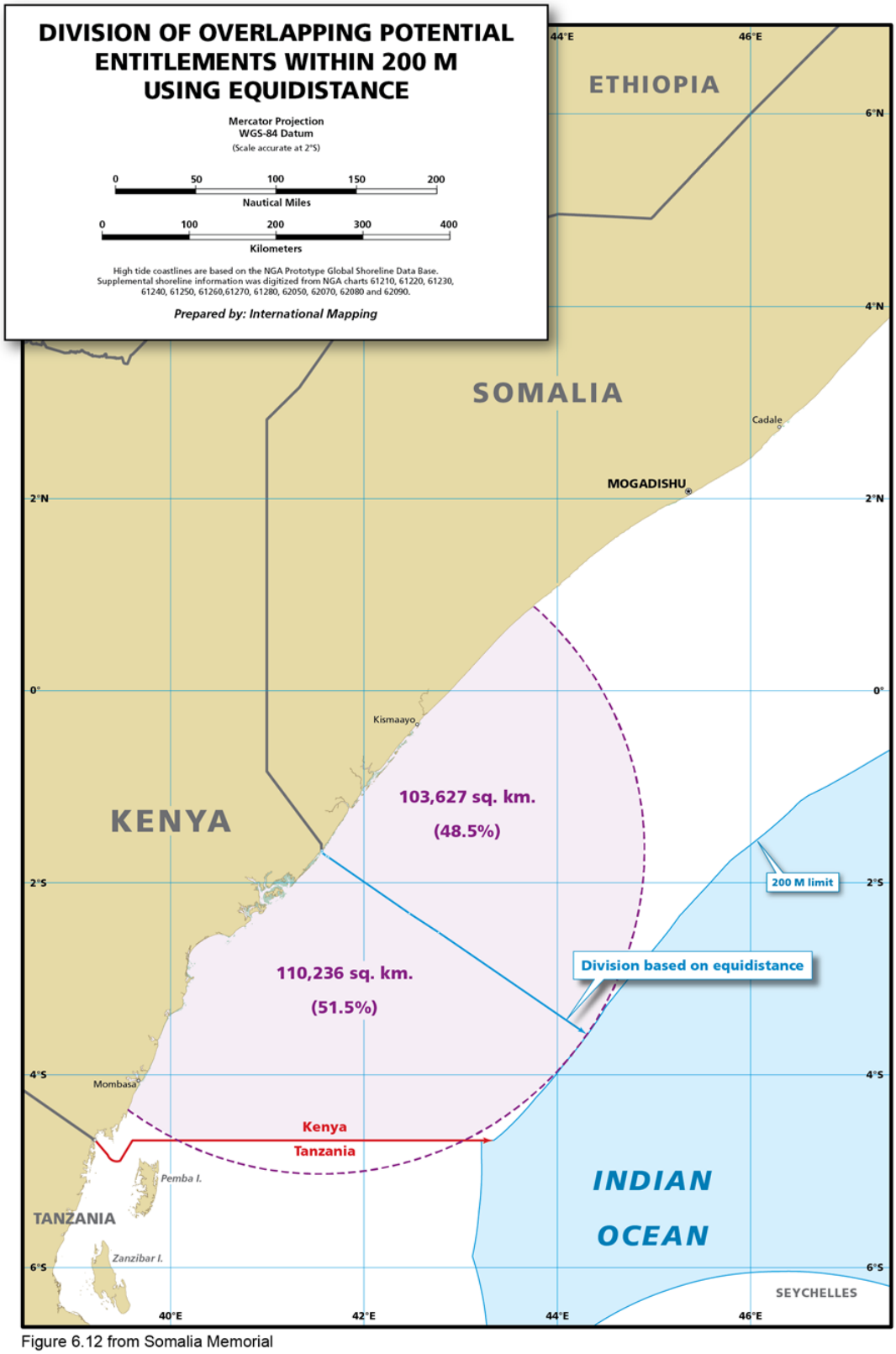


Figure 6.12 from Somalia Memorial

Figure KR 2-6: Somalia's depiction of an 'equitable' division of its version of the relevant area within 200M

177. In fact, if the relevant area is correctly identified as the area resulting from the projections of the relevant coast, as is required by international law, it becomes clear that it is *the parallel of latitude* (and not the equidistant line) that more nearly produces the "almost equal division" of maritime areas between Kenya and Somalia that Somalia claims to be an equitable solution. This fact was clearly noted in Kenya's Counter-Memorial[340] and is depicted in the two figures below.

178. **Figure KR 2-7** shows the division of the relevant area within 200M of the coast, as properly defined, using the equidistant line proposed by Somalia. At 68% for Somalia and 32% for Kenya, it falls far short of the "almost equal division" that Somalia itself claims to be an equitable delimitation. By contrast, **Figure KR 2-8** shows the division of the relevant area within 200M using the parallel of latitude. At 55% for Somalia and 45% for Kenya, that division is in fact more favourable to Somalia than the 48.5% and 51.5% division that Somalia presents as an equitable solution (see **Figure KR 2-6** above).

[340] Para. 352, fn 506.

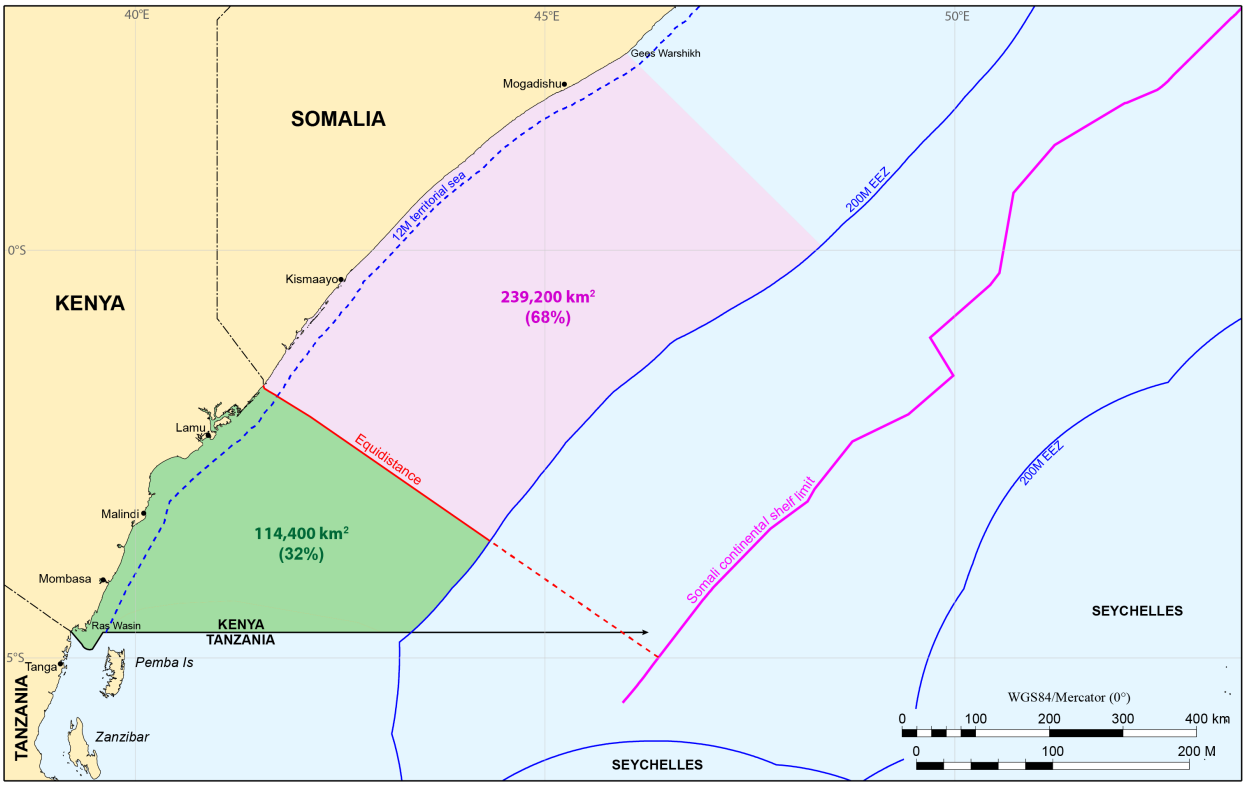


Figure KR 2-7: Division of the relevant area within 200M using the equidistance line

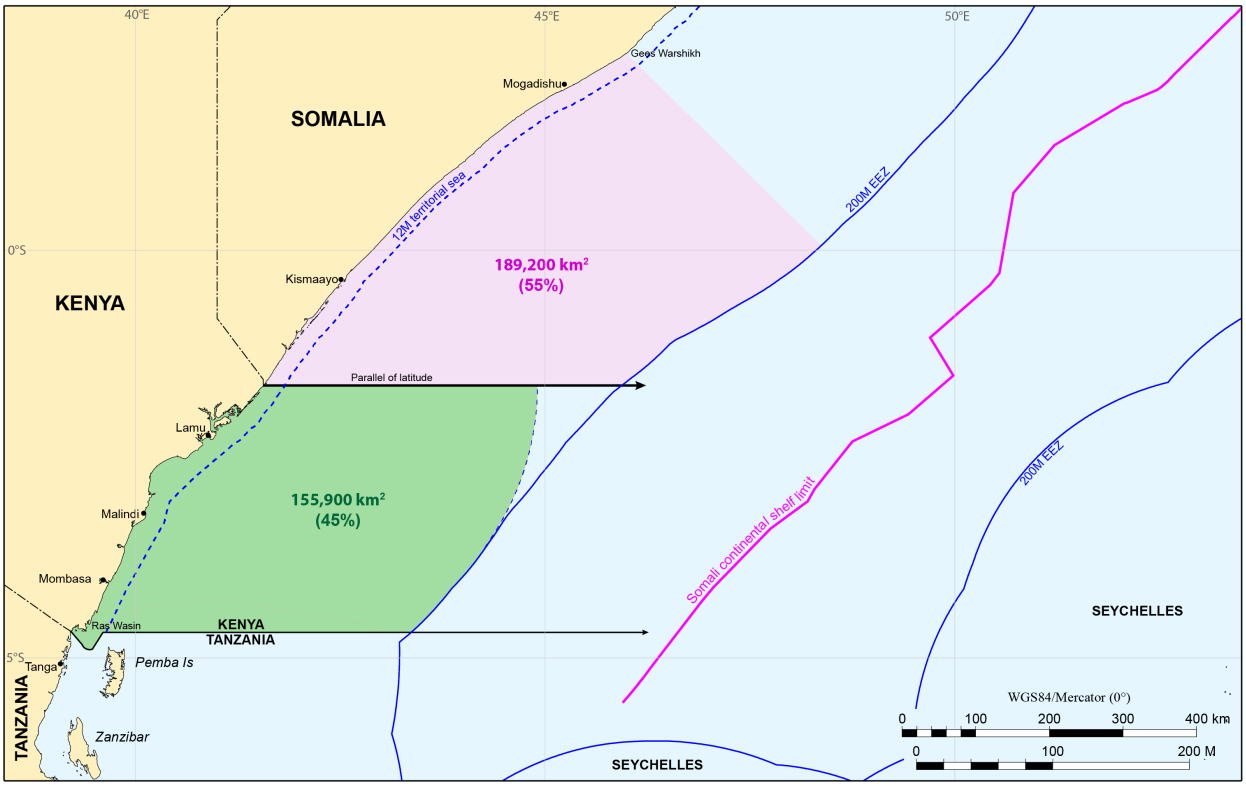


Figure KR 2-8: Division of the relevant area within 200M using the parallel of latitude

b. Delimitation of the Continental Shelf Beyond 200M

179. The equitableness of a maritime boundary at the parallel of latitude is even more manifest when the delimitation of the outer continental shelf is included in respect of the relevant maritime area.

180. In regard to delimitation of the continental shelf beyond 200M, Somalia states that:

> *"As reflected in Figure 7.9 (following page 124), a boundary between Somalia and Kenya following equidistance, taking into account the delimitation line resulting from Kenya's agreement with Tanzania, would leave Kenya with 41% of the relevant area (including some 16,700km2 beyond 200M), and Somalia with 59%."*[341]

181. This is not quite the equal division presented with respect to delimitation within 200M, but it is still presented by Somalia as an equitable solution.

182. Figure 7.9 is reproduced for convenience below. It shows that the division of 41% to Kenya and 59% for Somalia again flows from the relevant area being incorrectly identified as the area of overlapping entitlements (with the relevant area beyond 200M based on overlapping entitlements as identified by Somalia at Figure 7.4 of its Memorial).

[341] MS, para. 7.58. These figures are repeated at SR para. 3.96.

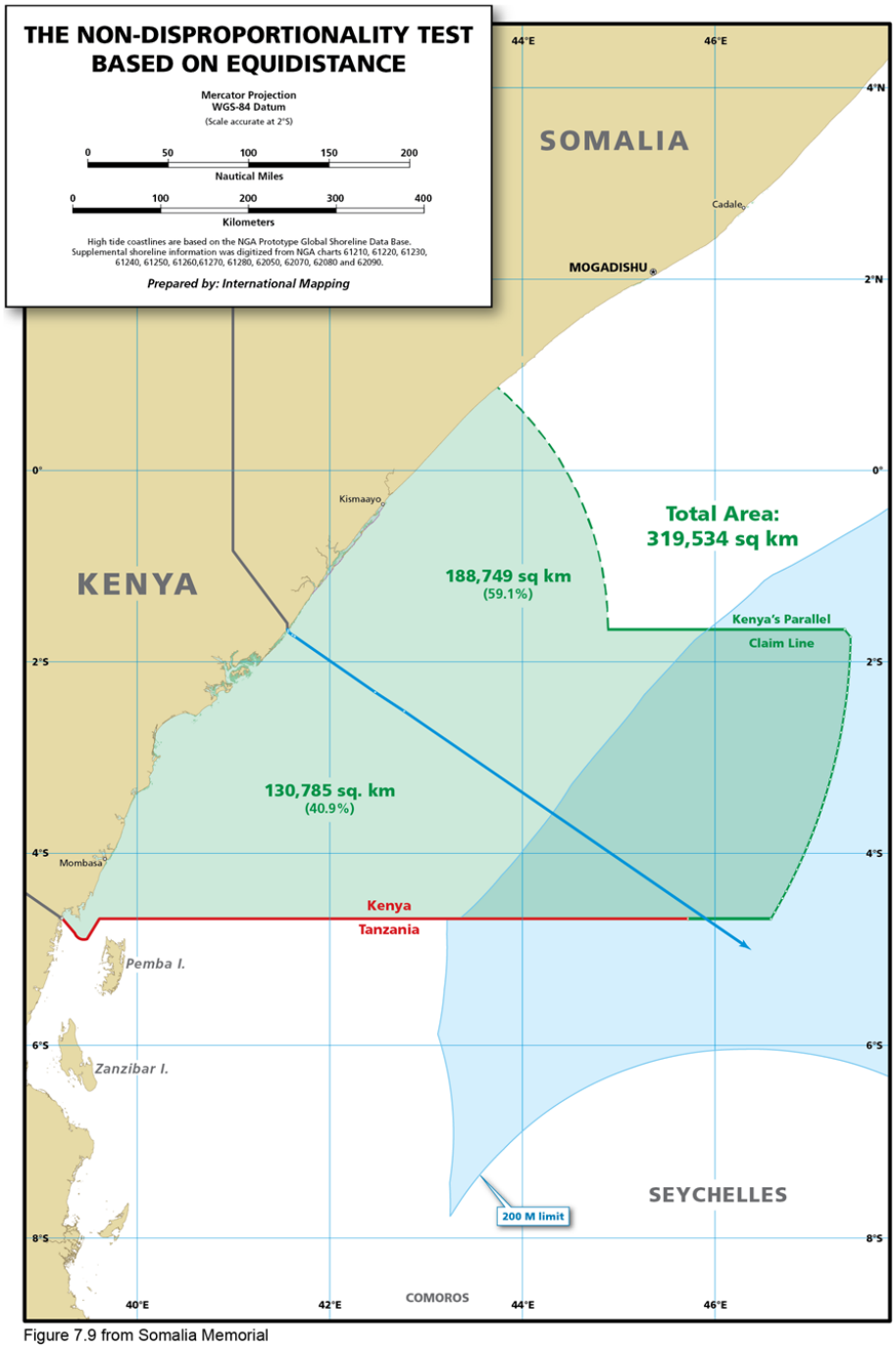


Figure 7.9 from Somalia Memorial

Figure KR 2-9: Somalia's depiction of an 'equitable' division of its version of the relevant area including the area beyond 200M

183. If the relevant area is correctly identified however (i.e. the area resulting from the projections of the relevant coast, rather than identification of the area of overlapping entitlements) it is clear again that it is *the parallel of latitude* (and not the equidistant line) that produces the "almost equal division" of maritime areas between Kenya and Somalia

that Somalia has recognised as equitable. This is depicted in the two figures below. **Figure KR 2-10** shows the division of the relevant area beyond 200M using the equidistant line proposed by Somalia. The result is a division of 75% to 25% in favour of Somalia. By contrast, **Figure KR 2-11** shows the division of the relevant area beyond 200M using the parallel of latitude. The result is a division of 51% to 49% in favour of Somalia. By Somalia's own measure therefore, when the relevant maritime area is properly identified, the maritime boundary at the parallel of latitude would be an equitable solution.

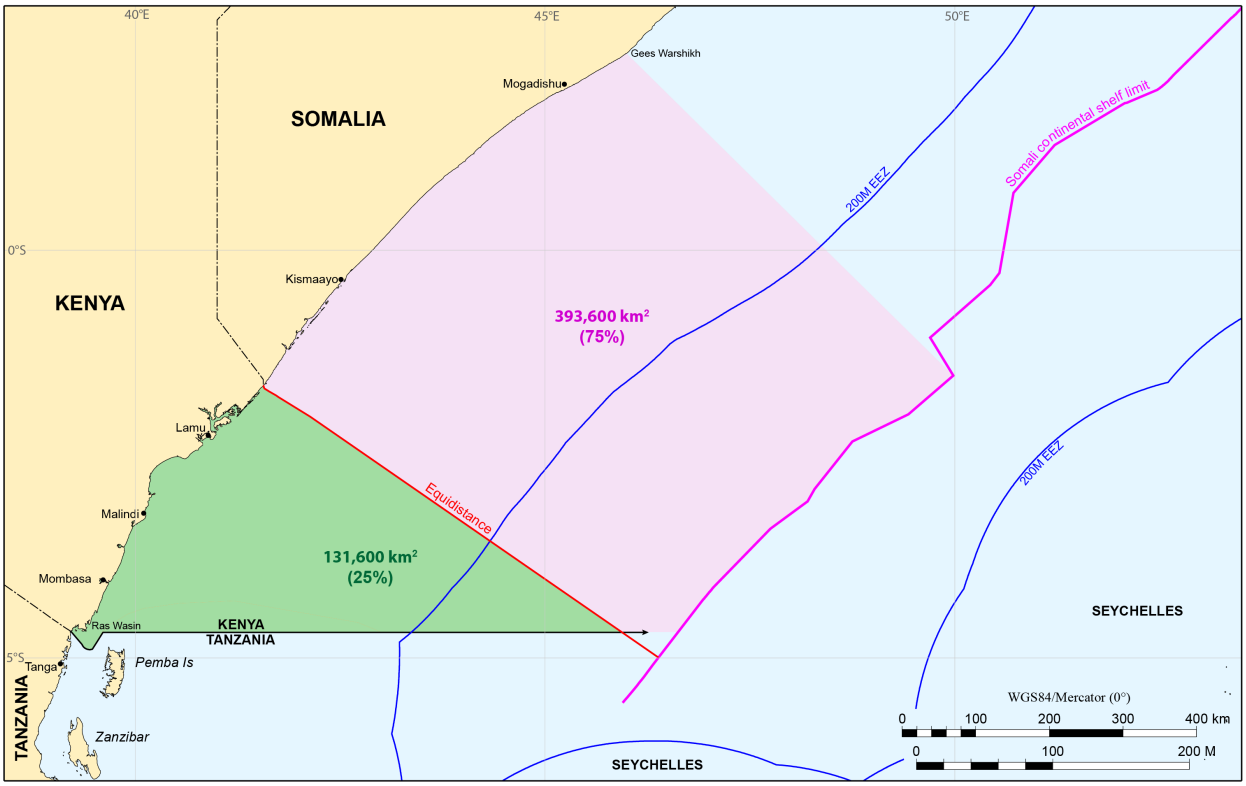


Figure KR 2-10: Division of the relevant area, including the area beyond 200M, using the equidistance line

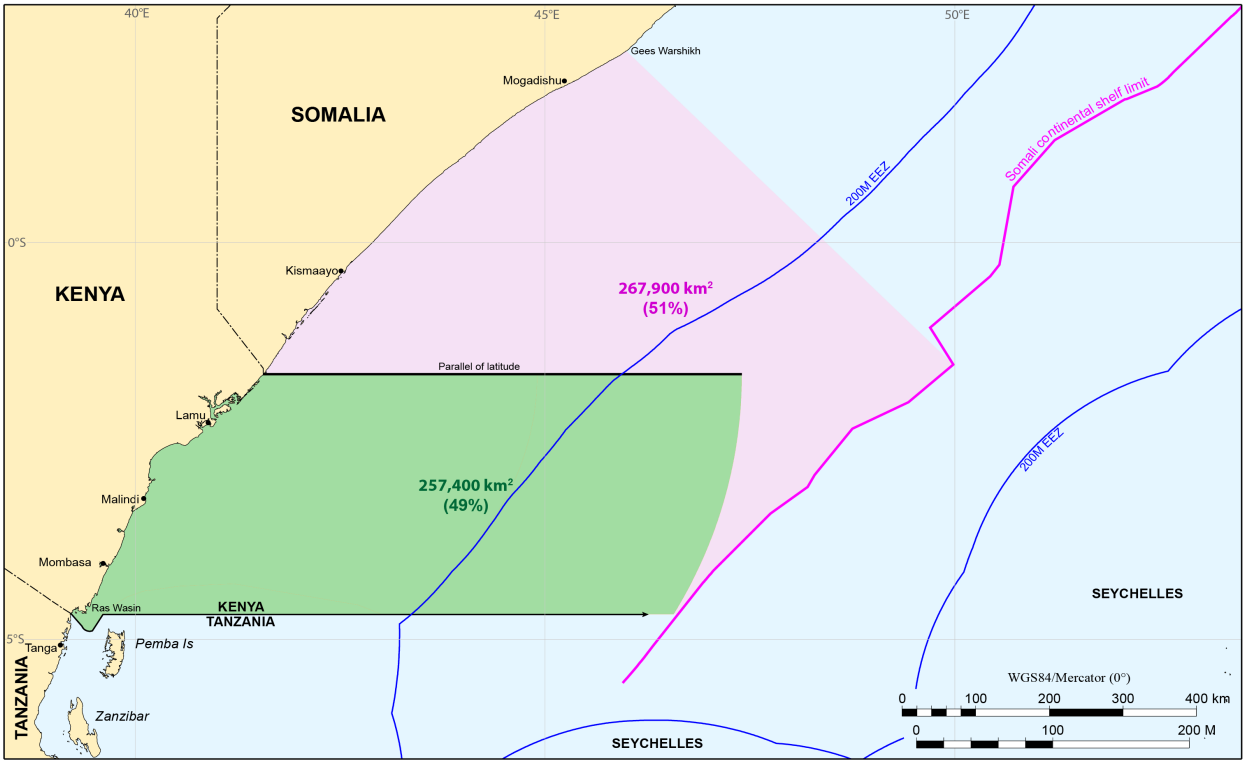


Figure KR 2-11: Division of the relevant area, including the area beyond 200M, using the parallel of latitude

184. The two figures above confirm that the parallel of latitude has only a modest effect on the area of Somalia's maritime entitlement.[342] For Somalia there is a difference of 129,900km^2 or 33% of its relevant maritime area, which is only 10% of its total maritime area. By contrast, if Somalia's claimed equidistance line is adopted, for Kenya there would be a difference of 129,900km^2 or 50% of its relevant maritime area, which is also 50 % of its total maritime area.[343]

185. In the Counter-Memorial,[344] Kenya explained that if Somalia's coastal length in its entirety (1890km measured as straight lines as far as the Horn of Africa, or 2119km measured along its natural configuration), and Somalia's territorial sea and EEZ (702,900km^2) are considered, and compared to Kenya's coast (420km as a straight line or 511km following its natural configuration) and territorial sea and EEZ (110,900km^2), there would be a significant disparity in the proportionality of the relative coastal lengths of the two States areas and the relative size of the portions of the relevant area attributed to each of them. Somalia has far more maritime area per kilometre of coast than does Kenya (a ratio of 371 compared to 262 (straight line) – or 331 compared to 224 (natural configuration)). Indeed, Kenya has the least maritime area per kilometre of its entire coast of any of the four east African States on the Indian Ocean – the two "outer" States around the concavity that is the Indian Ocean coast of East Africa being the States that obtain the greatest benefit.[345]

186. Somalia dismisses Kenya's submission in this regard as "pure invention".[346] The facts relied upon however are not disputed and in circumstances where the disparity in the results of the application of the putative delimitation line is so great, Kenya submits that this factor should be taken into account in achieving the objective of an equitable solution. It shows clearly why in 1979 Kenya – and by implication also Somalia – regarded the parallel of latitude as an equitable solution.

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[342] This point was made at KCM paras. 349 - 351. Somalia's response at SR para. 3.86 is that such a calculation must rely upon the relevant coast and relevant area; this does not undermine Kenya's fundamental point, as shown by the figures provided here (which rely on the relevant coast and relevant area).
[343] All of Kenya's maritime area is a relevant area.
[344] KCM para. 352.
[345] Ibid.
[346] SR para. 3.91.

D. Conclusion

187. Instead of automatically applying the three-step "equidistance/relevant circumstances" method as argued by Somalia, in effecting a delimitation the Court must take into account the fact that the Parties have considered a maritime boundary at the parallel of latitude as an equitable delimitation from at least 1979 to 2014. Kenya adopted the parallel of latitude in 1979 because it was an equitable delimitation consistent with the applicable international law. This was consistent with Somalia's clear position at UNCLOS III that the relevant provisions of UNCLOS should make no reference to equidistance methodology in respect of delimitation of the EEZ or the continental shelf, which should instead be based on an equitable solution.

188. The Court should also effect maritime delimitation in a manner that is consistent with the regional geographical context and State practice, including the use of parallels of latitude as maritime boundaries by other States on the east African coast of the Indian Ocean, namely the Kenya-Tanzania and Mozambique-Tanzania maritime boundary agreements.

189. In any event, however, by Somalia's own measure of an "almost equal division" of the relevant maritime area as an equitable solution, it is the parallel of latitude (and not an equidistant line) that achieves this result, when the relevant maritime area is properly identified.

190. Irrespective of Somalia's acquiescence therefore, delimitation at the maritime boundary at the parallel of latitude is an equitable solution.

CHAPTER III:
REBUTTAL OF ALLEGATIONS OF ILLEGAL ACTIVITIES IN THE DISPUTED AREA

191. This Chapter addresses Somalia's claim that Kenya has engaged in illegal activities in the disputed area.

192. In its Reply, Somalia maintains the assertion from its Memorial that Kenya is responsible for "unlawful acts in the disputed maritime area".[347] In respect of the facts however (Section A), having acquiesced to the maritime boundary at the parallel of latitude since Kenya's 1979 Proclamation, Somalia manifestly fails to establish that there was a "disputed maritime area" prior to 2014 when it first claimed an equidistant line. As set out above,[348] the existence of a "dispute" requires the claim of one party to be "positively opposed" by the other party.[349] Furthermore, with the sole exception of exploratory drilling on a single occasion in 2007 (against which Somalia never protested), Kenya's activities in the maritime area disputed since 2014 have been only transitory in character.

193. In regard to the applicable international law (Section B), Somalia applies an erroneous test for unilateral activities that disregards the Court's jurisprudence. First, Somalia ignores the fact that it rejected Kenya's offers of provisional arrangements of a practical nature pursuant to UNCLOS Articles 74(3) and 83(3) after the maritime boundary dispute crystallised in 2014, effectively putting an end to all exploration activities in the area. Contrary to Somalia's arbitrary interpretation of Articles 74(3) and 83(3) furthermore, there is no obligation to cease all activities in disputed areas, in particular transitory activities that do not lead to permanent physical change. Accordingly, having suddenly terminated all of Kenya's activities after 35 years of acquiescence, Somalia's claim for compensation is wholly without merit (Section C). It is in fact Kenya that has suffered substantial injury and loss of investment because of Somalia's conduct.

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[347] SR, Chapter 4.
[348] *Supra*, para. 81.
[349] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 32-33, para. 73.

A. The correct facts regarding the "disputed area" and Kenya's activities

194. As set out in Kenya's Counter-Memorial and in Chapter 1 of this Rejoinder, between 1979 and 2014, Somalia acquiesced in a maritime boundary at the parallel of latitude. Somalia had been repeatedly and formally notified of Kenya's position for 35 years before it lodged its first formal protest in 2014, the same year that it first claimed a maritime boundary based on equidistance. There was, therefore, no "disputed area" until 2014, because no dispute had crystallized prior to that year.

195. In its Reply, Somalia asserts that Kenya "had been aware" of Somalia's claim to an equidistance line since "the end of the 1970s".[350] As set out in Chapter I, this claim is wholly without merit. Somalia's Reply also asserts that: "Insofar as Kenya's activities took place in an area on Somalia's side of the boundary, these activities transgressed upon Somalia's sovereignty (over the territorial sea) and sovereign rights (over the EEZ/continental shelf)."[351] This disregards Somalia's prolonged acquiescence in the parallel line, including Kenya's uncontested exercise of jurisdiction in what is now the disputed maritime area. In fact, absent the existence of any maritime boundary dispute prior to 2014, Somalia does not explain how Kenya could have reasonably speculated as to whether its activities were "on Somalia's side of the boundary".

196. The alleged "unlawful" activities that Somalia attributes to Kenya predate the crystallization of the dispute in 2014.[352] The one exception is the announcement by Anadarko Kenya Corporation of exploratory drilling scheduled for 2015, which, as Somalia concedes, "does not indicate where exactly this drilling will take place".[353] As Kenya explained in its Counter-Memorial, there is no evidence that the drilling site was in the "disputed area" and in fact the drilling was never conducted.[354] Somalia – which has the burden of proof to show a violation of Article 83(3) – has no response except that "[t]he denial contradicts Total's press release announcing that exploratory drilling was

[350] SR, para. 4.12.
[351] SR, para. 4.15.
[352] KCM, para. 376.
[353] MS, Vol. I, para. 8.22.
[354] KCM, para. 376(c).

scheduled".[355] In fact, Total's press release does not mention drilling. It is only Anadarko's announcement that refers to drilling "planned for 2015".[356]

197. The Chief Executive Officer of the National Oil Corporation of Kenya ("NOCK") has confirmed in writing that there "is no substantive information regarding the spudding of any drilling in 2015".[357] The same letter explains that two wells were drilled in Blocks L7 (Kubwa-I) and L11B (Kiboko-I) in 2013, in locations that are far from the disputed area[358] and before the existence of the disputed area beginning in 2014.

198. The "further evidence" invoked by Somalia does not help its case either. The 2011 presentation by Kenya's Commissioner of Petroleum Energy refers to seismic testing and the drilling of the Pomboo-1 well by Woodside in 2007 that, as noted in the Counter-Memorial, all predate 2014.[359] Moreover, the drilling was a matter of public notoriety, including deliberations before the Kenya National Assembly; and by Somalia's own account, it never protested this drilling.[360] If anything, this is another instance of Somalia's acquiescence in Kenya's maritime boundary claim.

199. Somalia also places great emphasis on an agreement between the National Oil Company of Kenya and WesternGeco granting exclusive rights to data from 2D seismic surveys. This too does not help Somalia's case, as it rests on a series of incorrect assertions:

    a. First, Somalia cites a *draft* agreement from 2013.[361] Kenya annexes the final agreement to this Rejoinder.[362]

    b. Second, the agreement predates the emergence of the "disputed area" in 2014.

    c. Third, the seismic surveys contemplated in the agreement are transitory, and thus lawful activities (even in disputed maritime areas) that cause no permanent physical change (see paragraphs 204-205 below).

[355] SR, fn 263, citing MS Annex 102.
[356] MS Annex 126.
[357] Letter from MaryJane Mwangi, CEO of NOCK, to the Attorney-General of Kenya (11 October 2018) (Annex 8).
[358] See MS Figure 8.1.
[359] KCM, para. 376(b).
[360] MS, Vol. I, para. 8.21; SR, para. 4.3.
[361] SR, Annex 27.
[362] Agreement between the National Oil Corporation of Kenya and Schlumberger Offshore Services Limited (known as WesternGeco) (October 2013) (Annex 3).

d. Fourth, Somalia wrongly claims that the survey grids in the maps appended to the draft agreement "depict Somalia's and Kenya's claim lines".[363] Map 1[364] depicts concession blocks and survey grids but does not show any equidistance line. Map 2[365] depicts the same concession blocks and survey grids, but adds a line that could be the equidistance line. That line however, is intended only to distinguish WesternGeco's Phase I 2D seismic acquisition from the future Phase II 3D seismic acquisition "area to be determined" upon completion of Phase I.[366] It is clearly not a depiction of claimed maritime boundary lines as asserted by Somalia.

e. Fifth, Somalia states that clause 3.8 of the draft agreement obliges NOCK and WesternGeco to seek Somalia's consent for surveys.[367] In fact, clause 3.8 in both the draft and final agreements makes no mention of Somalia; it only refers in general terms to "waters subject to the claimed exclusive jurisdiction of a state other than Kenya". The clause in the draft agreement states that WesternGeco "shall not be obliged to enter into disputed territorial waters or the waters of another state". Furthermore, clause 3.8 in the final agreement omits these words altogether.[368] In any event, Maps 1 and 2 (Reply of Somalia, Figure R4.1) both show seismic testing up to the parallel of latitude, confirming that this was not considered as a disputed maritime area prior to 2014.

f. Sixth, Somalia also points to clause 8.3, which provides for a procedure in case of maritime boundary disputes.[369] All this indicates is that there was a procedure in place to be applied in the event of a future maritime boundary dispute, not that there was any such dispute at the time of the agreement.

g. Seventh, Somalia asserts that it "repeatedly protested" activities: but the only evidence it submits are letters that it sent to oil companies (not to Kenya) *other than*

[363] SR, para. 4.5.
[364] SR Annex 27, Appendix 1.
[365] SR Annex 27, Appendix 1 and Figure R4.1.
[366] SR Annex 27, Appendix 1, Map 2.
[367] SR, paras. 4.6-4.7.
[368] Agreement between the National Oil Corporation of Kenya and Schlumberger Offshore Services Limited (known as WesternGeco) (October 2013 (Annex 3).
[369] SR, paras. 4.6-4.7. The wording of the final agreement's clause 8.3 differs in certain ways, but not with respect to the words emphasised by Somalia.

WesternGeco, and only in April-September 2014, after the dispute arose.[370] Somalia claims it also "conveyed directly to Kenya its concern over the deleterious impact of these activities on the ongoing negotiations", but the footnote merely refers to a paragraph of the Memorial asserting that Somalia took the decision to initiate proceedings before the Court in August 2014, and to a 2012 news report by Reuters, none of which establishes "direct" (or even indirect) communication of concerns to Kenya, let alone a protest.[371]

200. Somalia also invokes three sources that at best demonstrate tensions between the Parties, but not a maritime boundary dispute. The 2013 report of the UN Monitoring Group on Somalia merely refers to "the persistence of a contested perpendicular line of demarcation" which "may serve to create further animosity between the Governments of Somalia and Kenya".[372] There is no reference either to any protest by Somalia or to any competing claim to an equidistance line. The reference to tensions between the Parties in the 2016 UN Monitoring Group Report (i.e. two years after the dispute arose in 2014), does not support Somalia's assertion that transitory activities were somehow "unlawful".[373] Similarly, the 2014 report of the Heritage Institute for Policy Studies based in Mogadishu only points to Kenya's "desire for near-term hydrocarbon exploration and exploitation" as "add[ing] a layer of complexity to the situation".[374]

201. In light of these facts, Somalia's assertion that Kenya's activities were unlawful is wholly without merit. If anything, it confirms the evidence referred to in Chapter 1 that there was no disputed maritime area between the Parties until 2014.

B. The correct legal test for the lawfulness of activities in the "disputed area"

202. In respect of the regime applicable to disputed maritime areas, Somalia's interpretation of the scope of UNCLOS Articles 74(3) and 83(3) is inconsistent with the jurisprudence of international courts and tribunals. The Parties agree that, as stated in *Ghana/Côte d'Ivoire*,

[370] SR, para. 4.9 and fn 273, citing MS, paras. 8.20, 8.23, 8.24 and 8.27.
[371] SR, para. 4.9 and fn 274 citing MS Annex 107; see *supra,* para. 32.
[372] SR, para. 4.21.
[373] SR, para. 4.22.
[374] SR, para. 4.23. The independence of the Institute may be questioned given that its close links to the government. Its Executive Director was formerly "deputy chief of staff at the prime minister's office, secretary to the council of ministers, communications director at the presidency, adviser to the prime minister and cabinet minister responsible for public works and reconstruction": http://www.heritageinstitute.org/staff/

Article 83(3) "contains two interlinked obligations for the States concerned, namely 'to make every effort to enter into provisional arrangements of a practical nature' and 'during this transitional period, not to jeopardise or hamper the reaching of the final agreement'".[375] Somalia however makes a number of errors as to the scope and application of this provision.

203. First, Somalia claims that the first obligation to make every effort to enter into provisional arrangements "is not in question in the present case".[376] This is not correct. In Somalia's view, Kenya's proposal to conclude practical arrangements for exploration and exploitation in the disputed area is "not relevant" because it was made in 2016, two years after Somalia filed its Application.[377] It concludes therefore, that the proposal "cannot cure the absence of any equivalent proposal, in 2000 or later".[378] It is notable that Somalia now moves the date that the dispute arose to 2000 instead of the "end of the 1970s"[379] though it does not have evidence in respect of either date. Furthermore, Kenya offered to enter into provisional arrangements with Somalia in 2016 precisely because there was no disputed maritime area prior to 2014, and thus no obligation in respect of UNCLOS Articles 74(3) and 83(3). Somalia's summary rejection of Kenya's efforts therefore is inconsistent with the obligation "to make every effort" to enter into provisional arrangements of a practical nature.

204. Second, on the obligation "not to jeopardise or hamper the reaching of the final agreement", Somalia asserts that this is to be read extremely broadly so that "unilateral activities in a disputed area are not judged solely by their physical effects, but also by their *likely effect* on the reaching of a final agreement".[380] Applying this expansive interpretation, Somalia asserts that "non-invasive acts such as seismic surveys can be provocative and inflammatory".[381] The test proposed by Somalia is contrary to the Court's jurisprudence in *Aegean Sea Continental Shelf* in respect of activities of a "transitory

[375] *Dispute concerning delimitation of the maritime boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)*, Judgment of 23 September 2017, ITLOS Reports 2017, para. 626; KCM, para. 365 and SR, para. 4.17.
[376] SR, para. 4.17.
[377] Ibid.
[378] Ibid.
[379] Cf SR, para. 4.12.
[380] SR, para. 4.20 (emphasis added).
[381] SR, para. 4.20.

character"[382] invoked more recently by the Annex VII Tribunal in *Guyana v. Suriname* to conclude that activities "which do not cause a physical change to the marine environment" are consistent with UNCLOS Article 83(3)[383] and thus "should be permissible".[384]

205. Somalia responds that *Guyana v. Suriname* does "not constitute an absolute gauge for determining compliance with Article 83(3)".[385] However, *Ghana/Côte d'Ivoire* upon which Somalia relies extensively, goes even further than *Guyana v. Suriname*. During the provisional measures phase, the Order of the ITLOS Special Chamber rejected Côte d'Ivoire's request that Ghana suspend all activities, and held only that the Parties "ensure that *no new drilling* either by Ghana or under its control takes place in the disputed area".[386] In fact, during the period between the Order and the final Judgment, Ghana carried out drilling activities, including drilling a new well in the TEN field, and the Judgment simply held that these were "ongoing activities … for which drilling has already been carried out" consistent with the Order on Provisional Measures.[387] Thus, unlike *Guyana v. Suriname*, the Tribunal in *Ghana/Côte d'Ivoire* found that in appropriate circumstances, even activities that cause "a physical change to the environment" should be permissible.

206. Third, in light of the applicable law, Kenya's conduct was exemplary, and went beyond its obligations under Article 83(3) with respect to the continental shelf. To recall, in his letter dated 27 May 2016, the Attorney-General of Kenya went so far as to state that, "[n]otwithstanding 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". He attached a letter dated 5 May 2016 from Kenya's 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 Somali Minister for Foreign Affairs and

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[382] *Aegean Continental Shelf Case (Greece v Turkey), Order on Provisional Measures of 11 September 1976, I.C.J. Reports 1976*, para. 30.
[383] *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, *RIAA*, Vol. XXX, p. 1, para. 467
[384] Ibid., paras. 467-468, 481.
[385] SR, para. 4.20.
[386] *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).
[387] *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.

Investment Promotion and to the Deputy-Agent of Somalia in the present proceeding.[388] Instead of making an effort to enter in practical arrangements, Somalia simply responded that Kenya "chose the only course of conduct consistent with its international obligations: to refrain from unilateral activities in the disputed area".[389]

207. Thus, after 35 years of acquiescence, during which Kenya exercised uncontested jurisdiction in the maritime area now in dispute, Somalia's conduct has resulted in the termination of all lawful transitory activities in respect of oil exploration, depriving Kenya of foreign investment and undermining the development of its offshore resources. There is no basis for Somalia's claim that Kenya's exemplary conduct is a violation of international law. To the contrary, it is Somalia that has failed to comply with its obligations under Articles 74(3) and 83(3) of UNCLOS.

C. Somalia's Claim for Compensation

208. Under these circumstances, Somalia's assertion that Kenya has "violated its international obligations" and "has a duty to make full reparation" including "the payment of appropriate compensation"[390] is wholly without merit. It was Somalia that refused to conclude provisional arrangements with Kenya in May 2016 despite Kenya's good faith efforts to suspend even lawful transitory activities in the disputed area in a spirit of good neighbourliness. It is Kenya that has suffered injury and significant economic loss because of Somalia's conduct. In effect, Somalia has used its novel claim to an equidistant maritime boundary beginning in 2014, combined with its subsequent refusal to fulfill its obligations under UNCLOS Article 83(3), to put an end to Kenya's offshore development in a maritime area that was not in dispute from 1979 until shortly before the commencement of these proceedings in 2014.

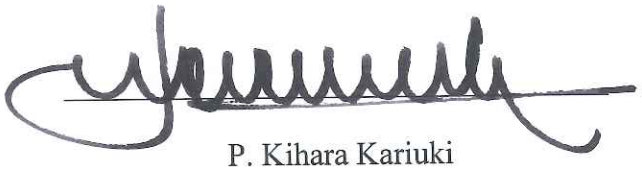
[388] KCM, para. 378; KCM Annexes 62 and 45.
[389] SR, para. 4.10.
[390] SR, para. 4.25.

SUBMISSIONS

On the basis of the facts and law set forth in this Rejoinder, Kenya respectfully requests the Court to:

1. Dismiss the requests in paragraphs 1, 3 and 4 of the Reply of Somalia.

2. Adjudge and declare that the maritime boundary between Somalia and Kenya in the Indian Ocean shall follow the parallel of latitude at 1° 39' 43.2"S, extending from Primary Beacon 29 (1° 39' 43.2"S) to the outer limit of the continental shelf.



P. Kihara Kariuki
Agent of the Republic of Kenya
18 December 2018

CERTIFICATION

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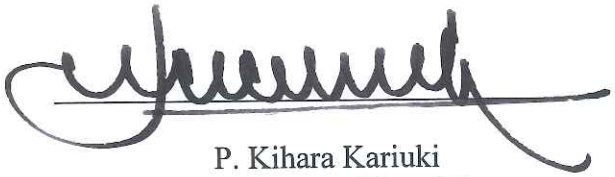

P. Kihara Kariuki
Agent of the Republic of Kenya
18 December 2018

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Annex 2	Agreed Minutes of the Joint Technical Committee Meeting on the Tanzania/Kenya Maritime Boundary held in Dar es Salaam, Tanzania (30-31 October 2008)
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